AD HOC ARBITRATION

BP EXPLORATION COMPANY (LIBYA) LIMITED V. GOVERNMENT OF THE LIBYAN ARAB REPUBLIC

AWARD (MERITS)

---

10 October 1973

Tribunal:
Gunnar Lagergren (Sole arbitrator)

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Award (Merits)

PART 1 - CONSTITUTION OF THE TRIBUNAL

[1]. The Respondent on 7 December 1971 passed a law (the "BP Nationalisation Law") providing that the activities of the Claimant in Oil Concession 65 were nationalised. Concession 65 comprises an area of over 8,000 sq.kms. in the heart of the Sarir desert. The Claimant, by a letter to the Respondent dated 11 December 1971, addressed to the Minister of Petroleum, Tripoli, which was delivered on the same day, protested against the action taken by the Respondent and took steps to institute arbitration proceedings pursuant to Clause 28 of the Concession Agreement of 1966, as amended, between the Respondent and the Claimant (the "BP Concession"). The said Clause 28 provides as follows:

> 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 anything herein contained or in connection herewith, or the rights and liabilities of either of such parties hereunder and if such parties should fail to settle such difference or dispute by agreement, the same shall, failing any agreement to settle it 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.
> In the event of the Arbitrators failing to agree upon an Umpire within 60 days from the date of the appointment of the second Arbitrator, either of such parties may request the President or, if the President is a national of Libya or of the Country where the Company was incorporated, the Vice-President, of the International Court of Justice to appoint the Umpire.
>
> 2. The institution of Arbitration proceedings shall take place upon the receipt by one of such parties of a written request for Arbitration from the other which request shall specify the matter in respect of which Arbitration is required and name the Arbitrator appointed by the party requiring Arbitration.
>
> 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 parties failing which such other party may request the President, or in the case referred to in paragraph 1 above, the Vice-President, of the International Court of Justice to appoint a Sole Arbitrator and the decision of a Sole Arbitrator so appointed shall be binding upon both such parties.
>
> 4. If the Arbitrators appointed by such parties fail to agree upon a decision within 6 months of the institution of Arbitration proceedings or any such Arbitrator becomes unable or unwilling to perform his functions at any time within such period, the Umpire shall then enter upon the Arbitration. The decision of the Arbitrators, or in case of a difference of opinion between them the decision of the Umpire, shall be final. If the Umpire or the Sole Arbitrator, as the case may be, is unable or unwilling to enter upon or complete the Arbitration, then, unless such parties otherwise agree, a substitute will be appointed at the request of either such party by the President, or, in the case referred to in paragraph 1 above, the Vice-President, of the

International Court of Justice.

5. The Umpire however appointed or the Sole Arbitrator shall not be either a national of Libya or of the country in which the Company or any Company which directly or indirectly controls it was incorporated nor shall he be or have been in the employ of either of such parties or of the Government of Libya or of any such Country as aforesaid.

The Arbitrators or, in the event they fail to agree within 60 days from the date of appointment of the second Arbitrator, then the Umpire, or, in the event a Sole Arbitrator is appointed, then the Sole Arbitrator, shall determine the applicability of this Clause and the procedure to be followed in the Arbitration.

In giving a decision the Arbitrators, the Umpire or the Sole Arbitrator, as the case may be, shall specify an adequate period of time during which the party to the difference or dispute against whom the decision is given shall conform to the decision, and such party shall not be in default if that party has conformed to the decision prior to the expiry of that period.

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 from the date of institution of Arbitration proceedings as specified in paragraph 2 above, shall be determined by the Arbitrators or, in the event the Arbitrators fail to agree within 60 days from the date of appointment of the second Arbitrator, then by the Umpire or, in the event a Sole Arbitrator is appointed, then by the Sole Arbitrator.

7. This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.

8. The costs of the Arbitration shall be borne by such parties in such proportion and manner as may be provided in the decision.

[2]. The full text of the Claimant's letter of 11 December 1971 is set out below; it appears from it that, in conformity with paragraph 2 of Clause 28 quoted above, the letter did specify the matter in respect of which arbitration was required, and the Claimant therein did name an arbitrator appointed by it:

We refer to the action taken by the Government of the Libyan Arab Republic on December 7th 1971 by the issue of the Law which, inter alia, provides for the nationalisation of 'the activities of the BP Exploration Company (Libya) Limited in Petroleum Concession Number 65' and for the vesting of 'all the funds, rights, assets and shares related to said activities' in the Arab Gulf Company for Exploration which is to be formed under this Law.

It is evident that this action purports to deprive the Company of the rights which it possesses under and in relation to Concession Number 65 dated 18th December 1957.

This action amounts to an attempt at total and unilateral repudiation by the Government of

> the Libyan Arab Republic of the Company's rights and accordingly to a grave breach thereof. In addition the arbitrary and discriminatory action of the Government in this respect also constitutes a violation of established principles of international law.
>
> The Company does not accept this purported repudiation or breach of its rights and accordingly a difference and dispute has arisen between the Government and the Company within the terms of Clause 28 of the Concession.
>
> Since the manner and form of the Government's action do not leave open any other form of settlement of this difference and dispute, the Company now requests, in accordance with Clause 28(2) of the Concession, that this difference and dispute be referred to arbitration and hereby informs the Government that it has appointed as its arbitrator Professor Sir Humphrey Waldock, Q.C. Further, the Company hereby requests the Government to nominate its arbitrator in accordance with Clause 28(3).
>
> Meanwhile the Company desires to make it clear that as the rights of the Company are capable of alteration only by mutual consent and not by unilateral action the rights of the Company continue to be those under and in relation to its Concession.
>
> The Company, therefore, advises you that it will take such steps as it may consider necessary or desirable to assert or protect all its rights.

[3]. No reply having been received by the Claimant, it addressed a letter of reminder to the Respondent on 11 February 1972. By a further letter dated 13 March 1972, the Claimant drew the attention of the Respondent to the fact that the period of 90 days for the nomination of its arbitrator, stipulated in paragraph 3 of the said Clause 28, had expired and informed the Respondent of the Claimant's intention to request the President of the International Court of Justice to appoint a sole arbitrator. The Claimant attached a Memorandum to the letter in which it was stated that it "presently calculates its claim for damages against [the Respondent] to be in the amount of £220 million as at 7th December, 1971", and in addition the Claimant would claim interest thereon between such date and the date of settlement. The letter described the Memorandum as being an expression of the Claimant's "present thoughts regarding the basis on which it will present its claim for damages in the arbitration."

[4]. On 15 March 1972, the Claimant applied to the President of the International Court of Justice for the appointment of a sole arbitrator pursuant to the provisions of paragraph 3 of the aforesaid Clause 28. Citing the BP Nationalisation Law, the Claimant stated that,

> This premature repudiation of the Agreement, 40 years before the expiry of its term, is a fundamental breach of the Concession occasioning a claim by the Company for reparation, and giving rise to a dispute within the meaning of Clause 28.

[5]. The President of the International Court of Justice, Sir Muhammad Zafrullah Khan, on 28 April 1972 appointed Judge Gunnar Lagergren, President of the Court of Appeal for Western Sweden, Sole Arbitrator to hear and determine the dispute. He is qualified under paragraph 5 of Clause 28 to receive such appointment. Thus the Tribunal was duly constituted.

PART II - PROCEEDINGS OF THE TRIBUNAL

[6]. The Sole Arbitrator, on 8 May 1972, invited both Parties to attend a first meeting of the Tribunal in Gothenburg. By letters of 8 June 1972, similarly sent to both Parties, the meeting was fixed to take place on 4 July 1972. In the case of the Respondent, the latter communication was addressed to the Minister of Petroleum and delivered against acknowledgment of receipt to the Chargé d'affaires of the Embassy of the Libyan Arab Republic in Copenhagen, and the letter of 8 May 1972 in addition was delivered against acknowledgment of receipt to the Minister of Petroleum at Tripoli. No reply was received from the Respondent, and at the meeting of the Tribunal on 4 July 1972, the Sole Arbitrator decided that the arbitration would proceed in spite of the Respondent's default but that copies of all correspondence and documents in the case would be communicated to the Respondent, and this has been done throughout the subsequent proceedings.

[7]. The Sole Arbitrator announced the appointment of Dr. J. Gillis Wetter as Secretary and Professor Jan Sandstrom as Deputy Secretary to the Tribunal.

[8]. The Tribunal determined that it would have power to provide for such secretarial and other assistance as it would deem necessary and further, with the consent of the Claimant, decided that the language of the arbitration would be English, that the Tribunal should have power to appoint one or more experts, if necessary, and that the name of the Tribunal would be The BP/Libya Concession Tribunal.

[9]. The Tribunal, with the consent of the Claimant, made various directions as to financial matters, including a decision that the Parties should be jointly and severally liable for making deposits as required by the Sole Arbitrator, but such deposits should, as between the Parties, be borne in equal shares.

[10]. With respect to the further course of the proceedings, upon motion of the Claimant for an order to divide the proceedings into a first and a second stage, the Tribunal decided that the Claimant within six weeks should submit a memorial setting forth its views as to the seat of the Tribunal and presenting argument in support of its request for a first, preliminary award.

[11]. The Claimant, on 8 August 1972, submitted a Memorial as directed by the Tribunal at the Meeting on 4 July 1972.

[12]. In the Memorial of 8 August 1972, the Claimant requested that Copenhagen be fixed as the place of arbitration and that the arbitration proceedings be divided into two stages, *viz.*, broadly speaking, a first stage to be concerned with the merits of the case, and a second stage to be concerned with the assessment of damages.

[13]. In support of the latter request, the Claimant argued that the amount of damages flowing from the alleged breach by the Respondent of the concession agreement was of the order of £240 million. The establishment of such a claim would call both for a consideration of the rules relating to the assessment of damages and the application of those rules to the facts of the present case. This would require examination of highly technical matters in great detail, and the sheer size of the damages claimed would call for the submission and scrutiny of a very large volume of material. Expert

testimony must be produced. The process of assessing damages therefore was bound to be lengthy, and the Claimant believed that it would assist the course of relations between the Parties if a decision on the merits of the case were not delayed until the necessarily extended question of assessing the damages was answered. The arbitration process thus could serve an additional function in the resolution of the differences between the Parties.

[14]. Two copies of the Memorial of 8 August 1972 were sent with a letter dated 14 August 1972 to the Minister of Petroleum at Tripoli and delivered against acknowledgment of receipt with an invitation to submit the Respondent's comments within four weeks of receipt.

[15]. No reply having been received from the Respondent, the Tribunal, by letters of 19 September 1972, invited both Parties to attend a meeting in Gothenburg on 4 October 1972. The letter to the Respondent was addressed and delivered against acknowledgment of receipt to the Minister of Petroleum at Tripoli.

[16]. The Respondent failed to appear at the meeting of the Tribunal on 4 October 1972 which was thus held in the presence of the Claimant alone.

[17]. The Tribunal, having heard the Claimant, made the following Order:

1. The place of arbitration shall be Copenhagen, Denmark.

2. The arbitration proceedings shall be divided into two parts, the first dealing with the merits of the claim and the second with the assessment of possible damages.

3. The Claimant, on or before 31 December 1972, shall file with the Tribunal ten copies of a Memorial.

4. The Memorial shall contain:

(i) a full statement of the Claimant's main claim, divided, as the case may be, into alternatives and stating the grounds upon which the claim is based;

(ii) the Claimant's request for an interim award in respect of the merits of the claim, divided, as the case may be, into alternative submissions and containing a full statement of the relevant facts and law. The Memorial ought to be accompanied by the written evidence upon which the Claimant wants to rely. The Memorial shall not deal with questions relating to the assessment of possible damages;

(iii) the Claimant's submissions on the status of Mr. Nelson Bunker Hunt in relation to the present proceedings.

5. The Respondent shall, upon the receipt of a copy of the Claimant's Memorial and within a period to be fixed by the Tribunal at a later stage, inform the Tribunal whether it desires to file a Counter-Memorial in reply thereto and, if so, how long a period is required by it to do so.

[18]. Upon application of the Claimant by letter and cable dated 22 December 1972, the Tribunal on 9 January 1973 ruled that the time limit for the submission of the Claimant's Memorial stipulated in

paragraph 3 of the Order cited above should be extended until 31 March 1973.

[19]. On 28 March 1973, the Claimant submitted to the Tribunal twelve copies of the Claimant's Memorial, divided into two printed volumes (Part One, stating the facts and reproducing in 34 Annexes certain documents adduced in evidence, and Part Two, devoted to an exposition of the Claimant's argument and containing also an opinion of Professor Mohamed A. Omar).

[20]. Two copies of the Memorial of the Claimant were sent by the Tribunal with a covering letter dated 2 April 1973 to the Minister of Petroleum at Tripoli and were delivered against acknowledgment of receipt at the Embassy of the Libyan Arab Republic at Copenhagen. The letter stated, with reference to paragraph 5 of the Minutes of the meeting of the Tribunal on 4 October 1972, cited above, that the Respondent was invited to inform the Tribunal on or before 15 May 1973 whether it proposed to file a Counter-Memorial in reply to the Claimant's Memorial and, if so, how long a period of time it would require for the preparation and submission thereof.

[21]. No reply has been received to the letter of 2 April 1973.

[22]. By letter of 21 May 1973 to both Parties, the Tribunal recorded the fact that no reply had been received from the Respondent within the prescribed time limit and advised the Parties that the Tribunal was preparing questions to the Claimant. By letter of 6 July 1973, the Tribunal directed 16 questions to the Claimant with the request that written answers be submitted by 1 August 1973, and such replies, dated 30 July 1973, were duly received. By letters dated 6 August 1973, both Parties were invited to attend a meeting in Copenhagen on 20 September 1973. The Respondent failed to appear at the meeting of the Tribunal, which was held on such date in the premises of *Østre Landsret* (the Court of Appeal for Eastern Denmark) in the presence of the Claimant alone. In the course of it, the Tribunal sought and received from the Claimant orally certain clarifications respecting the matters dealt with in the Tribunal's questions of 6 July 1973 and otherwise. At the conclusion of the meeting, the case was declared closed for purposes of the present, first stage of the proceedings.

PART III - THE JURISDICTION OF THE TRIBUNAL. THE PROCEDURAL LAW OF THE ARBITRATION. THE EFFECT OF THE RESPONDENT'S DEFAULT

1. *The Jurisdiction of the Tribunal*

[23]. The jurisdiction of the Tribunal derives from Clause 28 which is cited in Part I above and which provides, in particular, that the Tribunal shall determine the applicability of the said Clause and the procedure to be followed in the arbitration. In conformity with paragraph 6 of Clause 28, the Tribunal, as mentioned earlier, has fixed Copenhagen as the place of arbitration.

[24]. The Tribunal holds the said Clause 28 to be applicable to the present arbitration proceedings, and to vest the Tribunal with the required jurisdiction.

2. *The Procedural Law of the Arbitration*

[25]. The procedural law of the arbitration will be decided at the outset. The first issue which falls to be considered in that context is whether the proceedings, on account of the fact that one Party is a sovereign State, are governed by international law or by some other body of law not being a particular municipal legal system.

[26]. In the *Aramco* case of 1955, between Saudi Arabia and the Arabian American Oil Co. (Aramco), the arbitral tribunal discussed this question of principle at some length and arrived at the following conclusion:

> Considering the jurisdictional immunity of foreign States, recognized by International Law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceedings to which a sovereign State is a Party could be subject to the Law of another State. Any interference by the latter State would constitute an infringement of the prerogatives of the State which is a Party to the arbitration. This would render illusory the award given in such circumstances. For these reasons, the Tribunal finds that the Law of Geneva cannot be applied to the present arbitration.
>
> It follows that the arbitration, as such, can only be governed by International Law, since the Parties have clearly expressed their common intention that it should not be governed by the Law of Saudi Arabia, and since there is no ground for the application of the American Law of the other Party. This is not only because the seat of the Tribunal is not in the United States, but also because of the principle of complete equality of the Parties in the proceedings before the arbitrators.
>
> (Cited from the privately printed edition of the Award, p. 47, *cf.* 27 *International Law Reports* (1963) p. 117, at pp. 155-156.)

[27]. The Tribunal cannot share the view that the application of municipal procedural law to an international arbitration like the present one would infringe upon such prerogatives as a State party to the proceedings may have by virtue of its sovereign status. Within the limits of international law, the judicial or executive authorities in each jurisdiction do, as a matter both of fact and of law, impose limitations on the sovereign immunity of other States within such jurisdictions. Clearly, in some legal systems the degree of control exercised by the courts over arbitral proceedings is greater than in others, and at times extensive. By providing for arbitration as an exclusive mechanism for resolving contractual disputes, the parties to an agreement, even if one of them is a State, must, however, be presumed to have intended to create an effective remedy. The effectiveness of an arbitral award that lacks nationality—which it may if the law of the arbitration is international law—generally is smaller than that of an award founded on the procedural law of a specific legal system and partaking of its nationality. Moreover, even where the arbitrators do, as the Tribunal does in this instance, have full authority to determine the procedural law of the arbitration, the attachment to a developed legal system is both convenient and constructive.

[28]. The Tribunal has fixed Copenhagen as its seat. For the reasons stated in the foregoing, and having

particular regard to the wide scope of freedom and independence enjoyed by arbitration tribunals under Danish law, the Tribunal considers that the procedural law of the arbitration is Danish law. The Tribunal is not competent to establish conclusively the nationality of its Award, for this can only be decided by the courts of Denmark and of other jurisdictions in which enforcement of the Award may be sought. However, the Tribunal deems this Award to be Danish, and the proceedings have been conducted in a manner designed to be consistent with this view and intent.

[29]. This holding of the Tribunal is supported by practice in arbitrations between States and aliens. Thus, both Judge Python in the *Alsing* case (*Alsing Trading Co. v. Greece*, 1954) and Judge Cavin in the *Sapphire case* (*Sapphire International Petroleum Ltd. v. The National Iranian Oil Co.*, 1963) held that the relevant procedural law was the law of the seat of the arbitration. Judge Python, acting as Umpire, who rendered his award prior to the adoption of the agreement on arbitration procedure among certain Swiss cantons called the "Concordat sur l'arbitrage" of 27 March 1969, referred to the fact that, according to the terms of Article 2 of the Geneva Protocol Relating to Arbitration Clauses of 24 September 1923, the arbitration procedure, including the constitution of the arbitration tribunal, is governed by the will of the parties and by the law of the State in whose territory the arbitration takes place. According to the latter rule, the Code of Civil Procedure of the Canton of Vaud would apply, as the arbitrator sat at Lausanne. However, in accordance with the Protocol, the territorial law applied only in a subsidiary fashion, in the absence of provision made by the parties or the arbitrators appointed by them. Accordingly Judge Python held that the rules of procedure agreed upon by the parties were the only valid ones in the case, as indeed in international arbitrations under the Protocol even the mandatory provisions of the internal law must give way to the will of the parties. As for the procedure applicable to the inquiry and to the decision, the Umpire, exercising the power conferred upon him by the parties and, in view of the fact that the case fell within his exclusive competence, and that he was a Swiss Federal judge exercising his powers in Switzerland, decided to apply the Swiss Federal law of civil procedure to all questions not governed by the rules agreed by the parties. (See the unprinted Award, pp. 34-35; *cf.* Schwebel, "The Alsing Case", 8 *International and Comparative Law Quarterly* (1959), p. 320, at p. 328.)

[30]. Judge Cavin considered it unavoidable that a specific procedural law should apply to the proceedings but that the parties were free to elect domicile for the arbitration. If they had agreed to confer upon the arbitrator the right to choose the seat of the tribunal, they had impliedly submitted themselves to the procedural law of the State decided by the arbitrator to be the seat. Judge Cavin implicitly assumed that the law of the seat of the arbitration would then apply, and he went on to state that even if the will of the parties were disregarded, the rule was that an arbitration is subject to the judicial sovereignty of the State where the proceedings take place:

> En l'espèce, par leur convention les parties ont laissé l'arbitre libre de déterminer le siège de l'arbitrage, faute d'accord entre elles. Acceptant ainsi d'avance le siège tel qu'il a été fixé par l'arbitre, qui a choisi par délégation de la volonté des parties, les contractants ont pris l'engagement de se soumettre à la loi de procédure qui résulte de ce choix... Si même cette interprétation de la volonté des parties était rejetée, la règie est qu'à defaut d'accord des parties, l'arbitrage est soumis à la souveraineté judiciaire du siége de l'arbitrage, au lieu où se déroule l'instance.
>
> (Quoted from the unprinted Award, pp. 69-70 cf., 35 *International Law Reports* (1967), p. 136, at p. 169.)

[31]. It may be mentioned in this context that the Tribunal has satisfied itself as to the conformity with Danish law of a decision made by the Tribunal at an earlier stage in the proceedings, *viz.* the Order of 4 July 1972 cited in Part II above, to the effect that the arbitration proceedings be divided into two stages, the first dealing with the merits of the claim and the second with the assessment of possible damages. The Danish statute on procedure (*retsplejeloven*) provides that the court at its discretion may render interim or partial judgments. It may also render declaratory judgments. The competence of an arbitral tribunal to render interim, partial or declaratory awards cannot under Danish law be less than that of a court of law.

3. *The Effect of the Respondent's Default*

[32]. The Respondent has failed to reply to all communications of the Tribunal and has clearly elected not to appear as a party in the proceedings before the Tribunal.

[33]. Under the Clause from which the Tribunal derives its jurisdiction, and under the law applicable to the arbitration, the Tribunal is empowered to render this Award despite the Respondent's non-appearance. The Tribunal has been duly constituted. The Respondent has been notified of every meeting of the Tribunal and has received copies of all documents submitted by the Claimant to the Tribunal, and of all communications by the Tribunal to the Claimant.

[34]. In the circumstances the Award is similar to a default judgment, and it is necessary to comment on the procedural law aspects of an arbitration having such a character.

[35]. The arbitration statute of Denmark of 24 May 1972, and the body of customary law which supplements it give an arbitral tribunal a measure of freedom to conduct the proceedings which is greater than that of the ordinary Danish courts. A Danish arbitral tribunal is not obliged to apply Danish procedural law to its actions, but such law clearly can be of guidance. (See on these principles particularly Hjejle, *Frivillig Voldgift,* 1937, pp. 119-129; *Betaenkning vedrorende lovgivning am voldgift,* 1966, p. 13.)

[36]. With respect to court proceedings in which the defendant fails to appear, Danish law, as stated by Professor Hurwitz, represents a compromise between the extremes to be found among various jurisdictions:

> The various procedural codes provide different solutions in this respect, extending from complete preclusion to systems attempting to protect the non-appearing defendant by requiring a wide measure of proof on the part of the plaintiff of the truth of his claims, cf. H. Munch-Petersen II, pp. 213 ff. with references. The [Danish] Procedural Code, in conformity with Norwegian and German law, has adopted an intermediary solution. (Hurwitz, *Tvistemâl,* 1959, p. 197.)

Briefly, the general principle of Danish procedural law on the point is:

> In other words, the principle of Section 341 of the Procedural Code is that the court will base its judgment on the plaintiff's allegations of fact but will decide independently what legal

> consequences follow from those allegations. (Hurwitz, *ibid.*)

[37]. Briefly, the general principle of Danish procedural law on the point is:

> In other words, the principle of Section 341 of the Procedural Code is that the court will base its judgment on the plaintiff's allegations of fact but will decide independently what legal consequences follow from those allegations. (Hurwitz, *ibid.*)

[38]. The leading authority on Danish arbitral law, Dr. Bernt Hjejle, has expressed the applicable principle in the following manner:

> However, in contradistinction to ordinary court procedure, the arbitrator in my opinion must be allowed greater flexibility in that he should hardly be confined to the claimant's statement of the facts but might check it and, if he finds it to be at variance with the actual circumstances, base his award on the latter. Unlike a court of law, the arbitrator is not bound by a statutory provision—which, in turn, to a certain extent has to be seen in its historical context—but is absolutely free as regards his appraisal and consequently also with respect to estimating how far he is willing, without more, to base his decision on the claimant's statement of facts or subject the latter to a critical investigation. (Hjejle, *op. cit.*, p. 135.)

[39]. The committee which prepared the Danish arbitration statute of 24 May 1972 concurred in the opinion of Dr. Hjejle, and stated:

> It is the opinion of the Committee that the power, recognised in this country, of the arbitrators in each instance to decide in their discretion what the consequences should be of the nonappearance of a party, constitutes a satisfactory solution and that no statutory provisions are needed. (*Betaenkning, cit. supra*, p. 28.)

[40]. The jurisdiction of the Tribunal, as defined in Clause 28, and the law applicable to the proceedings necessarily confine its task to a consideration of the claims and submissions formulated by the Claimant, and the Award therefore rules exclusively on them.

[41]. The facts deemed relevant and taken as established by the Tribunal have been gathered from evidence produced by the Claimant alone. With respect to certain facts the Tribunal has sought and received from the Claimant the submission of additional documentary evidence and explanations. The Tribunal deeply regrets the absence of further elucidation on the part of the Respondent.

[42]. With respect to the analysis of facts and their legal implications the Tribunal has had the benefit of argument presented by the Claimant alone. However, the Tribunal has felt both entitled and compelled to undertake an independent examination of the legal issues deemed relevant by it, and to engage in considerable legal research going beyond the confines of the materials relied upon by

the Claimant. The conclusions in the Award therefore are based on a broader consideration of the issues than that permitted by the format of the Claimant's argument in support of its claims. Thus, the Tribunal to the greatest extent possible has endeavoured to eliminate any inherent adverse effects for the Respondent of its decision not to appear as a party in the proceedings.

PART IV - THE FACTS

1. *The Nationalisation*

[43]. On the basis of a contractual relationship with the Respondent, which will be explained and analysed in detail in Section 2 of this Part IV, the Claimant over a period of twelve years made substantial investments in Libya and operated a major enterprise in that country for the extraction, processing, and export of petroleum. The Claimant indirectly is and has at all times been wholly owned by the British Petroleum Company Limited, an English public company, between 48 and 49 per cent of whose ordinary share capital is held by the British Government. The Claimant was incorporated in England on 28 January 1938 and its head office is at Britannic House, Moor Lane, London E.C.2. All the statutory and other records are maintained at that address. The board consists of nine persons all of whom are British subjects resident in England. The whole of the administration, management and control of the Claimant's affairs is exercised by the board in London. Activities overseas are carried on through local representatives appointed and supervised by and subject to the directions of the board in London.

[44]. On 7 December 1971, the Respondent passed the BP Nationalisation Law which nationalised the operations of the Claimant in Concession 65. The BP Nationalisation Law claimed to restore to the State and then to transfer to a new company, the Arabian Gulf Exploration Company, ownership of all properties, rights, assets and shares relating to the above-mentioned operations.

[45]. The BP Nationalisation Law provided that the State should pay compensation to the Claimant. The amount of compensation was to be determined by a committee to be established by the Minister of Petroleum. The decision of the committee was to be documented and final, to admit of no appeal by any means, and to be communicated to the Minister of Petroleum who was to notify the Claimant of it within thirty days of its issue.

[46]. In the Claimant's submission, the BP Nationalisation Law was a measure of a unique character in that no similar step was taken against any other concessionaire of the Government or against other concessions owned by the Claimant. The Claimant states that to the best of its knowledge it believes that some 133 concessions had been granted to American, British, German, Italian and French companies prior to 7 December 1971; that in 1971 there were some 91 concessions in existence and that then and as of the date of the Claimant's submissions there were concessionaires operating in Libya who were of American, British, German, Italian and French nationality. Although the

Claimant gave notice of surrender of four of its remaining six concessions on 18 December 1971, it continues to hold Concessions 80 and 81.

[47]. In the aspects unrelated to compensation, the BP Nationalisation Law was rapidly implemented. The Claimant's operations in Concession 65 were brought to a complete halt: its staff were immediately excluded from its premises and from its production and transportation facilities. These were then taken over by the Arabian Gulf Exploration Company.

[48]. As regards compensation, no action was taken until 13 February 1972. Then, according to reports in the Libyan press on 14 February 1972, a three-man committee was appointed. According to Article 7 of the BP Nationalisation Law, this committee should have reported within three months from 14 February 1972, that is, by 14 May 1972, and the report should have been notified to the Claimant by the Minister of Petroleum within thirty days of that date, *i.e.* by 14 June 1972. The Claimant has received no such notification. On 28 September 1972 a cable was received which read:

> Before preparing its final report the Committee wishes to learn the company's viewpoint and remarks on the accounts prepared in respect of the compensation that may be due to or from your company. The Chairman and members of the Committee will be in Tripoli on Thursday 5th October 1972 at the company's Tripoli office to meet with your representatives on the same day. For Compensation Committee.

[49]. No representative of the Claimant attended such meeting but a letter was sent to the Minister of Petroleum, referring to the cable and saying, "As you know BP is willing to attempt to resolve the dispute which exists between it and your Government by negotiation".

[50]. Some indication of the circumstances in which the BP Nationalisation Law was adopted is called for at this point. On 29 and 30 November 1971, the Government of Iran occupied three islands in the Gulf, Abu Musa and the Greater and the Lesser Tumb. The Iranian claim to these islands was contested by the Rulers of Sharjah and of Ras-al-Khaimah. At the moment of the occupation of the islands both were still nominally under British protection, although the treaties of protection were due to end on 30 November 1971. The British Government did not react to the occupation of the islands and was accordingly blamed in the Arab world for the loss of islands which were regarded as Arab.

[51]. On 5 December 1971, President Qadhafi of Libya sent a cable to the Ruler of Ras-al-Khaimah saying that

> In our opinion Britain is primarily responsible for Iran's occupation of the islands and we hold it reponsible for the consequences of this action, through which it has demonstrated its malice towards the Arabs and its failure to fulfil its pledges.

[52]. On 9 December 1971, in the course of a discussion in the Security Council of the United Nations on

the question of the islands, the Libyan Representative, Mr. Maghribi, made, *inter alia*, the following comments on the nationalisation of the Claimant's interest in Concession 65:

> We have witnessed that a big Power can do anything it wishes, anything it deems in accordance with its chauvinistic interests, in violation of the Charter of the United Nations. The small States have always been left powerless against such actions and behaviour. Furthermore, we have seen that any State in agreement with a big Power can take similar liberties without respect for the Charter or international law. The Iranian military aggression in occupying the three Arab islands of Abu Musa and the Greater and Lesser Tumb, in connivance with Great Britain, is a clear manifestation of this.
>
> The Government of Great Britain has violated the provisions of the very treaties it had itself imposed upon the Sheikhdoms of the Arabian Gulf decades ago. The treaties imposed occupation and colonialism. However, they also provided for the protection of the territorial integrity of those Sheikhdoms and their islands. For many decades Great Britain has exploited all the provisions of those treaties to its own advantage and until now it has readily exploited the natural wealth of the Sheikhdoms. On the one occasion that Great Britain was called upon to apply the protection provision, it failed miserably and intentionally, reflecting the true nature by which the world has known it for centuries: 'divide and rule', trickery, treachery and butchery.
>
> A glance through past centuries gives proof of this. Indeed, hardly any major conflict or turmoil the modern world has known has not been the creation of Britain or its like-minded States, either directly or indirectly. And in the present instance of the Iranian aggression and occupation of the Arab islands Britain has been faithful to its nature and tradition. Has not Great Britain done the same in Palestine, although on a larger scale?
>
> Great Britain violated the treaties that it had itself imposed on the Sheikhdoms of the Arabian Gulf. It violated the principles of the Charter of the United Nations.
>
> My Government, an Arab Government, replied in the only way understood by the imperialists—by nationalizing the oil interests of Great Britain in the Libyan Arab Republic and withdrawing our deposits from British banks. The British Petroleum Company, owned in essence by the British imperialist Government, has exploited the natural wealth of my country for many years. Our step violates no principle of the Charter or international law; it is in accordance with those principles and also with the General Assembly resolutions concerning the natural resources of States.
>
> (*United Nations Security Council, Provisional Verbatim Record of the Sixteen Hundred and Tenth Meeting*, S/PV 1610, p. 93.)

[53]. The reaction of the British Government during December, 1971 to the actions of the Respondent may be summarised as follows.

[54]. On December 1971, the Minister of State for Foreign and Commonwealth Affairs said in reply to a question in the House of Commons:

Obviously, I shall wish to protest in the strongest terms when I know precisely what to protest about. I have to ascertain the facts first. The important thing is to get the facts and then to decide on action in relation to them. At present we have only hearsay evidence but, in so far as any question of nationalisation or expropriation is concerned, we have 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 when that occurs. This will be a matter which we shall certainly want to have in the forefront of our minds.

(*House of Commons, Official Report, Parliamentary Debates (Hansard)*, Vol. 827, No. 27, Wednesday, 8 December 1971, Columns 1299-1302.)

[55]. On 21 December 1971, the Minister of State for Foreign and Commonwealth Affairs made the following statement:

> ... the taking of the property of [the Claimant] is not a legitimate act of nationalisation because it is discriminatory against the company and for purposes which are not admissible in international law. We are of course supporting the company in its efforts to obtain redress.
>
> (*House of Commons, Official Report, Parliamentary Debates (Hansard)*, Vol. 828, No. 36, Tuesday, 21 December 1971, Written Answers to Questions, Column 312.)

[56]. On 23 December 1971, a note of protest was handed to the Ambassador of the Libyan Arab Republic in London, reading as follows:

> Her Britannic Majesty's Government present their compliments to the Government of the Libyan Arab Republic and have the honour to refer to the request, made to the Libyan Ambassador on 8 December 1971 by the Minister of State at the Foreign and Commonwealth Office and subsequently to the Libyan Government by Her Britannic Majesty's Embassy in Tripoli, for an explanation of the action of the Libyan Government in nationalising the assets of British Petroleum's production operation in Libya.
>
> Her Britannic Majesty's Government note with regret that the Libyan Government have not yet provided the explanation requested. In the absence of any such explanation and in the light of the public statements of the Libyan Government, Her Majesty's Government are bound to conclude that the measures in question amount to a breach of international law and are invalid. An act of nationalisation is not legitimate in international law unless it satisfies the following requirements:—
>
> > (i) it must be for a public purpose related to the internal needs of the taking State; and
> >
> > (ii) it must be followed by the payment of prompt, adequate and effective compensation.
>
> Nationalisation measures which are arbitrary or discriminatory or which are motivated by considerations of a political nature unrelated to the internal well being of the taking State are, by a reference to those principles, illegal and invalid.

> Her Majesty's Government must, therefore, call upon the Libyan Government to act in accordance with the established rules of international law and make reparation to British Petroleum Exploration (Libya) Limited, either by restoring the Company to its original position in accordance with the Concession No. 65 or by payment of full damages for the wrong done to the Company.

[57]. The Respondent did not furnish any reply to the note of the British Government.

[58]. The reaction of the Claimant to the nationalisation has been described above in Part I with respect to the institution and conduct of the present arbitration proceedings. Certain further steps taken by the Claimant, and evidenced in letters sent to the Minister of Petroleum, may be mentioned in this context.

[59]. On 30 December 1971, by a letter addressed to the Minister of Petroleum, Tripoli, the Claimant informed him that in the ordinary course of events the Claimant would have paid to the Respondent on that date in respect of Concession 65 the sum of £2,882,955 by way of royalty on crude oil produced and tax and supplemental payment on crude oil exported by the Claimant during the fourth quarter of 1971. The Claimant stated that in the circumstances it was withholding this payment, but that it was lodging the sum "in a special account... where the monies will be held pending the outcome of the arbitral proceedings and against such sums as are due from the Government to the Company by way of damages"..

[60]. By a letter dated 17 January 1972, addressed to the Minister of Petroleum, Tripoli, the Claimant placed on record the fact that the introduction and implementation within Libya of the BP Nationalisation Law in violation of the Claimant's rights under Concession 65 had compelled the Claimant to discontinue its operations under the concession, to withdraw its staff and to surrender to the Libyan authorities its offices, installations, equipment, oil stocks and other assets in Libya. The Claimant also pointed out that these steps were taken under duress and could not prejudice the Claimant's legal position and in particular could not prevent the vesting in the Claimant of title to its share of oil extracted from the area of Concession 65.

[61]. By a letter dated 28 January 1972, addressed to the Minister of Petroleum, the Claimant informed him, in terms similar to its letter of 30 December 1972, that on 30 July 1972, £2,882,955 would, in the normal course of events, have fallen due for payment to the Respondent on 30 January 1972, but that this sum would be lodged in a special account in a London bank pending the outcome of the arbitral proceedings.

[62]. Similar letters relating to payments of £3,001,133 and £10,290,136 otherwise due on 29 February and 30 April 1972 were addressed by the Claimant to the Minister of Petroleum on 28 February and 28 April 1972, respectively.

[63]. The letter of 28 April 1972 stated that the amount in question was withheld by the Claimant without being lodged in a bank account.

[64]. All sums above referred to, amounting in the aggregate to £19,057,179 are presently withheld by the Claimant without being deposited in a special bank account.

2. *The Contractual Relationship Between the Claimant and the Respondent*

(a) *Outline of Contractual Developments*

[65]. The Libyan Petroleum Law of 1955, as amended, established a framework within which exploration and production of petroleum in Libya might take place. In particular, it set up a Petroleum Commission (the "Commission") which was to be responsible for the implementation of the provisions of the Law. The Commission was empowered in Article 9 to grant concessions "in the form set out in the Second Schedule to the Law and not otherwise, provided that they may contain such minor non-discriminatory variations as may be required to meet the circumstances of any particular case."

[66]. On December 1957 the Commission granted a Deed of Concession, designated as Concession 65, to Mr. Nelson Bunker Hunt, a citizen of the United States of America, of Dallas, Texas, U.S.A. (the "Hunt Concession"). It was substantially in the form set out in the Second Schedule of the Libyan Petroleum Law of 1955.

[67]. By Clause 1 of the Deed of Concession, Mr. Hunt was granted the exclusive right for 50 years to search for and extract petroleum within a designated area, and to take away and dispose of the same. The area was marked out on an annexed map and originally covered 32,944 sq.kms. However, pursuant to Article 10 of the Libyan Petroleum Law of 1955 and Clause 2 of the Deed of Concession, the area was progressively reduced by surrender to 8,234 sq.kms. as at 7 December 1971.

[68]. Clause 25 provided that, save in circumstances which do not apply in the present case, the concession could only be assigned with the consent of the Commission and subject to such conditions as the latter might deem appropriate.

[69]. Following discussions in early 1960, the Claimant and Mr. Hunt entered into an agreement on 24 June 1960 consisting of a Memorandum and attachments in which it was agreed, *inter alia*, that Mr. Hunt would assign to the Claimant an undivided one-half interest in Concession 65. By a letter to the Commission dated 12 July 1960, Mr. Hunt asked for formal approval of the assignment to the

Claimant of an undivided one-half interest in Concession 65. The Claimant wrote in similar terms to the Commission in a letter of the same date. The first letter was accompanied by a draft Deed of Assignment. After consultation with the Commission, an amended draft thereof was presented to the Commission with a letter dated 17 August 1960 together with a program for carrying out the terms of the concession.

[70]. On 9 September 1960 the Commission resolved to agree to the assignment and informed the Claimant of its decision by a letter dated 11 September 1960. Its resolution was approved by the Minister of National Economy on 28 September 1960 and a copy of its decision was sent to the Claimant on 2 October 1960.

[71]. On 10 November 1960, the arrangements between Mr. Hunt and the Claimant were formally settled by the signing of a Deed of Assignment in the same terms as the draft presented to the Commission with the letter of 17 August 1960 by which Mr. Hunt assigned to the Claimant an undivided one-half interest and title in Concession 65. In consideration of this assignment, the Claimant agreed to undertake a work programme in which it would advance all the costs. This programme was to include seismic surveys, the commencement of drilling operations before 17 December 1960, the drilling of six exploratory wells and the construction of production facilities, pipelines etc. The Claimant undertook to purchase all or any part of Mr. Hunt's share of the production when required by Mr. Hunt to do so. In addition, it was provided that the Claimant should be entitled to three-eighths of Mr. Hunt's share of the oil production delivered f.o.b. Libyan sea-board until the Claimant had received a quantity of crude oil equal in value to 125 per cent of all costs and expenses advanced by the Claimant for Mr. Hunt's account for exploration, development or any other work performed in connection with Concession 65.

[72]. Between 21 May 1955, *i.e.* the date of the coming into force of the Libyan Petroleum Law of 1955, and 20 January 1966, a number of amendments were made by the Respondent to the Libyan Petroleum Law of 1955. The legislative measures containing these amendments were the following: two Royal Decrees of 21 May 1955; Royal Decree signed 3 July 1961; Royal Decree signed 9 November 1961; Royal Decree signed 26 April 1962; Royal Decree signed 16 July 1963; and Royal Decree signed 20 November 1965.

[73]. The changes introduced by these amendments into the Libyan Petroleum Law of 1955 and its Schedules did not by themselves affect existing concessions. However, the Royal Decree of 20 November 1965 contemplated that certain provisions of these amending decrees might by agreement be incorporated into and given effect as part of existing concessions.

[74]. On 14 December 1965 the Claimant gave the Respondent an undertaking of the kind referred to in Article XII of the Royal Decree of 20 November 1965 and on 20 January 1966 concluded an agreement with the Respondent as contemplated in that Article. This agreement amended, *inter alia*, Concession 65. Mr. Hunt on the same date executed an amendment to Concession 65 in a form identical with the agreement made between the Claimant and the Respondent.

[75]. A number of legislative decrees and decisions concerning the petroleum industry were made after the Royal Decree of 20 November 1965 but these scarcely touched and affected Concession 65. A major amendment to the Libyan Petroleum Law of 1955 came into effect on 8 December 1968 with the passing of Petroleum Regulation No. 8. This closely followed the OPEC Proforma Regulation for the Conservation of Petroleum Resources and empowered the Ministry of Petroleum to limit exploration and production and required the concessionaire to provide the Ministry with certain data relating to exploration, drilling and production. The Claimant and Mr. Hunt were the only concessionaires not to have their production cut back under this Regulation prior to 7 December 1971. In October, 1970 all the oil companies operating in Libya agreed to increase posted prices with effect from 1 September 1970 and to a general increase in tax from 50 per cent to 55 per cent. Finally, on 18 October 1970 a Law Organising Petroleum Affairs was issued which was concerned with governmental organisation.

(b) *Certain Contractual Aspects*

[76]. The contractual arrangements among the Respondent, the Claimant and Mr. Hunt, which have been described in broad outline under subsection (a) of Section 2 above, call for specific analysis and consideration in certain respects.

[77]. The subject matter of the transaction between the Claimant and Mr. Hunt was "Concession 65". By the Deed of Assignment of 10 November 1960, Mr. Hunt assigned to the Claimant "an undivided one-half (12) interest and title in and to the Concession."

[78]. The agreement of 24 June 1960, of which the Operating Agreement forms an integral part, is not by its terms subject to a designated legal system.

[79]. As required under paragraph 2 of Clause 25 of the Deed of Concession, the assignment received the approval of the Commission. The Commission did not have occasion to consider either the form of letter agreement attached to the Memorandum executed on 24 June 1960, nor the form of Operating Agreement (with three Exhibits) likewise so attached.

[80]. The Libyan Petroleum Law of 1955 provided in its Article l (which has not since been amended) as follows:

> 1. All petroleum in Libya in its natural state in strata is the property of the Libyan State.
>
> 2. No person shall explore or prospect for, mine or produce petroleum in any part of Libya, unless authorised by a permit or concession issued under this Law.

[81]. The Hunt Concession granted the holder the exclusive right for a period of 50 years within a defined

area, *inter alia*, to search for and extract petroleum, to take it away by pipeline or otherwise and to use, process, store, export and dispose of the same. For such purpose, the holder had the right within the concession area to erect and maintain any constructions, installations and works required for its activities and, outside the concession area, to erect and operate transport, harbour and terminal facilities.

[82]. The assignment clause in the Deed of Concession (Clause 25) did forsesee an assignment thereof "in whole or in part."

[83]. As between the parties to the assignment, the Operating Agreement established certain basic principles, two of the most important of which were, *firstly*, the designation of the Claimant as Operator with exclusive rights to conduct, direct and have full control over all operations in the concession area (Section 6), and, *secondly*, joint ownership (as to 50 per cent each) of all equipment and material, and all oil and gas produced in the concession area (Section 2, and specific provisions in Section 10 (a) on extracted petroleum, and in Section 21 on facilities, materials and equipment). In so far as the Hunt Concession and the parties' activities thereunder gave rise to ownership of or other rights of property in related physical installations in Libya, or petroleum extracted from the concession area, neither party could exercise and dispose of such property rights save in accordance with the terms and conditions of the agreement of 24 June 1960. The principal object of joint ownership, Concession 65, as granted by and defined in the Deed of Concession, remained an integral, undivided whole.

[84]. It may be mentioned in this context that on 20 September 1973 the Claimant submitted a letter from Mr. Nelson Bunker Hunt, dated 12 September 1973, in which he declares that he has no objection to the present arbitration proceedings, including in particular the requested Declaration No. 5.

[85]. As mentioned under subsection (a) of Section 2 above, the Libyan Royal Decree of 20 November 1965 stipulated that certain amendments to existing concessions might be incorporated therein by agreement, and the Claimant by a separate undertaking submitted on 14 December 1965 consented to such modifications with respect to its interests both under Concession 65 and under certain other concession agreements. An agreement was concluded between the Respondent (acting through the Minister of Petroleum Affairs in the name of the Government of Libya) and the Claimant, dated 20 January 1966 and entitled "Agreement for Amendment of Petroleum Concession No. 34, 36, 37, 63, 64, 80, 81, 65". This agreement was executed on a standardised form and mainly incorporated certain fiscal provisions which were more onerous to the concessionaire than the conditions previously applicable. It included as Clause 28 the arbitration clause quoted in Part I above and, as Clause 16, the following provision:

> 1. The Government of Libya will take all the 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 consent of the parties.
>
> 2. This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of execution of the agreement

of amendment by which this paragraph 2 was incorporated into this concession agreement. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent.

PART V - THE CLAIMS

[86]. As stated in Part I above, the Tribunal at the request of the Claimant has decided to divide the proceedings into two stages. The present stage concerns what the Claimant refers to as the merits of the claim. The Claimant is asking the Tribunal to render a declaratory Award dealing with certain specific questions, *viz.* to make the following declarations:

(1) The Libyan Nationalisation Law of 7 December 1971 and the subsequent implementation thereof were each a breach of the obligations of the Libyan Government owed to the Claimant under the Concession Agreement and so remain;

(2) The said breaches were and are ineffective to terminate the Concession Agreement, which remains in law valid and subsisting;

(3) The Claimant is entitled to elect, at any time so long as the Respondent's breach continues, to treat the Concession Agreement as at an end;

(4) The Claimant is entitled to be restored to the full enjoyment of its rights under the Concession Agreement;

(5) The Claimant is the owner of its share of any crude oil extracted from the area of the Concession Agreement after as well as before 7 December 1971 and of all installations and other physical assets, and the Libyan Government has no right to any such oil, installations or physical assets, which it can enjoy or transfer to any third party;

(6) Performance of the Claimant's obligations under the Concession Agreement is suspended for so long as the Libyan Government remains in breach thereof; and

(7) The Claimant is entitled to damages in respect of the interference by the Libyan Government with the Claimant's enjoyment of its rights under the Concession Agreement. If the Claimant does not exercise its rights under Declaration (3) above, then it is entitled to damages accruing up to the date of the final award herein. If the Claimant does exercise the rights under Declaration (3) above, it is entitled to all damages arising from the wrongful act of the Libyan Government.

(8) The Claimant further respectfully requests the Sole Arbitrator to reserve for a subsequent stage of the proceedings the assessment of the damages due under Declaration (7) above.

[87]. The Claimant also asks the Tribunal to give directions in principle as to costs.

PART VI - THE ISSUES

[88]. The declarations which the Claimant asks the Tribunal to make raise certain principal issues. This Part will identify these issues and state the Claimant's submissions regarding them.

1. *Nature of the Concession*

[89]. The first issue is the nature of the BP Concession. The Claimant submits that "Concession No. 65 is a contractual instrument concluded pursuant to legislation which contemplated a contractual relationship." It also maintains that the BP Concession constitutes a direct contractual link between the Claimant and the Respondent. The Claimant places particular reliance on Clause 16 of the BP Concession which, *inter alia*, provides:

> The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.

[90]. The Claimant, in July 1973, submitted to the Tribunal an opinion of Professor Mohamed A. Omar of Cairo University in which it is stated that concession contracts under Libyan law are considered to belong to the category of administrative contracts. The following principles are said to apply to such agreements:

> The Government have the right to change unilaterally the clauses of the concession, and have also the right to terminate the concession. But these two rights are not absolute: the change of the clauses of the concession or its termination must be in pursuance of a true public interest. The judges have the right to review the change or termination to see whether they are based on good reasons or not. If the change or termination are not lawful, the concessionaire is entitled to obtain complete damages covering not only his actual losses but also all the profits he would have realised had the change or termination not taken place.

2. *Applicable Law*

[91]. The second issue is what law applies to the relationship between the Claimant and the Respondent. It will be recalled that paragraph 7 of Clause 28 of the BP Concession contains an express provision on the law governing the concession. The Claimant argues that Libyan law has been excluded as the sole governing law and that the law governing the BP Concession is public international law. Alternatively, the BP Concession itself constitutes the sole source of law controlling the relationship between the Parties. Orally, the Claimant submits that it does not place emphasis on the word "sole". In the further alternative the Claimant submits that the legal position of the parties falls to be decided by reference to "the general principles of law".

3. *Breach of Contract*

[92]. The third issue is whether the nationalisation by the Respondent constituted a breach of the contractual relationship allegedly existing between the Claimant and the Respondent. The Claimant submits that the action of the Respondent was a fundamental breach or repudiation of the concession agreement and that there was no legal justification for it.

4. *The Effect of the Breach of Contract*

[93]. The fourth issue is the legal effects of the nationalisation by the Respondent which in the Claimant's submission constitutes a breach of contract. The basic proposition upon which the Claimant relies in this respect is that where an agreement has been fundamentally violated by one party, the breach does not of itself put an end to the agreement. Some further act on the part of the innocent party is required. The party in breach does not have the power to put an end to the relationship by his own wrongful act. The Claimant argues that, as it has not exercised its undoubted right to treat the BP Concession as at an end, it continues in full force and effect. The Claimant submits, however, that it is not bound to fulfil its own obligations while the Respondent remains in breach.

[94]. The Claimant argues further that the primary remedy to which it is entitled by virtue of the continuing validity of the BP Concession is restoration of the position as it was prior to the BP Nationalisation Law. The Claimant also submits that it follows from the continuity of the Claimant's rights under the BP Concession to its share of oil extracted from the concession area that it remains the owner and that the Respondent has no power (either itself or through its agents) to transfer to third parties any valid title to such oil.

[95]. In particular any dealing with such oil by the Libyan Government, the Libyan National Oil Company or the Arab Gulf Exploration Company is a dealing with oil which does not belong to any of them. Such a dealing is unlawful and cannot serve as a basis for a claim to title to such oil anywhere in the world by anyone other than the Claimant.

[96]. The Claimant submits that the Tribunal is competent to make a declaration in these terms as between the Parties, because the requested Declaration is limited to a statement regarding the legal position existing under and in connection with the BP Concession.

[97]. Lastly, the Claimant submits for the purposes of the present stage of the proceedings that so long as the BP Concession remains in force, the Claimant is entitled to damages for actual loss caused to it by the Respondent's breaches of contract up to the date of the Tribunal's final Award. If and when the Claimant exercises its right to treat the BP Concession as terminated, it will be entitled not only to damages flowing from the specific breaches of contract (*damnum emergens*) but also damages for loss of the benefit of the contract as a whole (*lucrum cessans*).

PART VII - OPINION OF THE TRIBUNAL

1. *Introduction*

[98]. The Tribunal will now analyse the issues which arise in the arbitration at its present stage.

[99]. It is necessary as an initial step to treat in conjunction certain fundamental questions which are inherent in the two first issues defined in Part VI above, and which relate to the nature of the BP Concession and the law applicable to it.

[100]. In contradistinction to all national courts, the *ad hoc* international arbitral tribunal created under an agreement between a State and an alien, such as the present Tribunal, at least initially has no *lex fori* which, in the form of conflicts of law rules or otherwise, provides it with the framework of an established legal system under which it is constituted and to which it may have ultimate resort. With respect to the law of the arbitration, the attachment to a designated national jurisdiction is restricted to what, broadly speaking, constitute procedural matters and does not extend to the legal issues of substance. It is erroneous to assume, as has been done doctrinally, on the basis of the territorial sovereignty of the State where the physical seat of an international arbitral tribunal is located, that the *lex arbitri* necessarily governs the applicable conflicts of law rules. (See in this connection the award of 1964 in Case No. 1250 of the International Chamber of Commerce, in which Professor Henry Batiffol presided as chairman.) Even less does it necessarily constitute the proper law of the contract. Instead, if the parties to the agreement have not provided otherwise, such an arbitral tribunal is at liberty to choose the conflicts of law rules that it deems applicable, having regard to all the circumstances of the case. (*Cf.* Article VII of the European Convention on International Commercial Arbitration of 1961, *U.N. Economic Commission for Europe*, E/ECE/423; E/ECE/Trade 48.)

[101]. The Tribunal deems Danish conflicts of law rules—which not only are those of the *lex arbitri* but by virtue of not containing any relevant restrictive rules provide a wide leeway for the free exercise of party autonomy—to be applicable in the present case. This in the circumstances seems to be the most natural solution.

[102]. The contract containing the arbitration clause from which the Tribunal derives its jurisdiction is an elaborate document carefully drafted and conceived of by the Parties as a legal instrument binding upon them. Therefore primary reference must be made to that instrument itself in determining the law which governs the agreement.

[103]. As stated earlier, the Tribunal deems Danish conflicts of law rules to be applicable. Having regard to them, the Tribunal accepts the distinct provisions of paragraph 7 of Clause 28 of the BP Concession as conclusive with respect to the issue of which legal system governs the agreement,

including the remedies available in the event of breach.

[104]. The paragraph is analysed in detail in Section 3 below.

2. *Nature of the Concession*

[105]. It follows from the analysis of the contractual arrangements among the Respondent, the Claimant and Mr. Hunt made in subsection (b) of Section 2 of Part IV above that the BP Concession constitutes a direct contractual link between the Respondent and the Claimant with respect to the interests of the Claimant under Concession 65. Hence the Tribunal, with respect to the first issue arising in this case, accepts the Claimant's submissions set forth in Section l of Part VI above.

3. *Applicable Law*

[106]. Paragraph 7 of Clause 28 of the BP Concession, quoted in Part I above, stipulates which law is to govern the agreement. While the provision generates practical difficulties in its implementation, it offers guidance in a negative sense by excluding the relevance of any single municipal legal system as such. To the extent possible, the Tribunal will apply the clause according to its clear and apparent meaning. Natural as this would be in any event, such an interpretation is the more compelling as the contractual document is of a standardised type prescribed by the Respondent. The governing law clause moreover was the final product of successive changes made in the Libyan petroleum legislation in the decade between 1955 and 1965 by which the relevance of Libyan law was progressively reduced.

[107]. In paragraph 7 of Clause 28, reference is made to the principles of law of Libya common to the principles of international law, and only if such common principles do not exist with respect to a particular matter, to the general principles of law. The Claimant argues, in the first of three alternative submissions, that international law alone is applicable.

[108]. This argument has two aspects.

[109]. (a) After indicating that a relevant distinction exists between "principles" and "rules"—a line of reasoning which is not further pursued in this connection—the Claimant states:

> ... the acceptance of a principle must be supported by both Libyan and international law if it is to govern the Concession. Therefore if the conduct of a party to the Concession cannot be justified by the principles of both Libyan law and international law, it is not justifiable under the Concession. It is justifiable only if the principles of both systems of law—Libyan and international—support it. Thus conduct which is a breach of the principles of international law

must necessarily be a breach of the Concession, even if not in breach of the principles of Libyan law.

This reasoning is clearly incomplete since it entirely leaves out of the picture the direction which follows from paragraph 7 of Clause 28 that conduct etc. in the last analysis should be tested by reference to the general principles of law. It is not correct to say that "a principle must be supported by both Libyan law and international law [in order to be] justifiable under the Concession" and that conduct "is justifiable only if principles of both systems of law—Libyan and international—support it". The principle may still be acceptable, and the conduct justifiable, if supported by the general principles of law. To take a few examples, one system may prescribe that payments shall be made in one currency and the other system that payment shall be made in a different currency. Clearly, in such a case, under paragraph 7 of Clause 28 the general principles of law must provide the answer to the question what currency is to be used. If one system imposes automatic, obligatory limitation after the lapse of a given period, but the other does not, again the general principles of law will be resorted to for the purpose of determining whether a claim is barred by the lapse of time. Similarly, if one system contains the principle that any default by a debtor entitles a creditor to accelerate payment of principal and interest with immediate effect, but the other system does not offer the creditor such a remedy, the general principles of law will govern the issue respecting the availability of that remedy. And so the situation must be also in regard to breach of contract. If a particular action by a party amounts to breach of contract under one system but not under the other, the issue is one which can only be decided by reference to the general principles of law. Thus, the first part of the Claimant's argument must be rejected. It is not sufficient for the Claimant to show that the conduct of the Respondent is a breach of international law as a basis for maintaining a claim based on breach of contract. In the event that international law and Libyan law conflict on that issue, the question is to be resolved by the application of the general principles of law.

[110]. (b) Secondly, the Claimant argues that since the Parties have expressly excluded the direct and sole application of Libyan law, but have made reference to the general principles of law, and since "a" system must govern, "the only system that is left is public international law".

The Tribunal cannot accept the submission that public international law applies, for paragraph 7 of Clause 28 does not so stipulate. Nor does the BP Concession itself constitute the sole source of law controlling the relationship between the Parties. The governing system of law is what that clause expressly provides, *viz.* in the absence of principles common to the law of Libya and international law, the general principles of law, including such of those principles as may have been applied by international tribunals.

4. *Breach of Contract*

[111]. No elaborate reasons are required to resolve the third issue in this case. The BP Nationalisation Law, and the actions taken thereunder by the Respondent, do constitute a fundamental breach of the BP Concession as they amount to a total repudiation of the agreement and the obligations of the Respondent thereunder, and, on the basis of rules of applicable systems of law too elementary and voluminous to require or permit citation, the Tribunal so holds. Further, the taking by the

Respondent of the property, rights and interests of the Claimant clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character. Nearly two years have now passed since the nationalisation, and the fact that no offer of compensation has been made indicates that the taking was also confiscatory.

5. *The Effect of the Breach of Contract*

[112]. The Tribunal having held that the Respondent has committed a fundamental breach of contract, only one issue remains to be considered, *i.e.* the effect in law of this breach, the resulting legal obligations of the Respondent and the remedies available to the Claimant, all to the extent that these questions can and need be answered for the purpose of ruling upon the Declarations which the Claimant now asks the Tribunal to make. This issue will be considered under separate headings below.

(a) *Introductory Remarks*

[113]. All the Declarations requested by the Claimant to be made by the Tribunal turn upon the issue of the effect of the breach of contract which, as determined earlier, has been committed by the Respondent. The legal questions relevant to a resolution of this issue cannot be treated wholly in isolation from one another as they are interdependent and in certain contexts inseparable. However, the following distinct points require analysis:

(i) Did the BP Concession survive the nationalisation?

[114]. The Claimant, it will be recalled, argues that where an agreement has been fundamentally violated by one party, the breach does not of itself put an end to it, but the party not in default remains entitled to treat the contract as being in full force and effect, or alternatively, to declare it terminated. As the argument is not qualified by reference to the time element, presumably the innocent party would retain his alleged rights indefinitely.

[115]. The question is basic to the requested Declarations Nos. 2, 3 and 6.

(ii) Are specific performance and *restitutio in integrum* remedies available to the Claimant? Can the Claimant be declared in these proceedings to be the owner of a share of the crude oil produced in the concession area before as well as after the passing of the BP Nationalisation Law, and of a share of all installations and other physical assets related to the BP Concession?

[116]. The Claimant's requested Declaration No. 4 is a claim for acknowledgment of its right to be restored to the full enjoyment of its rights under the BP Concession. The requested Declaration No. 5 amounts to a declaratory award concerning the Claimant's ownership to oil and certain assets.

[117]. It may be argued that the Claimant does not in fact ask for an order of *restitutio in integrum*, but merely for a declaratory statement as to its legal position under the BP Concession and with respect to certain property and that the issue of whether restitution in kind is an available remedy therefore is not presented. Such a distinction, subtle though it is, may be relevant for a proper understanding of the decisions of international tribunals (see further below). The Tribunal holds, however, that no such distinction should be made. If it is found that the Claimant is entitled to be restored to the full enjoyment of its rights under the BP Concession, and is the owner of the oil and the assets referred to, then the Claimant is entitled to an order for specific performance or, alternatively, a declaratory award of entitlement to specific performance. The question arising for decision therefore should be formulated as set forth in the first sentence under this paragraph (ii).

ad (i) and (ii)

[118]. While the questions in paragraphs (i) and (ii) above for certain purposes of analysis are separable, it is hardly realistic to treat in depth abstract rights and concrete remedies without correlating the two. For as Judge Huber said in his award in the *Spanish Zone of Morocco* case:

> La responsabilité est le corollaire nécessaire du droit. Tous droits d'ordre international ont pour conséquence une responsabilité internationale. La responsabilité entraîne comme conséquence l'obligation d'accorder une réparation au cas où l'obligation n'aurait pas été remplie. Reste à examiner la nature et l'étendue de la réparation. (1925; II *U.N.R.I.A.A.*, p. 615 at p. 641.)

[119]. The two questions of the continuity of the BP Concession and the requested remedy of specific performance and *restitutio in integrum* therefore will be treated under one heading.

(iii) Is the Claimant entitled to damages, and how should they be determined?

(b) *Continuity of the BP Concession, Specific Performance, and* Restitutio in Integrum

(i) *The Principles of Libyan Law*

[120]. In interpreting the expression "the principles of law of Libya" in paragraph 7 of Clause 28 of the BP Concession the Tribunal finds that the BP Nationalisation Law must be disregarded. One ground for this is that the Tribunal considers the action taken as an abuse of sovereign power. Another reason is that it can hardly have been the intention of the Parties that "the principles of law of Libya" should include provisions specifically directed against the other Party. The fact that one of the Parties to the BP Concession is in sole control of the legislative machinery of Libya and thus is in a position to mould the law of Libya after its will, makes it doubtful what in fact should be regarded as "the principles of law of Libya" as that expression is used in Clause 28. But the Tribunal considers that at any rate a legislative measure solely aimed at the other party should be ignored. The expression must have reference to provisions of more general application.

[121]. Leaving on one side the BP Nationalisation Law, it may thus be asked what the principles of Libyan law are on the questions of the continuity of the BP Concession, specific performance and *restitutio in integrum*. The Tribunal has not been in a position to form an opinion in this respect except on the basis of the argument presented by the Claimant which appears less than exhaustive.

[122]. The Claimant relies on Article 159 of the Libyan Civil Code which provides:

> In bilateral contracts (contrats synnallagmatiques) if one of the parties does not perform his obligation the other party may, after serving a formal summons on the debtor, demand the performance of the contract or its rescission, with damages, if due, in either case.

[123]. The Claimant further relies on the above-mentioned opinion of Professor Mohamed A. Omar, dated July, 1973, which on the basis of pronouncements by El-Sanhoury in his book *The General Theory of Obligations*, 1966, states, *inter alia*, as follows:

> When a breach of the contract occurs the wronged party has the right to ask the court to order the other party to carry out his duties. If possible, the eventual order of the court is enforced specifically. If the specific performance is not possible, the court awards damages to the wronged party.

[124]. A reference also should be made to the further statements by Professor Omar in his said opinion which are quoted in Section 1 of Part VI above and from which it appears that if the Government unilaterally changes or terminates a concession contract, the concessionaire under Libyan law is entitled to obtain damages. However, Professor Omar makes no reference in this context to the availability to the concessionaire of the remedy of specific performance or *restitutio in integrum* against the State.

[125]. The Tribunal finds that no certain conclusions as to the position of Libyan law can be drawn on the material available, nor is it necessary to pursue the research on Libyan law further on account of the conclusions presented below as to public international law, which is a second necessary link in the argument.

(ii) *Public International Law—The Law of Treaties*

[126]. The Vienna Convention on the Law of Treaties of 1969 (the "Convention") is viewed as a codification of the customary international law on the subject of unilateral termination or breach of a treaty. While the concept of "treaty" used in the Convention is restricted in its scope, certain of the provisions of the Convention have analogous application to international agreements in general which are governed by international law.

[127]. The main principle established in the Convention is the rule of *pacta sunt servanda* in Article 26, which provides:

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[128]. The Convention further stipulates in Article 42 that the termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or the Convention.

[129]. The Convention, however, conspicuously lacks any rules on remedies. Therefore customary international law, and particularly the case law of international tribunals, must answer the question of what remedies are available without the benefit of guidance from the Convention. It is true that there is a fleeting reference in Article 65, Paragraph 5, to a party "claiming performance of the treaty or alleging its violation", but in the context this cannot be construed as a considered incorporation of specific performance as a remedy. The main rule in Article 65 of the Convention is instead that in the event of disputes as to the validity or termination of a treaty, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

[130]. The sole provision in the Convention which has a direct bearing on the issues dealt with here is that contained in Article 60, Paragraph 1, which reads:

> A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

[131]. The International Law Commission was of the unanimous opinion that a breach of a treaty, regardless of how serious it is, does not *ipso facto* terminate the treaty and that a State is not at liberty simply to state that a breach of treaty has occurred and that the treaty as a consequence is determined. (See the Report of the Chairman of the Swedish Delegation to the Vienna Conference, Dr. Hans Blix: *Kungliga Utrikesdepartementet, Konferensen i Wien 1968 och 1969 angaende traktatratten; Den svenska delegationens slutrapport*, Stockholm, 1970 (cited below as "*Swedish*

Report"), p. 223.) It would indeed appear singularly inconsistent to take a different position on the effect of a breach of treaty as an opposite view would be tantamount to denying the principle of *pacta sunt servanda* enshrined in Article 26. However, Article 60, while implicitly resting on the proposition that a treaty continues in effect despite its unilateral abrogation by one party, falls short of providing that the innocent party is entitled in such a situation to demand specific performance or, as the case may be, *restitutio in integrum*. Public international law outside the Convention thus must be resorted to for determining the remedies available to the innocent party besides its right under Article 60 to suspend its own performance, or terminate the treaty on account of the other party's repudiation of it. The latter rule in the context should be understood merely as authorising—and requiring—a formal declaration to the effect that performance under the treaty by the party not in default will come to an end. It was precisely this limited aspect of the provision which was subject to deliberations among the members of the International Law Commission. (See *Swedish Report,* pp. 223224.)

[132]. Lord McNair, writing in 1961, referring to the Harvard Research, and relying also on *Charlton v. Kelly* (1913; 229 U.S. 447), expressed the rule later embodied in Article 60 in a somewhat more qualified form:

> One point is clear: a breach by one party (including an unlawful denunciation) does not automatically terminate the treaty, for the other party may prefer to maintain it in existence. Viewed from one angle, the right of abrogation is a remedy which the party wronged may or may not pursue. But he must make up his mind within a reasonable time; otherwise he will lose his right to abrogate the treaty.
>
> (McNair, *The Law of Treaties*, 1961, p. 553, *cf.* p. 571.)

[133]. As for the ultimate remedies available to the innocent party, Lord McNair states that the International Court of Justice may be asked to issue a declaration that the wronged party at its option may abrogate the treaty (adding that the "precise remedy obtainable by means of arbitration depends upon the instrument providing for arbitration"), or to award "reparation, which, according to the circumstances, may take the form of restitution or indemnity" (*ibid.*, p. 574). The latter statement is not expounded, nor is authority cited for it except the *Chorzow Factory* cases which are discussed below.

(iii) *Customary Public International Law and the Case Law of International Tribunals— the Remedies of Specific Performance and* Restitutio in Integrum

[134]. With regard to the question of the availability of the remedies of specific performance and *restitutio in integrum* in customary international law, it is important at the outset to stress that the inquiry below will be restricted to the general field of economic interests and especially to longterm contracts of a commercial or industrial character and property and other assets employed in industrial undertakings. The relevant issues may be fundamentally different in other contexts, such

as disputes concerning sovereignty over territory. A decision by a tribunal with respect to the alignment of a boundary between two States naturally implies that when the judgment has become effective; the State which is in possession of territory declared in the judgment to be the territory of the other State must cede it. Thus the judgment can be characterised as decreeing *restitutio in integrum* if the territory to be so ceded has been occupied by the wrongful possessor in the near or distant past. If the decision of the tribunal is based on a treaty, such restitution may be said to be of a contractual nature. Every international decision on a boundary at least impliedly presents this feature. The International Court of Justice in the *Temple of Preah Vihear (Merits)* case expressly decided not only that the temple in dispute was situated in territory under the sovereignty of Cambodia but also held that Thailand was under an obligation to withdraw any military or police forces or other guards or keepers stationed by her at the temple or in its vicinity on Cambodian territory. The Court went even further by ordering Thailand to restore to Cambodia any object which Thai authorities might have removed from the temple or the temple area since the date of the occupation of the temple by Thailand in 1954. (*Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Merits)*, Judgment of 15 June 1962: *I.C.J. Reports* 1962, pp. 36-37.) The restitution in kind ordered by the Court in this instance, it may be noted, comprised not only the temple and the territory on which it was situated but specific, unique works of art of religious significance.

[135]. If territory to a State always represents more than the economic market value of the real estate there are other situations also in which restitution in kind from one State to another of things appropriated in violation of an international obligation may be indicated for particular reasons. This is why the limitation is made in the inquiry below to cases and other materials relating to matters which in essence are of an economic character, such as industrial enterprises and their like.

[136]. Professor Schwebel, addressing himself to the question whether specific performance is, or should be, available to parties to a contract between a State and a foreign national, concludes, *de lege lata*, that "the fact that specific performance normally is not afforded against a state in the national sphere suggests that it normally will not be accorded in the international sphere" (Schwebel, "Speculations on Specific Performance of a Contract Between a State and a Foreign National" in *The Rights and Duties of Private Investors Abroad*, 1965, p. 201, at p. 210). However, he continues:

> Good faith observance of international contracts imports performance of the terms of the contract by both parties. Where there is a breach of contract, the remedy to repair it may be specific performance—especially where it is the only remedy which can repair it effectively. If a state, as is sometimes the case, lacks the capacity to pay the damages it would be obliged to pay were monetary compensation required, it may be said that good faith requires the contract to be performed specifically. (Schwebel, *ibid.*, at pp. 209-210.)

[137]. A particular point made by Professor Schwebel is that declaratory awards are sometimes rendered by international arbitral tribunals, which authoritatively establish the rights of the parties, or the correct interpretation of a concession agreement, or how it should be executed, and these awards subsequently have been performed accordingly. He concludes:

> How far removed is this process—this effective remedy—from that of specific performance?

> Actually, it is very close. (Schwebel, *ibid.*, at p. 211.)

[138]. Professor Jennings, citing the *Cutting, Silesian Loans* and *Anglo-Iranian Oil Co.* cases, adds the thought that while it "is not easy to find an order for restitution in the reports of tribunals", one should "remember that the law is demonstrated as much by successful negotiation on a basis of law as by the decisions of courts." (Jennings, "Rules Governing Contracts Between States and Foreign Nationals", *ibid.*, p. 123, at p. 136.)

[139]. It is difficult to state what the practice of States has been in diplomacy as such practice is published only sparsely.

[140]. Insofar as can be judged by American practice before World War II, the United States have requested restitution in kind, particularly in cases of taking of property, and insisted on specific performance by foreign States of undertakings made in contracts *vis-àvisa* American nationals. However,

> the choice of remedies has closely depended on the circumstances in each case, and the aim of the State Department has invariably been the flexible and reasonable one of seeking to prevent whatever government actions that might be prevented, or if that is too late, to obtain reparation or compensation such as has seemed appropriate and effective in the circumstances at hand.
>
> (Wetter, "Diplomatic Assistance to Private Investment; A Study of the Theory and Practice of the United States During the Twentieth Century", 29 *University of Chicago Law Review* [1962], p. 275, at p. 324.)

[141]. It is believed that the current practice of States exercising diplomatic protection of its nationals in cases of expropriations or nationalisations—whether or not affecting concessions—which have been fully implemented is to demand either simply compensation (qualified as prompt, adequate and effective, or otherwise qualified) or reparation in the form of restitution in kind, but in the latter case suggesting the alternative remedy, exercisable at the option of the defaulting State, of making reparation in the form of monetary compensation. This view seems to be confirmed by the text of the so-called Hickenlooper Amendment to the United States Foreign Assistance Act of 1962 which does not even mention restitution in kind. It is also significant that the British Government took precisely this view in the Note of 23 December 1971 which has been quoted in full in Part IV above.

[142]. It should be noted, however, that very recently a diplomatic action which may be differently interpreted was taken by the United States Government. By a law of 11 June 1973, the Government of Libya nationalised the property, rights and interests of the Nelson Bunker Hunt Oil Company in and relating to Concession 65. On 5 July 1973, the United States protested against this taking of the said property, rights and interests in the following terms:

> The United States Government has now had the opportunity to review the public statement by the Chairman of the Revolutionary Command Council on June 11, 1973, and the official

commentary accompanying Law No. 42 of the same date. It is clear from those pronouncements that the reasons for the action of the Libyan Arab Republic Government against the rights and property of the Nelson Bunker Hunt Oil Company were political reprisal against the United States Government and coercion against the economic interests of certain other U.S. Nationals in Libya. Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on considerations of political reprisal and economic coercion are invalid and not entitled to recognition by other states.

In these circumstances, the United States Government must protest the action in violation of international law against the Nelson Bunker Hunt Oil Company, and it calls upon the Libyan Arab Republic Government to take the necessary steps to rectify this situation and to discharge its obligations under international law with respect to the Nelson Bunker Hunt Oil Company.

[143]. The question as to whether specific performance and *restitutio in integrum* of industrial property and the like, are remedies in fact accorded by international tribunals, particularly in disputes concerning contracts between States and aliens, will now be examined by an analysis of the relevant cases. The first of these relate to the remedy of restitution in kind in situations of unlawful appropriation of foreign-owned property by a State. A second group of cases are those where express treaty provisions have provided for specific remedies. A third category of cases, which are of particular relevance in these proceedings, are international arbitral awards in disputes under contracts between States and aliens. Lastly, the submissions of the United Kingdom in the *Anglo-Iranian Oil Co.* case will be considered.

Cases Concerning Unlawful Taking of Foreign-Owned Property

[144]. Certain judgments in the series of decisions dealing with the Chorzow Factory are of interest in the context. It has been argued that Judgment No. 13 in the *Chorzow Factory (Claim for Indemnity, Merits)* case (*P.C.I.J.*, Ser. A, No. 17 (1928)) constitutes authority for the proposition that *restitutio in integrum* is a recognised remedy of international law. In fact, practically all writers on international law who advance the view that *restitutio in integrum* is so recognised rely largely on the pronouncements of the Court in this case. (Citation of such literature is superfluous here to the extent that the writers merely repeat the statements of the Court.) However, the judgment is not authority on the point, for the claimant, the German Government, did not claim *restitutio in integrum*, and anything the Court may have stated on the availability of that remedy therefore is *obiter*. The Court had held in an earlier judgment that the expropriation by Poland violated Article 6 and the following Articles of the applicable so-called Geneva Convention. Having regard thereto, Germany's principal final submission was that "the Polish Government is under an obligation to make good the subsequent injury sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought" (*ibid.*, p. 12). It will be observed that what the Court established in the crucial passage of the Judgment were "the principles which should serve to determine the amount of compensation due for an act contrary to international law", and it was in the course of defining such principles that the Court made the following oft-quoted pronouncement:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if (hat act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. (*Ibid.*, p. 47.)

[145]. The Court then went on to say:

> This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for the maintenance of economic life in Upper Silesia on the basis of respect for the *status quo*. The dispossession of an industrial undertaking—the expropriation of which is prohibited by the Geneva Convention—then involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designated to take the place of restitution which has become impossible.
>
> *(Ibid.,* pp. 47—48.)

[146]. However, summing up its foregoing statements, the Court again emphasised the limited purport of its holding by saying that "such being the principles to be followed in fixing the compensation due..." *(ibid.,* p. 48). While the Court, thus, did not have occasion to consider a claim for *restitutio in integrum*, since no such claim was made, it did pass upon certain submissions for orders in the nature of injunctions, *i.e.*. Germany's two alternative final submissions (*ibid.*, p. 12). The requested prohibition of exports was not considered because of the fact that compensation had been awarded, and the alternative claim for a prohibition of future exploitation also was deemed incompatible therewith (*ibid.*, p. 59).

[147]. If the limited purport of the holding in Judgment No. 13 is suggested by its express wording, the history of the earlier phases of the *Chorzow Factory* proceedings before the Court can leave no doubt about its meaning. It has further been contended that the Court in Judgment No. 7 ordered restitution in kind of the disputed factory (Personnaz, *La Réparation du Préjudice en Droit International Public* (1938), p. 85), but in fact the Court in that Judgment decided only that the application of certain provisions of the Polish law of 14 July 1920 as to German nationals or companies controlled by them constituted an infraction of the Geneva Convention and that the attitude of the Polish Government towards the companies was not in conformity with the provisions of the Convention. In the negotiations which followed between Germany and Poland after the rendering of Judgment No. 7, Germany demanded "the restoration of the factory as an industrial enterprise to the Bayerische", to which request Poland objected that "it was unable to comply for reasons of fact and of law" (*Case Concerning the Factory at Chorzow (Claim for Indemnity)* (*Jurisdiction*), *P.C.I.J.*, Ser. A, No. 9, p. 16 (1927)). In the last note of the German Government which preceded the claim that eventually resulted in Judgments Nos. 8 and 13, it was made clear that "the German Government had abandoned its original claim for the restitution of the factory [because] it

had come to the conclusion that the Chorzow factory, in its present condition, no longer corresponded to the factory as it was before the taking over in 1922..." *(ibid.,* p. 17).

[148]. There is a further aspect to the pronouncements of the Court in Judgment No. 13. Already in the decision by which the Court assumed jurisdiction in the case, *i.e.* Judgment No. 8 (*P.C.I.J.*, Ser. A, No. 9 (1927)) the remark was made that the Geneva Convention was "mainly designed to preserve the *status quo* in Polish Upper Silesia and therefore that, whenever possible, *restitutio in pristinum* is the natural redress of any violation of, or failure to observe, the provisions therein contained" (*ibid.*, p. 28). In Judgment No. 13 the same thought was reflected in the passage appearing on pp. 4748 which has been quoted above. The remedy of restitution in kind thus was considered appropriate by the Court because of the coinciding circumstances that the expropriation in question violated a treaty and that the main object of that treaty was to preserve a *status quo* by prohibiting the expropriation of certain property while allowing certain other such expropriations. For these reasons the *Chorzow Factory* decisions may in fact more appropriately be classified as belonging to the group of cases dealt with below under the heading Specific Remedies Created by Treaty or *Compromis*.

[149]. The award in the *Martini* case (1930; II *U.N.R.I.A.A.*, p. 975) made reference to the *Chorzow Factory (Claim for Idemnity, Merits)* case, but the issue of restitution in kind did not come up for consideration.

[150]. It was argued by Greece in the *Forests of Central Rhodope (Merits)* case (1933; III *U.N.R.I.A.A.*, p. 1405) that Bulgaria should restore the properties in question or, failing restitution, pay compensation for them. The arbitrator, Osten Undén, stated that in the course of the proceedings the choice between the two remedies had been left in his discretion. The claim for *restitutio in integrum* was rejected and the arbitrator stated that in the circumstances the only practical solution was to award an indemnity:

> L'Arbitre estime qu'on ne saurait imposer au Défendeur l'obligation de restituer les forêts aux réclamants. Plusieurs raisons militent en faveur de cette attitude. Les réclamants pour lesquels une demande formée par le Gouvernement hellénique a été considéréé comme recevable, sont associés d'une société commerciale comptant d'autres associés encore. II serait done inadmissible d'obliger le Bulgarie à restituer intégralement les forêts litigieuses. II n'est guère vraisemblable, en outre, que les forêts se trouvent dans le même état qu'en 1918. Etant donné que la plupart des droits sur les forêts ont le caractère de droits de coupe d'une quantité fixe de bois, devant être enlevée pendant une période déterminée, une sentence concluant à la restitution serait conditionnée par l'examen de la question de savoir si l'on peut actuellement obtenir la quantité cédée. Une telle sentence exigerait aussi l'examen et le règlement des droits qui pourraient avoir surgi dans l'intervalle en faveur d'autres personnes et être; conformes ou non aux droits des réclamants.
>
> La seule solution pratique du différend consiste par conséquent à imposer au Défendeur l'obligation de payer une indemnité. (*ibid.*, p. 1432.)

Specific Remedies Created by Treaty or Compromis

[151]. The remedy of restitution in kind has often been indicated in treaties made in peace time to put an end to situations brought about by seizures of property. One instance that may be cited is the award in the *Portuguese Religious Properties* case (1920; I *U.N.R.I.A.A.*, p. 9). Another is the treaty upon which various interpretations were put by the parties in the *Junghans* case (1939; III *U.N.R.I.A.A.*, p. 1845). There Germany, relying on the provisions of the treaty, sought a declaration that the forest in dispute should be restored by the Roumanian Government, and only if such restitution was impossible should it be replaced by an indemnity (*ibid.*, p. 1850). The tribunal did order the Roumanian Government to take all measures necessary to put the property at the disposal of the interested parties but also added that if the Government of Roumania failed to do so within two months of the award, an indemnity (the amount of which the tribunal, in the absence of argument, could not at that time assess) would be due. In the treaty applied by the tribunal, the guilty State thus was given the option to elect between effecting a restitution in kind and paying damages.

[152]. A *compromis* of the same character was that between the United States and Cuba in the *Walter Fletcher Smith* claim (1929; II *U.N.R.I.A.A.*, p. 913). The arbitrator, while pronouncing that restitution of the properties in question, which it was open to him to decree under one alternative heading, "would be not inappropriate", decided, in the "best interests of the parties, and of the public", to award merely damages (*ibid.*, p. 918).

[153]. Specific restitution of public and private property also has been prescribed in numerous peace treaties, such as the Treaty of Versailles and the 1954 Paris Convention on Settlement of Matters Arising out of the War and the Occupation.

[154]. A reference may be made in this context to the chapter on claims for restitution in Wortley, *Expropriation in Public International Law* (1959), pp. 72-92.

[155]. International arbitral tribunals occasionally have been vested by treaty with extraordinarily wide powers to order annulment of administrative decrees, and issue injunctions and make other dispositions. Such was the case, *e.g.*, with respect to the tribunals appointed to resolve disputes between the Algerian State and the Compagnie de recherches et d'exploitation de pétrole au Sahara (CREPS) and that between the Société francise pour la recherche et l'exploitation des pétroles en Algérie (SOFREPAL) and the Société nationale de recherches et d'exploitation des pétroles en Algérie (SN REPAL) (*cf. Yearbook of the International Court of Justice*, 1968-69, pp. 112-113). Both were constituted pursuant to the Franco-Algerian Agreement of 29 July 1965 concerning the settlement of questions relating to hydrocarbons and the industrial development of Algeria (*Journal Officiel de la République Française*, 28 December 1965, p. 11793). According to Article 178 of the said Agreement, the decisions of the arbitral tribunals are self-executory in the territories of France and Algeria. The powers of the tribunals are defined in Article 174, which includes the following provision:

> [Le tribunal] peut prononcer l'annulation de toute mesure contraire au droit applicable et ordonner la réparation des préjudices subis par l'octroi de dommages et intérêts ou tout autre procédé qu'il juge approprié; il peut ordonner toute compensation entre les sommes mises à la charge de l'une des parties par sa sentence et celles dont l'autre partie serait débitrice à l'égard de la première.

[156]. The quoted passage was modelled on Article 7 of the earlier Treaty on Arbitration of 26 June 1963 (*Journal Officiel de la République Française*, 31 August 1963, p. 7964) which formed part of the agreements implementing the so-called Evian Agreements. The interpretation has been placed on Article 7 that the tribunal might "ordonner la réparation du dommage subi, soit en allouant une indemnité, soit par tout autre moyen, éventuellement par la 'restitutio in integrum'". (Vignes, "L'accord franco-algérien du 26 juin 1963 en matière d'arbitrage pétrolier pour le respect des droits acquis au Sahara", 10 *Annuaire Français de Droit International* (1964), p. 383, at p. 392.)

[157]. The exceptional character of the treaty provisions now referred to is explained not only by the nature of the agreements reached between the contracting States but by the historical position of the concessionary enterprises which under a French statute of 1958 had had direct recourse to the *Conseil d'Etat* in disputes under the concessions with the Government of France:

> Cette clause est remarquable; elle ne peut s'expliquer que par les circonstances dans lesquelles l'accord a été conclu et par le souci d'assurer aux sociétés pétrolières les mêmes garanties qui leur étaient antérieurement conférées. Manifestement, référence est ainsi faite au Conseil d'Etat Français, juge de l'excès de pouvoir (annulation) et juge en plein contentieux (indemnités). Pourtant, les pouvoirs du Tribunal arbitral international sont encore plus larges: il peut procéder par injonction à l'égard de la Puissance publique algérienne et ses sentences sont directement exé cutoires contre elle. (Vignes, *ibid.*, p. 393.)

[158]. The treaties and cases decided pursuant to them which have now been described have the feature in common of resting upon the specific consent of all parties concerned, and they cannot therefore be regarded as expressive of principles of public international law; nor are such treaties and *compromis* sufficiently numerous and consistent to be regarded as evidence of a uniform State practice.

Remedies Invoked and Awarded in International Cases Concerning Contracts Between States and Aliens

[159]. The awards of international tribunals in cases concerning concessions evidently are of particular significance in the present proceedings.

[160]. Many such cases, especially where the origin of the dispute has been a repudiation or termination of the contract by the State or by the concessionaire, are irrelevant to the inquiry because of the fact that they have related solely to the composition or assessment of damages and no claim for specific performance or *restitutio in integrum* has been advanced. Merely by way of illustration, one may cite as cases falling under this category the awards in the *Delagoa Bay Railway* case (1900; Whiteman, *Damages in International Law*, Vol. III, 1943, p. 1694), the second arbitration between *Duff Development Company, Limited* and *The Government of Kelantan* (1921, unpublished), the *Palestine Railway* case (1922; Wetter and Schwebel, "Some Little-Known Cases on Concessions", 40 *British Yearbook of International Law* (1964), p. 183, at p. 222), the *Lena Goldfields* case (1930; *The Times*, 3 September 1930; 36 *Cornell Law Quarterly* (1950), p. 41), the *Warsaw Electricity* case (1932; III *U.N.R.I.A.A.*, p. 1679), *Losinger et Cie. S.A. v. the Government of Yugoslavia* (1934; reproduced in

P.C.I.J., Ser. C, No. 78, p. 54), and the *Sapphire* case (1963; cited in Part III above). The majority of concession cases decided by claims commissions, and particularly the Venezuelan and Mexican claims commissions, also relate solely or predominantly to the payment of compensation on the basis of the applicable treaty provisions.

[161]. In another series of cases, the tribunals have been asked to tender declaratory awards, and in these arbitrations both parties to a contract have defined the issue as being whether a particular clause is to be interpreted in one way or another, or whether a particular action or conduct by one of the parties would or would not be permissible under the agreement. The most explicit instances are the following arbitrations: *Petroleum Development (Qatar) Ltd. v. Ruler of Qatar* (1950; 18 *International Law Reports*, p. 161), *Petroleum Development Ltd. v. Sheikh of Abu Dhabi* (1951; 18 *International Law Reports*, p. 144), and the *Aramco* case (cited in Part III above).

[162]. The *Abu Dhabi* and *Qatar* awards established essentially, in the form of declaratory awards, that the subsoil underneath the territorial waters was included in the concession areas but that the contiguous continental shelves were not. In the *Aramco* case, it was held, basically, that the agreement between Mr. Onassis and Saudi Arabia was "in conflict with the Aramco Concession Agreement and is not effective against Aramco" (quoted from the privately printed edition of the Award, p. 127).

[163]. In some instances, the tribunals have passed upon the validity as such of a concession instrument. Thus, the Permanent Court of International Justice considered the concessions of Mr. Mavrommatis valid in the *Mavrommatis Jerusalem Concessions* case *(P.C.I.J.*, Ser. A, No. 5, p. 31), but the Court took pains to point out that this issue was decided as a preliminary question only (*ibid.*, p. 29); the decision also must be considered in the light of the related pleading that the concessions were invalid *ab initio* on account of Mr. Mavrommatis's nationality. The tribunal in the *Société Rialet v. Government of Ethiopia* case (1929; 8 *Recueil des Décisions des Tribunaux Arbitraux Mixtes Institués par les Traités de Paix*, 1929), at the request of the company declared the contracts at issue rescinded.

[164]. Some of the cases arising under a Greek utility concession of 1935 (Wetter and Schwebel, *op. cit.*, p. 194) go further than the declarations described in the *Aramco* group of cases, and the awards sometimes establish in extensive detail the precise rights and obligations of the parties in specific terms. The *Beyrouth Water* case (1953; reproduced in *I.C.J. Pleadings*, "*Electricité de Beyrouth" Company case* (*France v. Lebanon*), 1954, p. 423) is an illustration of an arbitration where the tribunal not only affirmed the validity and binding force of the contractual undertakings but ruled upon a large number of specific declarations requested by each of the parties.

[165]. In this context, reference may be made to the claims of France in the *Case Concerning the Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société RadioOrient (France v. Lebanon, I.C.J. Pleadings).* Lebanon had imposed taxes on the port company in violation of the tax exemption granted to the company in its concession, and had refused to arbitrate the resulting dispute, and further had imposed customs duties on goods imported by the radio company in violation of that company's concession which provided for certain customs duty exemptions. Before the Court, France maintined that these acts of Lebanon were unlawful and engaged her responsibility by entitling France to claim "adequate reparation". Accordingly, France claimed with

respect to the port company, *inter alia* :

> l'abandon par le Gouvernement libanais de l'exécution à l'encontre de la Compagnie des dispositions de la loi du 26 juillet 1956,

and, with respect to the radio company, *inter alia* :

> la cessation immédiate des mesures d'exécution de la loi du 26 juillet 1956 (*ibid.*, p. 49).

[166]. The Court never had occasion to consider these requests as the case was settled amicably. (See *Case concerning the Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient (France v. Lebanon)*, Order of 31 August 1960, *l.C.J. Reports*, 1960, p. 186; *cf.* on the terms of the settlement concerning the port company *Le Monde*, 15 April 1960.)

[167]. The tribunal in the *Greek Telephone Company* case (1935; Wetter and Schwebel, *op. cit.*, p. 216) did order a particular telephone line to be transferred to the concessionaire but added that if the State did not do so for important State reasons, full compensation would be payable. In this respect, the case resembles the treaty provision and decision in the *Junghans* case cited earlier.

[168]. A case in which the issue of specific performance was presented in a rather clearer fashion was the first arbitration between *Duff Development Company, Limited* and *The Government of Kelantan* (1916; unpublished). On the basis of an agreement of 1912, known as "The Deed of Cancellation and Grant of Other Rights", the company claimed that the Government had failed to perform certain representations allegedly made by it. The company requested the tribunal to declare (i) that the Deed was conditional upon the Government making good the representations to the effect that it would construct a certain railway, (ii) that in the event the Government did not do so, the company would be entitled to avoid and set aside the Deed, (iii) that in the case under (ii), the Deed would never have been valid or binding and the parties ought to be restored to the positions and rights in which they stood immediately before the execution of the Deed and (iv) that the company in such event would be entitled to the benefits of a concession of 1905 which the Deed of 1912 had superseded and replaced. The arbitrator, Sir Alfred George Lascelles, found that the company's claim must be rejected as the Deed was not executed on the basis of the alleged representations; hence the issue of specific performance was never decided.

The Arguments of the United Kingdom in the Anglo-Iranian Oil Co. *Case*

[169]. The only case in which the issue of the availability of *restitutio in integrum* as a remedy for breach of a concession has been presented squarely is the *Anglo-Iranian Oil Co.* case, but it was never judicially considered as the International Court of Justice found that it had no jurisdiction in the matter (*Anglo-Iranian Oil Co. Case* (*Jurisdiction*), Judgment of July 22nd, 1952: I.C.J. Reports, 1952, p. 93). The first alternative claim by the United Kingdom in its Memorial was formulated as follows:

> The Imperial Government of Iran is bound, within a period to be fixed by the Court, to restore

> the Anglo-Iranian Oil Company, Limited, to the position as it existed prior to the said Oil Nationalization Act and to abide by the provisions of the aforesaid Convention.
>
> (*I.C.J. Pleadings, Anglo-Iranian Oil Co. Case* (*United Kingdom v. Iran*), p. 124.)

[170]. The argument of the United Kingdom was based very largely on the pronouncements in the *Chorzow Factory (Claim for Indemnity, Merits)* case, which has been discussed and distinguished above. Reliance was placed also on certain statements appearing in books by Reitzer, Freeman, Decenciere-Ferrandiere, Lais and Anzilotti. Further, the *Shufeldt* case was cited, but the passage quoted in fact was one which the arbitrator in *Shufeldt* in turn quoted from another case and which he used merely as an introductory remark. The *Shufeldt* case itself is not relevant since the protocol of arbitration between the United States and Guatemala clearly laid down that the sole questions to be resolved in the case were whether *Shufeldt* had the right to claim a pecuniary indemnification and, if so, what amount Guatemala should pay to the United States. The arbitrator in no way considered any questions besides those entrusted to his determination (*Shufeldt Claim*, 1930; II *U.N.R.I.A.A.*, p. 1079).

[171]. The conclusions advocated by the United Kingdom are quoted below. It should be observed that the remedy of *restitutio in integrum* is said to be available except in situations where it is characterised as variously "impossible", "unnecessary" or "impracticable":

> The authorities adduced above show that there is nothing in the principles of international law and in international practice which prevents the Court from decreeing restitution in kind and that, on the contrary, international law prescribes such restitution as the remedy if restitution is possible. There is, in this connection, a further material factor to which the Government of the United Kingdom attaches importance. While it may be admitted that in certain circumstances restitution in kind may not be either possible or necessary for safeguarding the true interests of the parties, there may be other cases in which such restitution provides the only practicable and just solution. Such cases include those in which the offending State is unlikely to be in a position to grant adequate pecuniary compensation and in which the situation, wrongfully created by it, is calculated, if allowed to subsist, to affect adversely its solvency...
>
> The relief to be granted in the present case in respect of the action of the Imperial Government of Iran should be full restitution of its concessionary rights to the Anglo-Iranian Oil Company, since there is no reason to render such restitution impracticable.
>
> *(I.C.J. Pleadings, Anglo-Iranian Oil Co. Case (UnitedKingdom v. Iran),* pp. 116—117.)

(iv) *Conclusions with Respect to Continuity of Contract, Specific Performance and* Restitutio in Integrum *under Public International Law and in the Practice of International Tribunals*

[172]. The Tribunal concludes, on the basis of the material considered in paragraphs (ii) and (iii) above,

that it is arguable that when an international contractual obligation is unlawfully abrogated by one party, the other party may regard the agreement as still existing until it elects, within a reasonable time, to terminate it, and that such innocent party further, during the intervening period, may suspend its performance thereunder. However, the stated principle of the continuing validity of the agreement rests only on a basis of extreme generality and has never been fully considered in the context of facts such as those which are at issue here where one party is a sovereign State.

[173]. The important question is what remedies would be available to the party claiming the continuance of the agreement.

[174]. In considering this question, it is appropriate to refer initially to the following cautious statement in Oppenheim-Lauterpacht:

> The principal legal consequences of an international delinquency are reparation of the moral and material wrong done. The merits and the conditions of the special cases are, however, so different that it is impossible for the Law of Nations to prescribe once and for all what legal consequences an international delinquency should have. The only rule which is unanimously recognised by theory and practice is that out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such acts as are necessary for reparation of the wrong done. What kind of acts these are depends upon the merits of the case.
>
> (Oppenheim-Lauterpacht, *International Law*, Vol. I, Eighth Edition, 1963, § 156.)

[175]. The survey of cases and other relevant materials presented above demonstrates that there is no explicit support for the proposition that specific performance, and even less so *restitutio in integrum*, are remedies of public international law available at the option of a party suffering a wrongful breach by a co-contracting party. An analysis of the cases shows instead that while declaratory awards have often been made in terms of defining the rights and obligations of parties to a concession contract, these cases have never involved the total expropriation or taking by the State of the property, rights and interests of the concessionnaire; and indeed in the most important of the cases the validity and continued existence of the contract has not been questioned. The case analysis also demonstrates that the responsibility incurred by the defaulting party for breach of an obligation to perform a contractual undertaking is a duty to pay damages, and that the concept of *restitutio in integrum* has been employed merely as a vehicle for establishing the amount of damages. This becomes nowhere more apparent than in certain remarks on the concept made in 1927 by the late Sir Hersch Lauterpacht:

> A problem of a similar kind is involved in the question as to how far the general principle of private law, that in awarding damages *restitutio in integrum* should, as a rule, be aimed at, applies in cases when damages are to be awarded under international law. That principle means that the injured person is placed in the position he occupied before the occurrence of the injurious act or omission; it means that, to use the Roman law terminology, not only the *damnum emergens* but also *lucrum cessans* is taken into consideration. (Lauterpacht, *Private Law Sources and Analogies of International Law*, 1929, p. 147.)

[176]. Hence *restitutio in integrum* is not to be understood in its literal sense of being a remedy for physical reinstatement of a concessionaire party into a position from which it has been effectively and definitively removed by the other, sovereign party.

[177]. In summary, it is true as Professor Schwebel has stated in the article quoted earlier, that declaratory awards of the kind made in the *Aramco* case come close to being equivalent to orders for specific performance. However, the declaratory awards rendered in those instances are not comparable to an order for physical restitution by a State of a nationalised enterprise to a foreign concessionaire. There is considerable weight in the following statement by Dr. Z. A. Kronfol in which he sums up a review of the statements of certain writers, and some cases:

> Thus, there seems to be a contradiction between theory and practice. In reality, practice follows a pattern which is exactly the opposite of the one accepted in theory. In practice, compensation constitutes the principal remedy, *restitutio* being clearly an exceptional one. (Kronfol, *Protection of Foreign Investment; A Study in International Law*, 1972, p. 100; cf. Young, "Remedies of Private Claimants Against Foreign States" in *Selected Readings on Protection by Law of Private Foreign Investments*, 1964, p. 905, at pp. 935-938.)

[178]. Taking a broad view of State practice over the past decades, there is reason to believe that the sovereignty actually claimed and exercised by modern nations over their natural wealth and resources (with the tacit or explicit acquiescence of other States) constitutes weak support for the contentions of the Claimant in this case as to the remedies available to a concessionaire in circumstances such as the present. The trend of practice has gone another way, and may have become a custom and acquired the force of law.

(v) *Conclusions with Respect to paragraphs (i) through (iv)*

[179]. For the reasons now stated, the Tribunal is unable to find that there exist principles of the law of Libya common to principles of international law pursuant to which the BP Concession is still in law valid and subsisting and the remedy of *restitutio in integrum* available to the Claimant.

[180]. In accordance with its interpretation of the governing law provision in paragraph 7 of Clause 28, the Tribunal will now consider the issues in the light of the general principles of law.

(vi) *Continuity of Contract, Specific Performance at* Restitutio in Integrum *under the General Principles of Law*

[181]. The Claimant contends that the expression "the general principles of law, including such of those principles as may have been applied by international tribunals" in paragraph 7 of Clause 28 includes a reference to public international law. If this contention were accepted, the Claimant, for the reasons stated above, could not claim specific performance and *restitutio in integrum*. However, as it is arguable that the general principles of law, as used in said paragraph 7, are not determined on the basis of both public international law and municipal principles of law, but merely with

municipal principles of law as a foundation, the Tribunal will now consider the latter.

[182]. In English law the remedy of specific performance was an equitable remedy and that may be the explanation of its restrictive role in Anglo-American law even at the present day. In England and the United States the norm is damages and the exception is specific performance. It is only when damages are an inadequate or incomplete remedy that specific performance may be granted and not even then, it has been held, if the difficulties of enforcing the order are so great as to outweigh the plaintiff's need for it. The same limitations exist on the remedy of an injunction to restrain certain conduct which it is similarly in the court's discretion to grant or not.

[183]. In German law specific enforcement is the normal remedy as regards all obligations, and damages are awarded only when specific performance is not possible or the claim is for damages rather than specific relief. The position in Danish law is similar; and it may be said that the main rule in the uniform Scandinavian Sale of Goods Acts—a rule which by analogy has a wider application in the law of contracts—is akin to the governing principle of German law.

[184]. There are two further aspects which must be observed in an inquiry into the general principles of law on this subject.

[185]. *Firstly*, the principles even of those systems of law which recognise the most far-reaching rights for an innocent party to demand specific performance, are principles of ordinary commercial law. They have been devised, discussed and applied mostly in relation to everyday sale of goods contracts and other transactions of limited duration where, moreover, typically one party performs in kind and the other in money. It is only by stretching the meaning of legal concepts and general words into the extreme that these principles can be said to extend to contracts which like the BP Concession still have a term of 40 years to run and which provide for the right to extract and remove natural resources requiring vast fixed industrial installations and presuppose an intimate and complex relationship between the parties.

[186]. *Secondly*, the fact that the State is the respondent party is one which cannot be overlooked. Dr. Mitchell, on the basis of a survey of the municipal laws of England, France and the United States, has made it clear that the remedies of specific performance and restitution in kind normally are unavailable against governmental authorities under public contracts. He states with respect to what he terms the principle of governmental effectiveness:

> To deny enforceability to public contracts under the present principle is then to assert no more than that, even where normally available, the remedies of specific performance or injunction or their equivalents are ruled out by the principle of governmental freedom of action. Compensation is not thereby necessarily also eliminated, since it is the performance of, or abstention from, a particular act which is obnoxious to the general rule and not the payment of money. Rarely, as has been shown, the payment of compensation may itself offend. To admit the possibility of compensation does not however necessarily mean that the quantum of compensation should be the same as the quantum of damages for breach.
>
> The result of the general principle here advanced is therefore that the public authority may be exempt from performing its contract according to its strict expression, but that where this exemption results in loss to the individual contractor compensation should be payable save

where that payment would offend the principle.

(Mitchell, *The Contracts of Public Authorities*, 1954, p. 20.)

[187]. The commercial laws of representative nations in the world thus are disparate with respect to the effects of unilateral breach of contract and the availability to the innocent party of the remedy in contract of specific performance.

(vii) *Conclusions on Continuity of Contract, Specific Performance and* Restitutio in Integrum

[188]. An adaptation of the legal principles referred to above to the circumstances of the present case gives rise to the following considerations.

[189]. The observations made in paragraph (vi) have had the same object in mind as the earlier investigation of public international law and the practice of international tribunals, *viz.* to establish the law on the interrelated issues which must be resolved for the purpose of determining the effects of fundamental breach of contract consisting in the unilateral repudiation of an agreement between a State and an alien concessionaire. While the relevant questions are the same, the emphasis has been different in the several analyses mainly due to discrepancies in the terminology. Thus, the continuance in force of a treaty despite the occurrence of a fundamental breach has been a topic referred to only rarely in the literature and even more seldom in adjudicated cases, and specific performance similarly is a concept which has hardly ever been used in international law. Those two terms are, on the other hand, the ones which occur most frequently in the sphere of the relevant general principles of law. The expression *restitutio in integrum*, conversely, is often met with in writings on international law and has been considered in the practice of international tribunals but has much less significance in a study of the general principles of law. Generally speaking, however, it is probably true to say that the discussion about *restitutio in integrum* in public international law and that concerning specific performance in the field of the general principles of law, in fact have reference to the same problem.

[190]. Keeping in mind the dangers of the confusing terminology, it remains to sort out the conclusions to be drawn from the exposition above as regards the matter under consideration. As already indicated in Section 4 of Part VI, the problem may be approached by asking two questions.

[191]. *The first question* is whether the BP Nationalisation Law put an end to the BP Concession for all practical purposes or whether the agreement continues in effect, and entitles the Claimant to call for specific performance of it until such time as the Claimant elects to terminate it. In the context of those parts of public international law which are considered here, there is some support for the abstract thesis that unilateral abrogation does not have the effect of extinguishing the obligation of the party in default to perform, but the remedy of specific performance has not been explicitly recognised. It may therefore be concluded that, leaving aside peripheral means of redress sometimes said to be available to sovereign States *vis-à-vis* their equals, the principal remedy under public international law in regard to matters of essentially economic significance is damages.

[192]. In the practice of international tribunals relating to matters of the indicated character declarations have often been made to the effect that agreements, whose meaning or effects are disputed, are valid, and decisions have been made on contested issues as to whether conduct of a particular kind is permissible or not under an existing contract recognised by both parties as valid and binding *per se.* In theory, a tribunal making such a declaration or decision should, if seised with a subsequent request to enforce it or translate it into an executory order, decree specific performance against a recalcitrant party. In most cases, however, the limited jurisdiction and powers of *ad hoc* arbitral tribunals, resting as they mostly do on carefully circumscribed *compromis*, would not permit the arbitrators to take any such further step. Nor has any international tribunal ever decided a question like that presented in this case as to whether, despite a fully implemented nationalisation of an entire enterprise, the nationalising Government is bound specifically to perform its repudiated contractual undertakings, annul the nationalisation and restore the position of the concessionaire to the *status quo ante*.

[193]. The issue of the continuing validity of the BP Concession, examined in the light of the general principles of law, also turns largely upon the question whether and to what extent under the commercial laws of representative nations specific performance is a remedy available to the innocent party at its option. It appears that the legal systems reviewed here offer different solutions to the problem, ranging from the very extensive right that Danish law gives the innocent party to force the party in default, including the Danish Government and governmental authorities, to perform their commercial obligations *in natura*, to the attitude of English law that specific performance is granted at the discretion of the court only where damages are not an adequate remedy, and not in proceedings against the Crown. Now, in commercial transactions the interest of a party in obtaining performance of a contract can certainly as a rule be calculated in terms of money, and hence normally the sole remedy is damages.

[194]. The municipal systems of law examined here thus profess allegiance to two divergent principles on the question at issue. It is therefore not possible to hold that under the general principles of law an agreement fundamentally broken or abrogated by one party continues in force and is to be specifically performed indefinitely until the innocent party elects to declare it terminated, for under English and American law the sole remedy of the innocent party might well be an action for damages, and in several legal systems the remedy of specific performance does not lie against the State. It is another matter that the assessment of the damages may be made with reference to what the position of the innocent party would have been absent the breach or termination by the party in default.

[195]. Hence it is clear even from a brief examination of the few legal systems considered in the foregoing that there does not exist a uniform general principle of law that an agreement continues in effect after having been repudiated by one party but not by the other, and no uniform general principle of law pursuant to which specific performance is a remedy available at the option of an innocent party, especially not a private party acting under a contract with a Government. The Tribunal consequently has refrained from analysing in depth the legal position in each of those systems and from extending its research so as to encompass also other systems of law, not emanating from or akin to those considered here, that would otherwise have been investigated, such as Islamic Law, and Asiatic systems of law.

[196]. *The second question* is whether there is a legal basis for the Claimant's request for a declaration to

the effect that it is entitled to be restored to the full enjoyment of its rights under the BP Concession. Evidently, if the conclusion is reached that the BP Nationalisation Law effectively put an end to the BP Concession, the question of such restoration does not arise. However, considered as a separate issue, it necessitates an examination of the remedy of *restitutio in integrum* which, as mentioned earlier, may be one existing in international law and applied by international tribunals. It is sufficient here to refer to the summary of the study which has been made in paragraph (iv) above and to state that, while *restitutio in integrum* in the sense of restitution in kind of industrial property, *i.e.* physical restoration of such assets, has sometimes been claimed, and most explicitly by the United Kingdom in the *Anglo-Iranian Oil Co.* case, no international tribunal has ever prescribed this remedy with regard to such property, nor considered it in a context such as that presented in these proceedings. The concept has rather been employed at times as a principle for assessing the amount of damages due for breach of an international obligation.

[197]. The real issues of substance which require a resolution by the Tribunal are novel in character and scope in that they have not previously been scrutinised judicially. While certain trends in the law are discernible, there are no precise and clear rules that provide an obvious answer to any of the issues. The facts must be appraised and the law interpreted and applied in a balanced consideration of the intrinsic merits of the case and the *de facto* position of the Parties.

[198]. An expropriation, nationalisation or taking, if and when implemented in full, is an act of finality where a State has exercised its sovereign territorial power to expel a foreign enterprise and appropriate its property and other rights. No State has ever reversed such an action by granting *restitutio in integrum*, and it is unlikely that any State exercising diplomatic protection of its nationals will demand such a reversal without offering or eventually accepting the alternative remedy, exercisable at the option of the defaulting State, of reparation in the form of monetary compensation. It has rarely been suggested that the subject-matter in dispute is not property, rights and interests of a purely economic nature on which, thus, a financial value can be put. It has only been argued doctrinally that, where damages are not an adequate remedy (meaning where the State demonstrably is insolvent or incapable of discharging its proper obligations), *restitutio in integrum* should be considered. The Claimant has made no submission to such effect. At times it has been indicated, also, that damages may be difficult to calculate in respect of the value of an abrogated long term contract. However, such difficulties are not insurmountable.

[199]. The consequences of holding that a concession agreement continues in effect indefinitely despite a nationalisation which amounts to a total repudiation of the agreement by the grantor State and which partakes of the aforesaid character of finality, are complicated and perplexing in a long term perspective. Theoretically, the alleged rights of the concessionaire are not subject to limitation (the imposition by an arbitral tribunal of a rule of extinctive prescription would be purely discretionary and without an established legal basis), and hence the submissions of the Claimant in this arbitration could be made for the first time in 10, 20 or 30 years from now. Assuming that the enterprise has been carried on actively during all that time, the claim of the concessionaire eventually would not appear realistic. Even in a purely municipal law context, such an action would not be admissible since an order for turning the clock back would upset the current position too profoundly and would have unforeseeable practical consequences. The situation is the same if an award were given now to the effect that the BP Concession continues in full force and effect until terminated by the Claimant. So long as the present position in fact continues to exist, such a declaratory award would remain valid and outstanding but with the passage of time necessarily

would acquire a quality of increasing absurdity. This is simply the result of what Georg Jellinek so aptly termed "die normative Kraft des Faktischen"; an acceptance of the realities of the contemporary international community.

[200]. A rule of reason therefore dictates a result which conforms both to international law, as evidenced by State practice and the law of treaties, and to the governing principle of English and American contract law. This is that, when by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalisation of the enterprise and its assets in a manner which implies 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.

[201]. For these reasons, the Tribunal cannot accept the Claimant's principal proposition with respect to the issue now under consideration, and the Claimant cannot be granted the relief asked for in the requested Declarations Nos. 2, 3 and 4 (see Part V above); the requested Declaration No. 6, being predicated on Nos. 2 and 3, also cannot be made. The BP Concession can be said to remain in force and effect as a contractual instrument only in the sense that it forms the basis of the jurisdiction of the Tribunal and of the right of the Claimant to claim damages from the Respondent before the Tribunal.

(c) *Property Rights of the Claimant*

[202]. The Claimant seeks the further determination of the Tribunal which is set forth as Declaration No. 5 in Part V above and which relates to the ownership by the Claimant of "its share of any crude oil extracted from the area of the Concession Agreement after as well as before 7 December 1971" and "all installations and other physical assets". The absence of any right of the Respondent to the said property is also asserted.

[203]. The contention as to the ownership of oil extracted from the concession area *after* the date of the BP Nationalisation Law is based on the assumption that the BP Concession survived the nationalisation; that assumption is not accepted by the Tribunal. Hence the requested Declaration cannot be made. It may be added that the fact that ownership of the oil in its natural strata is vested in the State of Libya under the Petroleum Law of 1955 does not argue in favour of the Claimant.

[204]. As to the other property in question— *i.e.* oil extracted *before* 7 December 1971 and physical assets—the Tribunal is not prepared to come to a decision without receiving additional evidence and argument. In order not to hold up the determination of other issues, the Tribunal exercises its discretion to confine this Award to decisions on such other issues. The request for Declaration No. 5, to the extent that it relates to oil extracted *before* 7 December 1971 and to physical assets, is joined with the claim to be considered in the subsequent stage of the proceedings.

(d) *Damages*

[205]. The Tribunal holds that under the rules of applicable systems of law which at the present stage of

the proceedings require no detailed exposition or analysis, the Claimant is entitled to damages arising from the wrongful act of the Respondent. The principle of compensation is also recognised in the BP Nationalisation Law. The nature and extent of such damages can only be assessed in subsequent proceedings before this Tribunal.

FOR THESE REASONS

[206]. THE TRIBUNAL DECIDES as follows with respect to the Declarations requested by the Claimant:

Requested Declaration No. 1

> "The Libyan Nationalisation Law of 7 December 1971 and the subsequent implementation thereof were each a breach of the obligations of the Libyan Government owed to the Claimant under the Concession Agreement and so remain."

Decision:

> The BP Nationalisation Law and the subsequent implementation thereof were each a breach of the obligations of the Respondent owed to the Claimant under the BP Concession.

Requested Declaration No. 2

> "The said breaches were and are ineffective to terminate the Concession Agreement, which remains in law valid and subsisting."

Decision:

> The BP Nationalisation Law was effective to terminate the BP Concession except in the sense that the BP Concession forms the basis of the jurisdiction of the Tribunal and of the right of the Claimant to claim damages from the Respondent before the Tribunal.

Requested Declaration No. 3

> "The Claimant is entitled to elect, at any time so long as the Respondent's breach continues, to treat the Concession Agreement as at an end."

Decision:

> Refused, as a consequence of the decision on the requested Declaration No. 2.

Requested Declaration No. 4

> "The Claimant is entitled to be restored to the full enjoyment of its rights under the Concession Agreement."

Decision:

> Refused, for the reasons stated in subsections (a) and (b) of Section 5 of Part VII.

Requested Declaration No. 5

> "The Claimant is the owner of its share of any crude oil extracted from the area of the Concession Agreement after as well as before 7 December 1971 and of all installations and other physical assets, and the Libyan Government has no right to any such oil, installations or physical assets, which it can enjoy or transfer to any third party."

Decision:

> Refused, insofar as the requested Declaration refers to crude oil extracted after 7 December 1971. With this exception, the request is joined with the claim to be considered in the subsequent stage of the proceedings.

Requested Declaration No. 6

> "Performance of the Claimant's obligations under the Concession Agreement is suspended for so long as the Libyan Government remains in breach thereof."

Decision:

> Refused, as a consequence of the decision on the requested Declaration No. 2 that the BP Nationalisation Law was effective to terminate the BP Concession.

Requested Declaration No. 7

> "The Claimant is entitled to damages in respect of the interference by the Libyan Government with the Claimant's enjoyment of its rights under the Concession Agreement. If the Claimant does not exercise its rights under Declaration No. 3 above, then it is entitled to damages accruing up to the date of the final award herein. If the Claimant does exercise the rights under Declaration No. 3 above, it is entitled to all damages arising from the wrongful act of the Libyan Government."

Decision:

> The Claimant is entitled to damages arising from the wrongful act of the Respondent, to be assessed by this Tribunal in subsequent proceedings.

[207]. AND THE TRIBUNAL FURTHER DECIDES to reserve its decision on costs and to order the Claimant to present a Memorial in fifteen copies setting forth its case with respect to its request for Declaration No. 5 except as above decided and to its claim for damages, accompanied by all supporting documents and other relevant materials, on or before 1 February 1974 or such other date as the Tribunal may later fix.

[208]. Done and Delivered at Copenhagen, as of the 10th day of October 1973.