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The Libyan Nationalizations: TOPCO/CALASIATIC v. Libya Arbitration

On September 1, 1973, on the fourth anniversary of the military takeover of the Libyan Arab Republic (Libya) led by Colonel Muammar el-Qadhafi, the government of Libya announced the nationalization of 51 percent of the interests and properties of nine international oil companies operating in Libya. Approximately five and one-half months later, on February 11, 1974, on the eve of the opening of the Washington conference of major oil importing nations, the government of Libya announced the nationalization of the remaining 49 percent of the joint interests and properties of two of those oil companies, Texaco Overseas Petroleum Company (a subsidiary of Texaco, Inc.) and California Asiatic Oil Company (a subsidiary of Standard Oil Company of California) (collectively, the Companies). Those actions of the Libyan government purporting to expropriate the interests and properties of the Companies in Libya created the dispute which set the stage for one of the most important post-World War II international arbitrations.

This article will describe briefly the background of Libyan nationalizations, the steps toward arbitration, the arbitration proceedings, the awards of the Sole Arbitrator, and the significance of those awards.

I. FACTUAL BACKGROUND

The ancient Greeks gave the name of Libye to all North Africa west of Egypt, but for many centuries the term Tripoli or Barbary (after the corsairs who practiced piracy in the Mediterranean) was used instead.[1] It was not until the Italian conquest of the area in 1911 that the country became united under the name of Libya. Libya remained under Italian domination for thirty-two years and under a quasi-trusteeship and the aegis of the United Nations for another eight years. Finally, in 1951, Libya became an indepen-

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[1] *See* R. FIRST, LIBYA: THE ELUSIVE REVOLUTION 31 (1974).

dent country and adopted the name of the United Kingdom of Libya.[2]

Before the commercial production of oil in 1959-60, Libya was an extraordinarily poor country with no known natural resources of consequence, with a sparse and uneducated population, with only small areas of arable land (over 90 percent of the country is desert), and with little hope for much improvement. Some writers have described Libya as a "hostage to a hostile geography" and, as recently as 1959, one writer, who had prepared development reports on Libya for the United Nations, commented on Libya's economic prospects by saying that, "Libya combines within the borders of one country virtually all of the obstacles to development that can be found anywhere.... If Libya can be brought to a stage of sustained growth, there is hope for every country in the world."

However, in a period of 25 years, a virtual miracle occurred. Libya went from an annual gross national income of approximately $11.5 million in 1951 to a present annual gross national income of approximately $10 billion and from an annual per capita income of $40 in 1951 to a present annual per capita income of $4,000 (the highest in Africa).[3] This remarkable economic metamorphosis was almost entirely a result of the discovery, extraction, and exportation of petroleum.

Within that factual setting, Libya's economic development and the Companies' 20 years of activity in Libya evolved. The Libyan Petroleum Law of 1955 (Petroleum Law) established the terms and conditions under which petroleum concessions would be contractually granted and operated. Pursuant to this Petroleum Law, as amended, the Companies were granted 12 Deeds of Concession between 1955–1966 and in 1968 acquired a 75 percent interest in 2 other Deeds of Concession (collectively, the Deeds of Concession).

The Deeds of Concession contained normal contractual provisions including a provision, Clause 16, guaranteeing the Companies' rights which could not be altered except by the mutual consent of the parties. Clause 16 reads as follows:

> (1) The Government of Libya will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this concession shall not be altered except by mutual 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.

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[2]Since then Libya has changed its name to the Kingdom of Libya (1963), the Libyan Arab Republic (1969) and the Socialist People's Libyan Arab JAMAHIRIYA (1977). For the purpose of this article, "Libya" will be used to refer to the country under its various names.

[3]The present annual per capita income figure varies depending on the source used.

When oil production finally commenced, Libya was eager to have the Deeds of Concession revised in order to obtain additional financial benefits. Hence, the Deeds went through a number of modifications. The modification procedure consisted of a Royal Decree issued by the government revising the Petroleum Law which was then followed by an agreement between the Ministry of Petroleum and the Companies conforming the terms of the Deeds to the Decree. Each time, however, the amendments to the Deeds were negotiated between the parties. The actions of the Libyan government from the first major amendment to the Petroleum Law in 1961 to the last major amendment in 1971 confirmed the consistent recognition of the principle that the rights of the Companies could not be unilaterally changed without the Companies' consent.

In early 1973, Libya sought direct equity participation in the oil concessions owned by foreign oil companies. With respect to the Companies, Libya made a series of demands and threats ranging from 51 percent to 100 percent government ownership of the concessions. The Companies responded with counter-proposals, all of which were rejected by Libya. On September 1, 1973, Libya broke off negotiations and promulgated Decree No. 66 of 1973, nationalizing 51 percent of the interests and property of the Companies under the Deeds of Concession. On February 11, 1974, Libya acted again and promulgated Decree No. 11 of 1974, nationalizing the remaining 49 percent of the interests and property of the Companies.

II. STEPS TOWARD ARBITRATION

The Companies immediately objected to the nationalization decrees and invoked the arbitration provisions under the contracts. The operative portion of the arbitration provision, Clause 28 of the Deeds of Concession, reads 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... [arbitration].

After each nationalization decree, the Companies sent notices to the Libyan government requesting arbitration. The Companies also appointed their arbitrator. The Libyan government, however, refused to acknowledge arbitration and rejected the Companies' claims to arbitration, stating that there was not an arbitrable dispute. Following the procedure in the Deeds of Concession, the Companies then requested the President of the International Court of Justice to appoint a sole arbitrator to hear and determine the disputes. The Libyan government objected to the appointment of a sole arbitrator and submitted a memorandum to the president against such action, contending, in part, that the disputes were not subject to arbitration

because the nationalizations were acts of sovereignty. This memorandum represented the only appearance by the Libyan government in the arbitration proceedings.

On December 18, 1974, after considering Libya's arguments, the President appointed Rene-Jean Dupuy, Secretary General of The Hague Academy of International Law and Professor of Law at the University of Nice, as the Sole Arbitrator (Sole Arbitrator). Professor Dupuy named Jean-Pierre Sortais, also Professor of Law at the University of Nice, as the Registrar of the Arbitral Tribunal.

III. ARBITRATION PROCEEDINGS

In February 1975, the Sole Arbitrator drew up the rules of procedure and determined that the seat of the arbitration would be in Geneva, Switzerland. The Sole Arbitrator decided that the language of the Arbitral Tribunal would be French, but permitted the parties to submit their memorials and other papers in English or Arabic.

The Sole Arbitrator then proceeded to the initial stage of the arbitration—to decide whether he had jurisdiction to hear and determine the disputes—and directed the Companies to submit a memorial on jurisdiction. On June 16, 1975, the Companies submitted their Memorial on the Jurisdiction of the Sole Arbitrator. The Libyan government was given an equal period of time in which to respond but did not submit an answering memorial.

A. *Preliminary Award*

On November 27, 1975, the Sole Arbitrator delivered a Preliminary Award[4] (Preliminary Award) deciding that he had jurisdiction to hear and determine the disputes between the parties. In the Preliminary Award the Sole Arbitrator confirmed certain fundamental principles of jurisdiction.

The Sole Arbitrator considered initially whether he had the competence to decide his own jurisdiction. Looking to the well-recognized rule of *kompetenz-kompetenz* (*i.e.*, the competence to determine one's own jurisdiction), a rule compelled by logic and considered to be an inherent attribute of international tribunals, the Sole Arbitrator found unanimous authority for determining his own jurisdiction. Moreover, the Sole Arbitrator derived support from the arbitration clause in the Deeds of Concession which provides that "the Sole Arbitrator shall determine the applicability of this Clause [the arbitration clause] and the procedure to be followed in the Arbitration." Furthermore, the letter of the President of the International Court of Justice to the Libyan Government explaining the ap-

[4]The Preliminary Award was delivered in French. The Companies have prepared an authorized English translation on the Preliminary Award which was privately published in August 1977 in pamphlet form. The page references to the Preliminary Award refer to that pamphlet. [Hereinafter cited as Preliminary Award.]

pointment of the Sole Arbitrator recognized that the arbitration clause contemplated the Sole Arbitrator's determination of his own jurisdiction. Finding more than sufficient authority in 100 years of international case law, the writings of legal scholars, and the language of the arbitration clause, the Sole Arbitrator concluded that he was competent to decide his jurisdiction.[5]

Next, the Sole Arbitrator considered the autonomy and separability of the arbitration clause from the rest of the contract. In this context the Sole Arbitrator assumed for the purpose of argument that some action of the Libyan government might have terminated the Deeds of Concession and posed the question whether such termination would affect the validity of the arbitration clause. The Sole Arbitrator found overwhelming support in decisions of other international arbitrations, pleadings before the International Court of Justice, French law, and the writings of eminent legal scholars for the conclusion that the arbitration clause has a complete juridical autonomy from the other portions of the contract. In addition, the very language of the arbitration clause in question contemplated such autonomy. Clause 28 of the Deeds of Concession states that arbitration is appropriate "if at any time during or after the currency of [the] concession any difference or dispute shall arise." Hence, no unilateral action with respect to the contract by the Libyan government could invalidate the arbitration clause.[6]

Then, the Sole Arbitrator examined whether there were any prerequisites to arbitration with which the Companies had failed to comply. He specifically considered the argument raised by the Libyan government in its memorandum to the President of the International Court of Justice that an attempt to bring about a settlement must have been made and must have failed before the parties could initiate arbitral proceedings. The Sole Arbitrator rejected this interpretation of the arbitration clause. He found that there was no affirmative obligation of the parties to have recourse to negotiations before commencing arbitration. But even assuming that an affirmative obligation were present, the Sole Arbitrator found that the result would be no different. The history of the dispute clearly demonstrated that extensive negotiations between the parties to reach an amiable settlement had continued from May through August 1973, but to no avail.[7]

Finally, the Sole Arbitrator examined two additional objections raised by the Libyan government in its memorandum to the President of the International Court of Justice. The Libyan government asserted that the arbitration proceedings were instituted against the Libyan Arab Republic, while the Deeds of Concession were concluded by the Minister of Petroleum and, consequently, the Libyan Arab Republic, a sovereign state, was not a party

[5]Preliminary Award, p. 12-15.
[6]*Id.* at 15-21.
[7]*Id.* at 21-23.

to the Deeds of Concession. The Sole Arbitrator rejected this assertion and confirmed that a state can act only through its organs or persons. Under well-established principles of international law, a state's responsibility is engaged by the conduct of any of its organs having the status of an organ of the state under the internal law. The Sole Arbitrator concluded that the Minister of Petroleum was specifically authorized and empowered to bind the Libyan state pursuant to the internal law of Libya.[8]

The Sole Arbitrator also dismissed the other objection of the Libyan government that there could be no arbitration because there was no dispute or difference. Reviewing decisions of the Permanent Court of International Justice and the International Court of Justice relating to the definition of what constitutes a difference or dispute, the Sole Arbitrator agreed that the existence of a difference or dispute does not result from the mere assertion by the plaintiffs but must be based on a fundamental disagreement between the parties. The determination must be objective and the Sole Arbitrator found that there clearly was a difference or dispute between the parties in this case.[9]

Two further objections that the Libyan government raised in its memorandum to the President of the International Court of Justice, relating to the effect of the acts of nationalization on the Companies and the sovereign nature of such acts, were reserved by the Sole Arbitrator for the merits phase of the arbitration.

Accordingly, the Sole Arbitrator found that he had jurisdiction over the disputes between the Companies and the Libyan Arab Republic and proceeded to the next phase of the arbitration to consider the merits of the dispute.[10]

B. *Award on the Merits*

Determining that the damages portion, if necessary, of the arbitration should be reserved for a later stage, the Sole Arbitrator invited the parties to submit memorials on the merits of the case. On February 28, 1976, the Companies submitted their Memorial on the Merits which included not only exhibits and annexes, but also expert opinions on Libyan law and international law. Professor Soliman Morcos, Professor of Civil Law at the University of Cairo, submitted an opinion on relevant portions of Libyan law, and Professor Philip C. Jessup, former Judge of the International Court of Justice, submitted an opinion on relevant portions of international law. The Libyan government again did not respond. On June 15 and June 16, 1976, the Arbitral Tribunal held oral hearings in Geneva, Switzerland, at which time the Companies presented their case and responded to a series of questions asked by the Sole Arbitrator.

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[8] *Id.* at 23-24.
[9] *Id.* at 24-26.
[10] *Id.* at 26-27.

On January 19, 1977, the Sole Arbitrator delivered the Award on the Merits[11] (Award on the Merits) finding in favor of the Companies. The Sole Arbitrator held that (1) the Deeds of Concession were binding on the parties; (2) by adopting the measures on nationalization, the Libyan government breached its obligations arising under the Deeds of Concession; and (3) the Libyan government was legally bound to give the Deeds of Concession their full force and effort. The Libyan government was given approximately five and one-half months to take measures to comply with and implement the Award.

The Award on the Merits is an important and valuable contribution to international law. It is a thoroughly researched and carefully reasoned decision confirming basic principles of law. The Award makes serious inroads into new areas of law and, for one of the first times, explores the role of contractual relationships in a developing world economic order. Where case law in international jurisprudence has been sparse and, at times, inconclusive, this decision will prove to be a major contribution to international law.

1. APPLICABLE LAW

After reviewing the facts and the procedure in the arbitration, the Sole Arbitrator considered the question of the applicable law. Clause 28 of the Deeds of Concession, the choice-of-law provision, in its final form reads as follows:

> This concession shall be governed by and interpreted in accordance with the principles of the 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.

The applicable law provision provides a two-step choice of law. In the first instance, the Deeds of Concession are to be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and, in the absence of such common principles, then by and in accordance with general principles of law including such of those principles as may have been applied by international tribunals.

In considering the validity of the choice-of-law provision, the Sole Arbitrator focused on, initially, whether the parties had the right to choose the

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[11]The Award on the Merits was delivered in French. The Companies have prepared an authorized English translation of the Award on the Merits which was privately published in the same pamphlet referred to *supra,* note 4. The page references to the Award on the Merits in this article refer to that pamphlet. A portion of the original French text of the Award on the Merits was published in 104 JOURNAL DU DROIT INTERNATIONAL 350 (1977). The English translation of the Award on the Merits was published in 17 INTERNATIONAL LEGAL MATERIALS (1978) and is scheduled to be published in INT'L. L. REPORTS. [Hereinafter cited as Award on the Merits.]

system of law to govern their contractual relations and, second, whether that choice was valid under the present circumstances.

The Sole Arbitrator found that all legal systems recognize the principle of the automony of the will of the parties to provide for the system of law to govern their contractual rights and obligations. Relying on decisions of the Permanent Court of Justice and the International Court of Justice, French law, and the writings of legal scholars, the Sole Arbitrator determined that the parties inherently have the power to provide for the governing law.[12]

If the parties are permitted to choose the law to determine their legal relationship, the next question for the Sole Arbitrator was to decide whether that choice of law was valid. The Sole Arbitrator demonstrated that the Deeds of Concession had been internationalized which would confirm the ability of the parties to choose a governing system of law which was not solely the domestic law of one nation.

The basic criteria for internationalization were present. First, the Sole Arbitrator found that a reference in the governing law clause of the contract to general principles of law is sufficient to internationalize a contract. Second, by inserting a clause in the contract to provide that differences and disputes which may arise in the interpretation and performance of the contract shall be submitted to international arbitration also achieves the result of internationalizing the contract. Third, the very nature of the contracts, *i.e.*, economic development agreements between states and private persons, would internationalize the contracts.[13]

The character of deeds of concession, involving a permanent long-term commitment by the private party to the economic development of the host country, points out the necessity of providing the foreign private party with some protection from the internal legal system of the host country. As the Sole Arbitrator emphasized, this concern is a major reason for also having so-called stabilization-of-rights clauses inserted in economic development contracts. The Sole Arbitrator stated:

> [T]he emphasis on the contractual nature of the legal relation between the host State and the investor is intended to bring about an equilibrium between the goal of the general interest sought by such relation and the profitability which is necessary for the pursuit of the task entrusted to the private enterprise. The effect is also to ensure to the private contracting party a certain stability which is justified by the considerable investments which it makes in the country concerned. The investor must in particular be protected against legislative uncertainties, that is to say the risks of the municipal law of the host country being modified, or against any government measures which could lead to an abrogation or recession of the contract. Hence, the insertion, as in the present case, of so-called stabilization clauses: these clauses tend to remove all or part of the agreement from the internal law and to provide for the correlative submission to *sui generis* rules as stated in the *Aramco* award, or to a system which is properly an international system....[14]

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[12]Award on the Merits, p. 21-29.
[13]*Id.* 29-36.
[14]*Id.* 35-36.

2. BINDING FORCE OF THE DEEDS OF CONCESSION

Concluding that the choice-of-law provision was valid and should be applied, the Sole Arbitrator considered the first substantive question as to whether the Deeds of Concession are binding on the parties. He had little trouble finding overwhelming authority in both Libyan and international law that the principle of *pacta sunt servada, i.e.,* the binding force of contracts, is indisputable. With respect to Libyan law, the Sole Arbitrator referred to the famous precept of Islamic law found in the Koran: "O ye believers, perform your contracts," and to Articles 147 and 148 of the Libyan Civil Code which confirm that contracts must be performed in good faith in accordance with their terms.[15]

With respect to international law, the Sole Arbitrator looked to Professor Jessup's opinion and the corpus of international law which left no doubt that the rule of *pacta sunt servada* is ubiquitous.[16] The much quoted *Sapphire* award supports this universal maxim: "It is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule '*pacta sunt servada*' is the basis of every contractual relationship."[17]

3. LIBYA BREACHED ITS CONTRACTUAL OBLIGATIONS

The Sole Arbitrator then considered the second fundamental question: Did the Libyan government, in adopting the 1973 and 1974 nationalization decrees, breach its obligations under the Deeds of Concession? In that respect the Sole Arbitrator examined the various reasons which might have been raised by the Libyan government (if it had appeared) to justify its breach of its contractual obligations. Three possible justifications were examined in depth by the Sole Arbitrator and each such justification was dismissed.

a. Theory of Administrative Contracts

Could the Deeds of Concession be considered administrative contracts which, under certain conditions, might give rise to unilateral action by the Libyan government and justify the nationalization of the Deeds of Concession? Looking first to Libyan law, the Sole Arbitrator agreed with the analysis of Professor Morcos in his expert opinion. The Deeds of Concession did not have the necessary characteristics of administrative contracts under Libyan law. To be so classified, contracts must (1) have for their object the management or exploitation of a public service; (2) have been entered into by an administrative authority as such (an authority regarded as a state or public legal entity); and (3) contain specific administrative authority not usually found in a civil contract, such as to amend unilaterally the contract if the public interest so requires.[18]

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[15] *Id.* 40-41.
[16] *Id.* at 41.
[17] 35 INT'L L. REPORTS 136, 181 (1963).
[18] Award on the Merits, p. 42-43.

The Sole Arbitrator found that it was the clear intent of the Libyan government to deal with the Companies on a footing of equality and Clause 16 (the so-called stabilization-of-rights clause) stabilized the relationship between the parties. The Libyan government undertook not to exercise its sovereign power to amend unilaterally the contract and its actions during the period up to the nationalizations confirmed this recognition. As Professor Morcos stressed, the stabilization clause here negates one of the principal characteristics of an administrative contract. Moreover, resorting to international arbitration supports the view that the parties had intended to be on equal footing.[19]

A wholly separate reason for dismissing the theory of administrative contracts is that such theory is peculiar to French law and civil law systems and does not have a basis in international law. Hence, the Sole Arbitrator found that the theory of administrative law could not be regarded as a common principle of Libyan and international law and, consequently, was not applicable under the governing law provision.[20]

b. Concept of Sovereignty and Nature of the Nationalization Measures

Responding specifically to one of the objections raised by the Libyan government in its memorandum to the President of the International Court of Justice, the Sole Arbitrator dismissed the argument that the act of nationalization not only terminated the Deeds of Concession but also the Companies' legal status as concession holders. It is a well-established rule that nationalizations do not produce extraterritorial consequences which affect the legal existence of companies not having the nationality of the nationalizing state.[21]

The Sole Arbitrator accepted as unquestionable the right of the state to nationalize as an expression of that state's territorial sovereignty. However, the power of nationalization is not unlimited and must exist within recognized limits. From an international point of view, a state undoubtedly can enact measures affecting its own nationals or aliens. However, where the state has concluded an international contract with a foreign contracting party, the state is bound by the international legal order to recognize the terms and conditions of that agreement. It is a basic attribute of sovereignty for a state to make international commitments and be held to abide by them.[22]

Islamic and Libyan law have adopted the fundamental concept that sovereign states must fulfill their contractual obligations. In Islamic law (a source of Libyan law), this principle is even more rigidly construed with

[19] *Id.* at 43-46.
[20] *Id.* at 46-47.
[21] *Id.* at 47-48.
[22] *Id.* at 48-50.

respect to the sovereign than private persons. Because the sovereign has greater discretionary powers, he must be held to a higher standard of performance of his obligations as an example to his subjects. The Libyan Civil Code is to the same effect.[23]

International law also supports this theory. The state as a sovereign entity possesses the power to grant rights and bind itself to agreed terms. To permit a state to use its sovereignty to disregard commitments that it freely undertook through the exercise of that very sovereignty would be anomalous. This result would undermine and destroy the legal framework of the international order.[24]

The particular facts of the dispute support the basic principle. The Libyan government entered into contracts with the Companies and specifically limited its recourse to nationaliztion. The Libyan government unequivocally provided for the stabilization of rights of the parties and through its actions confirmed such obligations. Hence, the Sole Arbitrator concluded that the internal acts of nationalization could not prevail over the obligations of an internationalized contract containing a stabilization clause.[25]

In connection with the broadest interpretations of sovereignty, the Sole Arbitrator briefly noted two other possible arguments. First, assuming that a government or a predecessor government had effectively and permanently alienated its sovereignty to its detriment, would the present government be justified in rectifying the situation? The Sole Arbitrator agreed that in such a circumstance—where the state had completely and permanently alienated its sovereignty—nationalization could not be challenged under general international law. However, in this case, that was not the situation. Here, Libya granted the concession holders rights limited in scope and in duration and imposed a structure of duties and obligations upon the concession holders. The obligations of the concession holders and the nature of the Deeds of Concession were of clear benefit to Libya. As the Sole Arbitrator said:

> The notion of permanent sovereignty can be completely reconciled with the conclusion by a State of agreements which leave to that State control of the activities of the other contracting party. As regards the question of permanent sovereignty, a well-known distinction should be made as to enjoyment and exercise. The State granting the concession retains the permanent enjoyment of its sovereign rights; it cannot be deprived of the right in any way whatsoever; the contract which it entered into with a private company cannot be viewed as an alienation of such sovereignty but as a limitation, partial and limited in time, of the exercise of sovereignty. Accordingly, the State retains, within the areas which it has reserved, authority over the operations conducted by the concession holder, and the continuance of the exercise of its sovereignty is manifested, for example, by the various obligations imposed on its contracting party, which is in particular subjected to fiscal obligations that express unquestionably the sovereignty of the contracting State.[26]

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[23] *Id.* at 51-52.
[24] *Id.* at 52-55.
[25] *Id.* at 55-58.
[26] *Id.* at 60-61.

The other argument that the Sole Arbitrator discussed related to tendencies of some countries to try to remove an act of nationalization from the basic requirements of international law and limit within the framework of national law all of a state's relations with a foreign private party. The present body of international law rejects this position. The Sole Arbitrator, referring to the precedent of the International Court of Justice, reaffirmed that this Arbitral Tribunal had to apply positive law, *i.e.,* the law as it is, and not attempt to make new law. The Sole Arbitrator quoted the International Court of Justice in the 1966 *South West Africa* cases, "its [the Court's] duty is to apply the law as it finds it, not to make it."[27]

c. Concept of Permanent Sovereignty over Natural Resources

The Sole Arbitrator considered next the Libyan government's attempt to rely on resolutions of the United Nations General Assembly as a possible justification for its actions. Responding again to an objection raised by the Libyan government in its memorandum to the President of the International Court of Justice, the Sole Arbitrator examined in depth for one of the first times in an international judicial decision the concept of permanent sovereignty over natural resources.

Affirming that every state maintains the absolute right to exercise full sovereignty over its natural resources, the Sole Arbitrator questioned whether there is no limit to this sovereignty. He referred to the December 1962 Resolution No. 1803 of the United Nations General Assembly which confirmed the right of permanent sovereignty over natural resources but limited it to cases of public and national interest within the perimeters of international law. Tracing to the present the evolution of resolutions of the General Assembly relating to permanent sovereignty over natural resources, the Sole Arbitrator considered the more recent Resolutions Nos. 3171 and 3201 which the Libyan government argued had, in effect, removed any sovereign action relating to permanent sovereignty over natural resources from the standards of international law and conferred exclusive competence upon the legislative and judicial branch of the host country. This far-reaching concept of sovereignty reached its broadest interpretation in the Charter of Economic Rights and Duties of States, Resolution No. 3281 of the General Assembly (July 1974).[28]

The Sole Arbitrator focused next on the legal impact of United Nations General Assembly resolutions and the possible existence of a customary principle of law established by such resolutions. First, he considered the consensus of states with regard to the applicable resolutions by analyzing the voting patterns within the General Assembly. With respect to the 1962 Resolution (Resolution No. 1803), the General Assembly passed it by 87 votes to 2 with 12 abstentions. This resolution was voted for by developing countries as well as developed countries, including the United States, and

[27] *Id.* at 62.
[28] *Id.* at 63-65.

represented agreement among states from all geographical areas and of all economic levels. In discussions concerning that resolution, the Sole Arbitrator referred to debates which documented that imposing a standard of international law upon any act of nationalization was an essential factor in the support to the resolution by several of the western countries.[29]

The conditions surrounding the other two major resolutions, nos. 3171 and 3281, were quite different. With respect to Resolution No. 3171, the vote was 108 to 1 with 16 abstentions but a separate vote was requested for the operative paragraph relating to nationalization and that vote was adopted only by 86 votes to 11 with 28 abstentions. The paragraph concerning nationalization, which purported to remove the act of nationalization from a standard of international law, not only was rejected by western countries but also by a number of developing countries. The statements made by various delegates with respect to that resolution clearly demonstrated that the most important western countries were opposed to abandoning the compromise approach relating to nationalization contained in the 1962 Resolution.[30]

The voting pattern with respect to the Charter of Economic Rights and Duties of States (Resolution No. 3281) was similar. Resolution No. 3281 was adopted by 118 votes to 6 with 10 abstentions. Paragraph 2(c) of Article 2 of Resolution No. 3281, which does not refer to a standard of international law for acts of nationalization, was voted on separately and approved by 104 votes to 16 with 6 abstentions. All of the major industrialized nations voted against or abstained from voting on it. Thus, there was no general consensus.[31]

Having taken into account the voting patterns with respect to the abovementioned resolutions, the Sole Arbitrator examined generally the legal scope of United National General Assembly resolutions. Although it is possible now to attribute certain legal value to General Assembly resolutions, the legal value differs considerably and depends on the type of resolution and the circumstances surrounding its adoption. In the discussions surrounding the drafting of Resolution No. 3281, the issue of whether that resolution should be a legal instrument of a binding character rather than a declaration of intent was heavily debated. The final form of the resolution did not provide for the binding application of the text to those countries to which it applied. Hence, absent any express binding force of Resolution No. 3281 and relying simply on the acceptance by the member nations, the pattern of voting was critical to demonstrate that the Resolution No. 3281 was not a legally binding obligation. A resolution is binding only to the extent that nations wish to be bound.[32]

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[29] *Id.* at 66-67.
[30] *Id.* at 67-68.
[31] *Id.* at 68.
[32] *Id.* at 68-69.

Moreover, when a draft of Resolution No. 3281 was submitted by the developing countries, that draft proposed a provision providing that Resolution No. 3281 would be a first measure of codification and progressive development within the field of the international law of development. This provision was deleted because of the opposition of a number of the states and helps to demonstrate the nonlegal implications of Resolution No. 3281.[33]

Accordingly, the 1962 Resolution (No. 1803) seemed to the Sole Arbitrator to reflect the position of customary law existing in the field. He found the existence of a customary rule on which states clearly expressed their concurrence. However, with respect to Resolution No. 3281, its background, the statements and debates surrounding it, and the voting pattern illustrated that it was a "political rather than a legal declaration concerned with the ideological strategy of development and, as such, supported only by non-industrialized States."[34]

The Sole Arbitrator completed his discussion by stressing the principle of good faith in contractual relationships and the importance of preserving the framework of the economic order. He said:

> One should conclude that a sovereign State which nationalizes cannot disregard the commitments undertaken by the contracting State: to decide otherwise would in fact recognize that all contractual commitments undertaken by a State have been undertaken under a purely permissive condition on its part and are therefore lacking of any legal force and any binding effect. From the point of view of its advisability, such a solution would gravely harm the credibility of States since it would introduce in such contracts a fundamental imbalance because in these contracts only one party--the party contracting with the State—would be bound. In law, such an outcome would go directly against the most elementary principle of good faith and for this reason it cannot be accepted.[35]

4. LIBYA IS REQUIRED TO PERFORM ITS CONTRACTS (*RESTITUTIO IN INTEGRUM*)

Having decided that Libya had failed to perform its obligations under the Deeds of Concession, the Sole Arbitrator proceeded to consider whether Libya was obliged to perform such obligations. The Companies requested that they be granted the remedy of restitution in kind, *i.e., restitutio in integrum.*

Applying again the choice-of-law provision, the Sole Arbitrator found that both Libyan law and international law recognized the principle of *restitutio in integrum* which is the preferred remedy in situations where that remedy is physically possible. Libyan law leaves no doubt that *restitutio in integrum* is the preferred remedy when one party has breached its obligations. The Sole Arbitrator found support in the Libyan Civil Code and also

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[33] *Id.* at 71-72.
[34] *Id.* at 70-71.
[35] *Id.* at 73-74.

in the Egyptian Civil Code and under Islamic law which are both sources of Libyan law.[36]

With respect to international law, the Sole Arbitrator began with the fundamental articulation of the principle of *restitutio in integrum* in the *Chorzow Factory* case and traced the development of that principle through decisions of (and pleadings before) the International Court of Justice and awards of arbitral tribunals. The Sole Arbitrator then reviewed in depth the writings of prominent scholars in international law from both developed and developing countries which also supported that principle, and, in particular, the writings of the Honorable Jimenez de Arechaga, President of the International Court of Justice.[37]

Finding that *restitutio in integrum* is the normal remedy for nonperformance of contractual obligations, to the extent that the restoration of the status quo is possible, the Sole Arbitrator considered the particular circumstances of the case. He concluded that *restitutio in integrum* was possible in the present dispute and determined that the Libyan government should perform specifically its contractual obligations.[38]

Pursuant to the provisions in the Deeds of Concession, the Arbitral Tribunal gave the Libyan government a period of approximately five and one-half months to perform its obligations and implement the Award on the Merits, such time period to expire on June 30, 1977. The Libyan government did not comply with or implement the Award, and the Award became final by order of the Sole Arbitrator in July 1977.

IV. AFTERMATH OF THE AWARD ON THE MERITS

Approximately 8 months after the Sole Arbitrator's decision on the merits of the case, Libya and the Companies reached an amiable settlement of the dispute. As reported September 26, 1977, in *The Wall Street Journal* and *The New York Times,* Libya agreed to provide the Companies over the next fifteen months with $152 million worth of Libyan crude oil, and the companies agreed to terminate the arbitration proceedings.

The *TOPCO/CALASIATIC v. Libya* arbitration will take its place as one of the most important arbitrations in the history of international arbitration. Not only does the arbitration provide an excellent example of the process of arbitration, including the steps to arbitration and the determination of procedure, jurisdiction, and the merits, but also it confirms the effectiveness of the process that lead to the eventual settlement of the dispute. Moreover, throughout the arbitration, basic fundamental principles of law were considered, articulated and reaffirmed, adding precedent to the small body of international case law.

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[36] *Id.* at 74-76.
[37] *Id.* at 76-86.
[38] *Id.* at 86-87.

Most important, however, the Award on the Merits was unique in a number of respects. For the first time a major international decision considered the impact of the new world economic order upon the foundation of international contractual relationships, weighed the implications of an expanded concept of permanent sovereignty of states over natural resources, and examined the legal value of resolutions of the United Nations General Assembly. The decision once again confirmed the basic responsibility of states to fulfill their contractual obligations. In addition, for the first time in the history of international development contracts, a tribunal held that a government must specifically perform its contractual obligations and honor its contractual commitments to a foreign private party. The Award's detailed discussion of the principle of *restitutio in integrum* represents one of the most comprehensive analyses of the remedy of restitution in international law.

Furthermore, the decision was reached by an impartial and renowned Sole Arbitrator. Almost every argument in defense of Libya's actions was considered and evaluated. The thoroughness and careful reasoning of the decision and the extensive legal authority supporting it will establish this decision as a model in the international judicial process and will confirm its contribution to the progressive development of international law.