AD HOC ARBITRATION

LIBYAN AMERICAN OIL COMPANY V. THE GOVERNMENT OF THE LIBYAN ARAB REPUBLIC

AWARD

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12 April 1977

Tribunal:
Sobhi R. Mahmassani (Sole arbitrator)

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Award

PART ONE : ARBITRATION PROCEEDINGS

[1]. By its letter dated 2 July 1974 addressed to the President of the International Court of Justice, the Hague, the Claimant Libyan American Oil Company(hereinafter called LIAMCO) stated : that under date of 12 December 1955, the United Kingdom of Libya, now the Libyan Arab Republic (the Respondent herein), pursuant to provisions of its Petroleum Lav 1955, adopted 21 April 1955, - entered with the Claimant into three Petroleum Concessions Nos. 16, 17 and 20, - all of which were in the same fora(aa prescribed by the Lav) as to substantive clauses, relating, inter alia, to the extraction of Petroleum from certain land areas in Libya over a period of fifty years, renewable for an additional ten years.
That under date of 20 January 1966, upon demand of the Respondent, the said Concession Agreements (as all other similar agreements) were amended in material respects, including, in its entirety, Clause 28 thereof, entitled"Arbitration".

That by a so-called Nationalization Decree, made public 1 September 1973, the Revolutionary Command Council of the Respondent issued Law Number 66 expressed to provide for the nationalization and transfer to the Respondent of fiftyone percent of all pro perties, privileges, assets, rights, shares, activities and interests of the Claimant under its said Petroleum Concessions.

That this premature and unilateral repudiation in part of the Concession Agreements some thirty-two years before the expiry of the period of the concessions and some forty-two years before the time to which such period could be extended, is a fundamental breach of the Concession Agreements, thereby occasioning a claim by Claimant for restitutio in integrum and damages and giving rise to an arbitral dispute within the meaning of Clause 28 of the Concession Agreement

That on 15 November 1973, the Claimant directed to the Respondent a request in writing for Arbitration consistent with the provisions of Clause 28, especially its paragraph 2, of the Concession Agreements.

That on 13 February 1974, a period of ninety days after the date of said request expired, without the Respondent having to that date appointed its Arbitrator as provided in para 3 of said Clause 28.

Therefore, the Claimant requested the President of the International Court of Justice to appoint a Sole Arbitrator to arbitrate said dispute, as contemplated by the provisions of said clause under the circumstances hereinabove described,

[2]. By a second letter dated 17 January 1975, addressed to the President of the International Court of Justice, the Claimant stated further that by a second Nationalization Decree, made public 11 February 1974, the Respondent issued Lav Number 10 expressed to provide for the nationalization of the remaining forty-nine percent of the properties, privileges, assets, rights, shares, activities and interests of the Claimant under said Petroleum Concessions Nos, 16, 17 and 20, thus completing a

premature and unilateral repudiation in their entirety of the Concession Agreements.
That on 2 July 1974, the Claimant directed to the Respondent a second request in writing for Arbitration, and that on 1 October 1974, a period of ninety days expired without the Respondent having appointed its Arbitrator as provided in Clause 28 of the Concession Agreements.

Therefore, the Claimant requested the President of the International Court of Justice to appoint a Sole Arbitrator to arbitrate said dispute arising in connection with the Second Nationalization Decree, as contemplated by the provisions of said Clause 28 under the circumstances hereinabove described, and, further requested that such Sole Arbitrator be the same individual as may be appointed in response to Claimant's first communication of 2 July 1974.

[3]. On 27 January 1975, the President of the International Court of Justice, having concluded from the documents produced to him that the conditions upon which the power of appointment conferred upon him by Clause 28 of the Deeds of Concession have been satisfied, appointed Dr. Sobhi Mahmassani, Counsellor-at-Law of Beirut, as Sole Arbitrator to hear and determine the matters in dispute relating to the Concession Agreements Nos. 16, 17 and 20 which have arisen between the Claimant and the Respondent as a result of Nationalization Decrees issued on 1 September 1973 and 11 February 1974.
On 3 February 1975 the Sole Arbitrator confirmed formally his acceptance of his appointment by a communication addressed to the President of the International Court of Justice. Both parties were informed of this appointment by letters duly addressed to them by the Registrar of the International Court.

[4]. After duly convoking the Parties, the Arbitral Tribunal held a preliminary meeting in London, on 9 June 1975. Only the Claimant appeared and was represented by its representatives and counsel, Messrs Francis X. McCormack, Bertram Balch, Jr., Charles Torem, and W.L.Craig, -duly authorized by a letter of the Claimant Company dated 19 May 1975, which gives power of attorney to each of them and to any other person as may be designated by any of them. No appearance was made on behalf of the Respondent.

After hearing the Claimant on the question of procedure and details relating thereto, and in accordance with Clause 28 of the Deeds of Concession, the Sole Arbitrator rendered on the same date an "Arbitration Preliminary Decision", in which it was resolved as follows :

"1. That Dr. Maher Mahmassani be confirmed as Registrar of the Arbitration Proceedings with Power to handle the necessary secretarial help.

"2. That the City of Geneva, Switzerland, shall be the official scat of arbitration, with possibility to hold secondary meetings elsewhere if necessary as may be decided by the Arbitrator.

"3. That the Arbitrator, in his procedure, shall be guided as much as possible by the general principles contained in the Draft Convention on Arbitral Procedure elaborated by the International Law Commission of the United Nations in 1958.

"4. That the language of the proceedings shall be the English language, with possibility to use the Arabic translation when necessary.

"5. That the Claimant shall have one month from to-day's date in order to present written pleadings summarizing their claims.

"6. That the said pleadings shall be sent to the Arbitrator's Offices in Beirut, and that copies thereof shall be served by registered airmail on the Respondent, who shall have the right to reply and to file Statements with counter-claims under the same conditions and within the same period of time after notification.

"7. That within four months from the termination of the last period for said written pleadings, the Arbitrator shall fix a date for the hearings of the Parties, at which they shall present in writing and orally all statements containing the details of the facts with documents and other proofs supporting them, together with the statement of points of law with copies of any relevant Libyan law, statute or ordinance or of any relevant international text or precedent.

" 8. The Arbitrator also made decisions relating to advances in costs including the Arbitrator's honorarium and the expenses of the secretariat and other expenses".

[5]. On 7 July 1975, and in compliance with the above mentioned Preliminary Decision, Claimant presented its "Claim in Arbitration" with an initial set of supporting documents. Pursuant to its requests of 14 October 1975 and 5 April 1976, the Arbitrator, by two procedural orders dated 27 November 1975 and 16 April 1976, authorized the Claimant to submit its documents, briefs and statements of law and fact up to April 30 and June 30, 1976 successively.
Upon, Claimant's cable request dated 10 June 1976 and due to the touchy situation in Lebanon, the Arbitrator granted a further extension of time for the submission by Claimant of said documents and statements, and authorized it to present them to the Registrar's provisional residence in Paris.
On 6 October 1976 Claimant presented a Fact Memorial with 39 Exhibits, a Law Memorial with 12 Legal materials and a Libyan Law Consultation.

[6]. A second meeting of the Arbitral Tribunal was held in Geneva on 15 November 1976, at which appeared the Claimant represented by Messrs. Balch, Torem and Craig. It submitted a Memorial on Indemnification with Annexes A-D, and a copy of a Memorandum of the American State Department on foreign investment and nationalization.
The Respondent did not appear, although duly notified by cable.

After hearing the Claimant, and pursuant to his Preliminary Decision, the Arbitrator issued a second Provisional Order on the next procedural steps to be followed, and in which it was resolved to hold the arbitration hearing on 10 through 12 January 1977 at the International Conference Center of Geneva.

[7]. On the appointed date and place, the Arbitral Tribunal held a meeting at which appeared the Claimant, represented by Messrs. McCormack, Balch, Torem and Craig. The Respondent did not appear, although duly convoked by registered mail.
Mr. Torem made an oral presentation of LIAMCO's claims. His opening remarks referred to the subjects, purpose and object of the case, to the size of the concessions and their history, to the legal

aspects of this and other similar cases, the arbitrability of the dispute, the nationalization measures and their discriminatory and politically motivated character.

Mr. Torem continued his presentation by giving a summary of the facts of the case. He stressed the following points : the language of the concession, guarantees in case of revocation and cancellation, Government escape clause, Libyan Ministry of Petroleum official explanation in 1965 promising continuing respect for concessionaire's contractual rights, the question of vested rights and continuing validity of the concession.

[8]. On Tuesday, 11 January 1977, the hearing of the case was resumed. Mr. Craig, Claimant's Counsel, introduced and examined LIAMCO's witnesses and experts, namely : Mr. Edward Borrego(author of the report dated 14 June 1976, submitted with the Memorial of Facts, Exhibit 17), Mr. John Gilcrest (who collaborated with Mr. Lair in preparing the General Schedule, submitted under Annex A to the Memorial on Indemnification), Mr. William McNeill(author of the reports submitted under Annexes C3, D1 and D2 to said Memorial), Mr. Kenneth Riley (author of Annexes B and C2 to same Memorial), Mr. Robert Flaherty and Mr. Marvin Hagan. Each of the last two witnesses presented a written report dated 10 January 1977. All these witnesses expounded orally the contents of their reports, and clarified some points in answer to questions put to them by the Tribunal.
Then, Messrs. Torem and Craig continued the oral presentation of LIAMCO's arguments of fact, law and remedies. In particular, Mr. Craig confirmed the statement by the witness Mr. Hagan that no oil was found in Concession No. 16, and stated that no indemnification is claimed by LIAMCO in this connection.

After the summing up of the case made by Mr. Torem, he submitted a "Memorial on the Resolutions of the United Nations General Assembly" concerning the subject matter, and a copy of an Article by Messrs. Anderson and Coulson on "the Moslem Ruler and Contractual Obligations. They declared that they have nothing more to say or to submit, and requested the issue of an Award on the bases of their claims as set forth in their previous Memorials and Submissions.

[9]. The Tribunal declared the hearing closed, and adjourned for the consideration and preparation of the Award to be delivered on Tuesday 12 April 1977 at 10 a.m. at the International Conference Center of Geneva.

[10]. Copies of the two Preliminary Decisions with their Arabic translation and all the Claimant's submissions, together with all convocations to the arbitral meetings were notified to the Respondent by registered mail or cable. No response, appearance or communication were made by the latter.

[11]. After this Introductory Part, the questions of facts and evidence, the considerations of law and remedies, and the Conclusions will be examined in three successive parts.

PART TWO : FACTS AND EVIDENCE

[12]. As the Respondent did not appear, the Arbitral Tribunal had to admit the best evidence available and to rely chiefly on the basic facts as supported by copies of the various official documents and by

conclusive technical reports or expert testimony presented by the Claimant.

I. LIBYAN LAW ON CONCESSIONS

1. Petroleum Law of 1955

[13]. Libya, a federation of three provinces of Tripolitania, Cyrenaica and Fezzan, was recognized as an independent sovereign State by the United Nations in 1949, effective 2 January 1 Its form of government was monarchical under King Idriss I.

[14]. In order to improve its economic conditions, to encourage foreign capital investment, and to insure the exploitation and protection of its natural resources, Libya enacted Petroleum Law No. 25 of 21 April 1955 (28 Sha'ban 1374 h.), effective 18 August 1955, i.e. 30 days after publication in the Official Gazette.

[15]. This Law is a modern enactment which established a framework for the exploration and production of petroleum within the Libyan Kingdom. In its Article 1, it laid down the basic rule that :

> "(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, unless authorized by a permit or concession issued under this Law.

[16]. This Law provided a concessionary system for the exploitation of petroleum products, and established an autonomous Petroleum Commission responsible for the implementation of the provisions of the Law under the supervision of the appropriate Minister (Article 2.3). The Commission was empowered to "grant concession in the form set out in the Second Schedule to this 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". "Concessions shall be granted for the period of time requested by the applicant provided that such period shall not exceed fifty (50) years. A concession may be renewed for any period such that the total of the two periods does not exceed sixty (60) years"(Article 9.1, 9.4).

[17]. Under the "working obligations" of the concessionnaire, Article 11 provided for an obligation to make certain minimum capital expenditures and that :

> "The holder of any concession granted under this Law shall, within eight months of the grant of such concession, commence operations to explore for petroleum within the concession area. He shall diligently prosecute all his operations under the concession in a workmanlike manner and by appropriate scientific methods..."

[18]. The Law provided for the surrender by the concessionnaire of parts of the concession granted,

within a period of five years under conditions detailed in Article 10. The Law provided also for pipeline facilities, exemption from certain import and export duties, payments to the State as taxes, fees, rents, royalties and division of profits (Articles 12-16). It laid down the conditions for the assignment and revocation of permits and concessions, defined the rights and obligations of the parties in the event of force majeure and laid down provisions for penalties, definitions and other regulations (Articles 17-25).

[19]. Article 20 also provided that "any disputes between the Commission and the concession holder arising from any concession granted under this Law shall be settled by arbitration in the manner set out in the Second Schedule hereto", i.e. Clause 28 of said Schedule which will be analyzed in its amended form in a later section.

2. Minor Amendments to the Petroleum Law

[20]. Between 1955 and 1963, Libya issued a number of Royal Decrees supplementing the provisions of the Petroleum Law of 1955, or containing minor amendments to it, which, in general, either did not affect the contractual rights of the previous concessionnaires or were informally acquiesced to by them.

These Royal Decrees were the following :

- R.D. of May 21, 1955, modifying the date of entry into effect of the Petroleum Law.

- R.D. of May 21, 1955, naming members of the Petroleum Commission and its procedure.

- R.D. of July3, 1961, spelling out bases for calculation of royalties, taxes, profits, variation in arbitration procedures, and providing for the agreement by the concessionnaire to such modifications.

- R.D. of November 9, 1961, containing further supplement as to procedure for calculating tax carry-forward in favor of concessionnaires in the event that taxes, rents and royalties exceeded 50 % of profits, and containing reinforcement of "Security of Rights" provision to concessionnaires who accept to modify concession agreements.

- Law N: 6 of April 26, 1962, modifying the composition of the Petroleum Commission and providing for the appointment by the Minister of Petroleum, of the Director of Petroleum Affair the head of the Petroleum Commission, and providing for the Issuance of regulations, which, however, "should not include anything which might adversely affect the contractual rights explicity granted" by the Concession.

- R.D. of July 16, 1963, abolishing the Petroleum Commissi and providing that all its functions were to be exercised by the Ministry of Petroleum Affairs.

3. Royal Decree of 20 November 1965

[21]. This legislation was intended to amend the Petroleum Law of 1955 in such a manner as to significantly increase the State's Income from the concessionnaires, and to secure their consent to such increase.

[22]. The amendments included the following economic advantage

a) The royalty of 12½ percent was to be paid no longer on the value of exported oil determined according to the "free competitive market price" at a Libyan pert as provided in the original concession, but according to the"posted price", to be determined according to procedures set forth in the Amended Law. (Claimant contends that while the Law called for mutual consultancy prior to setting the "posted price", it is a fact that thereafter the posted price was set at levels higher than the free market price).

b) The amounts of marketing and quality allowances and discounts to be made in determining the "value" for the determination of royalties and taxes was to be fixed by the law and regulations, and not by the concessionnaires.

c) The Ministry of Petroleum was to have the right to purchase, at the same price upon which royalties were to be calculated, a substantial amount of the concession oil.

d) Clause 8 of the Concession Agreements was to be amended to provide that the 12½ percent royalty was no longer to be considered as a credit against the 50 % income tax, but simply as an expense in determining taxable profits. The effect was to increase taxes payable to the State in the amount of one-half of the royalties.

[23]. On 22 November 1965, an official Explanatory Memorandum was issued by the Ministry of Petroleum. It explained that the amended Law was enacted in consistency with the OPEC (Organization of the Petroleum Exporting Countries) settlement reached in 1964 with the major oil companies. It underscored the abovementioned advantages which Libya should enjoy from its oil in a way similar to that enjoyed by other oil producing countries.

[24]. The Memorandum stated that the new regime should be applied to all companies without exception, and that this application was to be made retroactive to January 1, 1965. It showed by a schedule of figures that due to the resulting increase the government oil revenues for that year would rise from 87.5 to 135.5 in million Libyan pounds.

[25]. The new regime was not automatically applicable to holders of existing concession agreements, except by means of amendments consented to by the concessionnaires. But Article 11(para.2) of the Amended Law provided that no company which had not so agreed would be eligible for any further concession grants.

[26]. As to agreements for amending previous concessions, Article 12 of said Amended Law provided as follows :

" The Ministry of Petroleum Affairs shall accept from a concession holder of a concession agreement who holds a petroleum concession granted before the coming into force and effect

of this Decree Law, a written undertaking to amend such concession agreement in accordance with the conditions and provisions of the Petroleum Law No. 25 of 1955 as heretofore and hereby amended... The Minister of Petroleum Affairs shall execute an agreement as specified below... Such concession agreement shall be amended by such agreement of amendment by amending the preamble and Clauses 8, 9, 13, 16, 21, and 28 thereof to read as such preamble and Clauses read in Schedule II to the Petroleum Law No. 25 as heretofore and hereby amended", with certain limitations detailed in said Article 12.

[27]. Thus, the Amended Law of 1965 modified the said preamble and clauses 8, 9, 13, 16, 21 and 28 of the Second Schedule to the Petroleum Law of 1955, which relate respectively to : taxation and division of profits, method of making payments, transport rights, security of company's rights, inspection and arbitration. Clause 28 concerning arbitration will be analyzed in a subsequent section. In particular, Clause 16 in its original and amended versions deserves special mention.

[28]. That Clause, entitled" security of company's rights", contained before its amendment the following provision :

" The Government of Libya, the Commission and the appropriate provincia] authorities shall take steps necessary to ensure Company's enjoyment of all the rights conferred by this Concession. The contractual rights express] created by this Concession shall not be altered except by mutual consent of the parties."

[29]. The Amended Law of 1965, in its Article 12 (para. 11) provided that Paragraph (2) of said Clause 16 shall read as follows

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

4. Petroleum Regulation No. 8 of 1968

[30]. This Regulation was enacted on 8 December 1968. Its purpose was to provide a framework for the conservation of petroleum resources in order to follow closely the measures suggested by OPEC.

[31]. In effect, the libyan concession agreements were not modified to incorporate the provisions of this new Regulation.

II. LIAMCO'S CONCESSION AGREEMENTS

1. LIAMCO's corporate status

[32]. Claimant, Libyan American Oil Company(LIAMCO) is a company organized on May 20, 1955 under the law, of the State of Delaware of the United States of America, for the purposes of research, exploration and exploitation of Petroleum and natural gas, particularly within the country of Libya. At the time of its organization, it was a wholy-owned subsidiary of Texas Gulf Producing Company, also a Delaware corporation.

[33]. In 1964, Texas Gulf Producing Company transferred its interest in LIAMCO to Sinclair International Oil Company, which, in turn, later transferred such interest to its parent Sinclair Oil Corporation. In 1969, as a result of the merger of the latter into Atlantic Richfield Company (ARCO), a Delaware corporation, LIAMCO became and remained the wholly-owned subsidiary of ARCO.

[34]. Claimant's statutory office is in Wilmington, Delaware. It maintained also a local business office in the City of Tripoli, Libya, until February 11, 1974, at which time its assets in Libya were wholly expropriated. Its present principal office for its transaction of business is in Los Angeles, California. Its president, Mr. Paul Ravesies, has assigned LIAMCO's address for communications relating to its arbitration requests to the care of Messrs. Coudert Fréres, 52 Avenue des Champs-Elysees, Paris, France.

2. LIAMCO's concession grants and partial assignments

[35]. After adopting its Petroleum Law of 1955, the Libyan Government, in the late summer of 1955, invited applications for exploration permits and concessions from companies which could meet the requirements of the Law, esp. Article 5 thereof. Among the invitees were Texas Gulf and its subsidiary LIAMCO, Sinclair and ARCO, all of which complied with the statutory requirements and belonged to the group called "independents". This group were actively solicited to participate by the Libyan Government, because (according to Claimant) they were noted for their aggressive exploration for oil and offered a counter-weight to the large integrated oil producers, called the "Seven Sisters:

[36]. Within the framework of the Libyan Petroleum Law, approximately 133 concessions were granted to American, British, German, Italian and French companies prior to the end of 1971. Among the first applicants, LIAMCO was granted, as of December 10, 1955, Concessions 16, 17, 18, 19, 20, 21 and 22. As permitted by Article 10 of the Law, Concessions 21 and 22 were voluntarily surrendered prior to 1970, and Concessions 18 and 19 were relinquished thereafter by LIAMCO to the Ministry of Petroleum. Thus, LIAMCO retained Concessions 16, 17 and 20, which are the subject of the present Claim in Arbitration.

[37]. By a series of partial assignments of concession rights, authorized by the proper Ministers of the Council and notified and accepted by the Petroleum Commission as required by Article 17 of the Law, LIAMCO assigned parts of its ownership in said petroleum Concessions 16, 17 and 20. So, in

1956, it conveyed a 49 % undivided interest therein to W.R. Grace & Co., a Connecticut, U.S.A., corporation. In 1960, LIAMCO and Grace each conveyed 50 % of the share that each held in the above petroleum Concessions to ESSO Sirte, Inc., a Delaware corporation (a wholly owned subsidiary of EXXON corporation). Finally, in 1965, Grace assigned all its concession rights to Grace Petroleum Corporation (Gracepeteco), a wholly-owned subsidiary. As a result of these partial assignments, the rights described in Concessions 16, 17 and 20 were shared as follows :

Baso Sirte 50 %

Grace(after 1965 Gracepeteco) 24.5 %

LIAMCO 25.5 %

[38]. LIAMCO continued to own that 25.5 % undivided interes in said Concessions. It is this interest which was expropriated by the Libyan Government, and has constituted the subject matter of the present arbitration.

3. The Concession Deeds

[39]. Concessions were granted to LIAMCO in the form of "Deeds of Concession", each representing a bilateral agreement concluded between the Petroleum Commission and LIAMCO, and approved by the Minister of Petroleum. All these concessions were dated 12 December 1955, and were executed in contractual form by a member of the Petroleum Commission, by two members of the Council of Ministers and by a representative of LIAMCO.

[40]. All the concession agreements adopted the same form, except for variances in property descriptions and sites. They followed the form prescribed by the Petroleum Law of 1955, as set forth in its Second Schedule.

[41]. That prescribed form, and consequently each Concession Agreement, contained thirty clauses entitled successively as follows : grant of concession, surrender of concession area, renewal of concession, working obligations, company to follow good oil field practices, surface rents, royalty, taxation on profits, method of making payments, exemption from certain import and export duties, exchange control, ancillary rights, transport rights, right to occupy land, company's labour, company's rights ensured, savings for rights of Government and others, employment and training of Libyans, water disposal and plugging of boreholes and wells, reports to be furnished, inspection, measurement of petroleum, address of local manager, force majeure, assignment, right to remove property, revocation, arbitration, definitions, fee.

4. Scope of the grant of concession

[42]. The grant of concession in each of LIAMCO's Agreements provided for the enjoyment of exclusive concession rights during the prescribed period, in consideration for the obligations undertaken by

the concessionnaire in terms summarized in Clause 1 of the standard form of the Second Schedule of the Law.

[43]. The terms of that Clause were inserted in each Agreement and read as follows :

> "In view of the Company's undertaking to make the annual payments, and settle the fees, leases, and royalties, prescribed hereafter and to perform and abide by the provisions of the Law, the Commission hereby grants the Company the exclusive right for a period of fifty years to conduct geological and geophysical explorations, including surveys from the air, and the search in any other manner, to drill and extract petroleum from within and over the area outlined in red over the map annexed hereto of approximately.... square kilometers situated in the... Zone bounded and defined as follows (here description of the area in detail).
>
> "The Company shall have the right to transport from the concession territory the produced petroleum through pipelines or otherwise, and the right to use, refine, store, export and dispose of same".

[44]. According to Clause 1 of Concessions 16 and 17, the concession area covered approximately 3709 and 4476 square kilometers, respectively, in the first petrolic zone (province of Tripolitania), ; and according to same Clause 1 of Concession 20, the area covered approximately 4708 square kilometers in the second petrolic zone (province of Cyrenaica).

[45]. Moreover, as to the period of concession, Clause 3 of each Agreement provided for its extension upon application of the concessionnaire, provided that the total duration of the concession shall not exceed sixty years.

5. Principal provisions of the Concession Agreements

[46]. The LIAMCO Concession Agreements of 1955 provided for the payment of rents, royalties and taxes. These were to be calculated as follows :

a) An annual rent, under Clause 6, was to be paid for each 100 square kilometers of concession territory, in the amount of :

- Ten Libyan pounds yearly for the first eight years ;

- Twenty Libyan pounds for each of the next seven years, or until the petroleum is discovered in commercial quantities, whichever date shall come first;

- 2500 Libyan pounds for each year thereafter.

b) Royalties, under Clauses 7 and 9, were to be paid quarterly in the amount of 12½ % of the value of field production of petroleum during the previous quarter. For this purpose, "value" of the crude oil was defined as the average free competitive market price during the previous quarter f.o.b. Libyan seaboard terminal (or in its absence, f.o.b. the nearest seaboard terminal

outside Libya), minus certain adjustments for storage and transportation from the field to the seaboard terminal.

c) Annual taxes, under Clause 8, were payable under the Laws of Libya, provided that if the total amount of taxes added to fees, rents and royalties falls short of SO percent of the Company's profits, the Company shall pay to the Government such sum by way of surtax as will make the total of the Company's payments equal to 50 percent of such profits.

[47]. In addition to the above economic obligations, LIAMCO undertook a number of contractual obligations pursuant to the terms of its Concession Agreements. Among the principal of such obligations are the following ;

a) Clause 4 of the Agreements imposed upon the concessionnaire the obligation to "work" the concession in conformity with Article 11 of the Petroleum Law, whose provisions are set forth above. This obligation entails the necessity to engage the minimum amounts of investment and expenses necessary to actively explore the concession area and to prosecute diligently all operations required thereby.

b) Pursuant to Clause 5 of the Agreements, the Company was required to perform all operations consistent with the exercise of proper field practice prevailing in the industry.

c) In Clause 18, the concessionnaire undertook an obligation to train libyan national employees and, within ten years of operations, to employ nationals to constitute at least 75 of its total number of employees, as well as to found special training programs for Libyans as soon as exports should be undertaken from the concession area.

d) The concessionnaire likewise undertook to render both technical and economic reports to the Petroleum Commission (Clause 20), and to permit inspection by the Commission of the project and of the Company's books and records (Clause 21).

[48]. As a counterpart to the numerous obligations undertaken, the concessionnaire received, pursuant to the terms of the Concessions as initially granted, the following protections :

a)"Security of Company's Rights" (Clause 16). This provided, as above set forth, that the contractual rights expressly created by the concession shall not be altered except by mutual consent of the parties.

b)"Right to Remove Property" (Clause 26). On the expiration or the termination of the. contract, the conccssionnaire was to have the right to remove all its movable property from the concession area. But the Director of Petroleum Affairs had the right to purchase the property at a fair price to be agreed upon by the parties, and in the event of failure to agree, then the fair price was to be determined by an expert or committee of experts as the parties shall agree.

c)"Cancellation of the Concession" (Clause 27). The Petroleum Commission was given the right to terminate the contract for several grounds of non-performance by the concessionnaire and, in particular, failure to pay rents and royalties overdue for at least six months or failure

to pay amounts as required by the decision of an arbitral tribunal rendered against it.The Clause particularly provided that:"Whenever the Company disputes the grounds under which cancellation is based and requests arbitration under Clause 28 of this contract, the cancellation shall only become effective subject to and in accordance with the result of the arbitration".

d)"Arbitration" (Clause 28). The Concession Agreements provided that all disputes arising out of or in connection with the concession shall be finally settled by arbitration as will be explained hereafter. They provided also that the concession shall be governed by and interpreted in accordance with the Laws of Libya and such principles and rules of international law as may be relevant.

6. Modifications of the Concession A g reement s

[49]. LIAMCO's Concession Agreements of 1955 were not substantially affected by the minor amendments of the abovementioned Royal Decrees issued prior to the Royal Decree of 20 November 1965, modifying the Petroleum Law of 1955. As set forth hereabove, that latter Decree provided for the increase of the Government petroleum revenues and for its application to holders of existing concessions only by means of amendments consented to by the concessionnaires.

[50]. Accordingly, LIAMCO accepted to amend its Concession Agreements as to contain the new clauses called for by the New Royal Decree. Its acceptance was published in the Official Gazette announcing the acceptance by concession holders of the modifications, and on 20 January 1966 it executed with the Minister of Petroleum a formal contractual amendment to the pre-existing Concession Agreements. The amendment concerned the Preamble and Clauses 8, 9, 13, 16, 21 and 28.

[51]. As analyzed above, the main effect of the modifications was first to compel LIAMCO to account to the Government for purposes of income taxes and royalties by valuing the crude oil produced at "posted prices", instead of the prices actually received on sales of the crude oil. Then the payment of the 12½ percent royalty was to be treated as an expense of the Company rather than a down payment against the 50 percent of petroleum profits payable to the Government as share of profits (Clause 8).The modifications changed also the accounting practices to be employed in determining profits, particularly in regard to amortization, deductions and discounts.

[52]. Likewise, the provisions of Clause 16 concerning the ensurance against altering the concessionnaire's rights except by mutual consent of the parties, as well as the provisions of Clause 28 concerning arbitration were amended as previously set forth.

III. NATIONALIZATION DECREES

1. Measures prior to LIAMCO's nationalizations

[53]. On September 1, 1969, a Revolutionary Command Council, headed by Colonel Muammar el Qadhafi, overthrew the Government of King Idriss, and announced the formation of the Libyan Arab Republic.

[54]. The new regime, from the outset, assured foreign interests that there would be no specific changes in policy and that the obligations of the State" would be respected. Later on, it took gradual measures which were proclaimed as a protection against imperialism and in harmony with the nationalistic aims of the Revolution.

[55]. The first measure was the demand that British and American forces evacuate the military bases established by them. Then followed the confiscation of all land, establishments and interests of Italian colonists established in Libya.

[56]. At the end of January 1970, the Libyan Government summoned local oil representatives and demanded substantial modifications in the"posted price"of petroleum. During the ensuing negotiations, the Government, acting under the authority of the "conservation" provisions of the abovementioned Regulation 8 of 1968, took measures to cut back production and increase pressure on the oil companies. In September 1970, LIAMCO agreed to a $0.30 increase in posting and a 55 % tax rate. Shortly after the agreement to terms, the production rates which had been cut back as" conservation measures" were restored to their pre-existing levels. Similar arrangements were made with other oil producers.

[57]. The September 1970 settlement forced up posted prices to approximately $2.53 per barrel. In January 1971, local representatives of oil companies in Libya were again summoned to the Ministry of Petroleum to agree to even higher posted prices, plus additional increases arising from the then pending Teheran negotiations between Gulf States' governments and petroleum concessionnaires. This demand was backed up by threats of complete stoppage of production. Finally, on April 2, 1971, fifteen oil companies, including. LIAMCO, signed the Tripoli Agreement, increasing posted prices to $ 3.44 with assorted other new financial obligations on the companies.

[58]. On December 7, 1971, the Arab Government of Libya passed a law nationalizing the entire interest of British Petroleum (BP) in Concession No. 65. As stated by the Libyan representative in his speech before the United Nations Security Council on 9 December 1971, the motive of this nationalization was in retaliation to the British non-intervention with regard to the Iranian occupation of three islands in the Arabian Persian Gulf. BP brought an arbitration proceeding pursuant to the dispute clause of its concession agreement. In a decision rendered on 10 October 1973 by the Sole Arbitrator Judge Gunner Lagergren, named by the President of the International Court of Justice, it was found that the Libyan nationalization was a "fundamental breach of the concession and that it clearly violated international law." BP Tress Release dated 25 November 1974 stated that an agreement has been signed with Libya, which fixed the amount of compensation to be paid to BP as a final settlement of the dispute at 17.4 million sterling pounds.

[59]. On April 1972, the Libyan Government asked the Italian national company, AGIF, to transfer to it 51 % of its concession at Abu Tiffel. After negotiations, AGIP accepted to transfer to the State 50 % of its two concessions in September 1972.

[60]. Bunker Hunt, an American "independent" company, owned 50 % of Concession 65, the other 50 %

of which was owned by BP. Beginning in October 1972, the State sought to negotiate a participation in the Hunt concession, and on 11 June 1973 a law was promulgated formally nationalizing the total Hunt concession. On 8 July 1973, the State Department of the U.S.A, filed a diplomatic protest to that nationalization considered as an action in violation of international law.

[61]. In July of 1973, the Libyan Government announced a general plan for participation in the oil industry. Under pressure pursuant to that plan, Occidential and three of the four members of the Oasis Group (Ameralda, Continental and Marathon, but not Shell) agreed to accept the nationalization of 51 % of their concession interests on the terms set forth in Nationalization Laws Nos. 44 and 51 of August 1973. In exchange, they received separate agreements with the Minister of Petroleum giving them certain assurances as to continuing sources of supply in the future, and entailing for them additional financial obligations, constituting very important modifications of their rights in the remaining 49 % of the Concession.

2. Nationalization of 51% of LIAMCO's concession rights

[62]. In summer of 1973, the Libyan Government asked the oil producers to accept a 51 % participation by the State in the oil concessions. It set the end of August as a deadline for their acceptance, under threat of taking "appropriate measures".

[63]. As no acceptance was made, the appropriate measures were the issuance by the Libyan Revolutionary Command Council on September 1, 1973 of Law No. 66, nationalizing 51 % of the concession rights of the following companies (Article 1) : Esso Standard Libya Inc., Libyan American Oil Company (LIAMCO), Grace Petroleum Corporation, Esso Sirte Inc., Shell Libya, Mobil and Gelsenberg Libya, Texaco Overseas Petroleum Company and California Oil Company.

[64]. The relevant articles for said nationalization were the following :

Article 1

" The ownership of 51 % of all property, rights, assets, portions, shares, activities and interests in any form... as regards petroleum concession deeds... shall be nationalized and transferred to the State...

"... This includes particularly the installations and facilities for exploration and drilling and for recovering crude petroleum, natural gas and their products, for transport, use, separation, storage and export, including wells, unitised fields, pipelines, storage tanks, pipes, terminals and other assets and rights..."

Article 6

"All property, rights and assets of the Companies, the ownership of which has reverted to the State in accordance with the provisions of Article 1, shall be transferred to the National Oil Corporation".

Article 7

"The nationalized concession areas shall be Invested through the National Oil Corporation in association with the Companies referred to in Article 1. The Corporation's share in the participation shall be 51 % and the share of these Companies in the participation shall be 49 %.

"The operation shall be made through the operating company which was actually operating before the execution of the provisions of this Law. A committee for the management of the operating company shall be appointed by a decision from the Minister of Petroleum. The committee shall consist of three members, two of whom shall represent the government and the other member shall represent the nationalized companies".

[65]. After those nationalization measures, there were only a few oil concessions which remained unaffected with a State participation. They were mostly controlled by non-American interests, namely : Aquitaine-Duke (French participation), Elf-Erap(French), Hispanoil (Spanish), Murphy Oil (American).

[66]. The nationalization measures were immediately implemented. The operator of LIAMCO's concessions, Esso Sirte, LIAMCO's co-concessionnaire, was put under control of a management committee as provided in said Article 7. The National Oil Corporation appropriated 51 % of all benefits accruing from those concessions, and LIAMCO was deprived of its rights thereunder.

[67]. As to compensation, Article 2 of said Nationalization Law provided as follows :

" The State shall compensate people concerned for the property, rights and assets that have reverted to it under Article 1. Such compensation shall be assessed by a committee or committees which shall be formed by a decision from the Minister of Petroleum, in the following manner :

" (a) One of the Judges of the Courts of Appeal, being Chairman, to be nominated by the Minister of Justice,

" (b) A representative of the National Oil Corporation, being a member, to be nominated by the Minister of Petroleum

"(c) A representative of the Ministry of Treasury being a member, to be nominated by the Minister of Treasury.

"In carrying out its task, the committee may seek assistance of any employee or others whose assistance it considers necessary".

[68]. Moreover, Article 3 of the Law provided that the Minister of Petroleum should appoint a committee to inventory the property and assets of the nationalized companies.

3. Nationalization of LIAMCO's remaining 49 % interest

[69]. By Decree effective February 11, 1974, the Revolutionary Command Council of Libya issued Law No. 10 of 1974, nationalizing LIAMCO's remaining concession interests. Article 1 provides as follows :

> "The ownership of all property, rights, assets, portions, shares, activities and interests in any form, owned by Libyan American Oil Company in connection with petroleum Concession Deeds Nos. 16, 17 and 20 shall be nationalized and transferred to the State".

[70]. The new Decree was aimed only at LIAMCO in respect to its remaining interest in said concessions. The other companies owning undivided interests in these same concessions, i.e. Esso Sirte and Gracepeteco, continued to exercise their remaining concession rights. The Law specifically provided that Esso Standard Libya would continue to act as operator of the concessions for the interest of the National Oil Corporation, Gracepeteco and Esso Sirte (Article 7).

[71]. Moreover, the new Decree of 1974 did not affect the other concessionnaires in Libya, which continued to hold at least an effective 49 % interest in their concessions, with the exception of two other American companies, Texaco Overseas and California Asiatic operating together as "American Overseas Oil Company" These two were also totally nationalized by separate decrees promulgated on 11 February, 1974, the same date as that of LIAMCO's Decree.

[72]. The Nationalization Decree of 1974 contained in its Articles 2 and 3 identical provisions as those of 1973 in respect to compensation and inventory committee.

4. Reactions to said nationalizations

[73]. Explaining the principles of the Nationalization Decree of 1973, the Libyan Prime Minister, in a statement of 2 September 1973, defined the basic principles for conducting negotiations with oil companies. The first principle is that Libya cannot buy its own oil which is underground, and consequently, compensation for nationalization should be based on the net book value of the concession. This means the balance of the funds a company brought into Libya and spent on the concession (for studies, exploration, pipe, reports), after deducting the funds it recovered from it.

[74]. LIAMCO immediately reacted to the September 1, 1973 Decree. Together with five other oil companies it filed a protest to the 51 % nationalization measures, refusing to give its agreement to them.

[75]. By note dated September 14, 1973, the State Department of the U.S.A, duly protested through diplomatic channels. It recalled the statement of the Revolutionary Command Council, made on September 1, 1969 to the diplomatic corps, that the new regime would fulfill all its international obligations and would respect the rights of the petroleum companies operating in Libya, and recalled the provisions of the concession agreements that the contractual rights of the concessionnaires should not be altered except by mutual consent of the parties. The note stated that the "net book value" formula for compensation did not meet the minimum standards for prompt, adequate and effective compensation required by international law. It further stated that it

expected Libya to respond positively to any requests for arbitration under the agreements.

[76]. To assert its right, LIAMCO by letter addressed to the Minister of Petroleum on November 11, 1973, requested arbitration according to the Agreements in respect of the dispute arising from that first nationalization.

[77]. By a circular letter to all oil companies dated 8 December 1973, the Minister of Petroleum advised that Libya, handling a matter of the heart of the sovereignty, did not accept therein any dispute which would be arbitrable under Clause 28 of the Concession Deeds;and that compensation being guaranteed according to procedures of the Nationalization Law, all arbitration applications should be rejected.

[78]. Under these circumstances, some concessionnaires finally did agree to compensation terms for the 51 % taking and, after agreeing to drop any requests for arbitration, entered into supplemental agreements in respect to the remaining 49 % interest.

[79]. Moreover, the Libyan Government proceeded to the total liquidation of LIAMCO's interests in Libya by the second nationalization in February 1974.

[80]. No compensation was paid or offered to LIAMCO for either the first or the second nationalization measures. To the Claimant's best information and belief, no committee was appointed for this purpose. Moreover, as was explained in the report submitted byMr. Robert Flaherty and in his testimony at the arbitration hearing, LIAMCO contends that it tried in vain to negotiate and to seek an arrangement with the Libyan Authorities on this matter.

[81]. After the second nationalization, LIAMCO formally pursued its arbitration course by letter addressed on July 2, 1974 to the Libyan Minister of Petroleum.

[82]. As the Libyan Government had failed in each case to name its arbitrator within the ninety days provided by Clause 28 of the Concessions, LIAMCO, by letters of July 2, 1974 and January 17, 1975, requested the President of the International Court of Justice to name a single arbitrator to determine the dispute. Then the arbitration proceedings progressed as set forth in PART ONE hereof.

[83]. Meanwhile, by another diplomatic note addressed to the Libyan Government on June, 1974, the State Department of the U.S.A, stated that it was clear that the reason for the nationalization of 1974 was political retaliation. It noted that "under the principles of international law, measures taken by a State against the interests of foreign nationals, which are motivated not by reason of public utility, but of political retaliation against the State of which those nationals are citizens, are invalid and are not entitled to recognition by other States". Accordingly, it called on Libya to "discharge its responsibilities under international law, including the payment of prompt, adequate and effective, compensation for the interests affected by the Decrees of February 11, 1974."

[84]. That position of the U.S. State Department was reaffirmed on 30 December 1975 in a press release No. 630 on foreign investment and nationalization. In that Statement it was repeated that :

"Under international law, the United States has a right to expect:

- That any taking of American private property will be nondiscriminatory;

- That it will be for a public purpose; and

- That its citizens will receive prompt, adequate and effective compensation from the expropriating country."

"...The State Department wishes to place on record its view that foreign investors are entitled to the fair market value of their interests. Acceptance by U.S. nationals of less than fair market value does not constitute acceptance of any other standard by the United States Government."

5. Summary of LIAMCO's activities

[85]. The above recorded details of facts were evidenced by copies of official documents submitted by LIAMCO. It gave also a summary of its role and activities in developing Libya's oil production. In support thereof, it presented a copy of a notarial affidavit signed by its former vice-president and general manager, Mr. Edward C. Borrego, and copies of two reports on the chronological breakdown of its activities prepared by its Exploration Department in 1965 and 1971. Mr. Borrego was heard by the Arbitral Tribunal. In his testimony, he confirmed his report and expounded verbally its contents.

[86]. On the basis of said evidence, LIAMCO's pretentions concerning its activities in Libya may be summarized as follows :

[87]. When LIAMCO entered into its concession agreements in December 1955, it acted as a pioneer in a desert land where no extensive exploration had been undertaken by any company. It faced exceptional difficulties with regard to any facilities that might be utilized in connection with supplies of any kind. There were no machine or repair shops, no roads, no adequate ports, no personnel nor labor, no water, no communications, no fuel and no experienced governmental departments to handle the required formalities and enterprise. LIAMCO was even confronted with the unusual and costly task of clearing abandoned World War II mines.

[88]. Under such circumstances, LIAMCO had to operate, and had, moreover, to agree to an expedited discovery program which required it to accept an obligation to commence the drilling of an exploration well by April 30, 1956, i.e. four and one-half months only after the grant of the concessions, subject to forfeiture of all its seven concessions in case of failure to meet that deadline. This was an obligation that the major petroleum companies would not accept.

[89]. LIAMCO struggled hard and overcame all those difficulties. Experienced personnel was brought from abroad, including a great number of Egyptians. Water supply was drilled and provided in sufficient quantities, even for Libyan tribes. LIAMCO pioneered these efforts which other companies followed, and even shared with them all its knowledge and experience.

[90]. Thus, by very intense day and night toil, the works of the initial operation well were completed on 19 April 1956, and next day the drilling operation began on schedule as agreed with the Petroleum

Commission.

[91]. LIAMCO undertook considerable photogeological and gravity-magnetic surveys as well as seismic studies in Cyrenaica, Tobruk, Harada and Sirte areas during the period 1956-1958. Additional exploration wells were drilled without success in 1957 and 1958 in Concession 18.

[92]. In 1958 paleontologic and regional gravity studies were expanded into the Northern Cyrenaica area in Concessions 17 and 20 and in Northern Fezzan. Wildcatting was commenced in May 1959 in Concession 17, where at the end of the year oil was discovered in what is now known as the Mabruk Field, and three producing wells were subsequently drilled.

[93]. During 1960-1968, drilling and studies continued in all Concessions, although physical control of exploration operations passed to Esso Sirte Inc. as operator. Major oil discoveries were made in the Mabruk area since 1960, and in the Kaguba area since 1961. During that period, LIAMCO contributed to the costly construction of a 54- mile pipeline linking the Kaguba area with the Zelten pipeline owned by Esso Libya with terminus at the port of Marsa el Brega, as well as to a complementary gaz transmission line and road. Since 1961, Libya began exporting petroleum from the said port.

[94]. In March 1964, LIAMCO and its coconcessionnaires entered with Esso Libya into the "Pipeline, Tankage and Oil Handling Facilities Operating Agreement", and purchased from Esso Libya an undivided 10/49 th interest in a 110 kilometer stretch of the Zelten pipeline, a one-fourth interest in sixteen Esso Libya storage tanks at Marsa el Brega and a 30 % undivided interest in the read parallel to the pipeline.

[95]. By the end of 1964, the Raguba oil field had produced 42 million barrels, the most productive field in Libya. In I960 large amounts were spent for a pilot water injection test for that field.

[96]. By the middle of 1968, the exploration situation could be summarized as follows ;

[97]. In Concession 16 : 21 wells had been drilled, two of which were capable of producing oil.

[98]. In Concession 17 : 31 wells were drilled, including 26 wells in the Mabruk field where numerous oil reservoirs had been discovered.

[99]. In Concession 20 : 89 wells had been drilled, including 59 wells in the Raguba field where large oil reservoirs were discovered, and commercial production in substantial quantities from 39 wells had been attained. The oil was piped to the port of Marsa el Brega through the 54- mile pipeline constructed by the concessionnaire and through Esso Libya’s 110 kilometer Zelten pipeline in which the concessionnaire had purchased an interest.

[100]. In 1970, LIAMCO and its concessionnaires completed construction of a 105 million cubic foot per day gas processing plant on the Raguba field in Concession 20. The plant was put in operation in 1971. The concessionnaires actively continued joint exploration and production in the concession areas through the nationalization measures of 1973 and 1974.

[101]. Claimant has summarized the status of Concessions 16, 17 and 20, on the eve of said nationalization measures, as follows : LIAMCO had performed all its obligations to "work" the concessions accorded to it as required by the concessionnaire acting alone and in concert with its co-concessionnaires;it had performed extensive scientific survey work, drilled numerous exploratory wells, drilled and completed 79 development or producing wells, constructed a 54- mile crude oil pipeline, and an accompanying gas transmission line and road, drilled two water supply wells and one water injection well; it constructed a 105 million cubic foot per day gas processing plant, and constructed all required supporting facilities necessary to the proper development of the petroleum reserves discovered in the concession area.

[102]. As a result of these exploratory and operational activities, LIAMCO and its co-concessionnaires discovered and defined a petroleum field containing substantial petroleum reserves, which on the dates of 1973 and 1974 was capable of producing up to 133, 000 barrels of crude oil and liquids per day, plus 150 million cubic feet of gas per day.

6. Claimant's characterization of the facts of the case

[103]. On the basis of the above facts, the Claimant contends that the Libyan nationalization measures of 1973 and 1974 concerning LIAMCO's 25.5 % undivided interest in Concessions Nos. 16, 17 and 20 of 1955 as amended in 1966, were politically motivated, discriminatory and confiscatory in nature, and constituted a denial of justice, a wrongful taking and an unlawful breach of contract, and are illegal as contrary to the principles of the law of Libya common to the principles of international law.

[104]. In consequence, Claimant requests the issue of an award ordering: as a principal relief the restoration of its concession rights together with all the benefits accruing from such restoration, and as an alternative relief the payment of adequate damages plus interest as will be detailed later.

[105]. As the merits of these arguments and demands depend upon the legal considerations of the case, their examination will be elaborated in the Parts hereafter.

PART THREE : CONSIDERATIONS OF LAW AND REMEDIES

I. GENERAL NATURE AND PROTECTION OF CONCESSIONS

[106]. The petroleum concession agreements entered into between LIAMCO and the Libyan Government constitute the subject matter of the dispute. These agreements, as other similar agreements, are classified by some international jurists under the type of the so-called "international development contracts".

[107]. A contract of this type is a semi-public agreement made between a State and a private individual,

whose object covers a project of public utility or the exploitation of certain natural resources, and in which are defined the rights and obligations of the parties in their mutual relationship.

[108]. Such a contract has special characteristics of which the most common are the following : The contracting parties are not ordinary private persons, one of them being the State or a Government organ, the other very commonly being a foreign corporation. The object of the contract is usually a long-term exploitation of natural resources, involving expensive plants and installations. The concession deeds follow generally a standard legal form, in which usually are provided special clauses concerning, inter alia, technical and financial provisions, use of exorbitant rights and privileges, the choice of the proper law of the contract, and a compulsory arbitration clause.

[109]. Although a concession contract partakes of mixed public and private legal character, it retains a predominant contractual nature. According to the general rules of the law of concessions, widely accepted by modern jurists, the concessionnaire's activities, in mining, petroleum and similar concessions, donot have the character of public service, but are considered as private projects and enterprises, and as such are generally governed by the principles of the private law of contracts (V.Duez et Debeyre,.Traité de droit administratif, No.803 p. 606;et André de Laubadére, Traité élémentaire de droit administratif, No.49 p. 45).

[110]. This contractual nature has been confirmed in all Libyan petroleum concessions, which took the form of written signed agreements, in which the usual style and language used in contracts were employed, the rights and obligations of each party were set forth"in consideration" of and in reciprocity to those of the other party, and all amendments were made by mutual consent according to an imperative contractual provision.

[111]. To strengthen this contractual character in LIAMCO's and similar other concession agreements as a precaution against the fact that one of the parties is the State, it was deemed necessary to ensure a certain protection for the contractual rights of the concessionnaire. Usually, foreign investors before taking the risk of investing substantial amounts of money and labor for "working" their concessions, are anxious to seek sufficient assurance for the respect of the principle of the sanctity of contracts. In other words, they seek to be guaranteed against the possibility of arbitrary exercise by the State of its sovereignty power either to alter or to abrogate unilaterally their contractual rights. Any such alteration or abrogation of concession agreements should be made by mutual consent of the parties.

[112]. To ensure such protection in LIAMCO's Concessions, a specific provision has been inserted to that effect in Clause 16 of its Agreements. That Clause has been legally authorized by and modelled upon the same standard clause of Schedule II annexed to the Petroleum Laws of 1955 and 1965. In its amended final version, it reads as follows :

> "(1) The Government of Libya, the Commission and the appropriate provincial authorities 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."

[113]. The above Clause comes under what has been termed "stabilization" and "intangibility"clauses, which have been considered as legally binding under international law (V.Article of Prosper Well" Les clauses de stabilisation on d'intangibilité insérées dans les accords de developpement économique", in Melanges Rousseau, p. 301-328).

[114]. Moreover, Clause 16 is justified not only by the said Libyan Petroleum legislation, but also by the general principle of the sanctity of contracts recognized also in municipal and international law, as will be analyzed at a later stage hereof. It is likewise consistent with the principle of non-retroactivity of laws, which denies retrospective effect to a new legislation and asserts the respect of vested rights (droits acquis) acquired under a previous legislation. The principle of non-retroactivity of laws is also admitted by Islamic law, and is based on the following Quranic verset

"We never punish until We have sent a messenger" (XVII, 15).

[115]. In addition to the clause protecting contractual rights, most concession agreements contain explicit mandatory provisions: determining the law to be applicable, and providing for arbitration in case of dispute. As will be explained hereafter, the validity of such provisions has been admitted by municipal and international law and practice.

[116]. Therefore, it is necessary in the present dispute to examine the legal principles to be applied, and the provisions of the arbitration clause as regards the arbitrability of the dispute, the jurisdiction of the Arbitrator and the arbitration seat and procedure.

II. PRINCIPLES OF LAW APPLICABLE IN THE DISPUTE

1. Validity of the choice of law clause

[117]. In a concession agreement, an important question arises regarding the choice of the proper law to be applied for its interpretation and enforcement and for governing any details that are not, explicity provided for in it.

[118]. The legal systems of the two contracting parties are usually dissimilar. It is not fair to rely on one of them to the exclusion of the other without infringing the principle of the equality of the parties, unless expressly agreed to by mutual consent either in the original contract or in a later document. Moreover, the two or one of these systems might be vague or insufficient on the various concession issues.

[119]. Hence, in a case involving a foreign litigant, the tribunal to which it is submitted has to refer for

guidance to the general principles governing the conflict of laws in private international law.

[120]. According to said principles, the proper law of a contract is that "by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or...to submit themselves"(Dicey's Digest of the Conflict of Laws, Rule 155; and Lord McNair's Article" The General Principles of Law Recognized by Civilized Nations", in British Yearbook of International Law, 1957, p.69-98).

[121]. Pursuant to that established rule on the solution of the conflict laws in contracts in general, concession agreements usually contain an explicit provision stating the intention of the parties as to the choice of the proper law to which they submit their contract.

[122]. In accordance with that practice, Clause 28, para. 7, of the original LIAMCO Concession Agreements Nos. 16, 17 and 20 of 12 December 1955 provided that :

> "This Concession shall be governed by and interpreted in accordance with the Laws of Libya and such principles and rules of international law as may be relevant, and the umpire or sole arbitrator shall base his award upon these laws, principles and rules".

[123]. The same Paragraph 7 was modified by the Amendment Agreement of 20 January 1966 as follows :

> "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 as may have been applied by international tribunals".

[124]. The legal validity of this Paragraph 7 of Clause 28, in both its original and new versions, is supported by the aforementioned rule of private international law. The validity of clauses of choice of law in concession agreements, whether drafted in the same or similar terms, has always been accepted by international jurists (Ex. Lagersen in the "Sources of the Law of International Trade, 1964, p.201-210, and D.P. O'Connell, in 2 International Law, 1970, p.979), as well as by international' precedents (Ex. Award of Lord Asquith in Petroleum Development Ltd. v. Sheikh of Abu Dhabi, 18 I.L.R. 144, 1951).

[125]. Moreover, Libyan municipal public law has explicitly authorized the said choice of law clause by Clause 28, para.7, of the Schedule II annexed to Petroleum Laws of 1955 and 1965.

[126]. The two laws were duly promulgated by the appropriate Libyan legislature. They have continued in force after the Libyan Revolution, according to the legal international public rule that the change of government does not, per se, affect the validity of the existing legal system and the rights and liabilities derived from it.

[127]. This rule of the continuity of the State and its legal system has been unanimously accepted by international jurists (V. for ex. Brierly in "The Law of Nations", 1930, p.81-90), and by international precedents (Ex. the Award in the Tinoco Claims arbitration between Great Britain and Costa Rica,

October 18, 1923).

[128]. Likewise, the Permanent Court of International Justice has ruled in an Advisory Opinion given in 1923, in Re : German Settlers in Poland, that:"Private rights acquired under existing law do not cease on a change of sovereignty"(Series B, No. 6 p.36). Later, it confirmed that ruling in its Judgment of 1926 in Re : German Interests in Polish Upper Silesia (Series A, No. 7 p. 42).

[129]. Moreover, as previously pointed out, the Revolutionary Command Council, while overthrowing the government of King Idriss and announcing the formation of the Libyan Arab Republic on September 1, 1969, assured, on that same date, foreign interests that there would be no specific changes in policy and that the obligations of the State would be respected.

[130]. Similarly, municipal private law concerning the principle of contractual freedom (Article 147 of the Libyan Civil Code) confirms in general the imperative character of contractual provisions. The choice of law clause is not excepted from this principle. The right to select the proper law of the contract is explicitly acknowledged by the Libyan Civil Code, whose Article 19 recognizes the right of the contracting parties to choose the law applicable to their contract.

[131]. Therefore, it is an accepted universal principle of both domestic and international laws that the parties to a mixed public and private contract are free to select in their contract the law to govern their contractual relationship.

2. Analysis of the choice of law clause

[132]. The proper law governing LIAMCO's Concession Agreements, as set forth in the amended version of said Clause 28, para.7, is in the first place the law of Libya when consistent with international law, and subsidiarily the general principles of law.

[133]. Hence, the principal proper law of the contract in said Concessions is Libyan domestic law. But it is specified in the Agreements that this covers only" the principles of law of Libya common to the principles of international law". Thus, it excludes any part of Libyan law which is in conflict with the principles of international law.

[134]. To determine the meaning of "the principles of international law", it is useful to refer to those of its sources that are accepted by the International Court of Justice. Article 38 of its Statute provides as follows :

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply :
>
> > "a.international conventions, whether general or particular, establishing rules expressly-recognized by the contesting states;
> >
> > "b. international custom, as evidence of a general practice accepted as law;

"c. the general principles of law recognized by civilized nations;

"d. subject to the provisions of Article 59(concerning the relative effects of judgments), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

"2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto".

[135]. As to the meaning of "the principles of the law of Libya" in this connection, it is relevant to point out that this comprises any legislative enactment consistent with international legal principles. lt includes, inter alia, all Petroleum concessions laws, all consistent relevant sections of any private or public Libyan legislation, including the Civil Code.

[136]. In particular, Article 1, para.2, of the Libyan Civil Code, promulgated on 28 November 1953, provides that :

"(2) If there is no legal text to be applied the judge will adjudicate in accordance with the principles of Islamic law, failing which in accordance with custom, and failing that in accordance with natural law and the rules of equity".

[137]. This text, which has been inserted in other Arab Civil Codes (all prepared by the late Egyptian jurist, Dr. Abdulrazzak Sanhoury), adds to Libyan statutory law two complementary sources, namely Islamic law and natural law and equity.

[138]. Apart from that specific reference to Islamic law, this law deserves special mention in connection with Libya. It has always been the common law governing family matters in Libya as well as in all Arab and most Islamic countries. Libya adopts in this field the teachings of the Maliki School of Jurisprudence, which is one of the four Sunni Schools.

[139]. Moreover, the Revolutionary Government underscored the importance of this source of law in its new legislation. Pursuant to this policy, the Revolutionary Command Council, by Decree dated 28 October 1971 (9 Ramadan 1391 H.), provided that Islamic law shall be the principal source of Libyan legislation, and appointed special commissions to review existing laws and to amend them according to dictates of Islamic Shari'a. Typical examples of such amended laws are the Statute on Wakfs No. 124 of 1972, the Larceny Statute No. 148 of 1972, and the Adultery Statute No. 70 of 1973.

[140]. It is relevant to note that the other subsidiary-legal sources mentioned in said Article 1 of the Libyan Civil Code, namely custom and natural law and equity, are also in harmony with the Islamic legal system itself. As a metter of fact, in the absence of a contrary legal text based on the Holy Coran or the Traditions of the Prophet, Islamic law considers custom as a source of law and as complementary to and explanatory of the contents of contracts, especially in commercial transactions. This is illustrated by many Islamic legal maxims, of which the following may be quoted :

-"Custom is authoritative".

-"Public usage is conclusive and action may be taken in accordance therewith"

-"What is customary is deemed as if stipulated by agreement".

-"What, is customary amongst merchants is deemed as if agreed upon between them".

-"A matter established by custom is like a matter established by law".

(Articles 36, 37, 43-45 of the Ottoman Majallah Code.V. our book"The Philosophy of Jurisprudence in Islam", 4th Arabic edition, Beirut, 1975, p.266-7, and its English translation, Leyden, 1961, p.132-133).

[141]. Similarly, equity (istihsan) is considered as an auxiliary source of law, especially by the Maliki and Hanafi Schools. Further, all Islamic rules of law are based on and influenced by religious and moral precepts of Islam (V.Ibid, Arabic text p. 190 et s., English translation p.85 et s.; and our book "The Moral bases of Islamic Jurisprudence, Arabic, Beirut, 1973, p.36 7-75).

[142]. It is very relevant in this connection to point out that Islamic law treats international law (the Law of Siyar) as an imperative compendium forming part of the general positive law, and that the principles of that part are very similar to those adopted by modern international legal theory(v. our lectures in the Academy of International Law entitled"General principles of International Law in the Light of Islamic Doctrine", Recueil, 1966, and our Arabic book on "International Law and Relations in Islam", Beirut, 1972).

[143]. Thus, it has been pointed out that Libyan law in general and Islamic law in particular have common rules and principles with international law, and provide for the application of custom and equity as subsidiary sources. Consequently, these provisions are, in general, consistent and in harmony with the contents of the proper law of the contract chosen and agreed upon in Clause 28, para.7, of LIAMCO's Concession Agreements, in which it is provided, as already explained, that said Agreements are governed primarily by those principles of the law of Libya as are common to the principles of international law.

[144]. Moreover, in the absence of that primary law of the contract, the sane Paragraph provides as a secondary choice to apply subsidiarily "the general principles of law as may have been applied by international tribunals" These general principles are usually embodied in most recognized legal systems, and particularly in Libyan legislation, including its modern codes and Islamic law. They are applied by municipal courts and are mainly referred to in international and arbitral case-law. They, thus, form a compendium of legal precepts and maxims, universally accepted in theory and practice. Instances of such precepts are, inter alia, the principle of the sanctity of property and contracts, the respect of acquired vested rights, the prohibition of unjust enrichment, the obligation of compensation in cases of expropriation and wrongful damage, etc.

III LEGALITY OF THE ARBITRATION

1. The Arbitration clause and its validity

[145]. Article 20 of the Petroleum Law of 1955, as slightly modified in 1965, provides that :

> " Any disputes between the Ministry of Petroleum and the concession bolder arising from any concession granted under this law shall be settled by arbitration in the manner set out in the Second Schedule hereto."

[146]. The said Second Schedule in its Clause 28 laid down the appropriate arbitration clause, which was inserted in LIAMCO's Concession Agreements of 1955. The same clause was amended by the Petroleum Law of 1965 and adopted by LIAMCO's Amendment Agreement of 1966.

[147]. The arbitration Clause 28, in its final modified version, reads as follows :

> "(1) If at any time during or after the currency of this contract any difference or dispute shall arise between the Government and the Company concerning the interpretation or performance of the provisions of this contract, or its annexes, or in connection with the rights and liabilities of either of the contracting parties hereunder, and if the parties should fail to settle such difference or dispute by agreement, the same shall, failing any agreement to settle it in any other way, be referred to two Arbitrators, one of whom shall be appointed by each party, and an Umpire who shall be appointed by the Arbitrators immediately after their appointment.
>
> "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 is incorporated, the Vice-President, of the International Court of Justice to appoint the Umpire.
>
> "(2) The institution of the 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 requested and name the Arbitrator appointed by the party request...; arbitration.
>
> "(3) The party receiving the request shall within 90 days of such receipt appoint its Arbitrator and notify this appointment to the other party, failing which that 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 award of the Sole Arbitrator so appointed shall be binding upon both parties.
>
> "(4) If the Arbitrators appointed by the two parties fail to agree upon a decision within 6 months of the institution of arbitration proceedings, or either or both Arbitrators become unable or unwilling to perform their functions at any time within such period, the Umpire shall then enter

upon the arbitration process. The award of the Arbitrators, or in case of a difference of opinion between them, the award 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 process, then, unless the parties otherwise agree, a substitute will be appointed at the request of either of said parties by the President or, in the case referred to in paragraph (1) above, by 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 such parties or of the Government of any of the aforesaid countries.

"The application of the provisions of this paragraph and the determination of the procedure to be followed in the arbitration shall be decided by the Arbitrators or, in the event they 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.

"In giving the Award the Arbitrators, the Umpire or the Sole Arbitrator, as the case may be, shall give an adequate period of time during which the party against whom the Award is given shall execute that Award, and such party shall not be in default if it has conformed to said Award prior to the expiry of that period.

"(6) The seat of arbitration shall he such as may be agreed upon by the two parties. In default of agreement between them within 120 days from the date of the initiation of the arbitration as specified in paragraph (2) above, it 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 paragraph recites the proper law applicable to the concession, as above set forth).

"(8) The costs of the arbitration shall be borne by the said two parties in such proportion and manner as may be fixed in the Award".

[148]. The validity of this arbitration clause necessitates the examination of the capacity of the parties to conclude it and the question of its continuance after nationalization.

[149]. On the one part, LIAMO's capacity to arbitrate is supported by tht Law of its place of incorporation, namely Delaware, whose Corporation Law of 1967, Section 122 as amended, provides that every corporation created pursuant to Delaware law shall have power" to sue and be sued in all courts and to participate, as a party or otherwise, in any judicial, administrative, arbitrativo or other proceedings in its corporate name".

[150]. On the other part, the Libyan Government is empowered to arbitrate by an explicite legislative text, namely the above mentioned Article 20 of the Petroleum Laws of 1955 and 1965 as completed and amplified by Clause 28 of Schedule II annexed to those Laws.

[151]. It is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the State of the contract in which it is inserted and continues in force even after that termination. This is a logical consequence of the interpretation of the intention of the contracting parties, and appears to be one of the basic conditions for creating a favorable climate for foreign investment.

[152]. This rule was adopted by decisions of the International Court of Justice (ex. in Ambatelias Case in 1952 and 1953) and of many Arbitral Tribunals (ex.in Losinger and Co. v. State of Yugoslavia). Such decisions have confirmed the obligation of the State to arbitrate with a private partyaccording to the terms of the contract despite the protest or default of the State and despite arguments that the agreement containing the arbitration Clause had been terminated or come to an end.

[153]. It has been contended by the Libyan Government, in its Circular letter of 8 December 1973, addressed to all oil companies and referred to above, that it rejects arbitration as contrary to the heart of its sovereignty. Such argument cannot be retained against said international practice, which was also confirmed in many international conventions and resolutions. For instance, the Convention of 1966 on the Settlement of Investment Disputes between States and Nationals of other States provides, in its Article 25, that whenever the parties have agreed to arbitrate no party may withdraw its consent unilaterally. More generally, Resolution No. 1803(XVII) of the United Nations General Assembly, dated 21 December 1952, while proclaiming the permanent sovereignty of peoples and nations over their natural resources, confirms the obligation of the State to respect arbitration agreements(Section I, para. I and 4).

[154]. Therefore, a State may always validly waive its so-called sovereign rights by signing an arbitration agreement and then by staying bound by it.

[155]. Moreover, that ruling is in harmony with Islamic law and practice, which is officially adopted by Libya. This is evidenced by many historical precedents. For instance, Prophet Muhammad was appointed as an arbitrator before Islam by the Meccans, and after Islam by the Treaty of Medina. He was confirmed by the Holy Coran (S IV, 65) as the natural arbitrator in all disputes relating to Muslims. He himself resorted to arbitration in his conflict with the Tribe of Banu Qurayza. Muslim rulers followed this practice in many instances, the most famous of which was the arbitration agreement concluded in the year 657 A.D.(37 H.) between Caliph'Ali and Mu’awiya after the battle of Siffin (V. our lectures on International law, op.cit., p.272-273, and Arabic text p.160-163).

2. Arbitrability of the dispute and jurisdiction of the Arbitral Tribunal

[156]. Arbitration was conceived and intended by the Parties in the Concession Agreements as a general method for settling disputes relating to them. Mentioned as such in the case of revocation (Clause

27), it was adopted for all other cases in the general terms of Clause 28, para.1. The scope of this arbitration clause, as appears from its amended text quoted above, is very wide. It covers any difference or dispute which may arise between the Government and the Company during or after the currency of the concession contract concerning the interpretation or performance of the provisions of the contract or its annexes or in connection with the rights and obligations of either party.

[157]. The present dispute arose after the unilateral termination of the contract by the Libyan State in nationalizing all the property, assets and concession rights of LIAMCO, and such dispute obviously concerns the legality of that nationalization and the consequent LIAMCO's claims.

[158]. It is obvious that all these problems come under the heading of the interpretation and execution of the concession contracts and the rights and obligations of the parties therein. In other words, the nationalization, by stopping prematurely the performance of the contract, affects, that performance and relates to the rights and obligations derived therefrom. Therefore, it comes within the terras of the arbitration clause, and consequently the dispute arising from that nationalization is obviously an arbitrable issue.

[159]. Moreover, it has been shown, under Part I hereof concerning the arbitration proceedings, that the present dispute is ripe for arbitration. The necessary applications and requests required were duly presented, and all the notices and time limits were observed, as prescribed by the above mentioned paragraphs of Clause 28 of the Agreements. The President of the International Court of Justice, having verified the documents produced, concluded that the said requirements for the arbitrability of the present issue were satisfied, and made his appointment of the Arbitrator in consequence.

[160]. As the arbitration clause and the procedure outlined therein are binding upon the contracting parties, and the procedure outlined therein being imperative, the Arbitral Tribunal constituted in accordance with such clause and procedure should have exclusive jurisdiction over the issues of the dispute. No other tribunal or authority, local or otherwise, has competence in the matter.

[161]. The exclusive and compulsory character of the arbitration process in such a case is widely admitted in international law. It has been affirmed by international arbitral precedents, such as the "British Petroleum Arbitration" referred to above, and has also been incorporated in the Convention of 1966 on the Settlement of Investment Disputes between States and Nationals of other States. Its Article 26 reads as follows :

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy..."

3. Arbitration Seat and Procedure

[162]. It is an accepted principle of international law that the arbitral rules of procedure shall be determined by the agreement of the parties, or in default of such agreement, by decision of the Arbitral Tribunal, independently of the local law of the seat of arbitration.

[163]. This proposition has been adopted by and inserted in such international conventions as the said Convention on the Settlement of Investment Disputes (Article 44), the Swiss International Arbitration Convention of 1969 (Article 24), and the Draft Convention on Arbitral Procedure of the U.N. Law Commission of 1958 (Article 13, para. 1).

[164]. It has also been followed in many arbitration cases, as in the Aramco-Saudi Arabian Arbitration of 1958, the Sapphire International Petroleum Arbitration of 1963 and the Hedjaz Railway Line Arbitration of 1972.

[165]. In the light of this proposition, and in accordance with it, Clause 28, para.5 and 6, of LIAMCO's Concession Agreements provides, as set forth above, that the Arbitral Tribunal shall determine the procedure to be followed as well as the seat of the arbitration in default of agreement between the parties as to that seat.

[166]. Pursuant to said Clause, and in default of agreement between the parties in this connection, the Arbitral Tribunal, by a Preliminary Decision of 9 June 1975 referred to in Part I hereof, resolved, inter alia, as fellows :

> "2. That the City of Geneva, Switzerland, shall be the official seat of arbitration, with possibility to hold secondary meetings elsewhere if necessary as may be decided by the Arbitrator.
>
> "3. That, the Arbitrator, in bis procedure, shall be guided as much as possible by the general principles contained in the Draft Convention on Arbitral Procedure elaborated by the International Law Commission of the United Nations in 1958."

[167]. In these proceedings, the Defendant, though duly notified, has made no communication nor appearance. The arbitration formalities and steps proceeded in Defendant's default in accordance with the provisions of Article 29 of the said Draft Convention, which read as follows :

> " 1. Whenever one of the parties has not appeared before the tribunal or has failed to defend its case, the other party may call upon the tribunal to decide in favour of its claim.
>
> " 2. The Arbitral tribunal may grant the defaulting party a period of grace before rendering the award.
>
> " 3. On the expiry of this period of grace, the tribunal may render an award after it has satisfied itself that it has jurisdiction and that the claim is well-founded in fact and in law".

[168].

Notwithstanding the fact that the arbitration proceeded in default of the Respondent, the Arbitral Tribunal has based its Award only upon such facts as were satisfactorily proved by the Plaintiff.

IV. CLAIMANT'S DEMANDS AND LEGAL ARGUMENTS

[169]. LIAMCO, in concluding its"Claim in Arbitration", requested the Arbitral Tribunal to :

1. Declare that the nationalization measures of Laws No. 66 of 1973 and No. 10 of 1974 purporting unilaterally to terminate the LIAMCO concessions violated the express terms and guarantees offered by the Government of Libya in the LIAMCO concession agreements of December 12, 1955, as modified and reaffirmed by the Amendatory Agreement of January 20, 1966, and constituted a fundamental breach by the Government of Libya of the concession agreements and a violation of the law applicable thereto.

2. Declare that the unilateral acts of the Government of Libya purporting to arrogate to the National Oil Company of Libya the exclusive concession rights of LIAMCO to explore for and extract petroleum in concession areas 16, 17 and 20 in contravention of LIAMCO's concession agreements, and contrary to the principles of the law of Libya common to the principles of international law, and contrary to general principles of law, was ineffective to transfer such rights to either the Government of Libya or the National Oil Company of Libya; and that neither the transfer by the Government of Libya of such contract and property rights, nor the title to petroleum extracted by, or in behalf of the National Oil Company of Libya, purportedly in the exercise of such rights, is entitled to international recognition.

3. Declare that in the event that LIAMCO shall not be effectively restored to its concession rights, and shall not fully obtain title to, or the proceeds of, petroleum extracted by or on behalf of the National Oil Company of Libya in pursuance of such concession rights, then it shall be entitled to damages for wrongful breach of the concession agreements in the amount of two hundred and fifty million dollars ($ 250,000,000)or such other amounts as may be proved in the arbitration proceedings.

4. Issue an Award in favor of LIAMCO ordering:

a) the restoration to LIAMCO of its concession rights; and

b) the transfer to LIAMCO of the benefits of the exercise of its concession rights by the National Oil Company of Libya from the time of the purported transfer of such concession rights until the time of effective restoration to LIAMCO of its concession rights; and

c) as an alternative to the relief decreed in sub-paragraphs (a) and (b), supra ; the payment by the Government of Libya to LIAMCO as damages for the irremediable breach of its concession agreements and purported termination of its concession rights the amount of two hundred and fifty million dollars ($ 250,000,000); and

d) such other and further relief as law and justice may require.

[170]. In its later" Memorial on Indemnification", LIAMCO amended the amount of damages claimed, and finally fixed it at $ 207,652,667 (two hundred seven million, six hundred fifty two thousand, six hundred sixty seven American dollars), plus interest at 12 % from 1st January 1974 to the date of payment or recovery of the award in full.

[171]. Further in its "Memorial on Law", LIAMCO amplified the explanation of these claims and demands, and detailed its legal arguments in support thereof.

[172]. The remedies demanded by LIAMCO may be summarized under the following headings :

1- Principal remedy : Restitutio in integrum, and absence of title to LIAMCO's nationalized property and rights and to petroleum extracted therefrom.

2- Alternative remedy : Damages.

[173]. The legal arguments presented in support of these claimed remedies may be classified under two groups:unlawful taking of property by unlawful nationalization, and breach of contract.

[174]. Therefore, the Arbitral Tribunal in ruling on the merits of all the issues raised in this dispute will examine them successively in the following order :

1. The lawfulness of the Libyan nationalization measures and the resultant taking of property.

2. The discharge of contract and its remedies.

3. Compensation and damages.

V. LAWFULNESS OF THE LIBIAN NATIONALIZATION MEASURES AND THE RESULTANT TAKING OF PROPERTY

[175]. In order to examine this problem and the arguments sustained by Claimant in this connection, it is of relevance to expose a brief historical background to this subject matter and to clarify some basic legal considerations.

[176]. This exposé will treat successively the following topics, namely : the classical concept of property, evolution of that concept and the right of nationalization, United Nations Resolutions on the subject, concession rights as property, the sanctity of contracts, and the examination of LIAMCO’s nationalizations in the light of said legal considerations.

1. The classical concept of property

[177]. One of the fundamental rights universally recognized is the right of private ownership or property (Dominium).

[178]. The Classical concept of this right defines it as the right to the use, exploitation and disposal (usus, fructus, abusus) of the object owned.

[179]. Although this classical definition has been tempered and limited sometimes by reason of public interest, nonetheless the inviolability of the right of property has remained throughout history as a sacred proposition confirmed and reaffirmed by a succession of constitutional and international declarations and charters. The most famous instances of such basic documents are :the English Magna Charta of 1215, the French'* Declaration des droits de l'homme et du citoyen" of 1789 which was recently incorporated in the Preamble to the French constitution of 1958, the Fifth amendment to the American constitution of 1789, the two Hague Conventions of 1890 and 1907, the Declarations of the International Law Association of Vienna in 1926 and of Oxford in 1932, and last but not least the United Nations Bill of Human Rights of 1948, the Pan-American Bill of the same name and date, and the Protocol of 1952 annexed to the Convention of Rome on Human Rights of 1950.

[180]. The same concept of this absolute right of property was adopted in private law, in particular Roman law, the European civil codes influenced by it, and many other modern codes. For instance, Article 811 of the Libyan Civil Code provides as follows :

> "The owner of a thing has alone, within the limits of the law, the right to use it, to exploit it and to dispose of it."

[181]. Applied to land (immovable property) the contents of this absolute right extended in theory to the air space above it and to things lying underground, as was often expressed in the Latin maxim :"Cujus est solum ejus est usque ad coelum, et ad inferos" (Whose is the soil, his is also that which is above and below it). Article 812 para.2, of the Libyan Civil Code incorporates the same rule with the limitations imposed by the special legislation on quarries and mines.

[182]. In the light of that classical definition, the State could not expropriate any private property, movable or immovable (chattels and land), except for public necessity and subject to the prior payment of full compensation. Expropriation was usually a matter of internal policy, based on special circumstances and effected under administrative regulations and formalities.

[183]. Nationalization on a large scale was not very usual. If resorted to, it has to be made without discrimination and on condition of paying "prompt, adequate and effective" compensation, as will be explained at a later stage.

[184]. In comparison with these views on property, it is relevant, to record that Islamic law recognized the inviolable character of the right of property, on the basis of the Holy Quranic Verse.

"And do not appropriate unlawfully each other's property" (S 11, 188).

[185]. Muslim jurists moulded the meaning of this Verse in a general maxim which provides that :

"One is not allowed to take another's property without legal cause"(Article 97 of the Ottoman Majallah Code).

[186]. But they limited the generality of that rule by the requirements of public necessity in order to prevent public nuisance. This restriction was couched in another complementary legal maxim which reads thus :

"Private damage has to be suffered in order to fend off public damage"

(Article 26 of the Ottoman Majallah Code.V. our book "The GeneralTheory of Obligations and Contracts under Islamic law", in Arabic, Vol.I p.93, and our "Philosophy of Jurisprudence in Islam", op.cit., in Arabic p. 309, English translation p. 157).

2. Evolution of the concept of property and the emergence of the right of nationalization

[187]. From the outset of this century and especially after World War I, new political and economic trends have tempered the absolute character of the aforementioned classical meaning of property.

[188]. Gradually, property came to be viewed as having a dominant "social function or role", and has as such to be subservient to the public interest of the Community represented by the State. The old sacred character of property has become subject to the influence of social objectives. Its protection has thus been attenuated in domestic as well as in international law.

[189]. Moreover, natural resources, in general, do not belong anymore to the owner of the land, but to the Community represented by the State as a privilege of its sovereignty. This view has been adopted in Libya and expressly laid down in its legislation on mines and petroleum. For instance, Article 1 of the Libyan Petroleum Law of 1955 stipulates in the following terms :

"Article 1: Petroleum Property of State :

"1. All petroleum in Libya in its natural state 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 authorized by a permit or concession issued under the Law."

[190]. Likewise, under Islamic law, particularly in the Maliki School, mines and underground resources are the property of the Sultan (the State). (V.the Arabic books : Ibn Juzay, "Al-Kawaneen al-Fikhiyyah" (The legal rules), Fez, 1935, p.102; and Ibn Hazm, "Al-Muhalla", Cairo, 1347-52 H., Vol. VI p. 111, and Vol. Vlll p. 238).

[191]. Pursuant to this new viewpoint, some confusion between the property of the State and that of its nationals was in fact made in connection with the payment of war reparations. This is illustrated by the relevant provisions of the Treaty of Paris of 1919, the Potsdam Agreement of 1945 and other similar post-war agreements.

[192]. Likewise, nationalization by the State of private property began to be practiced on a larger scale than in the past. As differentiated from individual expropriation acts based on administrative law and public necessity, nationalization has taken, in general, the feature of a collective legislative measure motivated by the public social policy of the State. It became thus characterized as a sovereign act, immune from judicial control and subject to international law whenever foreign elements were at issue.

[193]. According to the definition formulated in 1952 by the "Institut de droit international":

> "Nationalization is the transfer to the State, by a legislative act and in the public interest, of property or private rights of a designated character, with a view to their exploitation or control by the State, or their direction to a new objective by the State".(Annuaire 1952, 11 p.279).

[194]. The objectives of nationalization vary according to the general political and economic policies of various States.

[195]. In communist States, all land and means of production and capital, whether or not foreign-owned, were nationalized on a general scale, often with no compensation. This was done, for instance, by the Soviet State, following the Russian Revolution at the end of World War I.

[196]. Nationalization was also frequent in the period between the two world wars, and was even enhanced in some European and American States by express constitutional provisions. As an instance thereof, may be cited the Mexican nationalizations which were effected since 1936 on seventeen oil companies and on foreign-owned land in a program of agrarian reform.

[197]. After World War II, more nationalizations were executed on a very wide level by Eastern European nations, covering land and means of production, and in which only partial indemnities were paid.

Even in England and France nationalization of many companies and enterprises was effected, in which the principle of prior, full compensation was not strictly respected (V. Konst. Katzarov, Théorie de la nationalisation, Neuchatel, 1960, p.412 et s.)

[198]. Moreover, during that period and afterwards, many new nations, in particular those forming the so-called "Third World", have emerged and attained their independence. Motivated by a nationalistic spirit to stress their prestige and to control their national economy, many of these new States as well as some other old ones had recourse, especially since 1950, to general measures of nationalization covering 'chiefly oil concessions and other natural resources and public utilities.

[199]. Among such measures were those taken by : Iran in 1951, Egypt in 1956, Indonesia in 1957, Irak, Ceylon and Cuba in 1961, Algeria from 1963, Syria in 1964, Peru in 1968, Bolivia and Zambia in 1969, Chile in 1970, Libya from 1970, Saudi Arabia in 1972, and Kuweit since 1973. Some of these nationalizations will be discussed hereafter.

[200]. This overreaching tendency was implemented and aided by national organizations, such as the Algerian Sonatrac and the National Oil Company of Libya. Further, it was encouraged and systematized after the founding in 1960 of OPEC (Organization of the Petroleum Exporting Countries), in which most oil producing States were regrouped and are still represented. OPEC's tremendous influence is largely felt in the global oil business and consequently in the economic and financial situation all over the world

[201]. On the basis of such frequent precedents, mostly uncontested as to their principle, most publicists to-day uphold the sovereign right of a State to nationalize foreign property, in the sense that a State possesses as an attribute of its sovereignty and supreme power the right to nationalize all things belonging to any person within its jurisdiction. They stress that States possess that right to nationalize in" the manner and form they consider best, "and that they" enjoy complete freedom in this field... Neither international judicial decisions, nor international treaty practice, nor legal principles provide any evidence of a restrictive rule" (V.S. Friedman, Expropriation in International Law, London, 1953, p.134, 140-142 ; and Gillian White, Nationalisation of Foreign Property, New York, 1961, p.35 et s.).

[202]. More especially, international publicists admit to-day that the said right of nationalization applies to a concessionnaire’s interest even before the agreed date for the termination of a concession(V.White, op. cit.p.85). This viewpoint has been also adopted by many official international documents.

[203]. For instance, it was upheld in the Mexican letter addressed to the United States of America on 28 June 1917 relating to a Mexican nationalization decree of that year. It was even recognized sometimes on the part of nationalized concessionnaires, as was admitted in the United Kingdom Memorial in the case of the nationalization of the Anglo-Iranian Oil Company decreed in 1951, and

in the joint statement issued by France, the United Kingdom and the U.S.A, on 2 August 1956 in respect of the right of Egypt to nationalize the Suez Canal Company.

3. United Nations Resolutions on Nationalization

[204]. The frequency of the above mentioned general measures of nationalization has evoked international attention. Since 1952, The United Nations General Assembly has delivered a series of successive resolutions, in which the sovereign right of States to nationalize and to control their natural resources, as being the proproperty of the Community, has been confirmed and reaffirmed. Hereunder are recalled the provisions of the principal resolutions relevant to the points at issue.

(I) Resolution No. 626(VII) of 21 December 1952 :

which reads as follows :

"The General Assembly,

"Bearing in mind the need for encouraging the under-developed countries in the proper use and exploitation of their natural wealth and resources,

"Considering that the economic development of the under-developed countries is one of the fundamental requisites for the strengthening of universal peace,

"Remembering that the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and in accordance with the Purposes and Principles of the Charter of the United Nations,

"Recommends all Member States, in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations;

" 2. Further recommends all Member States to refrain from acts, direct -or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources."

(II) Resolution No. 1803 (XVII) of 14 December 1962;

which, while reiterating the said Resolution No. 626 and taking into consideration a similar Resolution No. 1515 (XV) of 15 December 1960 which recommended the respect of the sovereign right of every State to dispose of its wealth and natural resources, - confirms that right in the following terms :

" 1. The right of peoples and nations to permanent sovereignty over their wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

" 2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities".

(III) Resolution of 25 November 1966 :

which recommends increased participation of developing nations in the operation of projects exploited by foreign companies.

(IV) Resolution No. 3281 (XXIX) of 12 December 1974 :

in which it was provided, in its Chapter II, Article 2, as follows :

"1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

"2. Each State has the right ;

"(a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;

"(b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard to its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;

"(c) To nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent-. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means".

[205]. In response to the invitation proferred by the Arbitral Tribunal, the Claimant commented on the resolutions of the U.N. General Assembly bearing on the subject matter in a Hemorial which it submitted to the Tribunal at its meeting of 11 January 1977. Referring to Resolution No. 1803 of 1962, the Memorial concluded that it specifically provided for the respect of foreign investment agreements, and was in contemplation of the Parties when they entered into their Agreements of 1965. As to the Economic Charter contained in Resolution No. 3281 of 1974, it does not represent a consensus of nations and cannot be invoked as a source of international law.

[206]. In this connection, the Arbitral Tribunal has reached the conclusion that the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources, and that the said right is always subject to the respect for contractual agreements and to the obligation of compensation, as will be explained in a later section.

4. Concession Rights as Property

[207]. It is well-known that property in its general meaning is of two kinds : corporeal and incorporeal. The first, by unanimous opinion of jurists, covers all physical things, such as chattels, lands and various other things of material nature.

[208]. On the other hand, incorporeal property comprises all interests and rights which, though incapable of immediate material composition, may produce corporeal things or may be evaluated in financial and economic terms. In other words, incorporeal property includes those rights that have a pecuniary or monetary value.

[209]. Concession rights, as those of the present dispute, may be included under the class of incorporeal property. This assertion is recognized by international precedents, as vas held for instance by the Permanent Court of Arbitration in its Award delivered on 13 October 1922 in the dispute betwean the United States of America and the Kingdom of Norway.

[210]. This view is likewise in harmony with municipal law of most legal systems, and with the spirit of Islamic jurisprudence. Incorporeal property is mentioned as a special class of property in Article 86 of the Libyan Civil Code. It is also studied under the concept of "Mania'ah" (benefice, usufruct), and recognized as a special class of property (mal) in the prevalent view of most Schools of Islamic Jurisprudence(V. Ibn Abdessalaam, "Kawa'ed al-Ahkam", Cairo, 1934, Vol.I p. 172;and our book "The General Theory of Obligations and Contracts", op.cit., Vol.I p.10).

[211]. The only moot point in this connection concerns the estimation of concession rights, and the problem whether or not this estimation covers the loss of profits (lucrum cessans). This problem will be treated more fully in its proper place at a later stage hereof.

5. Sanctity of contracts

[212]. The right to conclude contracts is one of the primordial civil rights acknowledged since olden times. It was the essence of "commercium" or "jus commercii" of the Roman "jus civile" whose scope was

enlarged and extended by "jus gentium". Then it was always and constantly considered as security for economic transactions, and was even extended to the. field of international relations.

[213]. This fundamental right is protected and characterized by two important propositions couched respectively in the expression that "the contract is the law of the parties", and in the Latin maxim that"Pacta sunt servanda"(pacts are to be observed).

[214]. The first proposition means that the contracting parties are free to arrange their contractual relationship as they mutually intend. The second means that a freely and validly concluded contract is binding upon the parties in their mutual relationship.

[215]. In fact, the principle of the sanctity of contracts, in its two characteristic propositions, has always constituted an integral part of most legal systems. These include those systems that are based on Roman law, the Napoleonic Code (e.g. Article 1134)and other European civil codes, as well as Anglo-Saxon Common Law and Islamic Jurisprudence (Shari'a).

[216]. Libya adopted and incorporated this legal principle in its Article 147 of the Civil Code(Same in Article 147 of the Egyptian code, Article 146 of the Iraki and Kuweiti codes, Article 148 of the Syrian code, and Article 221 of the Lebanese Code of Obligations and Contracts), whose paragraph 1 reads as follows :

> "The contract is the law of the parties.lt cannot be cancelled or amended except by their mutual consent or for reasons admitted by the law".

[217]. The binding force of the contract is expressed in Article 348, para. 1, of the same Code :

> "A contract shall be performed according to its contents and in the manner which accords with good faith".

[218]. Moreover, Islamic law, which as we have seen forms a complementory part of the law of Libya(Article 1 of its Civil Code) underscores the binding nature of contractual relations and of all terns and conditions of a contract that are not contrary to a text of law. This is expressed in the legal maxim :

> " A stipulation is to be complied with as far as possible" (Article 83 of the Ottoman Ma— jallah Code).
>
> (V. our book "The General Theory, op.cit., vol.II, p.335 and 462).

[219]. This maxim is corroborated by the various sources of Islamic law. For instance, a Quranic Verse ordains : "Oh, you who believe, perform the contracts" (S V, 1).

[220]. In the same sense, a Tradition of the Prophet reads :

"Muslims are bound by their stipulations" (Al-Jami' As-Sagheer, II, No. 9213).

[221]. Muslim commentators and jurists expounded this binding force of contracts in detail. In particular, the Learned Ibn Al-Kayyem elaborated this principle in his great treatise "l'Iam Al-Muwaq'een", (Cairo, Vol.I p.299, and Vol.IlI p.337-340).

[222]. Further, and as a corollary to the binding force of the contract, its repeal or alteration requires a contrary mutual consent (contrarius consensus) of the contracting parties. This is well underscoredin said paragraph 1 of Article 147 of the Libyan Civil Code, as well as in most legal systems mentioned above.

[223]. Consequently, one of the parties cannot unilaterally cancel or modify the contents of the agreement, unless it is so authorized by the law, by a special provision of the agreement, or by its nature which implies such presumed intention of the parties.

[224]. Likewise, the same rule is recognized in Islamic law, in which cancellation of a contract is not valid except by mutual consent (al-ikalah) (V.Articles 163 and 190 of the Ottoman Majallah Code, and our book "The General Theory", op.cit., Vol.II p. 486).

[225]. Furthermore, some contracts explicitly emphasize the above mentioned principles and corollaries in a special provision, as in Clause 16 of LIAMCO's Concession Agreements, wherein it is provided that the "contractual rights expressly created by this Concession shall not be altered except by mutual consent of the parties".

[226]. The said Libyan law, whether in the text of the civil code or in the complementary Islamic Jurisprudence appears clearly consistent with international law in this connection, as exemplified by international statutes and custom.

[227]. In the first place, it is relevant to recall here what has been provided in the above mentioned United Nations Resolutions in relation to the subject matter.

[228]. Resolution No. 626 of 21 December 1952, while asserting the right of States to exploit freely their natural wealth and resources stresses "the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations".

[229]. Resolution No. 1803 of 14 December 1962 declares in Paragraph I, 8, that :

"Agreements relative to foreign investments freely concluded by sovereign States or between such States shall be respected in good faith."

[230]. Resolution No. 3281 of 12 December 1974, called the Charter of Economic Rights and Duties of States, recites among the fundamentals of international relations : the fulfilment in good faith of international obligations and the respect for human rights and fundamental freedoms (Chap. I, j and k).

[231]. International custom and case-law had always sustained the proposition of "Pacta sunt servanda". It has been upheld in many arbitration awards, such as Aramco-Saudi Arabia Arbitration of 1958, and Sapphire International Petroleum Ltd. v. National Iranian Oil of 1963.

[232]. This principle is also upheld by most international publicists, who maintain that the sovereign right of nationalization is limited by the respect due for contractual rights (V. Wehberg, Article"Pacta sunt servanda", in American Journal of International Law 1959 p. 786;and Friedman, op.cit., p.220-221). Professor Lapradelle, as rapporteur of the 1950 meeting of the "Institut de droit international", recorded that : "Nationalization, as a unilateral acy of sovereignty, shall respect validly concluded agreements, wether by treaty or contract." (Annuaire de l'Institut, 1950, I, 67).

[233]. The principle of the respect for agreements is thus applicable to ordinary contracts and concession agreements. It is binding on individuals as well as governments. The same is admitted in Islamic law, as is evidenced by many historical precedents. For instance, no less than the Great Caliphs Omar Ibn AJ-Khattab and Imam'All accepted to abide by their agreements and to appear before the Cadis (Judges) as ordinary litigants without feeling that this conduct was against their sovereign dignity (V. our Article on"The Judiciary and Al-Mawerdi", in Arabic, Al-Mawerdi Millennium, Cairo, Nov., 1975).

[234]. The Claimant underscored also the relevancy of Islamic law in this connection, and submitted in support thereof a copy of an Article by Anderson and Coulson entitled "The Moslem Ruler and Contractual Obligations" (N.Y.U.L., Nov., 1958, p.407-430).

[235]. The same principle is likewise applicable to treaties validly concluded between States. The subject of treaties and their binding nature according to international law has been confirmed and regulated by the recent Convention of Vienna on the Law of Treaties of 23 May 1969.

[236]. It is also of relevance in this dispute to refer to Islamic law, as part of Libyan law, concerning treaties. That law, as was previously stated, considers the rules of international relations (Law of Siyar)as an integral part of the common positive law. Treaties partake of the nature of contracts, and as such have the same contractual binding force. This is based on several Verses of the Holy Coran, particularly on the following :

-" And fulfil the covenant (of God) if you have covenanted and do not violate the oaths after their confirmation" (S XVI, 91).

-" And fulfil the covenant, for the covenant entails responsibility"(S XVII, 34).

(V.our Lectures on Islamic International Law, op.cit., p 268, and our Arabic book on International Law and Relations, op.cit., p.139).

[237]. Under international law, the principle of the binding force of treaties is sometimes restricted by the proposition of "Rebus sic standibus". This means that the binding force is subject to the continuance of circumstances under which a treaty was concluded. If such circumstances change substantially, then its modification or cancellation may be claimed and resorted to.

[238]. This limitation is akin to the "doctrine of unforseen events" (théorie de l'imprévision), which is known in civil and administrative laws in some countries. The Libyan Civil Code, as well as other Arab civil codes, referred to such restrictive phenomena, and provided in paragraph 2 of said Article 147 as follows :

" 2. However, if exceptional general circumstances arise which were not capable of being foreseen and for which the performance of the contract, although did not become impossible, but has become so onerous to the debtor that it threatens him with heavy loss, (then) the Judge, according to the circumstances and after weighing the reciprocal interests of the parties, may reduce the onerous obligation down to a reasonable limit. Any agreement to the contrary shall be void."

6. Legal qualification and implications of LIAMCO's nationalizations

[239]. Having laid down the views generally held in municipal law which are common to international legal principles on the right of nationalization versus the right of property and the respect for contracts, it is necessary to examine the legal qualification of LIAMCO's nationalization measures in the light of those views.

[240]. LIAMCO contends that such measures are wrongful, because they are politically motivated, discriminatory and confiscatory.

[241]. As to the contention that the said measures were politically motivated and not in pursuance of a legitimate public purpose, it is the general opinion in international theory that the public utility principle is not a necessary requisite for the legality of a nationalization. This principle was

mentioned by Grotius and other later publicists, but now there is no international authority, from a judicial or any other source, to support its application to nationalization. Motives are indifferent to international law, each State being free "to judge for itself what it considers useful or necessary for the public good... The object pursued by it is of no concern to third parties."(V. Friedman, op.cit., p.140-142;and White, op.cit., p.l45).

[242]. This assertion is easily comprehensible, because nationalization in itself usually presupposes a general policy or political plan in support of which it is executed.

[243]. However, political motivation may take the shape of discrimination as a result of political retaliation. That is what was sustained by LIAMCO in its contention of the discriminatory character of its nationalization measures.

[244]. It is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice (V. White, op.cit p. 119 et s.). Therefore, a purely discriminatory nationalization is illegal and wrongful.

[245]. In support of its contention of discrimination in its case, LIAMCO maintains that the nationalizations complained of were" specifically aimed at LIAMCO, an American company, because of its American corporate nationality and due to its insistence, amongst other things, on certain rights guaranteed to it under the concession agreements including the right to have all disputes determined by arbitration". "They were designed to discriminate- against selected foreign companies operating in Libya". It further maintains that such mea-sures"were aimed as a weapon of political retaliation against the governments of the countries in which the companies were incorporated". And they were "part of an overall program of political retaliation against those nations whose politics were contrary to those of the new Libyan regime". In particular, "they were timed to coincide with the opening of the Washington Conference on energy." —

[246]. In order to appraise such arguments, it is relevant to recall the following facts related by the Claimant, and summarized hereabove, under Part II on Facts:

(a) The first measure of nationalization by Libya after its Revolution was that relating to all land, establishments and interests of Italian colonists settled in Libya.

(b) The first oil nationalization was that of British Petroleum on 7 December 1971, and the second was that of the American Bunker Hunt Company of 11 June 1973.

(c) The first of LIAMCO’s nationalization Acts was issued on 1 September 1973. It covered 51 % of LIAMCO's concessions as well as those of many other American and Non-American companies, namely : Shell Libya, Esso Standard Libya Inc., Esso Sirte Inc., Grace Petroleum Corporation, Mobil Libya, Gelsenberg Libya, Texaco Overseas Petroleum Company and California Oil Company. All these other companies later made arrangements with Libya, and continue operating in Libya up till now. Other companies were not affected by the nationalization,

including the American Murphy Oil.

(d) The second LIAMCO nationalization Act, dated 11 February 1974, covered the remaining 49 % of LIAMCO's concession interests. This was apparently motivated by the failure of agreement with the Government as other companies had done. On the same date, two other companies were nationalized, namely Texaco Overseas and California Asiatic.

(e) In a Statement released on 2 September 1973, immediately after the first nationalization Law, the Libyan Prime Minister defined the principles for conducting negotiations with oil companies. This was drafted in a general non-discriminatory language, which clearly indicated that Libya's motive for nationalization was its desire to preserve the ownership of its oil.

[247]. From the above facts, it appears, that LIAMCO was not the first company to be nationalized, nor was it the only oil company nor the only American company to be nationalized by the first nationalization Act, nor was it nationalized alone on the date of the second nationalization Act. Other companies were nationalized before it, other American and Non-American companies were nationalized with it and after it, and other American companies are still operating in Libya.

[248]. Thus, it may be concluded from the above that the political motive was not the predominant motive for nationalization, and that such motive per se does not constitute a sufficient proof of a purely discriminatory measure.

[249]. LIAMCO further contends that the taking by Libya of its property was confiscatory, because it was not accompanied by simultaneous payment of adequate compensation nor by effective steps which ensure its prompt payment.

[250]. In this connection, it is relevant to recall that the exercise of the right of nationalization is subject to compensation. This obligation is recognized by the Libyan Acts of nationalization, in which certain provisions concerning the procedure to be followed has been set forth. As these provisions were never implemented, and the present arbitration proceedings are steered therefor, this important problem will be discussed in the next sections concerning remedies in general and compensation in particular.

[251]. Dealing with the point at issue and in the course of discussing its legal arguments and explanations, LIAMCO, especially in the "Legal Materials" and "Law Consultation" presented by it, referred to the grounds of "unjust enrichment" and "abus des droits" (abuse of rights).

[252]. As a rule, these grounds are resorted to only subsidiarily when no other ground is available. For example, unjust enrichment (enrichissement sans cause) is admitted in Lebanese law (Article 141 of the Code of Obligations and Contracts) and many other similar codes only if no other cause of responsibility is present.

[253]. After putting aside such grounds and the ground of tort (delictual) liability(responsabilité délictuelle) because no fraudulent or purely discriminatory intention has been proved, there remains the contractual liability of Libya towards LIAMCO in connection with its' concessions and their nationalization.

VI. REMEDIES FOR PREMATURE TERMINATION OF CONTRACT

1. Termination of contract by nat ionalization

[254]. From the foregoing legal considerations; may bo drawn the following propositions, recognized by both municipal and International law :

(a)- The right of property, including the incorporeal property of concession rights, is inviolable in principle, subject to the requirements of its social function and public well-being.

(b)- Contracts, including concession agreements, constitute the law of the parties, by which they are mutually bound.

(c)- The right of a State to nationalize its wealth and natural resources is sovereign, subject to the obligation of indemnification for premature termination of concession agreements.

(d)- Nationalization of concession rights, if not discriminatory and not accompanied by a wrongful act or conduct, is not unlawful as such, and constitutes not a tort (V.II, et.cit.p.318), but a source of liability to compensate the concessionnaire for said premature termination of the concession agreements.

[255]. Examined in the light of the above propositions, LIAMCO's Concession Agreements are binding, and cannot validly be terminated except on one of the following grounds :

(a) - Expiry of their contractual period as set out in Clauses 1 and 3 of the Agreements ;

(b) -Mutual consent of the contracting parties, in compliance with the said principle of the sanctity of contracts and particularly with the explicit terms of Clause 16 of the Agreements ;

(c) - Revocation by the Libyan Government for non-fulfilment by LIAMCO of its contractual obligations, with the latter's right of recourse to arbitration as specified and regulated in Clause 27 of same ;

(d)- Non-discriminatory nationalization coupled with the required compensation.

[256]. Moreover, in some legal systems (e.g. in France and Lebanon), administrative law recognizes the right of the State to redeem (rachat, repurchase) the concession, but on condition to pay an

indemnity covering all the damage caused, i.e. the actual damage sustained and the lost profit (V.Jeze, Droit administratif, III, 1223 ets.).

[257]. Therefore, the nationalization measures complained of constitute a source of obligation, for which LIAMCO is entitled to request remedy by way of arbitration.

[258]. In fact, the remedy claimed by LIAMCO in this arbitration, as set forth above, is of two kinds : principally restitutio in integrum, and alternatively damages.

[259]. In addition to these two remedies, and as complementary to them, LIAMCO requested the issue of a Declaratory Award in lieu of restoration of concessionary rights, namely declaring the unlawfulness of the Libyan nationalizations and of the Libyan entitlement to the produce of said concessions.

[260]. The principal remedies of restitutio in integrum and the Declaratory Award will be examined in this Section; the alternative remedy of damages will be the object of a subsequent special section.

2. Restitutio in integrum

[261]. As a principal remedy, LIAMCO claims that Libya's nationalization measures are unlawful and not entitled to international recognition, that Claimant is entitled to restitutio in integrum, and consequently that Libya does not have title to oil extracted from LIAMCO's Concessions.

[262]. In support of this demand, LIAMCO sustains that the expropriations (as a result of said nationalization) constituted an unlawful taking of its propertyincluding the contract itself and other property rights created by it.

[263]. This principal claim shall be examined in the light of the principles of municipal law of Libya which are common to those of international law, and which in fact are also consistent with the general principles of law.

[264]. According to these general common principles, obligations are to be performed, principally, in kind, if such performance is possible.

[2665]. In fact, the Libyan Civil Code recites in this connection, in its Article 206, par.1, that :

> "A debtor shall be compelled, upon being summoned to do so in accordance with Articles 222 and 223, to perform his obligation in kind if such performance is possible.

(V. the same Article in other Arab Civil Codes and esp. in Article 249 of the Lebanese Code of Obligations and Contracts).

[265]. A similar proposition exists in Islamic Jurisprudence, which constitutes part of Libyan law. "Rights are to be restored in kind if possible" is a general maxim in Islamic Shari'a. It is also expressed and amplified in another maxim saying"A substitute (remedy) is resorted to only when the principal fails" (Article 53 of the Ottoman Majallah Code.V.our "General Theory", op.cit., Vol.I, p.158 and 214, and Vol.II, p 503, and our Lectures on the"operation of Obligations in Arab Codes", Cairo, 1954, p.3).

[267]. This general principle is also common to international law, in which restitutio in integrum is conditioned by the possibility of performance, and consequently hindered by its impossibility.

[268]. Such impossibility is in fact most usual in the international field. For this reason, it has been asserted that "it is impossible to compel a State to make restitution, this would constitute in fact an intolerable interference in the internal sovereignty of States" (V. Friedman, op. cit., p.214).

[269]. Restitutio has thus been considered in international law as against the respect due for the sovereignty of the nationalizing State. This was the view held by the Austrian Supreme Court in a ruling dated 22 December 1965 (O.G.H., Evidenzblatt, 1966).

[270]. Moreover, it has also been asserted that there is no sufficient authority for the fact that nationalization in breach of a concession is an internationally unlawful act for which the remedy is restitution (V. White, op.cit., p.86 and 163).

[271]. Further, restitution presupposes the cancellation of the nationalization measures at issue, and such cancellation violates also the sovereignty of the nationalizing State. Moreover, nationalization is sometimes qualified as an "Act of State", which is immune from control, judicial or otherwise.

[272]. In fact, the principle of the State sovereignty has been raised and often reaffirmed by Libya against all arbitration in general, especially in its above mentioned Circular letter addressed on 8 December 1973 to all oil companies. This negative attitude was taken by Libya particularly towards LIAMCO's arbitration, by failing to respond or to appear in these proceedings.

3. Declaratory Award

[273]. For the foregoing reasons, LIAMCO admitted implicitly the impossibility of restitution in kind, and consequently requested the Arbitral Tribunal to award remedies in lieu of restoration of Claimant

to its rights in Libya. Apart from other remedies, especially damages which will be discussed later, LIAMCO requested the issue of a Declaratory Award that Libya's acts are unlawful and not entitled to international recognition, and that Libya does not have title to oil extracted from LIAMCO's Concessions. This demand was formulated by LIAMCO in the terms of its "Complaint in Arbitration" of 7 July 1975 as follows:

> "a) declare that the nationalization measures of 'aws No.66 of 1973 and No. 30 of 1974 purporting unilaterally to terminate the LIAMCO concessions violated the express terms and guarantees offered by the Governance of Libya in the LIAMCO concession agreements of December 12, 1955, as modified and reaffirmed by the Amendatory Agreement of January 20, 1966, and constituted a fundamental breach by the Government of Libya of the concession agreements and a violation of the law applicable thereto;
>
> "b) declare that the unilateral acts of the Government of Libya purporting to arrogate to the National Oil Company of Libya the exclusive concession rights of LIAMCO to explore for and extract petroleum in concession areas 16, 17 and 20 in contravention of LIAMCO's concession agreements, and contrary to the principles of the law of Libya, common to the principles of international law, and contrary to general principles of law, was ineffective to transfer such rights to cither the Government of Libya or the National Oil Company of Libya; and that neither the transfer by the Government of Libya of such contract and property rights nor the title to petroleum extracted by, or in behalf of the National Oil Company of Libya, purportedly in the exercise of such rights, is entitled to international recognition."

[274]. In other words, LIAMCO requested an award declaring the invalidity of Libya's title to said propertyrights until effective payment of LIAMCO's claims for said rights.

[275]. In support of this demand, LIAMCO cites some international arbitral precedents in which similar declaratory judgments were delivered. It cites also the German-Swiss Arbitration Treaty of 1921(Article 10) and the General Act for the Pacific Settlement of International Disputes of 1928 (Article 32), in which it is provided that failing restitutio in integrum, equitable satisfaction of another kind shall be awarded to the injured party. It likewise cites other precedents, in which it was asserted that "ex injuria jus non oritur", and that "nemo plus jure transferre potest quam ipse habet"

[276]. However, all such arguments do not stand against the legal considerations of the sovereignty of States and of the so-called "Acts of State", which as exposed above include nationalization measures. They are, in any case, faced with the same practical impossibility of enforcement as that of the remedy of restitutio in integrum. In fact, LIAMCO's interests and rights are - undivided and it is difficult to distinguish the produce of these rights from that of the co-owners' rights. Any Declaratory Award as requested would be practically unenforceable.

[277]. International president may be quoted in support of this viewpoint on unenforceability. For instance, in the Iranian nationalization of the Anglo-Iranian Oil Company of 1951, that Company sought to recover its nationalized oil in tankers at various ports. Contrary to the favorable decision

of the Supreme Court of Aden of 9 January 1953, the High Court of Tokyo (in 1953) and the Italian Courts of Venice(ll March 1953) and of Rome (13 September 1954) rejected the claims of that Company. Other English precedents confirm also this opinion (V.Francois Boulanger, Les nationalisations en droit international privé comparé, Paris, 1975, No. 40-42).

[278]. For these reasons, this Arbitral Tribunal has reached the conclusion that LIAMCO's demands concerning the remedies of restitutio in integrum and of the said Declaratory Award in the sense requested are not legally founded and should be rejected.

VII. COMPENSATION AND DAMAGES

1. LIAMCO's entitlement to indemnification

[279]. Pursuant to the legal ruin that substitute performance is due in case of impossibility of performance in kind, it is useful to recall that the discharge of contract caused by LIAMCO's nationalization measures is subject to indemnification in accordance with the proper law of the concession agreements.

[280]. Under that proper law, that is according to principles commonly accepted by municipal and international laws the obligation to compensate a nationalized concessionaire is a necessary consequence of the right of nationalization.

[281]. In fact, the Libyan Civil Code, Article 218 provides that :

> "If it becomes impossible for the debtor to perform the obligation in kind, he will be held liable to indemnification for non-performance of his obligation, unless he proves that the impossibility of execution was due to an alien cause not related to him..."

[282]. Even the Libyan Nationalization Laws complained of admitted the principle of indemnification in their Article 2, although that principle was not implemented in LIAMCO's case by serious steps and actual payment. But in previous similar cases, Libyan practice and code of conduct recognized the obligation to pay compensation by concluding various amicable settlements.

[283]. The same liability to compensate for nationalization is stressed in the United Nations Resolutions referred to above. It is useful to recall Resolution No.1803 of 14 December 1962 which provides that the owner of property nationalized, whether he be national or foreigner, is entitled to adequate indemnification (Section I, para.4). Likewise, appropriate compensation is due in case of nationalization according to Resolution No. 3291 of 12 December 1974.

[284]. The liability to indemnify is underscored also by the Permanent Court of International Justice. For instance, the Court, in its decision of 24 June 1936 in Re : Jablonsky V. German Reich, held that the property interests involved in a concession are subject to protection under international law according to the principle of respect for vested rights, and that reparation is due in case of expropriation of such interests.

[285]. In practice, most States recognize the existence of a liability to pay compensation in case of nationalization (V. White, op.cit., p.11-17, 187 et s., 235-243).

[286]. Thus, the principle of the necessity indemnification, being unanimously and equally supported by municipal and international legal theory and practice, shou1d be applied in this dispute, as being the proper law of the concession agreements, in compliance with Clause 28 thereof.

[287]. Therefore, there is no difficulty in principle as to this point. Likewise there is no difficulty also that the indemnity should include as a minimum the damoun emergens, e.g. the value of the nationalized corporeal property, including all assets, installations, and various expenses incurred.

[288]. However, the controversial question in this connection is the scope of compensation and the manner of its determination as regards the incorporeal property of the concession rights per se, and whether or not that determination should include the loss of profits (lucrum cessans). On this important question there were substantial divergences of view between municipal law and some international assertions in theory and rulings in practice.

[289]. Hereunder, these divergences will be discussed successively with reference first to municipal law, then to international law in cases of wrongful taking of property, and international law in cases of lawful nationalization.

2. Loss of profits, lucrum cessans, under Libyan civil law

[290]. The municipal legal systems of most civilized countries consider the loss of profit together with the damage sustained as the two constituent elements of compensation in the fields of both torts and breados of contracts. This view is admitted in civil law as well as administrative law (V. Laubadére, op.cit., II, No. 499).

[291]. In the case of the breach of contract, the Libyan Civil Code, as other Arab Civil Codes (for ex.Article 259 of the Lebanese Code of Obligations and Contracts), admits this view, and thus provides in its Article 224 that :

"The Judge shall fix the amount of the damages, if it had not been fixed in the contract or by

law. The amount of damages includes losses suffered by the creditor and profits of which he has been deprived, provided that they are the normal result of the failure to perform the obligation or delay of performance".

[292]. It is useful in this controversial point to examine also the stand of Islamic law, which as we have said is a complementary part of Libyan law. The prevalent view amongst most Muslim jurists, particularly the two Imams Malik and Shafei, consider incorporeal property, called Manfa'ah, when capable of being estimated in pecuniary terms, as ordinary property or chattels(mal), and thus constitutes an element in the damages due in case of wrongful expropriation or usurpation (ghasb). In fact, Imam Malik (founder of the MalikiSchool)tea-ches in this respect that the usurper is obliged to restore the property illegally seized together with the value of any beneficial use (manfa'a) made out of it during the time of usurpation (V."All-Hudawanna' al-Kubra" (the Great Treatise) of Imam Malik, Cairo, 1323 H., Vox. XIV, p.62-65; and our "General Theory", op.cit., Vol. I, p. 161 and 162).

3. Loss of profits under international law in cases of wrongful taking of property

[293]. As Clause 28, par.7, of LIAMCO's Concession Agreements, concerning the proper law of the contract, imposes the application of the principles of the law of Libya common to those of international law, it is necessary to ascertain whether or not the latter recognizes clearly and unmistakingly the said Libyan proposition relating to loss of profits.

[294]. The Claimant contends that international law recognizes such proposition. It repeats that an alternative to specific performance, or restitutio in integrum, must be considered when restoration in kind may be impossible or impractical, and that it becomes then necessary to determine the appropriate measures of damages and the methods of their calculation.

[295]. LIAMCO proceeds therefore to claim indemnification under two bases : the first that Libya's taking of property and repudiation of the concession agreements is wrongful under international law and entitles Claimant in lieu of specific performance to full damages including damnum emergens and lucrum cessans; the second basis that adequate compensation is due for even the lawful nationalization of a long term concession agreement and must include an estimation of the current value of the future economic benefits which the concessionnaire would have realized over the term of the contract. These two bases will be examined successively.

[296]. The first basis concerns wrongful nationalization. In support of it, Claimant cites, inter alia, the following precedents (recorded mostly in Whiteman's Damages in International Law, 1543), namely :

(a) The Sapphire International Petroleum Arbitration of 15 March 1963: in which it was ruled that :

> "This compensation includes the loss suffered (damnum emergens), for example the expenses incurred in performing the contract, and the prefit lost (lucrum cessans), for example the net profit which the contract would have obtained. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals (references)."

(b) The Lena Goldfields Arbitration of 1930:

> in which the Court had to decide :
>
> "...the future profits which the Company would have made and which the Government now can make..."

(c) The Greek Telephone Company Award of 3 January 1935, which ruled that the Company must be compensated:

> "for what it would have obtained"had the contract been implemented by the State.

(d) Delagoa Ray and East Africa Railway Company-Arbitration of 3 May 1900, which stated that :

> " the State, which is the author of such dispossession is bound to make full reparation for the injuries Jone by it."

(e) Robert May v.(Guatemala Award of 16 November 1900, which decided that compensation included both the damage suffered and the profit lost : damnum emergens and lucrum cessa-is, and that the Claimant in that case was"entitled to all the profit to be derived from the railroad until the completion of the term."

(f) Percy Shufelt (U.S.) v. Guatemala Award of 24 July 1930, in which it was declared that the sum awarded represented both damnum emergens and lucrum cessans, and that the latter:

> "...must be the direct result of the contract and not too remote or speculative... (but as) may reasonably be supposed to have been in the contemplation of both parties as the probable result of a breach of it."

[297]. In support of the. above, Claimant quotes also the opinion of such publicists as O'Connell, who professes that wrongful expropriation engages the seizing State to pay... damages representing the loss of expected profits (In International Law, 1970, 1115).

[298]. The forementioned quotations, whether in theoretical juristic opinion or in case law, apply undoubtedly- to cases of wrongful taking of property. Most of the precedents cited are already old, and were given before the recent evolution of the concept of the right of nationalization. This right,

as we have explained above, extends to-day even to concessions nationalized before the end of their terms. It has been asserted that: "Subject to limitations imposed by treaty or by rules of customary international law... States are free to carry out expropriation in the manner and form they consider best". Evidently, they have to observe in that exercise international standards of conduct, such as the rule of non-discrimination and the necessity of paying due compensation (V. Friedman, op.cit., 220-221, 134, 140-142;and White, op.cit., 35 et s.).

4. Loss of profits under international law in cases of lawful nationalization

[299]. In its second method of estimating compensation, LIAMCO maintains that even lawful nationalization of a long term concession agreement entails adequate compensation which must include the profit lost, i.e. the current value of the economic benefits which the corcessionnaire would have realized over the term of the contract.

[300]. This second method refers to lawful nationalization as distinguished from wrongful taking. Such distinction has already been clearly pointed out by the Permanent Court of International Justice in a dictum recorded in the Chorzow Factory Case in 1922. It clarified that, whereas in a wrongful taking the injured party must be restored to its original rights, - on the contrary in a lawful expropriation where the only wrongful act was the failure to pay the just price of what had' been expropriated, the compensation due should be the value of the undertaking at the time of dispossession (V.White, op.cit., p.236).

[301]. Claimant, in support of its contention that loss of profits must be included in the adequate compensation even in lawful nationalization, cites a number of precedents, the chief of which is the decision of the Permanent Court of International Justice in the Norwegian Claims Arbitration, issued on 13 October 1922. In that decision it was ruled that just compensation must be based upon a "fair market value of the property" taken, and must include" loss of profits of the Norwegian owners as compared with owners of similar property."

[302]. Claimant quoted also similar rulings in decisions of the American and British Claims Commissions, as well as other decisions, wherein the loss of profits was based on the "estimated profitability", or "the value of shares" of the company on the date of its nationalization, or the "fair market value of the enterprise", or "the value of the exclusive licence or franchise".

[303]. Claimant concluded that in estimating lump sum indemnities payable for the termination or expropriation of concession agreements in extractive industries, the key to the compensation has been the reliance on evidence of the size of the concession reserves and then finding the profits which would have been realized by the extraction and sale of these reserves over the life of the concession.

[304]. These arguments cannot be taken as relevant in this connection, because they are mostly vague and difficult to apply in practice. Moreover, they are not conclusive on the matter at issue, because international legal theory and practice are not yet in agreement on one general uniform rule in this respect.

[305]. An examination of some notorious instances of international practice is useful in this connection. It has been pointed out hereabove that the Russian nationalizations after World War I were without compensation, and that only partial compensation was paid later on, especially in the nationalization measures taken after World War II by Eastern European States, some American States and by France and the United Kingdom. Usually, compensation was determined by lump sura agreements (forfaitaire), or by other amicable settlements.

[306]. For example, the Iranian nationalization acts of the Anglo-Iranian Company of March and May 1951, and the partial Libyan nationalizations of 1973 concerning Esso Standard Libya, Esso Sirte Inc., Shell Libya, Grace Petroleum Corporation, Mobil Libya, Gelsenberg Libya, Texaco Overseas Petroleum Company and California Oil Company, - were all settled amicably, after various new agreements between the parties. The same may be said of the Libyan special agreements concluded with Occidental and the three companies of the so-called Oasis Group.

[307]. Partial compensation by lump sum agreements may be illustrated by that of 1946 concluded between Mexico' and the United Kingdom. Likewise, the Suez Canal Company was nationalized by an Egyptian Decree of 26 July 1956. After diplomatic uproar and the tripartite military invasion by Israel, England and France, and following long negotiations, the dispute was finally settled by the amicable Agreement of Geneva dated 13 July 1958. In that agreement, Egypt undertook to pay to the Compagnie Financiere ée Suez a lump sum of 28.3 million Egyptian pounds and to leave to the latter all its assets outside Egypt, in full and final settlement of all claims by holders of Founders shares and of"Parts Civiles" (V. "The Suez Canal Settlement" documents edited by E. Lauterpacht under the auspices of the British Institute of International and Comparative Law, London, 1960).

[308]. The same may be said of the Libyan nationalization of British Petroleum (BP) in 7 December 1971. After an Arbitral Award issued in default on 10 October 1973, an agreement was reached, in 1974 for the payment to BP of a lumps sum indemnity, as already pointed out in a previous section.

[309]. In the light of such frequent contemporary international practice, the classical doctrine concerning the determination of compensation has undergone the influence of the recent evolution of the concepts of the right of property and of the sovereign right of States to nationalize their natural wealth and resources.

[310]. The classical doctrine required the payment of "prompt, adequate and effective" compensation for the nationalized property of an alien. This is the formula adopted by the U.S. State Department in its various statements to which it was alluded in a previous section. "Adequate" compensation, in

particular, had to include "lucrum cessans, namely the loss of future profits from property such as invested capital or a concessionary right granted for a specific number of years" (V. White, op. cit., p. 15).

[311]. This classical doctrine was not always accepted neither in the inter-war period nor after World War II. Adequate compensation as including loss of profits, such as was awarded in the old above mentioned arbitral decisions (e.g. in Delagoa and Shufeldt cases), was no more acceptable as an imperative general rule. It retains only the value of a technical rule for the assessment of compensation, and a useful guide in reaching settlement agreement, as was well and justly asserted (V. White, op. cit., p.l8). It stands only as a maximum rarely attained in practice (V. Katzarov, op. cit., p.447).

[312]. In conclusion, it may be safely laid down that it is lawful to nationalize concession rights before the expiry of the concession term, provided that the measure be not discriminatory nor in breach of treaty, and provided that compensation be duly paid.

[313]. But the question whether or not the concessionnaire may claim compensation for all the loss of future profits for the unexpired term is still a controversial point which has not been definitely settled (V. Friedman, op.cit., p.220-221, and White, op.cit., p.178).

[314]. Amid this confusion, it was sometimes hinted to the doctrine called "Théorie de l' imprévision" (unforeseen events)which, as has been expounded above, is admitted by the Libyan Civil Code (Article 147, para.2)and other civil codes and legal systems in the field of ordinary contracts, as well as by administrative law in many countries in the field of concessions and other administrative contracts. This doctrine empowers the Courts to revise those provisions of a contract as might become excessive and exorbitant due to the advent of extraordinary circumstances.

[315]. The said doctrine has been assimilated to that of "Rebus sic standibus" admitted by international custom as a ground for amending old and onerous treaties, and was suggested by some international jurists as a ground for justifying nationalization or at least for tempering the hardship of classical rules relating to the assessment of damages (V. Katzarov, op.cit., p.442 and 444).

[316]. Further transformations have been noticed recently oh this point, both in theoretical studies and in practical application. A recent instance of this trend is illustrated by the Algerian Decree of 11 May 1967 nationalizing "la Société Miniére d'Ouenza", in which it was provided for an indemnity equivalent to the average market value of the Company's shares during the last two years (V. Boulanger, op cit., p.200).

[317]. The same trend is noticeable in some recent publications, where it is asserted that the rule of'full and prior" compensation is no more imperativa, and that only "convenient and equitable"

compensation is required in cases of nationalization. This trend has been justified by the necessity of taking into consideration not only the interest of the owner of the property nationalized, but also those of the Society (Community) and of the nationalizing State.

[318]. The "convenient and equitable" compensation formula has also been substituted for that of the "prior and full or adequate" compensation in the German Constitutions of 1919 (angemessene Entschadigung) and of 1946, and in the Declaration of Guarantees to the Accords of Evian concluded between France and Algeria on the occasion of the Algerian independence. Likewise a draft resolution of the "Institut de droit international", proposed at its meeting in Bath in 1950, provided that indemnification in case of nationalization is not at all(nulleraent) subject to the rule of prior and full compensation(V. Boulanger, op.cit., 94 and 124; and Katzarov, op.cit., p.174, 211, 429, 441 and 445).

5. Estimation of compensation

[319]. On the one part, the Claimant, sustaining the necessity of taking the loss of profits into consideration, contends that the key to the computation of money damages to which it is entitled should be the reliance on the size of concession reserves, and. then the calculation of such damages by finding the profits which have been realized by the extraction and sale of these reserves from the effective date of expropriation over the life of the concession.

[320]. On the other part, the Libyan Government, in Article 2 of the Nationalization Laws at issue, has recognized its liability to compensate LIAMCO "for the property, rights and assets that had reverted to it".Then, in a Statement released on the day following the first Nationalization Law, i.e.on 2 September 1973, the Prime Minister, officially interpreting that Article, has laid down the basic principles for conducting negotiations with the oil companies. He stated that compensation should be paid on the basis of the "net book value", and explained that statement in the following terms".

> "The first principle is that I cannot buy my own oil which is underground because this would be like a person who buys his house twice. In other words, libya considers and insists that compensation should be based on the net book value. Because this subject is of interest to the Libyan people, I would like to explain the meaning of the net book value so that our citizens can understand it."
>
> "The net estimated value is, for example, when the Occidental Company came and obtained a concession in Libya paying for example 100-million Libyan dinars. The Company began producing in 1962. For example, we will just assume that this particular company since the signing of the concession agreement, although it had spent 100-million dinars, had recovered until 1962 something like 60-million dinars. The book value at the time of nationalization or participation is 40-million dinars..."
>
> "Profit is not deducted from the net book value or from the expenditure any company makes under an oil agreement..."

"The second principle is that anyone who would like to be among us and cooperate with us must realize that the Libyan Arab Republic is not a milk cow. Anyone who would like to be among us and cooperate with us must take into consideration that part of the profits should be utilized in the interest of the Libyan Arab people..."

[321]. It is hardly necessary to record that these two viewpoints constitute two irreconcilable unacceptable extremes. Under these conditions and amidst the above mentioned confusion of opinions and precedents, it is easy to perceive the difficulty of estimating damages in the present dispute.

[322]. The obvious conclusion to be drawn from the above exposé of precedents and legal considerations as to the alleged rule of compensation for loss of profits in the field of nationalization is well summarized in a Judgment of the International Court of Justice, in Re : Columbian-Peruvian Asylum of 20 November 1950. It says;

"The practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule."

[323]. Moreover, the recent above mentioned United Nations Resolutions concerning nationalization have not formulated a clearer guide for the assessment of damages. Resolution No. 3281 of 12 December 1974, after declaring the right of each State "to nationalize, expropriate or transfer ownership of foreign property", has said vaguely that :

"...appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

[324]. In such confused state of international law, as is evident from the foregoing precedents and authoritative opinions and declarations, it appears clearly that there is no conclusive evidence of the existence of community or uniformity in principles between the domestic law of Libya and international law concerning the determination of compensation for nationalization in lieu of specific performance, and in particular concerning the problem whether or not all or part of the loss of profits(lucrum cessans) should be. included in that compensation in addition to the damage incurred (damnum emergens).

[325]. In compliance with Clause 28, para.7, of LIAMCO's Concession Agreements, and in such absence of principles common to domestic law of Libya and international law applicable to the matters in dispute, it is necessary to refer therefore to the general principles of law as may have been applied

by international tribunals.

[326]. One of these general principles of law is Equity, which is commonly and unanimously recognized as a supplementary source of law in Libyan law (Article 1 of the Civil Code), Islamic law (Istihsan) and international law (Article 39, para.2, of the Statute of the International Court of Justice). Taking Equity into consideration, it would be reasonable and just to adopt the formula of "equitable compensation" as a measure for the estimation of damages in the present dispute.

[327]. This formulation is certainly in complete harmony with the general trend of international theory and practice on the concepts of sovereignty, destination of national wealth and natural resources, nationalistic motivations in the attitude and behavior of "Third World" nations, the lawfulness and frequency of nationalization, and the recent declarations affirmed in successive United Nations Resolutions by the majority members of the General Assembly.

[328]. In the light of the foregoing reasons and considerations, the Arbitral Tribunal, adopting the formula of "equitable compensation" in this dispute, has examined LIAMCO's claims in its "Memorial on Indemnification"

[329]. In said Memorial, "LIAMCO seeks to be placed in the same net monetary position it would have been in if Libya had honoured its obligations rather than violating them and if LIAMCO had incurred all the further expenditures which would have been necessitated by its continued performance under the Petroleum Concessions."

[330]. Therefore, LIAMCO claims indemnification in the form of a lump sum based on the value of the Concessions including the value of physical plant and equipment, contract rights and other types of property.

[331]. LIAMCO states that, for convenience, the lump sura claimed has been based on the value of said Concessions taken as of January 1, 1974 roughly mid-way between September 1, 1973, the date of the first act of expropriation, and February 10, 1974, the date of the consummation of the complete take-over.

[332]. The total amount claimed is $ 207, 652, 667, detailed under the following three headings:

Physical plant and equipment $ 13,882,667

Concession 20-Raguba field 4186, 270, 000

Concession 17-Mabruk field $ 7, 500,000

[333].

In addition, LIAMCO claims interest on the above sums at the annual rate of 12 % from January 1, 1974 through the date of payment or recovery of the arbitral award.

[334]. These various elements will be examined successively hereafter.

[335]. As to Concession No. 16, Claimant's Counsel, at the arbitration hearing of 11 January 1977, confirmed the statement made by the witness Mr. Hagan that no oil was found in it, and declared that no indemnification is claimed by LIAMCO on that account.

6. Indeinnification for loss of physical plant and equipment

[336]. Under this heading, Claimant gives the following details :

[337]. This item consists of physical current and fixed assets that were taken by Libya pursuant to LIAMCO’s nationalization.

[338]. Current assets include cash ($ 16,000), crude oil in tankage ($ 2,064,916), material and supplies($5,111), and prepaid office rent and concession surface rentals ($82, 166).

[339]. As to fixed assets, their value was reduced by depreciation, depletion and amortization according to the time that such assets were in service prior to the date of expropriation. They include : Raguba field wells and connected facilities ($3, 647, 429), Mabruk field wells and connected facilities ($2, 750, 728), Raguba gaz plant ($2, 881, 228), Raguba surface facilities ($2, 946, 186), office equipment ($16,732), projects in process($5, 259) and pre-effective costs ($1, 733, 011).

[340]. The total value of both current and fixed assets equals $ 16, 148, 768. It has to be reduced by current liabilities for income tax, surtax and supplemental payment amounting to $ 2, 266, 091, so as to make the net value of all physical assets $ 13, 882, 677.

[341]. The above evaluations represent the market value of LIAMCO's 25.5 $ interest in said assets. That value is based on the original cost of only seventy wells as shown on the Company's books and records, adjusted for variations in construction costs by application of the appropriate international middle east construction index.

[342]. In support of the above contentions, LIAMCO submitted detailed schedules and reports signed by Messrs. L.L.Lair (controller), R.R.Ritter (of the drilling department), J.D.Sippel and D.M.Leach (of the Delta Engineering Corporation).

[343]. Oral testimony by Mr. John H. Gilcrest was presented by Claimant at the arbitration hearing. This witness explained how he collaborated with Mr. Lair in the preparation of the evaluation of the physical assets and equipment of LIAMCO in Libya after the nationalization measures, as set down in the general schedule, Annex A to the "Memorial on Indemnification ".

[344]. Moreover, this contention is legally supported by Clause 26 of the Concession Agreements, which provides that the concessionnaire has the right to remove his physical assets on expiration or termination of the concession. This general provision should mean any termination, including that caused prematurely by nationalization.

[345]. On the basis of this contractual obligation, and pursuant to the aforementioned legal proposition adopted by the Arbitral Tribunal affirming the undisputed obligation of the nationalizing State to pay full compensation for all the loss sustained (damnum emergens), -on all these grounds, the Arbitral Tribunal has reached the conclusion that the damnum emergens should represent the market value which the nationalized assets have at the said premature expiration of the concession, namely the actual present evaluation as proved by Claimant's said evidence.

[346]. In conclusion, applying these considerations to the above proved facts, the Arbitral Tribunal deems that the claimed sum of $ 13, 882, 677 (thirteen million eight hundred eighty two thousand six hundred seventy seven American dollars)should be awarded to LIAMCO as just and equitable compensation for nationalizing its interest in said physical plant and equipment.

7. Indemnification for expropriation of Petroleum Concession 20-Raguba field

[347]. Under this heading LIAMCO claims compensation for the loss of its concession contract rights. It contends that such compensation should include the loss of profit or other economic benefits (lucrum cessans) which the concession would have yielded to the concessionnaire over the remaining term of the concession or producing life of the petroleum deposits lying within the concession.

[348]. Applying this contention to its 25.5 % interest in the Raguba field of the Concession 20, LIAMCO claims the sum of $ 186,270, 000 as indemnification for the nationalization of that interest. In reaching this evaluation, it has proceeded as follows :

1. Evaluation was made of crude oil, liquids and gas that would have been produced from January 1, 1974 through the end of the production life of the concession, December 31, 1988, as determined by LIAMCO's reservoir and production experts. For this purpose the producing rate of 75, 000 barrels per day was used.

2. In the evaluation process, the July 1976 official market price was used to value crude oil production for all years 1977 through 1988 without heeding any probable future increase.

3. The gross revenues thus evaluated were deduced by the operating costs and expenditures, and by taxes and royalties payable to the Libyan Government at the rates in effect prior to the first nationalization measure in September 1973, without heeding the subsequent increase in such rates and in the posted price to which they were applied.

4. From the result of that evaluation which reached $90,420, 000 from 1974 to 1976 and $216, 680, 000 from 1977 to 1988, LIAMCO deduced new investment expenditures and other expenses, then applied a discount factor at an annual rate of 12 %, and thus arrived at the lump sum of $186,270,000(Memorial on Indemnification p.15 and Annex C 1).

[349]. In support of its evaluation, LIAMCO submitted the reports of Messrs. L.L.Lair, controller, and Messrs. J.J.Hanke, K.G.Riley and W.E.McNeill, engineering experts of the International Division of Atlantic Richfield Company.

[350]. The said Messrs. Riley and McNeill were also orally heard as witnesses at the arbitration hearing. Their testimony confirmed their written reports, annexed to Claimant's Memorial on Indemnification, under Nos. B, C2, C3, D1 and D2. They expounded the bases for the estimate of future production of oil and gas in Raguba and Mabruk fields, and explained the evolution of posted prices and their relation to the market price, the calculation of royalties and taxes and the evaluation of crude oil.

[351]. At the arbitration hearing, LIAMCO brought also as witness Mr. Marvin J. Hagan, Jr., who submitted and explained orally the contents of a written report dated 10 January 1977 with; explanatory tables, concerning the methods used in evaluating the market value of Raguba and Mabruk fields. The same topics were the object of Annexes C and D to the Claiment's "Memorial on Indemnification".

[352]. LIAMCO, in its said Memorial, compared the above evaluation of Concession 20 with the unjust enrichment of the Libyan National Oil Corporation (NOC).It showed that the net profits realized by NOC from LIAMCO's share for the period September 1, 1973 through the end of 1976 amounted to $45, 913, 228, and that the value of such profits through 1988 would be $56, 895, 645. It. explained that the great difference between this evaluation and that claimed by LIAMCO is due to the current high posted prices, income tax rates and royalty rates unilaterally imposed by the Libyan Government in derogation of the rights of the concessionnaires, and acquiesced to by the latter under threat of full nationalization. This explanation of said difference was confirmed by the testimony of the abovementioned Mr. Hagan.

[353]. Comparing these two greatly different evaluations, it is relevant to record the following considerations :

1. In favor of the NOC unjust enrichment evaluation, it seems that it is more realistic as it represents the actual profit that has been realized or will more probably be realized by the Respondent and by the coconcessionnaires of the same Concession 20 field. It is true that this evaluation is based on unilaterally imposed high posted prices and high rates of taxes and royalties, but such prices and rates were accepted by the co-concessionnaires and would probably have been accepted by LIAMCO as it did in the past, esp. in 1966.

Nevertheless, it is also undeniable that the bases of this evaluation constitute a discharge of contract, and a frustration of the intention of the contracting parties. Moreover, they donot take into consideration the great initial expenses and risks taken by LIAMCO in their pioneer works and subsequent activities.

2. In favor of LIAMCO's evaluation, it is to be noted that although it did not heed the increase in said posted prices of crude oil and tax and royalty rates, it also did not heed the increase in the official market price of crude oil which is a recurring certainty. On the other hand, this evaluation did not take into consideration the almost certain inflation in the currency from now till 1988, contrarily to what was done for the operating costs (Memorial on Indemnification, Annex C3, Table II).

[354]. For all these reasons and considerations, the Arbitral Tribunal, considering both evaluations as two different exaggerated extremes, and applying the measure of "equitable compensation" hereabove adopted, has reached the conclusion that a lump sum of $66, 000, 000 (sixty six million American dollars) should be a reasonable equitable indemnification for the nationalization of the concession rights of LIAMCO's interest in Concession No. 20, Raguba field.

8. Indemnification for expropriation of Petroleum Concession 17 - Mabruk field.

[355]. LIAMCO claims here indemnification for the loss of its rights to exploit the Mabruk field discovered on Concession 17, in 1959.

[356]. It states that at the time of its discovery, and for number of years thereafter, the particular conditions of this field, including the nature of the oil reservoir, rendered it uneconomic to develop by the concessionnaire. But it contends that with the more recent fourfold increase in the world market prices of crude oil, the field would be economic to be developed by the concessionnaire under the terms of the concession on which it lies. It adds, further, that the concessionnaire has been prevented from developing the said field commercially by the unilateral increase by the Libyan Government of the posted prices and of the royalty and income tax rates.

[357]. Accordingly, LIAMCO claims the value not only of the physical plant and equipment in this field, i.e.

the above mentioned sum of $2, 750,728, but also the sum of $7,500,000 which represents the minimum value to LIAMCO of the loss of the exclusive right and opportunity to develop this field under the terms of Concession 17.

[358]. The Arbitral Tribunal has, under a previous section, Considered that LIAMCO is entitled to the value of the physical plant and equipment in this field, as it represents the damnum emergens therein.

[359]. But recalling that the loss of profits to be taken into consideration must be certain and direct, the Arbitral Tribunal considers that the loss claimed here does net possess these characters, and was not in effect realized by NOC nor by the cooncessionnaires. The claimed loss of profits seems thus doubtful and not probably realizable under the present conditions of petroleum exploitation in Libya. If it were otherwise economical, NCC or at least LIAMCO's co-concessionnaires would have operated the said field.

[360]. Therefore, the indemnification claimed for this item cannot be sufficiently sustained in law, and consequently should be rejected.

9. Interest and costs

[361]. LIAMCO claims interest on the sums to be awarded from January 1, 1974 through the date of payment or recovery of the award in full. Although it states that the rate of interest is within the discretion of the Arbitrator, it requests the application of a 12 % rate, because that rate vas also the discount rate LIAMCO applied in reducing its claim of lost contract from $305, 710, 000 over the period 1974 through 1988 to a lump sum of $186, 270, 000.

[362]. The Arbitral Tribunal takes into consideration the proper law of the contract which is international law only when consistent with Libyan domestic law.

[363]. According to Article 229 of the Libyan Civil Code;

> " If the object of the obligation is a sum of money whose amount is known at the time of the claim and the debtor is delaying payment, he shall be liable to pay to the creditor, by way of compensation for the delay, an interest at the rate of 4 % in civil cases and 5 % in commercial cases. This interest accrues from the date of its judicial demand, unless the contract or the commercial usage fix another date for its accrual, always provided that the law does not stipulate otherwise."

[364]. This rule should be applied in the light of the recent trend in Libyan legislation which tends to be in conformity with Islamic legal principles. Interest in Islam is prohibited if it has a usurious(riba)

character.

[365]. Pursuant to that trend and to equitable general principles of Law, and taking into consideration the discount rate which was applied by the Claimant in its evaluations, the Arbitral Tribunal has reached the conclusion that it is just and equitable to consider the interest claimed not as usury (riba), but as a compensatory equivalent consideration of the said discount rate, after reducing it, in harmony with the Libyan Code, to the most usual rate of 5 %, applicable to commercial matters.

[366]. But as, in general law, interst on damages is due on claims of money whose amount is known(above mentioned terms of the Libyan Civil Code), it cannot accrue for unliquidated damages before their judicial ascertainment and liquidation. Consequently, this Tribunal has to apply it only from the time of the final assessment of damages at the date of this Award.

[367]. In addition to the interests, the Tribunal has considered the matter of arbitration costs and expenses.

[368]. Tn this connection Article 284 of the Libyan Code of Civil Procedure prescribes that :

> "If each of the litigants fails in some of his claims, it may be decreed that each (litigant) should support the costs he has defrayed, or that the costs be apportioned among them according to the appreciation of the Court, or that one of them be condemned to support all the costs."

[369]. Moreover, Clause 28, para.8, of the Concession Agreements, based on Schedule II to the Libyan Petroleum laws of 1955 and 1965, provides that :

> "The costs of the arbitration shall be borne by the said two parties in such proportion and manner as may be fixed in the award."

[370]. Pursuant to said provisions and taking into consideration the circumstances of the present case, the Arbitral Tribunal deems equitable to award the sum of $203,000(two hundred and three thousand American dollars) towards the costs and expenses of the Claimant.

PART FOUR : CONCLUSION'S

[371]. Whereas, from the above considerations of facts, evidence and law, the Arbitral Tribunal has reached the following conclusions ;

> 1. That LIAMCO’s Libyan Concession Agreements Nos. 16, 17 and 20 of 1955 as amended in 1966 are contractual in character and are governed by the proper law of the contract,

which, according to Clause 28, para.7 of said Agreements, is in the first place Libyan law when consistent with international law and subsidiarily the general principles of law, Libyan law in this connection including Libyan legislation, Islamic law, custom, natural law and equity.

2. That according to said proper law, the arbitration Clause No. 28 of the Concession Agreements is valid and remains binding even after the nationalization of the concession rights.

3. That the dispute arising from the Libyan Decrees of 1973 and 1974 nationalizing LIAMCO's 25.5% interest in said Concessionsis arbitrable under said Clause, and that the Arbitral tribunal constituted in accordance with that Clause has exclusive jurisdiction in said dispute.

4. That the arbitration seat and procedure are validly determined by the Arbitral Tribunal in the Preliminary Decision of 9 June 1975.

5. That the pleadings and hearings were validly conducted in default of the Respondent, duly notified, and in accordance with said Clause and procedure.

[372]. Whereas, the Arbitral Tribunal considered that the following legal propositions are recognized by both municipal and international law, as prescribed by the proper law of the contract, namely :

1. That the right of property, including the incorporeal property of concession rights, is inviolable in principle, subject to the requirements of its social function and public well-being.

2. That contracts, including concession agreements, constitute the law of the contracting parties, by which they are mutually bound.

3. That the right of a State to nationalize its wealth and natural resources is sovereign, subject to the obligation of indemnification for premature termination of concession agreements.

4. That nationalization of concession rights, even before the expiration of the concession terra, if not discriminatory and not accompanied by a wrongful act or conduct, is not unlawful as such, and constitutes not a tort but a source of liability to compensate the concessionnaire for said premature termination of the concession agreements.

[373]. Whereas, there has been no conclusive evidence to prove sufficiently the discriminatory character of the nationalization measures complained of, and therefore, these measures do not constitute a wrongful act provided due compensation is paid to the concessionnaire.

[374]. Whereas, no such compensation was paid in this dispute, and consequently LIAMCO is legally entitled to seek remedy therefor by way of arbitration.

[375]. Whereas, restitutio in integrum claimed as a principal remedy by LIAMCO as well as the remedy of a Declaratory Award declaring the invalidity of Libya's title to LIAMCO's nationalized rights, are to be rejected in accordance with prevalent international practice, and because they are practically

incapable of compulsory execution.

[376]. Whereas, moreover, the said remedies are liable to encroach upon the principle of the sovereignty of States and the indisputable and unappealable character of all "Acts of State", including in particular those connected with nationalization measures.

[377]. Whereas, concerning the remedy of indemnification claimed alternatively by LIAMCO, the Arbitral Tribunal considers the Claimant legally entitled to such indemnification, because it is imperative in case of premature termination of contract to award a substitute remedy whenever restoration in kind is impossible.

[378]. Whereas, there is no doubt that LIAMCO is entitled to damnum emergens, which represents the value of the nationalized physical plant and equipment that LIAMCO owns and has the right to recover at the termination of the concession under Clause 26 of the Concession Agreements.

[379]. Whereas, LIAMCO claims also indemnification for the value of the nationalized concession rights, representing the loss of profit (lucrum cessans)in Concessions 20 and 17.

[380]. Considering that there is no conclusive evidence of a uniformity in principles between the domestic law of Libya and international law and practice on the determination of the value of said indemnification.

[381]. Whereas, in such a case and in compliance with the abovementioned proper law of the contract, recourse should be made to general principles of law as may-have been applied by international tribunals, and in particular to the principle of equity.

[382]. Whereas, taking this principle into consideration, the Arbitral Tribunal has reached the conclusion that it is just and reasonable to adopt the formula of "equitable compensation" as a measure for the assessment of damages in the present dispute, with the classical formula of "prior, adequate and effective compensation" remaining as a maximum and a practical guide for such assessment.

[383]. Whereas, in application of the said equitable formula, the Tribunal has assessed the value of LIAMCO's share in Concession 20 (Raguba field) at the above mentioned sum of $66,000,000 and has concluded to the rejection of the claim inConcession 17 (Mabruk field), except for the physical plant and equipment therein, and to the rejection of interest as claimed with its recognition only as compensatory substitute for the discount rate applied by LIAMCO in evaluating its claims.

NOW, THEREFORE,

[384]. On the basis of the foregoing facts and reasons, IT IS HEREBY AWARDED AND ADJUDGED BY THE ARBITRAL TRIBUNAL,

Against the defaulting Respondent, the Libyan Arab Republic to pay to the Claimant, the Libyan American Oil Company, the following sums in American dollars :

1. $13, 882, 677 (thirteen million eight hundred eighty two thousand six hundred seventy seven American dollars) as indemnification for loss of physical plant and equipment.

2. $66, 000, 000 (sixty six million American dollars) as equitable compensation for loss of concession rights in Concession 20 - Raguba field.

3. $2G3, 000 (two hundred and three thousand American dollars)as contribution by the Respondent towards the arbitration costs and expenses of the Claimant.

4. Compensatory indemnity in lieu of interest at the rate of 5 % (five per cent) on the above mentioned sums to be added from the date of this Award till the date of their payment in full.

IT IS FURTHER RULED :

That all other remaining additional or contrary claims be rejected and dismissed, this Award being in full and final settlement of all claims related to this dispute.

AWARD rendered at the International Conference Center of Geneva, Switzerland, on the twelfth day of April nineteen hundred seventy seven.