TEXACO PETROLEUM v. THE GOVERNMENT OF LIBYA

Arbitration

In A Critical Perspective

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Dedication

To all those without whom things
would not have been the same for me.

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The view expressed here and any errors are entirely mine.

Preface

Arbitration could be studied in two different perspectives; what would be involved in the first perspective is the role that arbitration plays, among other methods, in avoidance of dispute. In this perspective a study would concentrate on the technique of drafting concession agreements, and the priority that would be given to arbitration clauses among the other methods, in addition to the precision and quality of these clauses. In the second perspective one would study arbitration at work, and its actual dealing with procedural and substantive issues. Here arbitration would be the mechanism of applying law to facts, and here is where arbitration would be expected to contribute to international law in so far as investment disputes are concerned. But for an arbitral tribunal to be successful in settling disputes and contributing to international law, a number of conditions (which will be referred to at a later stage of this section) must be present.

This paper proposes to deal with arbitration in both perspectives, in the light of the TEXACO Arbitration. Thus the introductory chapter will be dedicated to analysing the role arbitration clauses played in the concession agreements through their historical development. It shall start by the arbitration clauses in the traditional concessions, and analyse the attempt to provide for an international forum through the ICSID convention, and the declining role of arbitration clauses since then, to the stage where arbitration became a mechanism of last resort, giving the primary role to the new technique of dispute avoidance. This technique has been achieved (as will be seen) in what is known as the modern concession, which is a contract divided into several sets of rights and obligations in an elaborate form so as to comply with the ongoing relationship between the parties. This new model is, in other words, a set of contracts embodied in a concession, with each contract with a different instrument for conflict avoidance. The parties would execute these mini contracts individually, one after the other; thus any disputes arising from one of these mini contracts would not destabilise the overall relationship.

That is the role of arbitration as far as dispute avoidance is concerned in concession agreements. Concerning the second role, i.e. the actual settling of disputes, a combination of factors must be present for an arbitral tribunal to be successful in settling a dispute, and perhaps laying down new rules that may have a measure of significance in the build up of an international economic order, as well as declaring customary rules. These factors are: (1) full participation in the proceedings by all the concerned before an arbitral tribunal formed of three arbitrators or more (2) a clear reference to the law(s) that should govern the proceeding of the tribunal and the substance of the dispute. These factors are vitally important for, without full participation of all concerned the dispute would be presented by one side, and before a sole arbitrator usually (as was the case in the disputes relating to the Libyan nationalisations). In such a case (no matter how hard the arbitrator tried to anticipate the claims and counter claims that might have been submitted by the absent party) the argument would be one sided. A tribunal formed of a number of arbitrators is equally important, because there are different schools of thought relating to the position of individuals and their rights under both concession agreements and international law. An award delivered by a sole arbitrator would, most probably reflect only the opinion of one school, unlike a tribunal with three members which could firmly establish a rule that reflects a general acceptance, and could set precedents for other tribunals to follow.

The lack of reference to a particular law to govern concession agreements has generated so many controversies before arbitral tribunals and elsewhere. The argument in short is whether in the absence of choice of law clause, the contract should be governed by the law of the host country alone, or by a combination of that and international law, whether there is a branch of international law to govern relationships emerging from concession agreements, and what should its position be in relation to the municipal law of the host country. These questions may have varying impacts on the outcome of international arbitrations, and they could be answered in different ways, which could be eliminated only by clear and well drafted choice of law(s) clause.

This paper will attempt to produce a critical assessment of the TEXACO case by comparing it with other cases, and illustrate the significance of the parties participating. It shall also endeavour to analyse the relationship between international law and the municipal law in the light of the conflicting arbitrations. Recent case law shall be discussed where appropriate to show the recent developments relating to international arbitration and international investment. An assessment shall be made of the changes that have been brought about by these cases, and their significance to both foreign investors and host countries.

TABLE OF CONTENTS

INTRODUCTORY CHAPTER

The Role of Arbitration in the Settlement of Investment Disputes

Arbitration is the most popular mechanism for the settlement of commercial and investment disputes. Its popularity and attractiveness derives from the flexibility and privacy that it enjoys; on the other hand arbitration can be sometimes difficult, expensive, and time consuming.

More than in any other field arbitration is used for the settlement of investment and commercial disputes. In the field of investment however, the agreement is usually between a state and a foreign investor and so would be the arbitration most of the times in the event of disputes. For the purpose of this chapter in particular and this work in general emphasis shall be placed on investment disputes (oil concessions) to which state is a party, and for the settlement of which arbitration is the chosen mechanism. It must also be pointed out at the outset that this work will to a great extent be based on case law, state practice and multilateral treaty.

In the field of investment arbitration has gone through two stages. The first stage is the traditional concession where arbitration was the sole mechanism for dispute settlement. Arbitration peaked as a dispute settlement mechanism with the establishment of the International Convention for the Settlement of Investment Disputes between states and nationals of other states (ICSID) as an attempt to establish the mechanism on an international basis and provide it with an international forum (i.e. "the centre"). The second stage is marked by a decline in arbitration primarily as a result of the convention's failure to attract the major capital importing countries. This decline continued through the seventies as the traditional concession became gradually replaced by the self-enforced modern concession.

The introductory chapter will be divided accordingly into three sections. The first will deal with arbitration clauses in the traditional concession; the second will deal with the ICSID convention; the third will deal with the role of arbitration in the modern concession.

I Arbitration Clauses in the Traditional Concession

Arbitration clauses in the oil industry will be examined here, in the view of their close relation to our case and insofar as these clauses may give rise to difficulties in an arbitral tribunal. What will be examined here as an example is those arbitration clauses in traditional concession concluded in Iran, Iraq and Kuwait; the Libyan clauses will be left to be discussed in the case itself.

The oil was discovered in the Middle East as early as 1901 in countries which were either virtually British colonies or were in a very primitive stage from a legal, economic and political point of view.[1] In view of their need for foreign investment and expertise these countries concluded a number of concession agreements with foreign companies for the purpose of exploring for and exploiting oil. Our concern for these agreements is the arbitration clauses incorporated therein; of a prime importance is the answer to the question why arbitration in particular was chosen as a mechanism for the settlement of potential disputes in preference to other means (litigation for instance)? A lot can be mentioned here beside the fact that reference to a way of settling future disputes was essential. Arbitration was the only alternative, given the fact that one party to the agreement was formally a state and, the fact that a dispute could not be settled by way of litigation, in view of the absence of any judicial system or any law sufficiently developed to deal with disputes as such.

It was not until the Mussdic Revolution in Iran and his sweeping nationalisation policies that everyone realised how important arbitration clauses were. Prior to the revolution short era, the companies and the state' parties to the agreements had incorporated arbitration clauses dominated by generality and insignificance. The companies thought that there would be no political danger from the government's and the rulers, side. They were also relying on the influence their governments had on the region if not on their direct control.

Now let us trace the development of the arbitration clauses in these agreements (traditional concessions) concluded since the beginning of the oil era until the last decade in the light of the changes that took place in that area.

In Iran prior to the year 1954 when the consortium agreemont was entered into by the government of Iran and the national Iranian oil company with a consortium of American, British, Dutch and French companies as the result of the nationalisation of Iranian oil industry, there were no effective arbitration clauses in the agreements both with regard to how one party seeking arbitration could initiate arbitration in the event of dispute, and with regard to the choice of law, the development of arbitration clauses went through five stages illustrated here by a number of agreements.

1. In the agreement concluded between the government of Persia and William Knox D'Arcy (1901), with regard to the place of arbitration Teheran was designated, but there was neither any provisions concerning the appointing authority if one party failed to appoint its arbitrator, nor any provisions as to the choice of law.

2. In the agreement between the Government of Persia and the Anglo-Persian oil company in 1933 provisions concerning the procedural law and the appointment of arbitrators Article 22 were more advanced compared to the 1901 agreement and a great power was given to the

umpire or the sole arbitrator with respect to the time and place of arbitration. Concerning the governing law Article 22, (F) provided that "the award shall be based on the judicial principles contained in Article 38 of the Status of the Permanent Court of International Justice." These clauses however were frustrated in 1952 because reference was made to the President of the Permanent Court of Justice, which was replaced by the International Court of Justice in 1945.

3. In the consortium agreement in 1954 a substantial change was made with regard to disputes arising out of the agreement. Disputes related to technical or accounting questions were to be submitted to a single expert or a body of three experts. To this end Article 44 Para (B) 1 provided that "if the parties did not agree whether a dispute fell within the meaning of technical or accounting dispute, then they would proceed to arbitration as provided in the said Article P (C).

As to the governing law Article 46 provided that ".....this agreement shall be governed by and interpreted and applied in accordance with the principles of law common to Iran and the several nations in which the other parties to this agreement are incorporated, and in the absence of such principles, then by and in accordance with principles of law recognised by civilised nations in general, including such of those principles as may have been applied by international tribunals". This

Article was incorporated with a slight change in the agreement between NIOC and AGIP (a subsidiary of ENI, an Italian state corporation).

4. From 1958 to 1971 the agreements concluded between NIOC and different foreign companies in which agreements the governing law was "mutual goodwill and good faith."

5. Since 1971 the law of Iran has been the governing law and provisions concerning the forming of arbitral tribunals and appointing authorities are more developed and carefully drafted, and this is true also for provisions concerning recognition of awards, enforceability and execution.[2]

If a change can be seen from one agreement to the other in the Iranian oil sector, even without any significance sometimes, it is ironic to see no change in the Iraqi pattern of agreement both with regard to provisions concerning the governing law — which never existed in the twelve agreements concluded between 1925 and 1968, or even when a clause was incorporated, it referred to equity and recognised general principles of law — as well as with regard to the appointing authority or the place of arbitration which was the President of the International Court of Justice with respect to the former and no mention of Baghdad with respect to the latter.

In Kuwait, ten agreements were concluded between the Sheikh of Kuwait and foreign companies between 1934-1963, and two agreements between 1966-67 by the government of Kuwait.

In these agreements, two included provisions referring to goodwill, good faith, and rules generally recognised by civilised states as the governing law. Article 35 of the agreement between the Emir (Sheikh) of Kuwait and Shell Petroleum in 1961 and the agreement of 1966 between the government of Kuwait and BP, Article 7

provide

in paragraph F that the place and time of the arbitration proceding shall be determined by the referee who shall also determine the procedure of arbitration. Paragraph 1 refers to the governing law as the principles common to Kuwait and England, in the absence of such principles then by the principles recognised by civilised states in general, including these which have been applied by international tribunals. In this agreement a change was made with respect to tax disputes which, according to paragraph J, must be settled in accordance with procedural provision of the Kuwait Income Tax Decree No. 3 of 1955 as amended by the 1967 income tax law.

These agreements and agreements concluded between the government of Saudi Arabia and foreign companies and the rule of Abu Dabi embodied more or less the provisions mentioned above.

Having traced the development of arbitration clauses in Iran, Iraq and Kuwait, now the ICSID will be examined as the peak of arbitration era and how it was established to be an international forum for the settlement of investment disputes, and how it works to interpret the parties' intentions, and how it supplements the parties' provisions with regard to investment agreements between states and nationals of other contracting states.

II The ICSID Convention "International Forum"

The convention was introduced by the World Bank to provide an international forum to adjudicate investment disputes. The convention meant to provide the foreign investor with some certainty, eliminate his fear of changing municipal legal systems, and dramatic political changes that could undermine his undertaking, by removing the investment conflicts from the process of municipal law and remitting them to international forum (i.e. the centre created by the convention). Meanwhile the convention would deprive the foreign investor of his home country protection by diplomatic means when the host state is a member of the convention and accepted to submit to the centre.[3]

The convention has been ratified by 72 countries who were and may be still in desp rate need for foreign investment - but it should be noted that ratification in its own does not compel a member state to submit to the centre - on the other hand the convention has failed to attract the Latin American and other states who considerthe convention as a threat to their right of complete control over their natural resources within their countries. The Latin American view of the convention was stated clearly by Flex Ruiz, the Chilean IBRD-IMF Governor in 1964, who stated that: "the foreign investor under the convention, by virtue of the fact that he is a foreigner [is given] the right to sue a soveriegn state outside its national territory dispensing with the courts of law. This provision is contrary to the accepted legal principles of our countries and defacto, would confer a privilege on foreign investors placing the nationals of the country concerned in a position of inferiority."[4]

Nevertheless the role of the centre as an international forum under the convention has to be examined here. What remains to be examined after this is the modern concession as a framework for investment and the role of arbitration therein.

The role of the centre is to channel to conciliation and arbitration but not to be involved directly in the settlement process.[5] The dispute has to be a dispute between a contracting state and a national of another contracting state, so it does not entertain disputes between member states or between a member state and one of its nationals, neither does it in this regard examine disputes between private parties.[6]

For the centre to have jurisdiction the consent of the parties involved is essential, but once this consent has been established it cannot be revoked unilaterally. The parties consent does not have to be given at the time of submission to the centre, it only has to exist at that time. Therefore it may be given in a clause incorporated in the investment agreement or can be given by a separate agreement at the time of dispute taking place - one way of giving consent is by a treaty between two member states, like the one between the UK and Jordan in 1979 for the promotion and protection of investments whereby the parties agreed to refer disputes to the centre in question.[7] In such a case Jordan is under an obligation to submit every dispute between it and nationals of the UK with regard to investment taking place in Jordan, to the Centre. So much the more when a member state refers to the centre for the settlement of disputes in legislating for foreign investment and concludes a treaty for such purpose with a capital exporting state.[8]

The centre has its own rules of procedure which must be applied in the event of arbitration before it. The arbitrators should respect the parties' choice of law to govern the substance, and the country's law would apply in the absence of express choice to the contrary. In general the centre would refer the dispute to an arbitral tribunal, which would apply the parties' agreement to the dispute and supplement such application by the centre's rules if the agreement's provision did not fulfil the task.

The convention does not only accomplish the investor's wish to see his disputes taken away from the host country municipal courts, but also guarantees him the recognition and enforcement of awards rendered against the host state. The convention in this respect provides that every state member is under an obligation to recognise and enforce awards rendered by the centre.[9] The host state against whom the award is rendered is required to comply with the award or otherwise it would be subject to sanctions and may be taken to the international court of justice.

Although the CSID has failed to constitute the international tribunal before which investment disputes could be decided between states and nationals of other member states, both non member states and private investors continue their endeavour to avoid disputes or reduce it to the minimum extent possible, or reduce the impact of disputes on their contractual relationship. For such purpose they developed the so-called modern concession which will be examined now.

III Framework: "The Modern Concession"

The recent development agreements have been regarded as a framework for an ongoing relationship rather than a mere contract defining the rights and obligations of the parties. Host governments and foreign investors have realised that arbitration is not always the suitable mechanism for dispute settlement and may prove costly for technical or accounting matters. Further, they have realised that the source of dispute may be:

1. interpretation of the provisions of the agreement;

2. the appropriateness of the provisions themselves;

3. the state's dissatisfaction about the lack of control over its natural resources.

The parties to modern concession therefore tend to build their relationship in a way that is capable of avoiding disputes to a great extent, hence it is called the self-enforced contract. In such a contract the arbitration or stabilisation clauses are retained but just in case; or as a traditional formality.

The modern concession agreements elaborate on the rights and obligations of the parties through the duration of agreement, and by stage-by-stage attempts to overcome the generality and the inefficiency of the host government's investment codes and laws. It is a well known fact that company law and other relevant laws are very poor in host countries when compared to European and North American laws on the subject. In addition to that the modern concession gives the host government a major role in investment projects, either by its participation or by giving it the right to supervision and control, in contrast with the traditional concession where the investor was given almost unrestricted rights in exploiting the natural resources, and the sole obligation of the investor was a royalty.

One of the stabilised frameworks is the concession agreement between the Egyptian government, the Egyptian General Petroleum Company (EGPC) and Chevron Oil Company of Egypt.[10] In this concession the parties made a detailed framework for a twenty-year project - the duration of the concession. The concession is divided into two stages and the parties' relationship would change from the first stage to the second.

The first stage is the exploration period, where the company would prepare the work programme and the budget, which would be reviewed by a joint committee "Exploration Advisory Committee" and subject to EGPC approval. The committee would be established by EGPC and the company: 3 members from each side and the chairman would be designated by the EGPC.

The exploration period, would be three years initially but it could be extended to two additional periods of two years each, or maybe terminated by a commercial discovery.[11] The company would carry out then all the operations necessary for exploration and pay for it on its own, but it would recover its expenses at a later stage (i.e. the production stage). The EGPC would be represented in the joint committee only for purposes of control. At this stage EGPC would be taking no financial burden, maybe because it could not afford a substantial amount of money or could be placing the initial risk on the investor.

The second stage starts with the establishment of a commercial discovery. At this stage the parties would establish a joint company instead of the joint committee to run the project on behalf of the parties during the production stage. The provisions incorporated to stabilise the relationship during this stage and to allow the company to recover the exploration expenses are unique. In Article 8 of the agreement the parties agreed to divide the oil produced in this manner:

(a) The company would take 30% per annum of the crude oil produced and saved as a cost recovery share to recover what it had paid during the first stage.

(b) The remaining 70% would be shared:

(i) 80% to the EGPC, out of that quantity the EGPC would pay to the government (in cash or in kind) what would be the equivalent of 10% of total quantity produced before the deduction of the 30% cost recovery.

(ii) the 20% remaining would be taken and disposed of by the company.

In this kind of concession the role of arbitration has declined substantially, because the details in the concession make the likelihood of dispute very slim. What is more important in this concession is the modern concession conflict avoidance provisions or the avoidance of full-scale arbitration, some of which will be discussed now.

1. Relinquishment Clauses

One of the common clauses in the concession is a clause providing for periodic reduction of the concession area. Usually a company would need a large area to explore, but it would not find equally attractive reserves in the whole area. Furthermore such a clause would speed up the exploration and prevent the tying up of land that could be used for exploitation by the government or a new investor. In the concession examined between the Egyptian government, the EGPC and Chevron, the company undertook under Article 5 to relinquish to the government at the end of the third year a total of 25% of the original. At the end of the fifth year an additional 25% and the end of the exploration period the company wald relinquish the remainder of the original area.

2. Periodic Revision

One source of disputes is when some terms of the agreement are no longer acceptable to one of the parties as a consequence of changing cirumstances. Although changing circumstances may lead to contract revision even without an express clause to that effect, the contemporary practice is to include a review clause in the agreement. The review may be periodic and may be at the instance of one of the parties. In the agreement between the Liberian Government and the Liberian Iron and Steel Corporation,[12] the parties agreed in Article 3(B)that "in case of any profound change in circumstances, the parties, at the request of either of them, shall consult together for the purpose of considering such change ....." An example of periodic revision is the clause in the agreement between the government of Sierra Leone and Guiseppe (an Italian company)[13] Article 1, paragraph 31 calls for a revision not more often than five years. The advantage of such a clause is, that it helps the parties to update the agreement and put both of them "on notice that a review will take place and thus minimise the possibility of surprise and misunderstanding."[14]

3. Phase in of Host Country Ownership

One of the means of avoiding disputes is the transfer of shares to the host government or to a local partner. The OPEC established guidelines in the early seventies suggesting that its members receive an initial 25 per cent participation in equity of local companies and that such participation increase by stages to an eventual 51 per cent control. The equity was to be paid for by the producing countries.

A 51% participation may be achieved by renegotiation as in Libya prior to the nationalisation.[15] Anaconda (American company) and its subsidiaries had to renegotiate their agreements with the Chilean government in 1969 and to transfer two mines to a new company in which the Government owned 51% of the shares. In these two cases renegotiation and the transfer of 51% of the shares to the host government failed to settle the disputes because in the former example the government's ultimate aim was an outright nationalisation, and in the latter the Allende Government came to power in 1970 having in mind a total nationalisation, for which the Government proposed a constitutional amendment.[16] Nonetheless poor countries prefer to become partners when the production begins and the project appears to be profitable. A balanced approach has been suggested to transfer ownership without endangering the overall relationship and avoiding decrees of nationalisation. This approach "would allow the local partner, at his option, to increase his ownership up to specified portion of the shares. If the local ownership reaches the key percentage figure, the foreign firm has a 'put' option whereby it can require that the local partner take all the outstanding shares of the enterprise."[17] This approach strikes a balance between the state which wants to participate and the company which seeks certainty. The country would never reach the key figure as long as it needed the company, in which case the company would be a party to a commercial project. If the country felt that it no longer needed the foreign company and it reached the key figure, it would have to buy the outstanding shares and enable the foreign company to withdraw in peace without loss or a need for arbitration.

Arbitration has maintained its place in the framework concession, but its role has declined substantially. It became the last resort if the parties could not modify their relationship mutually and satisfactorily within the framework. Hence the arbitration has often been limited to certain disputes specified in the agreement or to certain categories of disputes and not to all disputes arising from or in connection with the agreement.

The parties in the Pan-American-Iranian agreement of 1953 realised that accounting and technical disputes would be better solved by experts than by arbitration which is usually more effective on points of law. The parties therefore agreed that disputes of "technical and accounting" nature would go to one or three experts for expeditious handling. Any disputes relating to "legal questions" that deal with interpretation and execution of the agreement would go to a regular arbitration. In the agreement between Chevron, EGPC and the Egyptian Government agreed that disputes between the government and one of the companies would be referred to the relevant Egyptian court. Disputes between the companies would be settled in Paris according to the ICC rules of arbitration.[18]

This is the role of arbitration in the settlement of disputes and conflict avoidance, but given the high financial stakes and the changing concession environment, it would be ideal if conflict did not arise.

Now the Texaco and Calasiatic concessions will be assessed briefly in light of what has been discussed. The concessions were a model annexed to the Libyan petroleum law of 1955. The concessions accommodated the companies' and King Idris' Government's interests quite satisfactorily. The said law was amended nine times and the concessions accordingly, but only to an extent that did not affect the companies' rights. The amendments were in the law clauses and other technical matters, but the contracts were not renegotiated because of the stabilisation clause which had guaranteed that the companies' rights could not be affected without the companies' consent - the provisions of the concessions will be discussed through the discussion of the arbitration.

In spite of the stabilisation clause the companies were prepared to give in when they saw their interests threatened after the overthrow of Kind Idris' Government. Thus they put up with the decree of nationalisation No. 66/ 1973 which nationalised 51% of the companies' properties, rights and assets. The 51% were transferred to the Libyan National Company (LNC). The companies formed a new company (Amoseas) to carry out its activities as to 49% for the account of the companies and as to 51% for LNC.

The dispute in the arbitration at hand is not so much the product of a shortcoming of the contracts as a dispute about whether the concession as a whole could be used to nullify the state's decision to nationalise the companies and as an instrument to impose on the state an obligation to perform its obligations under that very contract. This paper proposes to discuss the arbitration and its approach to the problem. It will be divided to three chapters: the first one deals with the procedural aspect of the arbitration, the second and the third deal with the tribunal's approach as to the substance.

FOOTNOTES: Introductory Chapter

1. In his award of 1951 the arbitration between Petroleum Development (Trucial Coast) Limited and the Ruler of Abu Dhabi, the arbitrator - Lord Asquith of Bishopstone - had to determine the proper law of the concession agreement. In the course of his consideration he had said "if any municipal law were applicable it would *prima facie* be that of Abu Dhabi. But no such law can be reasonably said to exist. The Sheikh administers a purely discretionary justice .....; and it would be fanciful to suggest that in this primitive region there were any settled body of legal principle." ICLQ, 1952, pp.247-61.

2. Agreements referred to and examined in this section can be found in the Annexe to 'Arbitration Clauses in the Oil Industry, by D.A.G Sarre, *International Commercial Arbitration*, Vol.3, pp. 63-81.

3. Article 27, Paragraph 1 of the convention; for the text see *ILM*, 1965, p. 538.

4. Quoted by W.D. Rogers, *AJIL*, 72, 1978, p. 4.

5. Article 1, Paragraph 2 of the convention.

6. The Secretary-General examines these requirements when a dispute is submitted to the Centre for registration.

7. UK Treaty seris, No. 51, 1980.

8. Indonesia entered into a treaty with the UK in addition to legislating for the foreign investment and referring to the ICSID as a way of settling disputes.

9. Article 45, Paragraph 1.

10. For the text of the agreement see Fishres, A Collection of International Concessions and Related Instruments, (Contemporary Series), II, p.381.

11. Article 4, Paragraph 6.

12. For the agreement see Fishres, I, p.113.

13. Fishres footnote 10 p.1.

14. Smith and Wells negotiating Third World minerals agreements, p.139.

15. See the facts of the Texaco case, 53, ILR.

16. 59, ILR, pp.417-21.

17. Smith, supra note, 14, p.131.

18. Article 23 of the Chevron agreement, supra note 10.

THE ARBITRATION

Factual Background

Libya gained its independence in late 1951, Idris was named King of the country. The only source of the national income was very primitive agriculture, and the agreements between the government and the US, and the UK giving the government a few million dollars; in return they were allowed to build military bases for their troops on the Libyan coast.

Libya had no hope of exploring for minerals by itself. The financial cost of exploring for minerals would run into thousands of millions of dollars Libya could not afford, in terms of expertise and technology. In the light of these factors the Libyan government at the time issued the petroleum law in 1955 in order to encourage foreign investment.

A great number of concession agreements were concluded pursuant to that, between the Libyan government (petroleum commission or petroleum ministry, depending on the date of the contract) and foreign companies. Among those were fourteen deeds of concession concluded between the Libyan government on the one hand and California Asiatic Oil Company and Texaco Overseas Petroleum on the other (referred to hereafter as the companies).

The 14 deeds of concession took the form of a model contract annexed to the petroleum law of 1955, so the provisions of the model contract are the same provisions incorporated in the said 14 deeds of concession.

Clause 16 of the deeds of concession which reads in its original wording that "The government of Libya, the commission and the appropriate provincial authorities will take all steps necessary to ensure that the company enjoys all rights conferred by this concession. The rights expressly granted by this concession shall not be altered except by mutual consent of the parties."

These clauses were the subject matter of agreements between the companies and the government amending it. The final version of Clause 16, as established by the agreement of 20th January, 1966, which was subsequent to the decree of 22nd November, 1955 reads as follows: "The government of Libya will take all steps necessary to ensure that the company enjoys all the rights conferred by this concession. The contractual rights expressly created by this concession shall not be altered except by mutual agreement of the parties. This concession shall throughout the period of its validity be construed in accordance with the petroleum law and the regulation in force on the date of execution of the agreement of amendment by which this paragraph (2) was incorporated into the concession agreement. Any amendment to or repeal of such regulation shall not affect the contractual rights of the company without its consent."

Clause 28, which provided that (Paragraph 1): "If at any time during or after the currency of this concession any difference or dispute shall arise between the Government and the company concerning the interpretation or performance hereof, or any thing therein contained in connection herewith, or the rights and the liabilities of either such parties hereuender and if such parties should fail to settle such difference or dispute by agreement, the same shall, failing to settle it in any other way, be referred to two arbitrators, one of whom shall be appointed by each such party and an umpire who shall be appointed by the arbitrators immediately after they are themselves appointed ....."

Paragraph 2: "The institution procedings shall take place upon the receipt by one of such parties of a written request of arbitration."

Paragraph 3: "The party receiving the request shall, within 90 days of such receipt, appoint its arbitrator and notify this appointment to the other of such party, failing which such other party may request to the president ..... of the international court of justice to appoint a sole arbitrator and the decision of the sole arbitrator as appointed, shall be binding upon both such parties."

Paragraph 5 provided that ".....the sole arbitrator shall determine the applicability of this clause and the procedures to be followed in the arbitration."

Paragraph 6: "The place of arbitration shall be such as may be agreed by such parties and in default of agreement between them within 120 days ..... be determined by the sole arbitrator."

Paragraph 7: "The concession shall be governed and interpreted in accordance with the principles of law of Libya common to the principles of international law and in absence of such common principles then by and in accordance with the general principles of law including such of these as may have been applied by international tribunals."

In 1969 King Idris was overthrown by a revolution led by Colonel Gadafi. The policy of the state has been subsequently changed and a socialist trend prevailed. Shortly after that the most important sectors of the economy were nationalised; banking, insurance, transport.

In the field of the oil industry a programme of nationalisation started although a number of those nationalisations appeared to be politically motivated or discriminatory.

Concerning the companies, the first blow came with the decree of nationalisation (Law No. 60/1973) which decreed the nationalisation of 51% of the properties, rights and assets of the companies and seven other companies, but it did not apply to all foreign companies operating in Libya.

Article 2 of the decree provided for compensation by the state to be determined by a committee appointed by the government of Libya.

On 2nd September, 1973 the companies notified the Libyan government that they intended to submit to arbitration their dispute. The Government rejected the demand. The companies then availing themselves of clause 28 requested the President of the International Court of Justice to designate the sole arbitrator.

In 1974 a decree of nationalisation (Law No. 11/1974) decreed the nationalisation of all the properties, rights and assets of the companies relating to the 14 deeds of concession with a committee to determine compensation. The companies having gone the same course once more requested the president of the court of justice that the sole arbitrator hear both cases, and so it was.

The Libyan Government abstained from taking any part in the proceedings. It did however raise certain objections in a memorandum attached to a letter dated 25th July 1974, to the President of the International Court of Justice. It contended that:

1. Under clause 28 of the deeds of concession there was a preliminary requirement that an attempt to bring about a friendly settlement should have been made beforehand, and unless such negotiation had failed the initiation of arbitral proceedings would be invalid.

2. It was remarked that the arbitral proceedings were instituted against the Libyan Arab Republic, while the deeds of concession were concluded between the Minister of Petroleum and the companies and that the deeds related to legal relations between the Minister and the companies while the Libyan Arab Republic, a sovereign state, was

not party to the contract.

3. It rejected (that there was) a need for arbitration in the present case because there was no dispute or difference.

4. The request for arbitration was made by a party not qualified to bring it since the companies had as a result of the nationalisation "lost their status of concession holders".

5. The nationalisation was an act of sovereignty which cannot be judged by jurisdictions other than those of the state concerned.

After considering the Libyan Government's objections the President of the International Court of Justic appointed Professor Dupuy as the Sole Arbitrator. The latter decided that the initial stage of arbitration should be devoted to the question whether he had jurisdiction to hear and determine the dispute and that is the subject matter of the first chapter of this work, accompanied by the question of the procedural law.

CHAPTER I

Jurisdiction and the Procedural Law

The Sole Arbitrator had to be particularly careful in establishing his jurisdiction in view of the Government's decision not to participate in the proceedings. The Government objections to the Arbitration are mentioned above, but for the purpose of this chapter they should be assessed once more. These objections understandably mean that:

1. The state sovereign right to nationalise the companies' properties and property rights was beyond dispute. It entails an obligation to compensate, for which purpose a committee was set up. Therefore there was no dispute.

2. Since the contract had been terminated by the exercise of that sovereign right, the arbitration clause itself was terminated with the contract, therefore there was no basis for arbitration.

3. The state was therefore not bound to arbitrate, and cannot be subject to arbitration without its consent as a sovereign state immune from arbitration as such.

Now did the Arbitrator have jurisdiction over the dispute? The Arbitrator did not fail to point out that according to relevant rules adopted by international tribunals and recognised by legal scholars, he was the competent judge to rule on his jurisdiction. In the Arbitrator's own words "It is for the sole Arbitrator and for him alone to render a decision on his own jurisdiction by virtue of a traditional rule followed by international case law and unanimously recognised by the writings of legal scholars.[2]

In proceeding to establish his jurisdiction the Arbitrator had to deal with a number of problems in the light of the Government of Libya's ogjections to the Arbitration and its refusal to participate. This chapter is devoted to tackle such problems in two paragraphs, and the third one shall be devoted to the crucial question of the procedural law.

I.1 Enforcement of the Arbitration Agreement

It is generally agreed that once a state has assented to submission to arbitration and then refuses to participate in the proceedings, arbitration can proceed unilaterally. The principle has been upheld by international courts and tribunals and all have agreed that a state's attempted unilateral recession of an agreement to submit dispute to arbitration does not impair the jurisdiction of the forum in question. This principle has been clearly stated in Article 25 of the ICSID Convention (examined in the Introductory Chapter).

The statute of the International Court of Justice makes provisions for the procedure which the court should adopt in the event that one of the parties to a case fails to appear. Article 53 provides: "1. Whenever one of the parties does not appear before the Court or fails to defend its case the other party may call upon the Court to decide in favour of its claim. 2. The court must before doing so, satisfy itself not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well found in fact and in law."

Similar provisions are found in the model rules in arbitral procedure drawn by the International Law Commission, 1958. Article 25 of the model rules provides: "1. Whenever one of the parties has not appeared before the tribunal ..... the other party may call upon the tribunal to decide in favour of its case." "3. .....then tribunal shall render an award after it has satisfied itself that it has jurisdiction. It may only decide in favour of the submissions of the party appearing, if it is satisfied that they are well found in fact and in law."

In these examples it can be seen that jurisdiction must be found first by the forum. If so, the agreement is enforced and the tribunal may proceed. As a matter of fact the above examples concern agreements where the tribunal in the case at hand had jurisdiction under a clause in a terminated contract, but the outcome is not significantly different after a brief examination of the severibility of the arbitration clause. The jurisdiction of the Sole Arbitrator was found in Clause 28 of the fourteen deeds of concession which had been terminated by the decree of nationalisation, and here is where Sole Arbitrator Dupuy had to examine the severibility question. He then held that "The principle to which it is appropriate to refer in this matter is that of the autonomy or the independence of the Arbitration clause. This principle has the consequences of permitting the

Arbitration clause to escape the fate of the contract which contains it."[3] Indeed the modern view is to consider that the arbitration clause is separable from the main contract. "The authority of the arbitrator to decide all disputes would stem from the arbitration clause itself rather than from the agreement in which it is contained."[4]

Indeed the Arbitration clause should be considered separable in order to fulfil its function, given the parties' intention (stated in clause 28) to submit disputes to arbitration having failed to solve them, by other amicable means. This was the intention not only when a dispute emerged during the validity of the contract, but also when the dispute emerged in connection with the contract after the contract duration or termination, and in this area where the companies contended (i.e. the companies challenged) the validity of the state's act and disputed its right to nationalise their properties and property rights, in addition to their requirement for specific performance as the proper remedy. The requirement for specific performance is certainly outside the scope of the contract and needed to be decided by the Arbitrator, and that's the subject matter of the third chapter.

I.2 The Sovereign Immunity Issue

The severibility of the arbitration clause was examined in the last paragraph and it has been found that the clause in question could survive the termination of the contract.

The question now is whether a state pleading immunity could be subject to arbitration when it has not expressly waived its immunity in the contract in dispute? The overwhelming weight of authority calls for an affirmative answer. Decisions of arbitral tribunals, treaty, and statutory provisions found in the European Community convention and in the law of several countries[5] and judgments of public courts all agreed that a state party to on arbitration agreement is precluded from asserting its immunity in order to frustrate the purpose of the agreement. Furthermore the state immunity can be implicitly waived and that can happen by incorporation of an arbitration clause in a contract. In 1975 Nigeria and Ipitrade, a French company, entered into an agreement for the purchase and sale of cement. The agreement provided that it would be governed by Swiss law and potential disputes would be submitted to arbitration by the ICC. Subsequent to various disputes the company instituted arbitration proceedings in 1976. Nigeria refused to participate, relying on sovereign immunity as a defence. The tribunal not only dismissed the defence but also rendered an award granting some of the company claims. Nigeria refused to make any payment in accordance with the award.

Before the District Court of the District of Columbia the company sought to enforce the award in accordance with the provisions of the New York Convention on the recognition and enforcement of foreign arbitral awards of 1958 to which the USA, France, Switzerland and Nigeria were signatories.

In addition to contending that the award was enforcable under the New York Convention, Ipitrade relied on the sovereign immunity act claiming that submission to arbitration constitutes a waiver of Nigeria's immunity under the Act. The court held that "submission to arbitration in another country as distinguished from the United States, constituted an implicit waiver of immunity and that such waiver was binding upon and could not be revoked by Nigeria."[6]

I.3 The Procedural Law

The parties made it the task of the Sole Arbitrator to determine the procedural law applicable, Clause 28(5) provided that "..... the Sole Arbitrator, shall determine the applicability of this clause and the Procedure to be followed in the Arbitration."

In a case such as this should arbitrators follow the traditional approach which implies that every activity occurring on the territory of a state is necessarily subject to its jurisdiction?[7] Therefore when the parties have not stipulated the procedural law, the tribunal should apply the procedural law of the seat? Or should arbitrators or can they follow the new approach that calls for delocalisation of the arbitration proceedings in the absence of the parties' agreement to the contrary, and the place of the arbitration should have no significance in relation to the proceedings on the grounds that, the contract itself gives the proceedings a binding affect and not the procedural law of the seat or the place simply because it provides geographically neutral ground for litigation.

The latter approach finds a great support in the French case law and among the French scholars and in the ICC rules. The trend towards delocalisation of arbitral proceedings can be seen in Article 11 of the ICC rules which after revision in 1975 provides: "The rule governing the proceedings before the arbitrator shall be those resulting from these rules and, where these rules are silent, any rules which the parties (or failing them) the arbitrator may settle, and whether or not a reference is thereby made to a municipal procedural law to be applied to the arbitration." Prior to the revision in question the rules of the ICC were in favour of the traditional approach, Article 16 of the ICC rules of 1955 provided that "the rules by which the arbitration proceedings shall be governed shall be these rules and, in event of no provision being made in these rules, those of the law of procedure chosen by the parties of failing such choice, those of the law of the country in which the arbitrator holds the proceedings."

French Case law is greatly in favour of the new phenomenon of proceedings escaping all municipal laws and deriving their binding effect from the transactional contract itself. What justifies this is the need and the usage of international commerce. This trend has been illustrated recently by Libyan Maritime Company v. Gotaverken,[7] a Swedish shipyard. The dispute emerged from a set of substantially identical contracts whereby Gotaverken undertook to construct three tankers for the Libyan Maritime Company. In accordance with the contract the dispute was submitted to the ICC arbitration in Paris. The tribunal composed of a French chairman, a Norwegian and a Libyan. By a majority decision dated April 1978 (which the Libyan arbitrator refused to sign) the tribunal rendered an award in favour of the shipyard. The Libyan Maritime Company sought to set the award aside before the court of appeal of Paris for the reason (among others) that "it violated the French public order because it imposed on a foreign party an obligation contrary to imperative norms of its home country."

In defence the Gotaverken maintained that the contract had no connecting factor with France, thus argued that shipyard fixing Paris as the seat of arbitration did not give the courts of France any jurisdiction over the proceedings given the rule of autonomy that applies to ICC arbitration.

On rebuttal the Libyan Maritime Company argued the view that French law necessarily controlled the arbitration. This position was founded on three observations:

1. The New York Convention's reference to the (subsidiary) applicability of the procedural law of the place of arbitration;
2. The fact that the arbitrators had applied French rules of conflict of law; and
3. The fact that Gotaverken itself had in the Swedish

> recognition proceedings maintained that the failure of the Libyan arbitrator to sign the award was "in accordance with the French procedure, the place of arbitration being Paris".

For these reasons according to the Libyan Maritime Company the court of appeal of Paris had jurisdiction.

Gotaverken replied that there was no need for arbitral proceedings to be attached to a national legal system; under the New York Convention the law of the place of arbitration controls the proceedings only in the absence of a specific agreement by the parties, and such agreement according to the shipyard was present by virtue of the reference to the rules of the ICC, whose Article 11 authorises the detachment of arbitral proceedings from local law. Thus the award was not French, and could not be appealed from in France.

The court refused to take jurisdiction on the principle that parties to international arbitral proceedings are free to select the legal order to which they wish to attach the proceedings, and this freedom extends to the exclusion of any national system of law.

The decision of the court constitutes a clear acceptance of the detachment phenomenon. Its underlying thesis is that the legal force of transnational arbitration is found in the parties' creation of a contractual institution; the effect of the proceedings may be left to be controlled by whatever legal system is requested to recognise the award, once it is rendered, and that system need not necessarily be that of the place of arbitration.[8] Sole Arbitrator Dupuy, influenced by the examined trend, had two precedents in terms of investment disputes and he examined them both.

The Sole Arbitrator examined the approach which prevailed in Sapphire v National Iranian Oil Company (NIOC) arbitration, where the tribunal had chosen to be governed by the procedural law of the Canton of Vaud and submitted to the judicial sovereignty of Vaud. The Sole Arbitrator found this approach unsuitable on two grounds. The Arbitrator held that "from a theoretical point of view, neither of the two parties was a sovereign state. Second, from a practical point of view it is unreasonable to think that an arbitration award connected with a national legal system may perhaps be easier to enforce ..... But this is a consideration relating to enforcement which is not within the jurisdiction of the Arbitrator. There is in this case, therefore, no decisive reason either theoretical or practical, to adopt this solution."[10]

The Sole Arbitrator then proceeded to examine the second approach that had been adopted in the dispute between Saudi Arabia and the American Arabian Oil Company (Aramco) in which dispute the tribunal decided that the arbitration would be governed by international law on the following grounds. In the tribunal's words: "The Arbitration is to take place, in all cases outside Saudi Arabia. It is obvious therefore that the law to be applied to this institution is not the law of Saudi Arabia since the parties have intended from the very beginning to withdraw their dispute from the jurisdiction of local tribunal." And the tribunal continued to state that: "Considering the jurisdictional immunity of foreign states recognised by international law ..... the tribunal is unable to hold that the arbitral proceedings to which a sovereign state is party could be subject to the law of another country."

"It follows that the arbitration as such, can only be governed by international law."

Sole Arbitrator Dupuy endorsed these reasons and applied the approach to the case at hand adding: "..... one must moreover add that the procedure for the appointment of the Sole Arbitrator and in particular the provision, that he should be appointed by the President of the International Court of Justice strengthen the presumption that the parties intended that any possible Arbitration between them should be governed by international law."

So, for the above mentioned consideration the Sole Arbitrator chose international law to govern his Arbitration. Now were these considerations, on which the approach was based, sound? Could such approach make Arbitration easier, more difficult, or ineffective? Before answering the question or making any comment a mention has to be made of the approach adopted by Judge Lagergren acting as a Sole Arbitrator between the Government of Libya and the British Petroleum,[11] on a similar dispute arising out of identical contracts to those in the case at hand and under the same circumstances (the Libyan Government refused to take part before the tribunal).

Having fixed Copenhagen as a seat of his tribunal the Sole Arbitrator chose the Danish procedural law to govern proceedings before the tribunal. The resort to the Danish law (law of the seat) was based on considerations of "effectiveness" of an award "founded on the procedural law of a specific legal system and partaking of its nationality referring to the "wide scope of freedom and independence enjoyed by arbitration tribunals under Danish law." The Sole Arbitrator added that "the attachment to a developed legal system is both convenient and constructive."[12]

For the purpose of answering the proposed question, a comparison of the two approaches and considerations on which each of them was based is necessary; Judge Lagergren's chief concern was the effectiveness of his award, where the Sole Arbitrator Dupuy's chief concern was to avoid a collision with state immunity, a consideration which the former arbitrator dismissed, stating that "within the limits of international law, the judicial or executive authorities in each jurisdiction do as a matter of fact and law impose limitations on the sovereign immunity of other states." With regard to the effectiveness of the award and its enforceability the latter held that it was not his concern. Furthermore he held that the effectiveness of the award should be the parties' concern, and the nationality and enforceability of the award is a matter which is usually decided by courts where recognition and enforcement are sought.

Both Arbitrators seem to be arguing correctly to a certain extent. Sovereign immunity is no longer a formidable hurdle,[13] a point in favour of Judge Lagergren's argument and against Dupuy's. The courts where recognition is sought may recognise a detached award, a point in favour of Dupuy's argument.[14] What is the best approach? In fact there's no consensus as to the procedural law and whether it should be detached, or should be the law of the seat. The argument between arbitrators reflect the theoretical one.

The current practice however seems in private disputes, i.e. disputes between parties subject to the private to be to choose an arbitration institution (e.g. ICC) and to submit to its rules of procedure.

Concerning disputes arising out of development agreements between governments and foreign companies, the practice is in absence of reference to institutional arbitration with its own rules of procedure like the centre of ICSID convention is to leave the choice to the arbitral tribunal, as was the case in the two Libyan cases discussed above. A recent litigation between the Government of Kuwait and Aminoil[15] (an American company) seem to offer a new and appropriate approach. The Tribunal in this litigation did not waste any time discussing and comparing international law with the law of the seat (the tribunal fixed its seat in Paris, France). It adopted its new approach, which calls for arbitral tribunal to form its own rules of procedure leaving enough room for the mandatory rules of the seat. But having chosen a place where the law allows a great freedom for arbitration, the referenc to the mandatory rules of the law of the seat would not have any distorting effect on the tribunal's own procedures because the French legal system (as it is shown above) allows for procedural rules to be completely detached from any legal system including that of the seat, which is in fact giving the tribunal the chance to internationalise the procedural aspect of the arbitration.

FOOTNOTES: Chapter I

1. The clauses are quoted from Vol. 53, ILR.
2. The Case 53, ILR at No. 9, p.404.
3. Ibid, No. 16, p.408.
4. Duldmne Transnational Contract, Vol.II, Ch.13, p.47.
5. The Foreign Sovereign Immunity Act in the UK, and Soveriegn Immunity Act in the USA.
6. 17, ILM (1978), p.1398.
7. The case quoted from Jan Pulssan. 'Arbitration unbound: award detached from the law of its country of origin'. ICLQ, 1981., p.3.
8. Ibid, p.367.
9. 35, ILR, P.136.
10. The case, p.432.
11. 53, ILR, p.297.
12. The BP award Ibid. at 14, P.309
13. See the judgment cited in Footnote 6.
14. See the French Court's recognition of the award of case cited at Footnote 7.
15. 21, ILM (1982), p.976.

CHAPTER II

The Law Governing the Substance

Having internationalised the procedural aspect of his arbitration, Professor Dupuy proceeded to find the law governing substance. The Sole Arbitrator deduced that the parties had intended to remove their contract from the domain of private law and internationalise their relationship.

Because subjecting such a relationship to the so-called International Law of Contract may be of grave consequence to the host country and to its development goals, what will be examined here is: first, under what conditions can a contract be internationalised and thus be subject to international law, and whether these conditions are sound enough to indicate the parties' intention to internationalise their relationship. Secondly, the content and purposes of an International Law of Contract will be examined in the light of third world countries' attempts to make their political independence more meaningful by trying to achieve an independent economy. Thirdly, the question when did this branch of law evolve and by whom will be attempted, and how it was intended to be applied to developing countries, and the international environment in which such law was developed. All this will be to establish that the Arbitrator applied a set of rules contained in a very fragile concept that cannot stand in the path of developing countries working for permanent sovereignty and control over their natural resources which could be of vital importance to the nation, especially if it is the basic source of national income.

The first step "indications of internationalisation" will be examined in the light of the Sole Arbitrator's findings.

II.1 Internationalised Contract

The Arbitrator lists three conditions under which the internationalisation of a contract can be brought about, and the presence of one of these conditions is said to be sufficient to internationalise the contract and remove it from the ambit of any municipal law. These conditions are:

(A) the contract may refer to the "general principles of law" as the applicable law;

(B) it may contain an arbitration clause;

or (C) it may be an economic development agreement.[1]

It is true that the contract in dispute contained the first two conditions in addition to being an economic development agreement, but these conditions cannot have that effect without the parties' consent. Could these conditions be taken as the parties' consent or approval of the internationalisation of potential disputes? The conditions listed by the Arbitrator will be examined here in turn to answer the proposed question, in light of the historical background of granting such a concession and the divergent views about it as held by writers and arbitrators. But before doing so it must be pointed out that the concession had not even an implicit reference to international law as the governing law of the contract in event of dispute, and the Arbitrator did not mention that in his list as a matter capable of justifying internationalisation of concession agreements, maybe because such reference is rare if not unheard of.

Could reference to general principles of law indicate the parties' intention of internationalising the contract? Reference to general principle of law can be found in concession agreements concluded four or five decades ago between foreign companies and governments or rulers of less developed countries, especially in the Middle East, at a time when these countries had hardly any legal system sufficiently developed to govern sophisticated relationships like the oil concessions. Thus Arbitrators[2] and scholars[3] held in the past and recently that the host state's law is "prima facie" applicable to its contracts; and resort to general principles of law can only be justified by the absence of municipal law that can govern the concession in dispute. In the light of all this, the dismissal of the law of Libya, because of reference to principles which, at best, are only one of the sources of international law, seems unwarranted.

Another reason for incorporating general principles of law, was the company's fear of changes in municipal laws of the host countries. Reference to such principle is meant to insulate the companies concessions from dramatic changes in municipal laws which may deprive them of their contractual rights, through confiscatory measures, which may be deemed legal in a domestic context.

Now the law of Libya was not changed, but a new law nationalising the companies was introduced. In dealing with this very point the Sole Arbitrator in the BP case decided to ignore the law nationalising the company, because it was directed only to the said company, and to look for rules of more general application in the law of Libya. The Arbitrator held that "the tribunal considers that ..... legislative measure solely aimed at the other party should be ignored. This expression must have reference to provisions of more general application."[4] One can conclude now that, reference to general principles of law cannot have the effect of precluding the application of the Libyan law, when (as stipulated in the choice of law clause) the principles of such law are in conformity with international law.

Turning to the second condition in Dupuy's list, the concession combining an arbitration clause. This factor may be worth taking into account, when determining whether a particular concession is an internationalised contract. It may reflect the parties' intention to internationalise their potential dispute (i.e. submit to arbitration, an international forum as opposed to municipal judicial systems). But it does not necessarily indicate the parties' intention to have their contract governed by international law. Recent development agreements show that the arbitration clause may be coupled by a choice of the host state's law to govern the contract. In Brazil an agreement between the Brazilian National Corporation (PETR ORAS) and a private contractor for offshore exploration provided that "for the settlement of any dispute, whatsoever, the arbitrators shall be guided by the provisions of this contract, "and documents related thereto, and the law of Brazil."[5] The agreement of 1971 between the National Iranian Oil Company and Mobil Oil provided for the law of Iran as the governing law.[6]

The third condition in the Arbitrator's list was that, the concession being an economic development agreement. According to this criterion no concession may escape being governed by international law which is, a rigid approach if applied and may result in imposing an undue limitation on the parties' freedom of choice. In fact it is well accepted that what would nationalise or internationalise the contract is the parties' will, not the subject matter of their agreement. The role of the arbitrator (in this context) is to apply law (as chosen by the parties) to facts, and not to extract law from facts. At this stage it may be useful to recall that the choice of law clause in its last formulation called for the application of "the law of Libya and such rules and principles of international law as may be relevant but only to the extent that such rules and principles are not inconsistent with and do not conflict with the laws of Libya." The Arbitrator found this clause applicable.[7] But at a later stage he decided that "..... reference made by the contracts to the principles of Libyan law does not nullify the effect of internationalisation of the contracts which has resulted from their nature as economic development agreements ....."[8] If international law has to be the applicable law one way or another, the crucial question remains "what is the international law" that has to apply to an economic development agreement? This question will be dealt with in following section.

II.2 The Content of International Contract Law

This branch of international law has been under a severe attack from scholars and lawyers, specially from those advocating the third world's right to unfettered sovereignty and control over natural resources.[9] The criticism is not directed so much to its being international as to its ambiguity, and the way some arbitral tribunals attempted to apply rigid rules and attributed them to International Contract Law.

In the case at hand the Arbitrator ruled that the principle "Pacta sunt servanda" applied to the contracts. In doing so he further stated that "treaties are not the only type of agreements governed by international law ..... contracts between states and private persons can under certain conditions come within the ambit of particular and new branch of international law: The International Law of Contract."

The Arbitrator claimed that the contract was subject to new branch of international law, but failed to draw a line between public international law at its strictest and the new branch "International Law of Contract". He simply applied the law of treaties (Pacta sunt servanda) to the contracts in dispute, which cannot be justified since the internationalisation of the contract "was founded on affirmation of diversity and multiplicity of possible subjects and rules of international law."[10]

As a matter of fact any law of contract is bound to start with the principle "Pacta sunt servanda" but the principle in its international sense is intended to have a different impact on the state contract. Its implicit impact as it has been argued is that, states cannot invoke their sovereignty to abrogate an international treaty, neither can they do so to alter a contract once it has been internationalised. This was the approach in the Aramco case, on which the Arbitrator relied to state that the principle "Pacta sunt servanda" was a fundamental principle of international law applicable to concession agreements. In the Aramco case the tribunal held that "By reason of its very sovereignty ..... the state possesses the legal power to grant rights which it forbids itself to withdraw before the end of the concession."[11] It is obviously a bid to assimilate state contracts to treaties, and if granted it would constitute a denial of host governments' right to nationalise. States are usually free and possess the power to make such limitations on their sovereignty where the other party is a sovereign state, but in its relation with a foreign private party, the state cannot be presumed to have limited its sovereign power when it has revoked a contract with a foreign investor by using that very power.

A recent arbitration between the Government of Kuwait and Amin Oil[12] came to rectify the situation and relax the rigidity of the approach adopted in the Aramco and Texaco cases. In examining the effect of the stabilisation clause (a clause similar to the one in the case at hand) whereby the Government of Kuwait undertook not to change the agreement by general or special, or by administrative measures, or by any other act whatever,[13] the tribunal stated that "..... Limitations on the state's right to nationalise are juridically possible, but what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the regulation governing the conclusion of state contracts; and it is to be expected that it should cover only a relatively limited period..." The tribunal went on to say:

"A limitation on the sovereign rights of the state is all the less to be presumed where the concessionaire is in any event in possession of important guarantees regarding its essential interests in the shape of legal right to eventual compensation."[14] The tribunal has, in effect, reversed the rulings in Aramco and Texaco cases which called for absolute immunity for concession agreements for their duration. It is an undue limitation on the host state sovereignty, if not damaging, to hold that a contract, according to the rule of "Pacta sunt servanda", should not be altered or abrogated by a sovereign act once it has been signed by a government. Indeed the contract ran for fifty or sixty years and a state cannot be presumed to have signed its sovereignty off for such a period. The tribunal in Amin Oil held that the clause in question should not be interpreted "as absolutely forbidding nationalisation ..... its real effect is to prevent the nationalisation from having a confiscatory character."[15]

Arbitrator Dupuy (relying on the Aramco precedent) ought to deprive the state of Libya of its right to nationalise by applying International Contract Law. Another tribunal, adopting Dupuy's approach and borrowing his method of internationalising contracts, denied to the state of Jamaica its right to change tax legislation applying to operating companies within its boundaries, because the Jamaican Government granted concessions to foreign companies prior to the enactment of the said legislation. The case is known as Revere Copper v. OPIC.[16] The facts may be summarised like this: Between 1967 and 1975, Revere Copper and Brass Inc. (Rvere) made substantial investments in a bauxite aluminium plant, owned and operated by Revere's wholly-owned subsidiary, Revere Jamaica Alumina Ltd (RJA) in Jamaica. A 1967 agreement prescribed the amount of taxes and royalties which were to be payable to the Government by RJA and provided inter alia that no further taxes or financial burdens would be imposed on RJA and that the Agreement would remain in force for twenty-five years for the purpose of taxation and royalties.

In 1972 there was a change of Government in Jamaica. Two years later the Government's attempts to renegotiate the 1967 Agreement failed and a new law concerning bauxite was passed thereafter. The Bauxite Act increased the tax on bauxite payable by all companies, including RJA. RJA's claim that it was not liable to pay the increased levy because of the 1967 Agreement was rejected by the Supreme Court of Jamaica. In addition the Mining law was amended in 1974 increasing royalty on bauxite. RJA plant had been insured with the Overseas Private Investment Corporation (OPIC). The guarantee contract provided for compensation for loss resulting from "expropriatory action" of a kind contrary to the principles of international law and including action which prevented the investor "from exercising effective control over the use or disposition of substantial portion of its property." Revere contended that the increased levy and royalty amounted to repudiation of the 1967 Agreement; that such repudiation was contrary to international law and its effect was to deprive Revere of its investment. OPIC argued that since the 1967 Agreement was governed by Jamaican law, it had not been broken and that, in any event, there was no deprivation of effective control.

In the course of determining the applicable law the majority held that "Although the Agreement was silent as to the applicable law we accept Jamaican law for all ordinary purposes of the Agreement, but we do not consider that its applicability for some purposes preclude the application of principle of international law which govern the responsibility of states for injuries to aliens. We regard these principles as particularly applicable where the question is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and assurance given in good faith to such aliens as an inducement to their making the investments affected by the action."[17] The majority went on to say, "The reason for this is that such contracts, while not made between governments and therefore wholly international, are basically international in that they are entered into as part of a contemporary international process of economic development, particularly in the less developed countries."[18]

In order to substantiate this opinion, the majority recalled the pioneer effort (yet unsuccessful) made by the

UK in the Anglo-Iranian Company case, to establish the international illegality of contract breach by a government, the Aramco award, and the Texaco award. Having found these precedents persuasive as regards the question of internationalisation of the Agreement between Revere and the Government of Jamaica the majority held that "in our view the actions of the Government ..... violate generally accepted international law principles ..... we find on the merits for Revere and award accordingly."[19]

Before making any comment on the majority findings, one has to see what the minority thought of the case and the applicable law. The minority did not fail to point out that the contract which was subject to arbitration was not "a contract between Revere and Jamaica but a contract between two American companies entered into in the District of Columbia and containing a provision for arbitration in the District of Columbia of dispute arising under it. The contract and its interpretation are thus governed by the law of the USA and international law."[20]

Assuming for a moment that the tribunal was to examine the Government of Jamaica's actions under international law, according to the minority opinion, the said actions were in conformity with international law. The minority held that "Neither the actual amount of the Bauxite Levy nor the manner of its imposition is unreasonable by normal standards of tax enactments in the international community ..... a fairly acurate measure of the Levy would be 20% and by any standard this lies well within the reasonable range of the taxing powers of the government and is not by any standard confiscatory." The minority further stated that "a company of the size of

RJA which on $ 100 million normally expected to generate a net income of at least $ 10 million would in most European countries pay taxes well in excess of the Bauxite Levy on RJA. And to make but a few examples of Latin America the minority listed:

1. Guatemala's 48: tax;
2. Venezuela's 72% tax on net income of oil companies and 60% on mining companies.

It was also pointed out that "what triggered the shut-down of RJA's plant was the failure of Revere to obtain an extension of its labour contract ..... and not the government action."[21]

In the light of the minority opinion, the majority seemed to have seen International Contract Law as the instrument that should freeze the legal conditions existing at the time of concluding the Agreement, and hold them for its duration (25 years) so that they would be immune from any changes effected by national legislation, even if the legality of such legislation had been endorsed by the Supreme Court of Jamaica. One might conclude that if international law does not intervene to modify a contractual relationship where the host state is in an inferior position to its foreign partner, it should not be a bar in the state's path when it seeks to modify such a relationship to match what prevails with its contemporaries. On this particular point, Amin Oil Arbitration has made a valuable contribution to international law regarding investment agreements, in the course of its interpretation of Art. 9 of the Supplement Agreement of 1961, between the Company and the Government of Kuwaite. Art. 9 provided that "If as a result of changes in the terms of concessions granted hereafter, an increase in benefits to governments in the Middle East should come generally to be received by them, the company shall consult with the Ruler whether in the light of all circumstances ..... any alteration in the terms of the agreements between the Ruler and the Company would be equitable.[22] The Tribunal in this arbitration unlike the one in Rever Copper arbitration, did not resist the alteration of the contract terms, specially when such alteration had become generalized through an extensive circle of contractual relationships. In fact the Tribunal did not fail to point out that Art. 9 had received a kind of application even before it was drafted, because "..... it was the generalization of the 50/50 sharing of profits formula which led both to revision of the financial terms of the concession in 1961, and at the same time giving expression to the principle on which that revision was itself founded."[23] The underlying thesis of the Tribunal reasoning was that "..... a freely concluded agreement establishes as a matter of principle an equilibrium of interests between the parties. In spite of that, this equilibrium will be modified in favour of another equilibrium deemed equally equitable."[24] Thus Art. 9 established (as the Tribunal held) "a system rests on the implied concept of progressive process of justice revealing itself in the course of sufficiently general historical evolution ....."[25] Indeed the Tribunal in Rever Copper case refused to take into account the developments that had been brought about by concessions granted in the hard mineral industry in Latin America, just to ensure stability and security for the investor, which did put the Jamaican Government in an awkward position before its people. It is the conformity of the alteration sought with like contracts, that should determine the question of legality of a governmental action, not simply the obsolete terms of the contract that may render it manifestly unjust as a result of the change in the ongoing relationship.

In line with this reasoning the Tribunal in Amin Oil further upheld the validity of what was known as the Aba Dhabi formula, which had transformed the concession to a service contract. The Formula (which was adopted in a resolution by three Gulf States in Aba Dhabi and subsequently in Vienna by OPEC in 1974) consists of putting up the royalty rate on posted prices by 20% and moving the tax rate upward to 85%. The formula made the revenue of Amin Oil predetermined on a fixed basis of 22 cents by barrel, thus transforming the concession defacto into a service contract. Both parties did not challenge the legality of the formula, but they differed on its application against the background of Art. 9 and the condition in that Article that imposed on the parties the duty of consultation, taking into account all relevant circumstances. The long-lasting consultation and negotiation between the two parties lead to the nationalization of the Company. In upholding the validity of the said formula, the Tribunal noted that the widespread application of the formula had led to the nationalization of a number of companies operating in the Gulf area - Aramco among them -

and thus nationalizing Amin Oil was perfectly legal since it was not a more drastic measure than what the other companies had received. A further examination of International Contract Law will be made in the third chapter on discussing "specific performance" as a remedy for a breach of contract under international law, and how one reconciles the principle of acquired rights and the sovereign right of the host state to nationalize, but it is vital at this point to explore the evolution of International Contract Law and the third world posture in relation to it.

II.3 Evolution and Applicability of International Contract Law

To assess the legal value of International Contract Law it is proper to make such assessment in a historical context; therefore scholars and arbitrators who bore in mind the third world countries' position vis a vis foreign companies when granting concessions, put a lot of emphasis on the fact that countries granting concession at the end of the colonial era or the beginning of independence lacked both the bargaining power and the legal sophistication to have those concessions governed by their own laws. Hence every concession was (as shown in the Introductory Chapter) either silent on the issue of the governing law or referring to good will, good faith, and general principles of law. Thus Lord McNair writing in the late fifties held that "..... when the legal system of the country in which for the most part the concession is to be performed is not sufficiently modernised for the purposes of regulating this type of contract ..... the system of law most likely to be suitable for regulation ..... is the general principles of law recognised by civilised nations."[26] McNair's views came to confirm the position taken earlier by Lord Asquith of Bishopstone in the Arbitration between Petroleum Development Limited and the Ruler of Abu Duhabi.[27] The underlying thesis of these Authorities is that what justified the resort to general principles of law was the lack of developed law in the concerned countries, which would otherwise have been applicable.

At that time and while some lawyers were seeking recognition for general principles of law, as the governing law of concession agreements, others put International Contract Law forward as an alternative. The then newly independent countries, on the other hand, were trying to make their political independence more meaningful by securing a matching economic independence, for which independence nationalisation was only one instrument. International Contract Law (as evidenced by Aramco, Texaco, and Revere Copper cases) has been based on concern for protection of the foreign investor in the third world by making his investment immune and in a superior position to national legislations. Indeed since the traditional concession did not have enough room for renegotiation and took the form of a charter that defined rights and obligations for fifty or sixty years, International Contract Law meant to freeze what had been accepted on concluding the agreement and hold them immune for their duration.

The legal value of such law has to be examined in the light of two notions. The first is whether a two-decade period is long enough for a rule to emerge and develop to be accepted as customary law. The second is the third world consistent assertion of sovereignty over natural resources and control, and the attempt to bring about a new international economic order.

It is known that customary law may take a long time to evolve, develop, take the form of state practice, and thus become binding upon those who regard it as a law but without any effect on those who refuse to accept such law and maintain such a refusal. Concerning International Contract Law, it evolved as a matter of fact at the end of the colonial era in which disputes used to be solved by the use of force and coercion more than by arbitration. One of the known examples was the blockade of Venezuelan ports by Germany, Great Britain and Italy in 1902 to inforce a series of claims, several of which arose out of contracts.[28] But the most blatant use of force in disputes arising out of nationalisation was the invasion of Egypt by British and French troops in the wake of the Suez Canal nationalisation in 1956. Since the use of force had been involved up to 1956, and most developing countries got their independence in the sixties or a short period earlier, it is indeed a short period between the fifties and the seventies for a customary law to emerge and mature.

Even if such law was maintained and said to have matured, by Western lawyers during the post colonial era, it cannot be applicable to states known for their long-standing opposition to such law. The Sole Arbitrator dismissed the General Assembly resolutions, regarding the third world states permanent sovereignty over natural resources and the inalienable right to control over such resources, on the ground that such resolutions do not constitute a norm of law. The

General Assembly's legislative power is not the major concern of this work but the legal value of these resolutions is. These resolutions constitute the third world refusal of the so-called International Contract Law or any law other than their domestic laws and as any norms constituting any law as such.

Then what should have been the applicable law in the case at hand? Starting from the Arbitration clause itself which refers to arbitral awards as guidelines, and the Arbitrator's failure to take into account the BP award which concerned a similar dispute, one can state that the Sole Arbitrator did not adhere to the contract terms precisely. either did he come to the right conclusion. In the BP case the Arbitrator found that the Libyan law was applicable so long as it did not conflict with principles of international law and, only when such conflict occurs might he resort to general principles of law dismissing the international law as the applicable law. Furthermore he construed the clause as referring to principles of law of Libya that had general application, which did not conflict with principles of international law. He found such applicable principles, e.g. the contract was an administrative contract and the state had the power to modify or abrogate it for the benefit of the people . Sole Arbitrator Dupuy understood the choice of law clause as excluding any municipal law and came up with a different conclusion that did not manifest the right assessment of the interests at stake, the parties intention, and the development that occured in the field of investment disputes and the role of arbitration in such disputes.

FOOTNOTES: Chapter II

1. The award at 40 - 45.

2. Arbitrator Lord Bishopston in Ruler of Abu Dhabi v. Petroleum Development ICLQ, 1952, p.247-61.
3. Lord McNair "General principles of law recognised by civilised nations", 23, BYBIL (1957) and M. Sorranrajah "Myth of International Contract Law", 5, JWTL (1981) p.187.

4. The BP award at 35(b) 1.
5. Duleume Transnational contract, Footnote (4) of Chapter 14.
6. See the annexed agreements to "Arbitration clauses in the oil industry" by D. Sarre in "International Commercial Arbitration" for the NIOC and Mobil Oil Agreement, see p.63.
7. The award at 39-39.
8. *Ibid* 49.
9. Sorranrajah, *op.cit*.
10. Fatauros "International law and internationalised contract" 74, AJIL, 1980, p.137.
11. The Aramco award, 27, ILR, p.117.
12. 21, ILM, 1982, p.976.
13. The agreement, *ibid* p.990.
14. The Amin Oil award, *ibid* at (95), p.1023.
15. *Ibid* at 96.
16. 56, ILR, p.258

17. Ibid, p.271.

18. Ibid,

19. Ibid, p.296

20. Ibid.

21. Ibid.

22. For the complete text of the Article see the Amin Oil award at 15.

23. Ibid.

24. Ibid. at 20.

25. Ibid.

26. McNair op.cit., p.19.

27. Op.cit., Footnote 2.

28. See R.Y. Jennings "State contracts in international law", 37, BYBIL, 1961, p.156.

CHAPTER III

The Award and Conclusion

The Sole Arbitrator having decided the law applicable to the Arbitration and the contract, proceeded to deliver his award. The award was what could be expected from the Arbitrator's examination of the case. He arrived at the conclusion that the deeds were binding on the parties. The Libyan Government had breached its obligations arising from the said deeds of concession, to which breach the legal remedy was specific performance (restituto in integrum). Therefore the Government was bound to perform these contracts and give them full effect within a period of five months.[1]

The award gives rise to two questions. First if the state under international law has a sovereign right to nationalise foreign properties, what is the scope of such right (i.e. can it be limited, if the answer is in the affirmative then, to what extent and by what means)? Secondly, if the state can nationalise freely as an exercise of sovereignty, what kind of redress is available to the foreign investor whose property and property rights have been nationalised and is the instrument by which the foreign investor acquired such rights (i.e. the so-called guaranteed contract) of significant importance in relation to the remedies available to the foreign investor?

The two questions are interrelated and the answer to one of them may give a clue to the other one, but they will be examined in two separate sections; firstly the Libyan nationalisation as an exercise of sovereignty and secondly the remedies available to the companies.

III.1 Nationalisation as an Exercise of Soveriegnty

Pursuant to the revolution and the overthrow of King Idress in 1969 the social and economic structure of the state of Libya began to undergo a significant reform. A change began to take place in the economic sector by transforming the state economy from free market to a directed economy, with the involvement of the state and under its supervision. Currently every important sector (banking, insurance, wholesale and retail of goods) of the economy is owned and run by the state.

With regard to the oil industry, the political leadership of Libya realised that changing the economic patterns without nationalising the said industry would be an absolute failure in advance. This fear was based on the fact that the companies not only dominated the economy, because oil was the only resource of revenue, but also because they dominated the global distribution of the product,[2] by which domination they could frustrate the implementation of the state plans. In addition to that, the state could not give the alien more rights and freedom than what it gave its citizens. So while nationalising the Libyan banks and insurance companies, the state could not give the foreign companies a free hand in the oil industry (generally a state is not required under international law to give foreigners more rights than it gives to its citizens under normal circumstances).

The plan was to nationalise the companies one after the other and not the whole industry at a single stroke. This seemed legitimate in the Amin Oil Case where the tribunal held that it did not see any reason "..... why a government that was pursuing a coherent policy of nationalisation should not have been entitled to do so progressively. It is hardly necessary ..... to stress the reasonable character of a policy of nationalisation operating gradually by successive stages, in step with the development of the necessary administrative and technical availabilities."[3]

Now, was the Libyan nationalisation in conformity with international law? Changing the structure of the economy was a matter of sovereignty (exclusive internal authority) to the exercise of which the companies and their concessions were a threshold, Therefore the nationalisation of the companies and the termination of their concessions was essential.[4] The Libyan government's right to nationalise was beyond any doubt - even the Sole Arbitrator acknowledged that the state's right to nationalise is unquestionably today; it results from international customary law and, it is the expression of the state's territorial sovereignty, which confers upon the state an exclusive competence to organise as it wishes the economic structure of its territory and introduce therein any reforms which may seem to be desirable to it.[5] The Libyan sovereign right however was qualified by conditions that Libya failed to meet, these being that every nationalisation must be for public benefit and must not be discriminatory in character. The Texaco nationalisation, and generally the policy pursued by the Libyan government in nationalising foreign companies operating in Libya was not coherent, but arbitrary which gave the nationalisation laws a discriminatory character, in addition to the fact that they were introduced in a political context (for purposes of domestic consumption) that gave the Sole Arbitrator and some commentators the conviction that it was politically motivated and not for the welfare of the state or any development purposes. Discriminatory and politically motivated nationalisations are not permitted under international law. Thus the Libyan Government was held in breach of both international law and of its contractual commitments which arose from - according to the Arbitrator - an internationalisation contract.

Since this is the case, what are the remedies available to the companies and is specific performance the principle remedy or is there any other remedy that may accommodate the companies acquired rights and the other rights which conflict with these rights (e.g. the state's right to nationalise foreign companies operating within its territory) and what is the impact of the nationalisation being discriminatory and politically motivated? This is what will be dealt with in the following section.

III.2 Remedies Available to the Companies

In the decree nationalising the companies assets and rights the Government undertook to compensate the companies and a committee was to be set up for that purpose. The companies refused that and opted for arbitration.

Since compensation was rejected by the companies and the Arbitrator concluded that the contract was international and subject to both international and the Libyan laws but if they conflicted international law would be applicable, one has to explore the remedies under both systems, starting with the companies contention that specific performance is the normal one.

A. Specific performance

Insofar as the Libyan law is concerned the Arbitrator quoted a paragraph of Professor Mahmassani's book (The General Theory of Obligations and Contract in Islamic Law) as evidence of Islamic law. Mahmassani wrote: "we know that one of the principles of Islamic law is that the right should revert in kind whenever there is a way to do this. We also know that as a consequence of this principle, obligation must be specifically performed as long as this is possible." The Arbitrator also listed a few articles of the Libyan Civil Code, the most important of which is Art. 206, para (1) which provides that "a debtor shall be compelled upon being summoned to do so in accordance with Art. 222 and 223 specifically to perform his obligation, if such performance is possible."[6] Islamic law and the Libyan Civil Code intended to apply to everyday transactions but not to concession agreements running for several decades and to a state transaction which usually governed by administrative law under which the remedy is damages.[7] Assuming that the Civil Code was applicable, specific performance was impossible, considering the time between the nationalisation and delivering the award, in addition to the fact that it is politically unacceptable to a self-respecting government to go back on a measure undertaken in the exercise of its sovereignty.

In international law the matter is subject to a great controversy and the views about it are in great variance. Some scholars believe that "the government has the inherent power to over-ride its contractual obligations ..... this over-riding prevents the contract from being made the subject matter of specific performance."[8] To hold otherwise is to give the state contract an absolute sanctity, an effect which has not prevailed in the field of treaty relations.

Insofar as international case law is concerned, the Arbitrator referred to a number of precedents, the most important of which will be examined here in the light of the conflicting views about them, to establish whether specific performance is the principal remedy under international law. The Arbitrator started with the often cited case, the <u>Chrozow Factory Case</u> where the PCIJ decided that "the essential principle contained in the actual notion of an illegal act ..... is that reparation must, as far as possible, wipe out all the illegal consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or if that is not possible, payment of a sum corresponding to the value which restitution in kind would bear ....."[9] The Arbitrator admitted that the principle had only the value of <u>obiter dictum</u> since restitution in kind was not formally requested. But (he held) that the principle mentioned still has the value of precedent. To support this argument the Arbitrator quoted Sir Gerald Fitzmaurice as holding in the Barcelona Traction Case that "..... Judicial pronouncement of one kind or another constitutes the principal method by which law can find some concrete measure of clarification and development....."[10] The statement is right as far as it goes, but was the Arbitrator's role to apply de lexe lata or, de lege firenda. The Arbitrator obviously applied the latter starting from the company's request to have the dispute decided on principles, He saw his role as to decide whether or not the remedy restitution in kind had existed in the case law. That must have been the case indeed because the Arbitrator quoted a paragraph from Fatours' Government Guarantees Foreign Investors[11] where damages, it was stated, were more prevailing than specific performance. Professor Fatours states that:- "It has been widely held that restitution in kind is the principal mode of reparation of material wrong, pecuniary compensation being subsidiary in character, applicable only when restitution is not possible or not claimed. On the other hand it is generally admitted that in practice, restitution is possible only in exceptional cases and that in the overwhelming majority of cases, the responsibility of the state is discharged by the payment of compensation. The latter view is supported by the case law of international tribunals as well as by the prevailaing diplomatic practice.[12]" In fact it is only in exceptional cases that reparation is made through "restitution", specially whenever compensation is manifestly insufficient as a remedy like in the Temple of Preha - Vihear Case which the Arbitrator referred to, and where the court ordered restitution to Cambodia of all the objects removed from the Temple and its surroundings by the Thai authorities. The third case in Dupuy's list was Mairommatis Jerusalem Case, where the court decided that "..... the concessions granted to M. Mairommatis ..... are valid ....." On all these grounds the Arbitrator held that "restitutio in integrum" is the normal sanction for non-performance of contractual obligations.

Before making any comment one has to make a note of Judge Lagregren's examination of these cases in the BP v. Libya Arbitration, because his argument seems more thorough and convincing than Dupuy's. In search for a precedent in international case law, Judge Lagregren dismissed the Temple of Preah case because it related to a dispute concerning territories and boundaries which bears no relevance to investment disputes and concession agreements. Nonetheless, the restitution in kind ordered by the court in that case "..... comprised not only the Temple and the territory on which it was situated but specific unique works of art of religious significance." Indeed in this case any remedy other than restitution in kind would have been insufficient simply because a territory always represents more than the market value of the real estate.

Turning to the most relevant precedent, the Chorzow Factory case, the judge pointed out that the principle had only the value of obiter dictum (for the above stated reasons). Furthermore it cannot be considered as an authority for "specific performance" because "..... the expropriation violated a treaty and the main object of that treaty was to preserve a <u>status quo</u> by prohibiting the expropriation of certain property."[13] The court mentioned restitution only to establish the principle which serves to determine the amount of compensation due for an act contrary to international law. The third case, the Mairommatis Jerusalem case was dismissed by Judge Lagregren too, because the court took pains to point out that "this issue /the validity of the concessions/ was decided as a preliminary question only ..... and the decision must also be considered in the light of the related pleading that the concessions were invalid."[14]

In general, Judge Lagregren argued that these cases cannot be taken as authorities for specific performance, for "the tribunals have been asked to render declaratory awards, and in these arbitration both parties to the contracts have defined the issue as being whether a particular case or conduct by one of the parties would or would not be permissible under the agreement."

Unlike Dupuy, Judge Lagregren found no authority in international law supporting specific performance as a remedy for a breach of concession agreements.

At the scholars' level, Dupuy's approach and conclusion have been criticised because of their rigidity. Holding that restitution in kind was the principal remedy, because it was awarded in cases where the taking was a violation of a treaty, or where damages would have been insufficient, seems unwarranted.

Once more "if the imposition of the strict remedy restitution might possibly be justified in some cases as between states, it is much harder to defend such limitation on state's freedom of action within its territory for the benefit of private person."[15]

Damages is preferred to restitution in kind in this case simply because it "..... strikes a balance between the need to provide certainty for foreign investments, while recognising the host state's right to exercise control over natural resources."[16] This solution means that a state nationalising a foreign investment negotiated in good faith and guaranteed would have to pay more than just and fair compensation which is the usual remedy for nationalisation. Once more, damages works effectively to accommodate conflicting interests of the private investor on one hand, who seeks certainty and protection for his investment, and the government which, on the other hand, wants to exercise sovereign power and control over its natural resources. To show the effectiveness of damage in this context it must be mentioned here that the Government and the companies settled the dispute by agreement in disregard of the Arbitral award at hand. The Government agreed to deliver $ 152 million worth of crude oil to the companies over a fifteen month period.[17] In return the companies agreed to terminate the arbitration proceeding. The Arbitrator's failure to mention the BP award, where a different conclusion had been reached, and the application of rules intended to apply to state treaties, produced a rigid and too inflexible remedy for a dispute between a state and private investor.

The last point to be made in this chapter is with respect to state practice. The Arbitrator quoted the British claim before the ICJ (1952) in the Anglo-Iranian Oil Company Limited case that "the Government of Iran is bound, within a period to be fixed by the court to restore the Anglo-Iranian Company to the position as it existed prior to the said Oil Nationalisation Act."[18] This claim as evidence of state practice should be abandoned because the British attitude has changed since then, in addition to the fact that restitution was not the outcome of the said dispute. In 1971 the British State Minister of Foreign Affairs stated in the House of Commons in the course of the BP dispute that "Insofar as the question of nationalisation or expropriation is concerned we never said that it is our view that countries are not entitled to nationalise - of course they can nationalise - but we do expect prompt and adequate compensation."[19] The conclusion is inescapable here, the British claim differs considerably from the one that prevailed in the era of the Anglo-Iranian Company dispute. In the English law the principle that a state cannot be prevented by contracts from performing function essential to its existence has long been formulated in the often cited case Amphirite v. The King where it was held that "the Crown cannot by contract hamper its freedom of action in matters which concern the welfare of the state."[20] This principle does not suggest that the state has an inherent inability to abide by a contract but it stands against absolute sanctity of the contract where the welfare of the people is concerned.

It may be absured to say that, damages or monetary compensation is the only remedy regardless of the nature of the taking (legal or otherwise). Such an argument would also make a mockery of the prerequisites laid down by international law for a taking to be legal, namely that a taking must not be discriminatory or be politically motivated, and be for the peoples benefit. But it is the practice which lays down the rules in conjunction with the case law. In that field it has not been proven that specific performance is possible against governments, and neither has it been proven that it has been awarded by a tribunal set up to determine a dispute between a sovereign government and a foreign investor. The usual remedy has been compensation in addition to political and/or economic sanctions if the taking was not approved of. The fact that one party has always been a government can not be overlooked; Dr. Mitchell (The Contract of Public Authorities) on the basis of survey of the municipal laws of England, France and the USA, made it clear that the remedies of specific performance and restitution in kind are normally unavailable against governmental authority under public contracts.(21) On these grounds Judge Lagergan was stating the law when he concluded that "a rule of reason therefore dictates ... that, when by the exercise of sovereign power a state committed a fundamental breach of concession agreement by repudiating it through nationalisation of the enterprise and its assets in a manner which implied finality, the concessionaire is not entitled to call for specific performance by the government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages.(22)

Judge Lagergan's statement alone does not solve the whole problem regarding nationalisation and, the ensuing responsibility to compensate the foreign investor. The problem which arises in this respect is the amount of compensation and whether it should be full compensation, or appropriate compensation, and whether the legality of the taking has any impact on such amount. The subject matter of this question will be dealt with in the discussion of the second remedy available to the companies, namely the monetary compensation.

B. <u>Compensation</u>

In practice compensation has been paid for almost every nationalisation, but there is no consensus in theory on the amount due for legal taking. As a general rule, companies have always demanded the full payment of future profits they lost by abrupt repudiation of their concessions, on the basis that restitutio in integrum would be the appropriate remedy for losing the profits they expected and the initial risk they took.(23) The host governments, on the other hand, have always asserted that: the oil or mineral subject matter of the concessions was the property of the state; the stream of earnings was unreasonably high; and the ability of host governments to exact taxes in recent years has made the calculation of future profits less certain; thus book value should be the standard.(24) These two conflicting claims represent two conflicting standards, the traditional one being 'prompt adequate and effective compensation' known as 'full compensation', which has been advocated by the capital exporting countries. The second standard is 'appropriate compensation', a norm that has been embodied in two resolutions of the General Assembly of the UN, and much invoked and advocated by capital importing countries and their lawyers. A major problem of the second standard is that it does not provide a definite manner of assessing such compensation. This problem, however, has been mitigated by the Amin Oil award where the Tribunal introduced the concept of "legitimate expectations of the parties" as broad lines to be followed in assessing compensation due to foreign investors.

Now in view of the sufficient discussion the traditional standard has received from its advocates,(25) what will be discussed next is the attack upon the standard itself, the events that lead to evolution of the new standard (i.e. appropriate compensation) and the argument supporting its binding nature.

1. <u>The attack upon the traditional standard</u>

Full compensation means in simple terms, the market value of the property and interests nationalised in the absence of threat of nationalisation, with interest to the day of payment.

Those calling for this standard have buttressed their claim on legal norms like 'unjust enrichment' and 'restitute integrum'. They claim that the host government which takes property that does not belong to it becomes enriched to the extent at least of the value of the property, if not also to the extent of future profits that would accrue from it.(26) It also has been argued (with emphasis the Chrozow Factory Case) that restitute in integrum (as the second best remedy) requires the payment of full compensation where specific performance is not granted or impossible to carry out. These two theories presume that foreign investment is always beneficial to the host country and helps the flow of capital and technology from the developed countries to the less developed ones. In fact past experience has shown (as will be seen later) that foreign investment has not been beneficial to less developed countries all the time, for the simple reason that foreign investors have not been concerned so much about the welfare of the host countries as the maximisation of profits. There is little doubt that those investors would have kept their investment at home, had they known that it would be more profitable there.

In recent years the obligation to pay compensation was under a serious threat; this was true not only with regard to full compensation but also with compensation in general. The serious blow came with Allende's government taking power in Chile and its sweeping nationalisations. The Chilean government did that through its constitutional instruments and through legal channels. The most relevant of these was the introduction by the government of the concept of 'excess profits' which, according to the government, were to be deducted from the amount of compensation due to foreign companies. The application of such a method lead to the conclusion that, in some cases, the excess profits had exceeded any compensation otherwise due.

The contention between Chile and the American companies did not only undermine the full compensation claim, but also revealed that foreign companies might be unjustly enriched as a result of what seemed to be incentives at the first instance (e.g. low rate of royalty, low rents, low rate or exemption of taxation) but which developed as time passed to create a gap between the companies' rights and obligations. Moreover the traditional concession ran for fifty or sixty years; the industry where the concession was granted would be bound to change, and since the companies' obligations were frozen, their gains would inevitably increase while the obligations remained the same.

In a speech to the UN General Assembly in December 1972 Dr. Allende outlined the conflict between his government and some American companies.(27) He stated that his Government while compensating small companies had determined that 12 per cent profit a year was a reasonable limit and any amount exceeding that was excess profits - with respect to Anaconda Company he stated that it had made profits of 21.5 per cent a year over its book value between 1955 and 1970 while its profit in other countries had been only 3.6 per cent a year. The other example was Kenncott Copper Corporation which in the same period of time made an average of 52.8 per cent profit a year in Chile. In some years it made an incredible profits like 113 per cent in 1968 and 205 per cent in 1969, at the same time Kenncott was making less than 10 per cent a year in other countries.(28) For a country like Chile whose foreign debt was $40,000 million, the yearly service of which represented 30 per cent of the value of Chile's export, full compensation would have been profound injustice since the companies were the ones that were unjustly enriched. That appears more blatant when it is pointed out that the companies profit during that period was $4,000 millions, while their initial investments were less than 30 million. In cases like these full compensation would virtually be a prohibition of nationalisation, since the country would be required to pay compensation greater in amount than benefit received. In conclusion it has to be said that if a company had received a reasonable reward for its investment in a poor country, and its nationalisation would do the country some good, compensation should not hinder such a process

In this context Chile resorted to Resolution 1803 of the General Assembly, which required the payment of only appropriate compensation. In doing so the Chilean Government prescribed a detailed formula for valuation based on 1964 book value. In respect of excess profits; they were defined as those profits exceeding: (1) the average return on the companies world wide copper investment outside Chile, (2) the return allowed foreign investors under international agreements to which Chile was a party, or (3) the level established as the base for preferential dividends payable to Chilean Government Corporation "Codelco", under the 1967 agreements with the companies. The dispute remained unsettled and the compensation withheld until a change of policy was brought about by a new government in 1974.(29) The new government paid compensation, but the precedent was set that compensation does not always have to be prompt and full. The Chilean incident illustrated, among other things, that a new standard for compensation was needed.

In fact what has prevented a new norm from emerging is, the refusal, in principle, by capital exporting countries and their national of any norm calling for less than full compensation. And the refusal, in principle, to pay more than book value by capital importing countries, although compensation has, in most of the cases, been more than book value and less than full. This was the case until the Amin Oil Arbitration declared the new norm of "appropriate compensation", which will be discussed after a brief look at the previous practice.

2. Inconsistency of previous practice

The liability of the nationalising state to pay appropriate compensation has been embodied, without being defined, in two UN Resolutions: Resolution 1803 (XVIII) of 1962 on permanent sovereignty over natural resources and, the Charter of Economic Rights and Duties of States 1974.(30) Since the adoption of these Resolutions book value has been used by governments and companies as the starting point from which agreement on compensation may be reached. Book value when agreed upon as the basis of compensation means the value of total assets minus total liability. Companies have always used book value as the bottom line, and their demands for compensation equivalent of book value or in excess of it have always been in accordance with their bargaining position as well as the effectiveness of support they could get from their governments. ITT refused to accept less than book value for its investment in Chile when the Allende's Government offered $58 million while the company was claiming the book value, which was said to be $150 million.(31) The US government in turn reminded Allende of the seriousness with which it regarded the non-payment of just compensation.[32] Cerro Corporation on the other hand, had accepted $13,254,000 for its 70 per cent interests in Compain Minera Andia operating in Chile at the time.[33] The company announced that the figure was relatively close to book value. Anaconda transferred 51 per cent of its shares to Cadelco, in two mines for a price that was calculated at 51 per cent of the company's book value.[34]

In the Libyan laws nationalising the companies there was no reference to any formula for calculating compensation. But the Libyan Government offered book value.[35] The American Government expressed its dissatisfaction with the lack of reference to prompt and effective compensation and protested that "the net book value formula ... was far less than fair value of the contract rights and property involved."[36] In the BP case the British Government demanded full compensation for the BP rights and assets in Libya, but full compensation was never paid. The dispute was settled by separate agreement between the Government and the individual companies. By an agreement in November 1974 the Libyan Government agreed to pay the BP £17.4 million. This figure was arrived at by deducting from the sum of £62.4 million agreed to be due to the company, taxes, royalty and claims made by the Government amounting to £45 million. TEXACO was paid by an agreement $152 million worth of crude oil. The two companies never expressed whether they got the amount they initially wanted, and whether there was any preferential arrangement, like service contracts or a long term supply of oil. This was so because the settlement agreements were never published, but the companies issued statements announcing the settlement of the disputes by compensation and the end to their demand for restoration of the concession agreement. The Amin Oil Arbitration illustrates the claims and counter claims of companies and governments alike, and that will be the subject matter of the next step.

3. <u>Declaration of the new standard "appropriate compensation"</u>

In the Amin Oil case the Company claimed compensation founded on the assumption that the concession should have continued for its full term, without modification.(38) That is to say compensation in line with the principle restitute in integrum. The Government of Kuwait countered by maintaining that the only compensation the company was entitled to claim was compensation calculated on net book value basis. The Government backed its argument up by relying on events that took place in the Middle East between 1971-77 in the oil industry, as creating new rules regarding compensation. Thus the claim must be determined by precedents resulting from a series of negotiations and agreements about compensation. These precedents the Government maintained "had instituted a particular rule, of international and customary character specific to the oil industry."(39)

The Tribunal found both claims unsuitable for the purpose of calculating appropriate compensation. Having refused both claims, the Tribunal proceeded to spell out the general rules that should govern the compensation issue, and pointed out the facts specific to Amin Oil.

Before starting discussions these rules and reasoning, one should discuss why the Tribunal refused both arguments and whether this has any bearing on the amount of compensation and compensation itself as a remedy available to foreign companies.

The Tribunal started by pointing out that the amount of compensation varies according to the legal nature of the governmental action in question. Hence illicit acts result in the liability to indemnify by paying the equivalent of restitute in integrum, while the matter is different for indemnities due for consequences of acts of expropriation of legitimate nationalisations.[40] The Tribunal did so in the course of explaining the technical difficulties that could be faced in determining the amount of compensation; a problem that has been caused by the 'controversial question of foreign investments, and operations involving an important economic complex.'[41] Thus compensation on the basis of restitute in integrum is, in principle, due only for illicit nationalisations. By drawing a line between the compensation due for illicit expropriation, and that due for a legitimate one, the Tribunal has, in effect, subscribed to the view that specific performance is not a remedy available against governments.

Turning to the government of Kuwait's contention that net book value compensation has acquired the force of law and become a binding rule on the parties by its usage in the Middle East between 1971-1977, the Tribunal dismissed the argument in spite of the long use of the book value standard, not only in the Middle East and the oil industry but in nationalisation of all kinds of natural resources elsewhere. The Tribunal produced a number of reasons regarding both facts and law, which undermined the book value standard genrally as an international rule, and made it less than fair in the light of the circumstances surrounding the Amin Oil Case. As to the facts, the Tribunal held that compensation has always been coupled by bilateral arrangements of every kind (contracts of services, long term supply, etc ...). Therefore it could not be said that book value was the only compensation, for "what is certain is that in addition to compensation, a preferential relationship was often instituted or maintained between the state and the foreign entity concerned. It would be difficult to express in figures the value in terms of money of these preferential arrangements; for the advantages they bring depend on the structuring of the former concessionaire company."(42)

As to reasons of law the Tribunal took into account the effect of the OPEC concerted policy on the relations between the companies and governments that reflected on the standards of compensation. Facts like the crucial preoccupation of the companies to ensure the continued supply of petroleum products to consumers, and the passivity of the importing states, made the companies accept defacto what the OPEC members demanded. In conclusion the Tribunal held that, while such acceptance was proper for the conduct of business, it lacked the concurrence of opinio juris. Its underlying thesis seems to be that a practice de facto accepted should have the approval of the opinio juris to create a customary rule. Accordingly the Tribunal held that, "it would be somewhat rash to suggest that "such acceptance" had been inspired by juridical considerations. The opinio juris seems a stranger to consent of this type.(43) On the face of this finding one might see the ambivalent position the Tribunal put itself in, since it upheld (at an earlier stage) the validity of the Abu Dhabi formula for the reason (among others) that the companies had accepted it. But the Tribunal has in single paragraph spelled out the relation between events that would be expected to create rules of law and the law as it exists: It held that "... It can be held that the consents ... were not obtained by means amounting to duress, and they were valid and final. But the economic pressure that lay at the root of them had nothing to do with law, and do not enable them to be regarded as components of the general formation of general legal rules. A juridical entity has the facility, even in the case of pressure exercised through economic constraints, to handle its own business affairs in such a way as to produce concrete valid results, but it can not be claimed that such dealing is apposite for generating rules of law applicable to other cases too."(44)

It may be right to hold that the opinio juris has an important role to play in the creation of new rules, but its absence should not deprive a practice of its legal value. Net value was at least a quasi law, and its dismissal just because the companies' acceptance was not inspired by judicial consideration should not deprive it of its nature as a practice; after all an element of pressure or duress has always been present in the renegotiations, if not in the concluding, of almost every economic agreement. To sum up the Tribunal refused the company's claim because, if restitutio in integrum is the compensation for illicit nationalisation, it can not be so in cases of legitimate nationalisation. The Government argument fails in turn because it did not reflect the law in totus, for net book value was (as the Tribunal saw it) only one of many elements that should be taken into account in calculating appropriate compensation.

Now having seen the reasons for refusing both arguments, what is appropriate compensation and how should it be assessed? The Tribunal held that the most general formulation of rules was contained in the UN General Assembly Resolution 1803 (XV11) Article 4 which provides that "Nationalisation, expropriation or requisting shall be based on grounds or reasons of public utility ... in such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state ... and in accordance with international law."

The text which obtained a unanimous vote in the General Assembly codifies (as the Tribunal held) positive principles; what remained to be done by the Tribunal was to illustrate such principles and apply them to the case before it. The facts and circumstances taken into account in calculating compensation due for Amin Oil are not relevant here, but what is relevant is the general rules that could be applied to every case. The Tribunal held that appropriate compensation was a customary rule of an international character. In the making for appropriate compensation the following considerations are to be taken into account as general rules, those considerations are: (1) enquiry into all the circumstances relevant to the particular concrete case; (2) compensation should not be such as to render foreign investment useless, therefore it must be calculated on a basis such as to warrant the upkeep of flow of investment in future; (3) the legitimate expectation of the parties; this formula (the Tribunal held) "is well devised and justifiably brings to mind the fact that, with reference to every long term contract ... there must necessarily be economic calculations, and the weighing up of rights and obligations, of chances and risks, constituting the contractual equilibrium, this equilibrium cannot be neglected ... when it's a question of awarding compensation."(45) The list provided by the Tribunal is a general understanding of the concept of appropriate compensation. Indeed such compensation has to be determined on a case by case basis and by looking into each case individually. Therefore a tribunal as such could not devise more than general rules to create a framework for the calculation of compensation for legitimate nationalisation. This is so much so, considering the fact that cases are not identical and vary according to the type of concession granted, and the interests at stake. The Tribunal did not fail to point out that there have been attempts on both sides of the argument to make the standard of compensation reflect the one or other group views. On the part of capital exporting countries attempts have been made by governments as well as nationals to promote the full compensation norm, by which norm foreign investment may become a burden rather than a help. The capital importing countries have attempted to make compensation, in some instances, very little or nothing. With these attempts in mind the Tribunal held that "compensation should not be as to render foreign investment useless.(46) Therefore the legitimate expectation of the parties (the last point on the list) must be the criterion that should determine the appropriateness of compensation. A company investing a substantial amount of money expects to get a reasonable rate of return. The host government, on the other hand, expects some benefit from allowing foreign investment into its country, which should not be hindered by a high standard of compensation for nationalisation. These two considerations are always the two sides of the compensation coin.

CONCLUSION

Before the Arbitrator in this case there was a great deal of money and prestige at stake. The Arbitrator had to weigh the interest of the private companies vis a vis the public interest of the state of Libya as represented by the Government. He failed to settle the dispute, and the parties had to settle it by a separate agreement. The Arbitrator's approach has exacerbated the controversy over both the effectiveness of arbitration as a means of settlement of investment disputes, and the extent to which international law may intervene to safeguard the foreign investor's interest in a host state that wishes to control its natural resources for the benefit of its people by means of nationalisation. The conclusion here is about both arbitration and the state's right to nationalise under international law and the consequences of the exercise of such right.

To bring the conclusion in line with the whole work done here a concluding remark should be made about the procedural aspect of the arbitration, a matter on which there is no consensus, and which can only be remedied by an express stipulation of the procedural law by the parties for the potential litigation or, better still, by a reference to institutional arbitration (i.e. ICSID Centre - ICC) with procedural rules available to provide an answers for procedural issues or, at least to supplement the rules that may have been agreed upon by the parties. Comparison of approaches has been made in the first chapter about the choice of the law to govern the proceedings before an international tribunal to which a state is a party in the absence of an express choice. But as a critical study of the approach adopted by Professor Dupuy the following remark must be made. The Arbitrator placed excessive emphasis on consideration of sovereign immunity. To hold that the procedural aspect should be internationalised because of reasons of sovereign immunity is to ignore the fact that submission to arbitration is in itself a waiver of immunity, and there is no reason why such immunity should be waived at the time of submission, to be restored during the proceedings.

Turning to the point of nationalisation; for a state it is an absolute right to nationalise under international law, but this right should always be exercised for the welfare of the people. The parties to a development agreement would be well advised, for the stabilising of the relationship, to make an express choice of law to govern the contract, they can choose the municipal law of the host state, or international law.[20] International law may intervene to protect the foreign investor against the abuse of the state's right to nationalise or to repudiate a guaranteed contract, or when the host state's legal system is not sufficiently developed to govern the relationship, but this does not guarantee that the state would be required to perform. Furthermore international law (as the parties' choice or as the proper law determined by an arbitral tribunal) does not confer absolute sanctity on the development agreement entered into by a state and a foreign investor, which in consequence means that the internationalisation of the agreement does not necessarily yield specific performance as the principal remedy of international law. It is the belief among some western lawyers that specific performance is the most likely remedy under international law for a breach of internationalised contract by measures taken in exercise of sovereignty, which has led most third world countries to assert their municipal laws as the sole governing law of every development agreement they concluded with a private investor in recent years. Once more international law in this perspective should not be understood to mean Pacta sunt servanda, because such a principle is found in every municipal law and in the law of treaties, and there is no need to internationalise the contract just to discover the same principle again. International law in this case has to be international case law and state practice, which the arbitrator failed to explore properly or misinterpreted.

Now one should state what the state of the law is after the Amin Oil Arbitration.

(1) The right of the state to nationalise is absolute, therefore investors are not entitled to call for specific performance as a remedy for nationalisation whatever the nature of the taking. The sole remedy is monetary indemnification.

(2) The indemnification is to be calculated on the basis of restitute in integrum if nationalisation is not in completely confirmity with the conditions laid down by international law. But if the nationalisation is lawful, only appropriate compensation must be paid.

(3) In so far as stabilisation clauses are concerned, the present position is that, they cannot be regarded as limitation on the host state sovereign to nationalise or modify the contract. Their sole effect is to prevent nationalisation from having a confiscatory character. Such guarantee has been provided generally by rules of international law, therefore these clauses have been, in effect, written off as unnecessary.

(4) Concession agreements can be governed by municipal law, international law or a combination of both; but international law has always to be the state practice in the field in question, and a rule should have the necessary consensus before being declared international.

FOOTNOTES: Chapter III

1. The award, Section (5), 53, ILR, p.511.
2. See Akinsanya Foreign Economic Control in Africa, 30, ICLQ (1981) p.774; and Tony Carty in article on "Oil, power and manoeuvrability", p.111.
3. Amin Oil v. Government of Kuwait, *op.cit*. the award at 86.
4. The Libyan policy with regard to the level of production and using the oil as a political weapon would have conflicted with the companies' interests.
5. The award at 59.
6. *Ibid* at 93-94.
7. See Professor M. Omar's opinion in the BP award, Part VI, p.324.
8. R. Geiger "The unilateral change of economic development agreements", 23, ICLQ (1974) p.89.
9. The Texaco award at 97-98.
10. *Ibid*.

11 and 12 *Ibid* at 103

13. The BP award at 65.
14. *Ibid* at 77.
15. Fatouro, *op.cit*. p.139.
16. See White "Expropriation of the Libyan oil concessions", 30, ICLQ, p.17.
17. See the introductory note by von Meherent at 17, ILM (1978).
18. The award at 101.

19. The BP award, Part IV.

20. (1921) 3, KB, 500.

21. Cited in the BP award at 87.

22. Ibid at 95.

23. See for example the company's argument in LIAMC.CV. The Libyan Government 20I.L.M(1980) 69.

24. For Governments views see the Libyan Prime Minister's statement on "book value formula", Ibid page 75.

25. See D. O'Connell, International Law, Vol. 2, 2nd ed pp. 780-790 and J. Greig, International Law, 2nd ed p.326.

26. B. Ching cited by Sornaragah op.cit. pp.119

27. The full speech can be found in "International firms and Modern Imperialism". Edited by Hugo Radice page 233.

28. These figures and other relevant factors are extracted from the same speech.

29. Decree Law No. 601 of the Junta B.I.LM pp.1189.

30. For the former see Brownlie Basic documents in International Law, and for the latter see 141.LM (1975) pp.251.

31. ITTV.OPIC 59,ILR pp.379.

32. Ibid pp.380.

33. New York Times, December 1972.

34. Anaconda Arbitration op.cit. pp.407.

35. See footnote 24.

36. Statement by the Department of State 13.1.L.M p.767.

37. The BP Award pp.298.

38. Ibid at 155.

39. Ibid at 155.

40. Ibid at 138.

41. Ibid

42. Ibid 156.

43. Ibid at 157.

44. Ibid at 157 (11).

45. Ibid at 148.

46. Ibid 146.