Table of Contents:
INTERNATIONAL ARBITRATION OF PETROLEUM DISPUTES: THE DEVELOPMENT OF A LEX PETROLEA
I. INTRODUCTION
II. International Arbitral Procedural Law
2. Separability of Arbitration Clauses
IV. LEX PETROLEA
1. Expropriations
   A. Concessions
   B. Nationalization of contractual rights
      a. Lawfulness of expropriations
      b. Effect of stabilization clauses
      c. Creeping expropriation
      d. Duress
      e. Failure to perform releases the other party
   C. Defenses claimed by expropriating States
      a. Implied termination or waiver
      b. Doctrines of changed circumstances and unforeseen events
      c. Force majeure/ frustration/impossibility
      d. Administrative contracts
      e. United Nations Resolutions
   D. Remedies for expropriations
      a. Restitutio in integrum/specific performance
      b. Damages
         (1) Loss suffered (damnum emergens)
         (2) Loss of profits (lucrum cessans)
         (3) Net book value
         (4) Equitable compensation
         (5) Discounted Cash flow (DCF) method
         (6) Underlying asset valuation approach
         (7) Going concern value
         (8) Liquidation value
         (9) Inflation
         (10) Interest
2. Production Sharing Contracts
   A. Force majeure clause
   D. Damages/liquidated damages/mitigation
   H. Unjust enrichment
   J. Interest
3. Operating Agreements
   A. Misrepresentations or mistake
   E. Interest

Content:
INTERNATIONAL ARBITRATION OF PETROLEUM DISPUTES: THE DEVELOPMENT OF A LEX PETROLEA

R. Doak Bishop*
I. INTRODUCTION

Over the past 25 years, an increasing number of international arbitral awards relating to the petroleum industry have been published. These public awards provide the source material from which customary law may be drawn.

The Government of Kuwait argued, in one case, that a sub-species of these disputes has "generated a customary rule valid for the oil industry - a lex petrolea that was in some sort a particular branch of a general universal lex mercatoria".1 In the context of that very narrow claim, the contention was rejected, but it is the thesis of this paper that in a larger context, these published awards have created the beginnings of a real lex petrolea that is instructive for the international petroleum industry.

This paper will discuss this incipient "lex petrolea" and the rules, or at least the range of rules, established by surveying virtually all reported international arbitration awards relating to the petroleum industry. The paper is arranged by identifying and categorizing the issues decided in these published awards, with each issue discussed on a case-by-case basis in order to provide the fullest exposition of the issue along with the factual context in which it was raised and decided. It is hoped that this paper will provide a comprehensive road map of the major substantive issues raised, and the disposition of those issues, in modern international arbitrations involving the petroleum industry.

II. International Arbitral Procedural Law

2. Separability of Arbitration Clauses

In many arbitration proceedings, one Party - often a governmental entity - claims that the contract containing the arbitration clause has terminated by its own terms, has been terminated, or was void ab initio. The logical claim then is that the arbitration agreement contained in the contract has also terminated or is void, and since binding arbitration is consensual, the parties are not bound to arbitrate their dispute. This problem has arisen many times and is now determined by the doctrine of the separability of arbitration clauses from the remainder of the agreement. Like the question of the competence of the arbitrators to determine their own jurisdiction, the doctrine of the separability of arbitration clauses is included in the UNCITRAL Model Law.11

In TOPCO v. Libya,12 the arbitrator addressed the issue of whether, if the nationalization had voided the Deeds of Concession, this would affect the arbitral clause. The arbitrator held that the arbitration clause would not be affected even if the Deeds were void because of the principle of the autonomy or independence of the arbitration clause from the contract in which it is contained. In support of this decision, the arbitrator referenced the Permanent Court of International Justice decisions in the cases of Lena-Goldfields13 and Losinger.14 Similarly, the tribunal in Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic,15 held that "[i]t 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 the termination." The arbitrator rationalized this decision by finding it was the intention of the parties and is a basic condition for creating a favorable climate for foreign investment. The tribunal cited in support of this proposition to ICSID Convention Art. 25, Resolution No. 1803 (XVII) of the UN General Assembly Sect. 1(1) and (4) (21 Dec. ;1952), and the arbitrations of the Prophet Mohammed, as indicating that arbitration is consistent with Islamic law and practice. The LIAMCO case was also an ad hoc arbitration.

NIOC claimed in the Elf Aquitaine matter16 that the Exploration and Production Contract was rendered void ab initio by declaration in 1980 of a Special Committee of the Iranian Government, and therefore, the Government was not bound to the arbitration clause. The arbitrator rejected this claim and said, "It is a generally recognized principle of the law of international arbitration that arbitration clauses continue to be operative, even though an objection is raised by one of the parties that the contract containing the arbitration clause is null and void." The tribunal noted that an arbitral clause may
not always be operative if there never existed a valid contract between the parties, but the arbitrator did not find that to be the case here. The arbitrator summed up by stating, "The autonomy of an arbitration clause is a principle of international law that has been consistently applied in decisions rendered in international arbitrations, in the writings of most qualified publicists an international arbitration, in arbitration regulations adopted by international organizations and in treaties."

The same question arose in a different context in All-Union Foreign Trade Association "Sojuznefteexport" v. Joc Oil, Ltd., which was an arbitration before the Foreign Trade Arbitration Commission (FTAC) of the USSR Chamber of Commerce and Industry. There, the Association filed an arbitration claim with the FTAC, but Joc Oil claimed the contract (including the arbitration clause) was invalid because it was not signed by two persons with a power of attorney from the Chairman of the Association, and therefore, did not comply with the requirements of Soviet law for foreign trade transactions. Joc Oil also claimed that the theory of the autonomy of an arbitration agreement was not applicable in the USSR. On these bases, Joc Oil contended that the FTAC did not have jurisdiction to proceed with the arbitration. The tribunal found the contract to be invalid on the ground asserted by Joc Oil, but rejected the company's argument on the autonomy of the arbitration clause. The tribunal noted that the overwhelming majority of Soviet authors recognized the autonomy of arbitration clauses, cited to

Page: 1139

UNCITRAL Arbitration Rules Art. 21(2), and stated that a 1974 FTAC decision treated an arbitration agreement as a procedural contract and not as an element (condition) of a material-legal contract. An arbitration agreement is invalidated only for "defects in will, mistake, fraud and so on", none of which were found to exist in this case. The FTAC concluded, therefore, that the arbitration clause is a procedural contract, independent of the contract in which it is contained, and is valid.

[...]

Page: 1154

[...]

IV. LEX PETROLEA

1. Expropriations

A. Concessions

Two preliminary issues relating to the nature of concessions have arisen from time to time in expropriation cases. The first is whether a concession is a contract that can be breached. The second is whether contractual rights represent property which is capable of being expropriated and for which compensation is due in the event of expropriation. Affirmative answers have evolved to both of these questions.

In BP v. Libya British Petroleum argued that its concession was a contractual instrument, which was concluded pursuant to legislation that contemplated a contractual relationship. According to BP, the concession

Page: 1155

created a direct link between BP and Libya. BP's expert witness opined that under Libyan law, concessions are administrative contracts. The arbitrator accepted BP's arguments and held that the concession was in the nature of a contract and created a direct contractual link between BP and Libya. Apparently, the Libyan Government did not argue in this early case that the administrative nature of the contract allowed it unilaterally to modify or terminate the agreement.

In another arbitration the sole arbitrator expressly held that Deeds of Concession granted by a former government of Libya were of a contractual nature because they expressed an agreement of the wills of both the concessionaires and Libya. This holding was based on general principles of law and the teachings of comparative law. The arbitrator went on to find that these were international contracts because of their connections to different States.

The Iran-US Claims Tribunal, Chamber Three, was faced with the question of whether contract rights constitute property for purposes of compensation for an expropriation in Amoco International Finance v. Iran. Iran claimed that Amoco's
50% interest in the shares of Kharg Chemical Co., Ltd., was not property within the meaning of the 1955 Treaty of Amity between the US and Iran. Chamber Three noted Iran's admission that for nationalizations there is "no basis for any distinction between real property and contract rights" because both are subject to a State's right of eminent domain. The Panel decided that an expropriation "may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value". It held that Amoco's interests constituted "property" or "interests in property" as those terms are used in the Treaty, and thus, are subject to compensation in the event of an expropriation under the terms of the Treaty.

Chamber Two of the Iran-US Claims Tribunal has also held that contract rights are "interests in property" as that term was used in the Treaty of Amity. The negotiating history of the Treaty indicated that this phrase was included at the insistence of the US for the purpose of ensuring that contract rights would be protected. In the following passage, the tribunal noted the necessity of compensating a taking of contractual rights:

"As the tribunal has held in a number of cases, expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights in the present Case."

It now seems settled that contract rights in a concession, a production sharing agreement, a sales agreement, or other contract, constitute interests that can be expropriated and for which compensation is required. Under international law, the nationalization of such interests clearly require compensation.

B. Nationalization of contractual rights

a. Lawfulness of expropriations

The lawfulness of nationalizations has been the subject of considerable confusion over the years in arbitral decisions. There is no question under international law today that States have the right to nationalize their own natural resources, but that right comes with a corresponding obligation to compensate the party whose property is confiscated. The modern issue is the amount of compensation payable for a nationalization. In that context, the lawfulness or unlawfulness of a nationalization may affect the standard for compensating, as well as the amount of compensation payable.

One international arbitral case addressed the legality of a nationalization in the context of a claim of tort (delictual) liability. The tribunal found no fraudulent or purely discriminatory intent involved, and therefore, rejected any tort liability. It also refused to find unjust enrichment and abus des droits (abuse of rights) because these causes of action are only resorted to subsidiarily when no other grounds are available.

Other cases have held that nationalizations constitute breaches of contract. One tribunal found that, by a nationalization, Libya breached its obligations under the Deeds of Concession. In BP v. Libya, the sole arbitrator found that the nationalization of BP's property, rights and interests constituted a fundamental breach of the Concession, was a total repudiation of the agreement and the Government's obligations, was arbitrary and discriminatory and

violated public international law because it was made for purely extraneous political reasons, and was confiscatory because no offer of compensation was made in the two years since the nationalization.

Still other cases have found no breach of contract, but nevertheless have determined that an obligation exists to compensate, or to pay damages for failure to compensate, within a reasonable time. In LIAMCO v. Libya, the tribunal found that the nationalization was not unlawful provided that due compensation was paid, but since it had not been paid, LIAMCO was entitled to indemnity as a substitute award for the failure to compensate in a timely fashion.

The arbitral tribunal in AGIP v. Congo held a nationalization to be a violation both of Congolese law and of international law because it breached the stabilization clauses of the contract. The panel rejected AGIP's argument, however, that the nationalization was irregular under the Congolese Constitution because it was not required by the national interest. AGIP
sought to distinguish between the government acting in the general interest of the populace and acting in a private interest as a shareholder of a company. The panel decided that a State is still acting in the general interest of the national community when it nationalizes a company of which it is a shareholder.

One recent case holds that the lawful/unlawful distinction is relevant only because, for an unlawful taking, two additional remedies may be possible over and above those that may be awarded for a lawful expropriation: (1) restitution of the property, and (2) any increase in the value of the property between the date of the taking and the date of the award. In that case, neither restitution nor any increase in value was sought, so the distinction was irrelevant. The tribunal did say, however, that no compensation less than the value of the property on the date of the taking is due if the nationalization is lawful.

Perhaps the most comprehensive discussion of the unlawfulness of a nationalization is found in Amoco International Finance v. Iran. The tribunal held that a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking. Amoco claimed that the nationalization was unlawful because (1) it violated Iranian internal law; (2) no compensation was offered or paid; (3) it was discriminatory; (4) the decision to expropriate was not motivated by a public purpose but was intended to avoid contractual obligations; and (5) it

b. Effect of stabilization clauses

A stabilization clause has been defined as "contract language which freezes the provisions of a national system of law chosen as the law of the contract as of the date of the contract, in order to prevent the application to the contract of any future alterations of this system." The history of stabilization clauses has been traced to the period between World War I and World War II when US companies began to include them in concessionary contracts because of Latin American nationalizations. The purpose of these clauses was to ensure that the concessions would be operative for the full term provided in the

contract. The modern consequence of the classic stabilization clause aimed at prohibiting an expropriation is not to invalidate a nationalization, but to make it unlawful, which in turn affects the amount of compensation that may be awarded.

The sole arbitrator in TOPCO v. Libya noted the presence of a stabilization clause (Art. 16) in the concession, which provided that the Libyan Government "shall take all the steps that are necessary to ensure that the Company enjoys all the rights conferred upon it by this concession, and the contractual rights expressly provided for in this concession shall not be infringed except by agreement of both parties." The clause went on to provide that the concession would be interpreted according to the laws and regulations in effect at the time it was granted, and no amendments would apply
without the Company’s consent. The tribunal decided that the Government could not exercise its sovereignty to nationalize in violation of its specific contractual commitments in the stabilization clauses, and the nationalization in the face of these stabilization clauses amounted to a breach of the Deeds of Concession.

A different, and somewhat confusing, approach to stabilization clauses was taken by the tribunal in the case of *Kuwait v. AMINOIL*. There, Art. 17 of the 1948 Concession provided that the Concession could not be annulled or altered by legislation or regulations unless jointly agreed. Art. 7(g) of the Supplemental Agreement of 1961 also provided that the agreement could not be terminated before the end of the term except by surrender or default. The tribunal rejected the Government's arguments that these clauses did nothing more than embody general principles of contract law, that they were void because they were imposed on Kuwait during colonial times, and that they were annulled by the subsequent Kuwaiti Constitution of 1962 or by the public international law rule of *jus cogens*. The tribunal took the view that the purpose of the stabilization clauses was only to prohibit any measures of a confiscatory nature. With respect to damages, however, these clauses were held to create legitimate expectations that must be taken into account.

In a separate opinion, one of the arbitrators, Sir Gerald Fitzmaurice, voiced another perspective. The question, as he saw it, was the right of the Government to nationalize in the face of a contractual undertaking not to do so. The purpose of these clauses was to prohibit any measure terminating the contract before the end of the term; they were not limited to confiscatory measures. Sir Fitzmaurice rejected the notion that the test can ever be whether a nationalization is confiscatory because, by its inherent nature, it always is.

Thus, it was his view that the nationalization was rendered unlawful because it was irreconcilable with the stabilization clauses.

In *AGIP v. Congo*, the Government of the Congo agreed in the Protocol Agreement to guarantee the stability of AGIP’s local subsidiary’s legal status, and in Arts. 4 and 11 of the Agreement not to apply any laws or decrees that would alter the Company’s legal status. An ICSID tribunal found that the nationalization of AGIP’s Congolese subsidiary was clearly inconsistent with the stabilization clauses, was irregular under international law, and gave rise to an obligation by the Government to compensate AGIP fully. The panel specifically decided that stabilization clauses "have the limited effect that changes in the legislative and regulatory arrangements stipulated in the Agreement cannot be invoked against the other contracting party".

The contract in the *Amoco International Finance* case before the Iran-US Claims Tribunal included two provisions that were claimed to be stabilization clauses. One was set out in Art. 30(2) which applied to current laws and regulations existing when the contract was signed. The tribunal found this provided no guarantee for the future and was not a stabilization clause. The other provision was embodied in Art. 21(2) and provided that no measures could be taken to annul, amend or modify the agreement except by mutual consent. The tribunal decided this created a principle of interpretation and implementation of the contract in a cooperative manner, it did not bind the Government of Iran because the Government was not a signatory of the contract, and it was not a stabilization clause. The panel found that any contractual limitation on a nation's right to nationalize must be expressly stipulated, must be within the State's regulations, and must cover only a relatively limited period of time. In the absence of a stabilization clause, a contract does not bar nationalization, and any such nationalization is not unlawful.

More recent stabilization clauses provide that if any government action adversely affects the economics of the project to the companies, then the terms of the agreement will be readjusted to keep the companies in the same financial position as provided by the contract on the date it was signed. No published international arbitration awards have dealt with this type of stabilization clause.

c. Creeping expropriation

A nationalization can be *de jure* or *de facto*. Creeping expropriation is a variation of a *de facto* nationalization in which the expropriation occurs over a period of time by a series of gradual actions and measures rather than by a single act taken at a definite time. For example, new taxes affecting the economic returns of a project or increasing regulations undermining the control of a venture may ripen into an effective expropriation over time.

As a variant of a *de facto* nationalization, a creeping expropriation can give rise to a claim for compensation even if no
executive decree or legislative act can be found confirming the taking. Of great significance is that a creeping expropriation may lead to a finding that a nationalization has occurred at a time earlier than the date when a formal decree is issued. This may affect the amount of compensation payable since later acts - actions taken by a government before the issuance of any formal decree of expropriation - may reduce the value of the concession or contractual rights seized, and thus reduce the amount of compensation to be paid.

A US drilling contractor, Sedco, claimed a creeping expropriation of its shares of the Iranian company, Sediran Drilling Company, in the case of Sedco, Inc. v. National Iranian Oil Co. (NIOC). Clause C of the Law for the Protection and Development of Iranian Industries, which was promulgated in August 1980, provided that factories and institutions that received substantial loans from the government, and whose total debt exceeded net assets, "will be nationalized". Iran argued that this clause was applied to Sediran in order to transfer Sedco's shares to Iran. The Iran-US Claims Tribunal observed that Clause C of that law "is not per se a formal decree of nationalization ...." On the other hand, Clause A which read: "In addition to oil, gas, railway, electricity and fisheries which have already been nationalized, the following industries will be nationalized ...", was held to present "a classic formal decree of nationalization", although the tribunal did not rest its finding of expropriation an that decree.

The panel ruled that the Treaty of Amity did not expand Iran's responsibility for a taking beyond the areas already recognized by international law; the Treaty merely incorporates the rules of customary international law as to the question of what constitutes a taking. The tribunal also noted, "It is an established principle of international law that an act of expropriation does not require a formal decree of nationalization". Mere regulation, within a State's accepted police power, however, does not give rise to liability for economic injury, but a taking must be presumed when an outright transfer of title occurs, as it did here under Clause C.

Sedco argued that a taking occurred many months before Clause C was promulgated. The tribunal found that in the summer or early fall of 1979, Sedco was denied access to Sediran's funds and was deprived of its ability to participate in the management and control of Sediran. But the event focused on by the tribunal as defining the moment of taking was 22 November 1979, when Iran appointed three provisional or temporary directors of Sediran. The tribunal held that "the appointment by Iran of temporary managers is prima facie evidence that the entity involved is an Iranian controlled entity ...." and the appointment of such managers is "an important factor in finding a taking". The rationale is that such an appointment represents a "denial of the owner's right to manage the enterprise". In conclusion, the tribunal said:

"When, as in the instant case, the seizure of control by appointment of 'temporary' managers clearly ripens into an outright taking of title, the date of appointment presumptively should be regarded as the date of taking. The choice of the date of taking is not without significance because the value of the shareholders' expropriated interest may change dramatically during the surrounding time. Selection of the earlier date of the appointment of government managers as the time of taking is equitably most appropriate given that the Government of Iran and not Sedco became the chief architect of Sediran's fortunes at that point .... It is legally the most appropriate date because valuation must discount the effect of expropriatory acts ....

When, as in the instant case, it also is found that on the date of the government appointment of 'temporary' managers there is no reasonable prospect of return of control, a taking should conclusively be found to have occurred as of that date ...."

A different view was taken by another chamber of the Iran-US Claims Tribunal in the Amoco International Finance case. Amoco claimed a series of actions resulted in an expropriation by 1 August 1979. Specifically, Amoco claimed that it was notified in May 1979 that its expatriate employees would not be allowed to return to Iran, and in June and July 1979 Amoco was informed that the sale of products would be, managed by the National Petrochemical Company of Iran (NPC) and NIOC. The tribunal believed, however, that Amoco had already concluded it had no future in the petrochemical industry in Iran, and both parties had substantially agreed to terminate Amoco's involvement. As a result, for purposes of determining whether the expropriation violated Iranian law, the tribunal concluded that the expropriation was a lengthy process that was ambiguous for a long period, had not
occurred as of August 1979, and was not complete until 24 December 1980, when Amoco was notified that the Special Committee set up under the Single Article Act had decided that the Khemco agreement was null and void. Thus, the expropriation did not violate domestic law. For purposes of determining compensation, however, the tribunal held Amoco's expropriated interest in Khemco would be valued as of 31 July 1979 because Iran caused NPC and NIOC to act in July 1979 in a manner contrary to the Position taken by Khemco's Board of Directors, thereby depriving AMCO of its rights in the management of Khemco.

Perhaps the leading case on creeping expropriation in the energy industry is that of *Phillips Petroleum v. Iran*. In that case, NIOC sent a letter to the Consortium of which Phillips was a Party on 10 March 1979, repudiating the Consortium agreement. The tribunal held that a State may act through organs or entities not part of its formal structure, and NIOC is one of the instruments by which the Government carried out its national oil policy. Following the letter, NIOC unilaterally set production rates substantially below those of pre-Revolution levels. An internal memorandum of 11 July 1979 referred to the Government's policy that all hydrocarbon sales must be made by NIOC. A notice of 13 September 1979 in the Official Gazette stated that all oil contracts shall be signed by NIOC on behalf of the Government. A law adopted an 5 July 1979 stated that the Petroleum industry had already been nationalized. Negotiations also began in the spring of 1979 for a sale/purchase agreement, which was linked by NIOC to the termination of the Joint Structure Agreement (JSA). One of the Consortium Parties was informed on 29 September 1979 that the JSA was terminated. In January 1980, the Single Article Act was promulgated by the Iranian Government, and a written notification of the nullification of the JSA was sent in August 1980.

On this set of facts, the tribunal held that it need not determine the intent of the Government; the Government's liability does not depend on proof that the expropriation was intentional. It is the effect of the measures on the owner that determines if an expropriation has occurred. Here, however, the tribunal found both that the effects of these actions were consistent with a policy to nationalize the oil industry and that the Iranian Government intended to terminate the JSA. The tribunal stated:

"The conclusion that the claimant was deprived of its property by conduct attributable to the Government of Iran, including NIOC, rests on a series of concrete actions rather than any particular formal decree, as the formal acts merely ratified and legitimizied the existing state of affairs."

The date of the "creeping expropriation" next concerned the tribunal. It determined that the taking occurs "when the interference has deprived the claimant of fundamental rights of ownership and such deprivation is 'not merely ephemeral', or when it becomes an 'irreversible deprivation'". The tribunal found that the taking occurred here not in August 1980, when notice was given to the Consortium of the formal nullification of the JSA, but as of 29 September 1979 when the parties were informally told in a meeting that the JSA was terminated.

d. Duress

A claim often raised by parties who have suffered expropriations - particularly creeping expropriations - is that earlier actions of the government, to which the parties agreed, were coerced by economic pressure. Such agreements are typically claimed to be invalid based on the legal doctrine of duress. In the absence of a written record of reservations of rights, protests or a lack of consent, this claim is seldom given much credence.

Revision of a concession from the Government of Kuwait to AMINOIL was embodied in an agreement of 16 July 1973, and a letter of 22 December 1973. When Kuwait terminated the agreement in September 1977 and confiscated AMINOIL's assets, AMINOIL claimed that the July 1973 agreement and December 1973 letter were obtained by duress because it was threatened with a prohibition of all exports if it did not consent. The tribunal observed that strong economic pressure "can result in depriving such consents of certain supplementary or side effects". The panel noted that such effects should not be enlarged by extensive interpretations. While AMINOIL failed to protest Kuwait's unilateral setting of prices in 1973, which was contrary to the terms of the concession, it did not forfeit the right to refuse consent on other occasions, even under analogous conditions. A legally valid consent, which is given under economic constraint, cannot serve as a precedent for establishing a customary rule of general validity. To constitute duress, the panel held there must be an "absence of any other possible course" or the object or means used to obtain it must be illegal. The tribunal found that
AMINOIL had not proved "the illicit character of the threats" against it, neither did AMINOIL enter any reservations of its position nor protest Kuwaits actions. Therefore, the tribunal refused to find duress. The company simply made a disagreeable choice because it was still possible to live with it, but the Government's pressure did not inhibit the company’s freedom of choice.

e. Failure to perform releases the other party

The arbitrator found that NIOC deliberately refused to carry out its obligations under a concession agreement, which was a breach of contract, in Sapphire International Petroleums v. NIOC. NIOC's attitude in hiding behind reasons it knew were invalid, adopting a wholly negative attitude, and failing to perform duties that were clearly defined in the agreement breached the contract provisions that required the parties to carry out their agreement according to the rules of good faith and in a spirit of good will. The tribunal observed that it is a fundamental principle of law that contractual undertakings must be respected; the rule pacta sunt servanda is the basis of every contractual relationship. Respect for acquired rights is also a general principle of law recognized by international tribunals. A third general principle of law is that the failure by one party to a synallagmatic contract to perform its obligations in breach of contract releases the other party from its obligations. This principle is founded on the interdependence of obligations, the reciprocal effect of obligations, the equal value of obligations, or an implied condition. The party released from performance by the breach of the other party is entitled to recover damages.

The arbitrator concluded that the deliberate failure of NIOC to carry out its obligations in breach of contract justified Sapphire in not performing the contract by stopping its prospection work. Although some legal Systems require immediate notice by a party in Sapphire's position that it intended to repudiate the contract, and perhaps even a grace period given, the arbitrator ruled that NIOC's continued refusal to perform made any notice superfluous. The failure to give formal notice could not have caused any damage to NIOC, and the invocation of such a rule requiring notice would be incompatible with the principle of good faith.

C. Defenses claimed by expropriating States

a. Implied termination or waiver

An agreed termination of a Sale and Purchase Agreement (SPA), as a defense to an expropriation claim, was argued by the Government of Iran in Mobil Oil v. Iran. In 1973, Mobil Oil and other Consortium members entered into the SPA with Iran and NIOC, which replaced and terminated the Consortium Agreement of 1954. Mobil and the other Consortium members claimed before the Iran-US Claims Tribunal that NIOC and Iran repudiated the SPA and expropriated the Consortium members' contract rights by a letter of 10 March 1979. In that letter, the Chairman of the Board and Managing Director of NIOC wrote, inter alia, that the Consortium's "future relationship" with NIOC "has to be based on the following principles". Those principles included: (1) NIOC would treat the Consortium members as its prime customers, (2) there was no place for Oil Services Company of Iran (OSCO) nor its expatriate employees, (3) OSCO's Iranian employees "shall be transferred to NIOC", (4) NIOC would take over OSCO's contracts with contractors and consultants, and (5) Iranian Oil Services Ltd. (IROS) may continue, provided that the Consortium members transfer their shares and interests in IROS to NIOC.

By letter of 23 March 1979, the Consortium replied, saying the members would like to meet with NIOC "to reach an agreement in respect of the termination of the 1973 Sale and Purchase Agreement" and that they were "pleased that NIOC shall be prepared to treat the Consortium members as its prime customers". The Consortium's letter noted that any termination must "deal with repayment of Members' Investment and advances and settlement of any Claims of either party", that the Consortium members would reserve all their rights, and that they could not accept NIOC's statements that the SPA had proved to be inoperative soon after its effective date because of the Consortium's alleged failure to comply with essential provisions.

The tribunal noted that the parties did not comply with many provisions of the SPA, beginning soon after it was signed, such as the fact that posted prices were unilaterally determined by Iran, and that by the end of 1975, the SPA no longer governed essential aspects of the parties' relationship. Although it refused to find that the SPA was frustrated or terminated, it did find that many important provisions of the SPA were replaced by the end of 1978 with ad hoc or de facto agreements. The tribunal next noted that the Consortium
did not treat the 10 March 1979 letter as a repudiation, and it held that NIOC did not repudiate the SPA. Instead, it held that the Consortium's 23 March 1979 letter constituted an agreement to terminate the SPA, with the legal and financial terms of the termination to be determined by negotiation. As of that time, the SPA was temporarily suspended by force majeure.

In a concurring opinion, Judge Charles Brower noted the erroneous premise of the Award in "mistaking claimants' practical acceptance of the political realities in Iran ... for a conditional surrender of their legal rights ...." Making the point in eloquent fashion, Judge Brower stated, "An unwanted but inevitable fate is no less unilaterally imposed by virtue of its being gracefully accepted than if it had been less decorously confronted. Style never has been a matter of legal consequence."

While the tribunal seems to hold that there was a mutual agreement reached in March 1979 to terminate the SPA, in light of the position of the Consortium that the NIOC letter unilaterally repudiated the contract and expropriated the Consortium's rights, the case is better analyzed as a finding of an implied termination or an implied waiver of rights. Nevertheless, one of the lessons of this case is that, in order to preserve a party's legal rights, written protests should be made whenever the other party takes action inconsistent with the terms of the contract.

b. Doctrines of changed circumstances and unforeseen events

One international arbitral tribunal has defined the doctrine of changed circumstances or rebus sic stantibus in these terms:

"Under international law, the principle of the binding force of treaties is sometimes restricted by the proposition of 'Rebus sic stantibus'. 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.

This limitation is akin to the 'doctrine of unforeseen events' (theorie de l'imprevision), 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 Art. 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 1168 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.""
allows the tribunal to consider changed circumstances for the purpose of determining the law to be applied. Iran claimed that this doctrine applied to terminate the JSA both because of the social changes brought about by the Iranian Revolution and because of the change in oil policy of the new regime. The, tribunal distinguished the case of Questech, Inc. v. Ministry of National Defense of the Islamic Republic of Iran, in which the changed circumstances doctrine was applied to excuse contractual obligations, because of "the obvious differences between the cancellation of military intelligence projects of unique political sensitivity and the taking of contract rights involving offshore petroleum fields". The tribunal rejected the doctrine of changed circumstances in this case because "a revolutionary regime may not simply excuse itself from legal obligations by changing governmental policies...".

c. Force majeure/frustration/impossibility

Two chambers of the Iran-US Claims Tribunal have held that force majeure is a general principle of law that may be applied even if the contract is silent on

the point. In Mobil Oil v. Iran, Chamber Three specifically stated, "It also is admitted generally that force majeure, as a cause of full or partial suspension or termination of a contract, is a general principle of law which applies even when the contract is silent." In that case, the contract provided in Art. 27 a force majeure clause that could temporarily suspend the contract, but the tribunal said that although the contract was silent on the point, under general principles of law force majeure could also "terminate" the contract under the proper conditions. Similarly in Phillips Petroleum v. Iran, Art. 36 of the JSA provided a force majeure clause that could be invoked by the operator, but it did not provide that NIOC could invoke force majeure. Nevertheless, the tribunal noted that under general principles of force majeure, NIOC could also invoke the doctrine.

In the Mobil Oil case, Iran and NIOC argued that force majeure conditions persisted over a long time period, which frustrated the agreement by changed circumstances, thereby resulting in the full termination of the contract. The tribunal held that force majeure events were created by the revolutionary events of late 1978 up to March of 1979, when Iran resumed oil exports. The tribunal noted that "force majeure conditions will have the effect of terminating a contract only if they make performance definitively impossible or impossible for a long period of time." The tribunal found that as of NIOC's letter of 10 March 1979, which did not mention force majeure, the contract could not be considered as frustrated or terminated by force majeure. A new government had been installed by that date and oil exports had resumed. Thus, the tribunal rejected Iran's claim that the contract was frustrated or terminated by events of force majeure.

NIOC and Iran claimed in the Phillips Petroleum case that the JSA was totally frustrated by conditions of force majeure, which made it impossible for the parties to perform their obligations. Again, the tribunal held that force majeure conditions prevailed in late 1978 and early 1979 due to strikes and work stoppages in the oil industry. Force majeure conditions were held to have ended, however, when the new government ordered a resumption of oil production. Iran claimed, however, that the oil workers adamantly opposed any resumption of the JSA, and their attitudes created continuing force majeure conditions that prevented NIOC from performing its obligations. The tribunal rejected this claim, holding that the oil workers' attitudes were congruous with the Revolutionary Government's stated policies and "did not constitute an

independent and effective force which can be said to have made performance of the JSA impossible for that same Government". The oil workers acted in accordance with the policies of the new Government. Therefore, the tribunal held that Iran and NIOC failed to prove that force majeure conditions prevented performance of the JSA or that its performance was frustrated.

d. Administrative contracts

Some governments have claimed that Petroleum concessions were administrative contracts, which allow the governments unilaterally to amend or terminate the agreements. These Claims have been uniformly rejected by international arbitral tribunals, except for the BP v. Libya case, in which the Government did not argue that an administrative contract allows it unilaterally to modify or terminate the agreement.

Application of administrative law to a Petroleum concession was first argued in Saudi Arabia v. ARAMCO. The Government of Saudi Arabia relied on French administrative law to claim it could modify an oil concession by
administrative regulations. The tribunal rejected this claim because there was no reason to apply French law to a dispute between a US company and Saudi Arabia, a Petroleum concession is not a public service concession since the public is not a customer of the concessionaire and the concession does not involve any users or any dues paid by the public, and there is no Conseil d'Etat to review and annul any illegal administrative act.

The Same argument was raised in the case of TOPCO v. Libya. There, the arbitrator refused to apply the concept of administrative contracts to a concession. The arbitrator reasoned that the concession did not meet the requirements of Libyan law for an administrative contract because of the stabilization clause, which negated the power of the public authority unilaterally to amend or abrogate the agreement. It was also decided that administrative contracts are not sufficiently widely and firmly recognized in the leading legal systems of the world to constitute them as a general principle of law, and therefore, they did not come within the concession's governing law clause applying principles common to Libyan law and international law.

The tribunal in the AMINOIL case noted that administrative contracts were originally developed in France and subsequently adopted in other countries such as Egypt and Kuwait. Administrative contracts are governed by two special rules: (1) a public authority can vary the private party's liabilities, but

not so as to modify the financial clauses of the contract or to disturb the general equilibrium of the parties' rights and obligations (i.e., the "financial equation"); and (2) the public authority may terminate the contract when essential necessities concerning the functioning of the State require such action. The Panel observed that the termination of administrative contracts is practicable only because this act is subject to the control of judicial organs enjoying the confidence of both parties. The arbitrators concluded that the theory of administrative contracts could not justify a "nationalization" First, the theory is unknown in international law, and therefore, it is not a principle of law common to Libyan and international law and does not come within the governing law clause of the contract. Second, in French administrative law, the power of the government to take measures to change a contract is provided for, at least tacitly, by the contracting parties, while nationalization is not a power provided for by the contract. Finally, the stabilization clauses expressly negate the power of the government to nationalize.

e. United Nations Resolutions

The Government of Libya contended in the TOPCO and LIAMCO cases that certain resolutions of the United Nations established a rule of international law that left the issue of compensation for an expropriation exclusively to the municipal law and courts of the expropriating State. The arbitral tribunals in the Libyan nationalization cases reached differing conclusions on this issue.

The first relevant United Nations Resolution was No. 626 (VII) of 21 December 1952, which suggested that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty", and suggested both that States refrain from impeding the exercise by another State of its sovereignty over its natural resources and that States have due regard, in exercising its rights over its resources, for maintaining the flow of capital. The next relevant resolution was No. 1803 (XVII) of 14 December 1962. Resolution No. 1803 provides that a nationalization or expropriation "shall be based on grounds or reasons of public utility, security or the national interest", and the owner shall be paid "appropriate compensation" in accordance both with the rules in force in the expropriating State and with international law.

Libya relied most prominently upon more recent UN Resolutions adopted in 1974. UN Resolution No. 3201 (S-VI) of 1 May 1974, entitled "Declaration on the Establishment of a New International Economic Order" said, in Art. 4(e), that a State had a right to nationalize its resources and could not be subjected to economic, political or other coercion to prevent the exercise of that right. Most importantly, UN Resolution No. 3281 (XXIX) of 26 July 1974, Art. 2, provided that each State has a right to nationalize or expropriate foreign property in which case appropriate compensation should be paid, taking into account the expropriating State's relevant laws and regulations and all circumstances which that State considers pertinent. In the event of any controversy, it shall be settled under the domestic law of the nationalizing State and by its courts, unless it is freely agreed that other peaceful means be used.
The arbitrator in TOPCO found substantial differences between Resolution No. 1803, which calls for compensation to be set in accordance with the rules of the expropriating State and in accordance with international law, and the subsequent resolutions, especially Resolution No. 3281, which do not provide a role for international law in setting compensation for an expropriation. In analyzing the United Nations voting patterns for the various resolutions, the arbitrator found that a majority voted for Resolution No. 1803, including many developed countries with market economies, and the inclusion of the reference to international law was an essential factor in the support of several Western countries. With respect to subsequent resolutions, however, while they were supported by a majority of States in the United Nations, they were not supported by industrialized nations with market economies. The tribunal held that only Resolution No. 1803 reflected the state of customary law. In support of this holding, the arbitrator noted that 65 countries had ratified the ICSID Convention as of 31 October 1974.

The tribunal also decided that the entire text of Resolution No. 3281 negated the arguments of Libya because another provision of the Resolution referred to good faith, and the arbitrator concluded that it would be a violation of the most elementary principle of good faith if there was a fundamental imbalance in which a contract bound only the private party but not the State.

In the LIAMCO case, by contrast, the arbitrator ruled that the more recent resolutions of 1974, "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 ...." The tribunal went on to note that this right "is always subject to the respect for contractual agreements and to the obligation of compensation...".

D. Remedies for expropriations

a. Restitutio in integrum/specific performance

Some petroleum companies have asserted as their principal remedy in nationalization cases the right to restitution in kind (restitutio in integrum) or specific performance. These assertions touched off a debate over whether restitution in kind or specific performance is recognized in international law as a remedy for a nationalization. In modern practice, restitution in kind does not appear to be generally recognized as a remedy for an expropriation, although it might be applied if the expropriation is unlawful or the Government is incapable of discharging its obligations.

British Petroleum sought restitutio in integrum or specific performance as its principal remedy for the nationalization of its interests by Libya in 1971. The tribunal noted the practice of States at that time in exercising diplomatic protection of their nationals by requesting restitution in kind or, alternatively, monetary compensation. The tribunal also surveyed the international case law, noting that the German Government did not claim restitutio in integrum in the Chorzow Factory case, so the discussion of that remedy by the International Court of Justice was merely obiter dictum. The tribunal found no explicit support in public international law for applying remedies of specific performance or restitutio in integrum for wrongful breach of contract. The arbitrator concluded that there is no uniform general principle of law by which "specific performance is a remedy available at the option of an innocent party, especially not a private party acting under a contract with a Government". The principal remedy under public international law is damages. As an afterthought, the arbitrator observed that it has been argued that restitutio in integrum should be available as a remedy when a State is insolvent or incapable of discharging its obligations, and thus, damages is not an adequate remedy, but noted that BP made no such claim in this case.

A different result was reached by the arbitrator in TOPCO v. Libya. There, the tribunal found that restitutio in integrum is an appropriate remedy under the Libyan Civil Code and Muslim law, and cited the Chorzow Factory case as applying the rule of restitutio in integrum. The arbitrator also held that the overwhelming majority of authors recognize restitutio in integrum as the proper remedy to repair injuries caused by an unlawful act, although in practice it is applied only in exceptional cases. The arbitrator noted his
performance was the principal remedy intended by the parties and damages was only a subsidiary remedy. The tribunal found Libya's nationalization to be a breach of contract and gave Libya five months to comply with the award by performing the contract or other measures would be taken.

The final installment of the great trilogy of Libyan nationalization cases also addressed this remedy. The arbitrator there found that Art. 206(1) of the Libyan Civil Code and Islamic jurisprudence recognize specific performance as an appropriate remedy, when it is possible. The tribunal also decided that the principle of *restitutio in integrum* is common to international law, but is conditioned by the possibility of performance. "Such impossibility is in fact most usual in the international field." According to the arbitrator, "restitution presupposes the cancellation of the nationalization measures at issue, and such cancellation violates also the sovereignty of the nationalizing State". Moreover, the arbitrator decided there was insufficient authority that nationalization in breach of a concession is an internationally unlawful act permitting restitution as a remedy. The tribunal, therefore, rejected the remedy of *restitutio in integrum*.

Although not directly claimed as a remedy by AMINOIL, the tribunal noted that the company's damage calculation included an element of *restitutio in integrum* in *Kuwait v. AMINOIL*. The panel held that AMINOIL's estimate of damages was founded on the assumption that the concession would have lasted its entire term without modification, which is consistent with restitution. The panel rejected this assumption in setting damages.

Finally in *Phillips Petroleum v. Iran*, Chamber Two of the Iran-US Claims Tribunal indicated that the remedy of restitution of property may be available if the expropriation were unlawful. The panel decided it need not determine the availability of that remedy because restitution was not sought by Phillips.

### b. Damages

#### (1) Loss suffered (damnum emergens)

*Damnum emergens*, which refers to out-of-pocket costs and losses, is the least controversial element of damages awardable for an expropriation. It is universally held that if any compensation is due, at a minimum, the *damnum emergens* must be paid by the expropriating State.

In *Sapphire International Petroleums v. NIOC* the sole arbitrator in a relatively early nationalization case held that the compensation for breach of a concession "includes the loss suffered (damnum emergens), for example the expenses incurred in performing the contract, and the profit lost (lucrum cessans), for example the net profit which the contract would have obtained". The expenses for which NIOC was held liable in the *Sapphire* case included $350,000, which constituted the amount of a letter of credit wrongfully cashed by NIOC, and expenses incurred in performing the contract such as the cost of prospection work, the claimant's share in the capital of IRCAN, and the registration fees of certain companies in Iran. The arbitrator held, however, that these expenses could be claimed only through the end of June 1960, which was the date by which the claimant had stopped performing its obligations. The total expenses awarded amounted to US$ 650,874.

The arbitrator in *LIAMCO v. Libya* concluded that the compensation to be awarded for the nationalization of LIAMCO's property by Libya should include the value of all tangible property seized. Specifically, the arbitrator said "there is no difficulty also that the indemnity should include as a minimum the damnum emergens, e.g., the value of the nationalized corporeal property, including all assets, installations, and various expenses incurred*. For these assets and expenses, the tribunal awarded LIAMCO the full amount of its claim for its 25.5% interest in the physical plant and equipment - US$ 13,882,677.

As part of the damages, the tribunal in the *AMINOIL* case awarded the claimant the depreciated replacement value of the fixed assets seized by Kuwait. The panel did not limit the damages awarded to the value of AMINOIL's assets, but also included a going concern value.

### Page: 1176

In the *AGIP* case, the tribunal awarded FFr 968,071.86 against the Congolese government for non-recovery of commercial debts; FFr 16,688,388 for payments made by AGIP as guarantor; and FFr 2,800,000 for 50% of the shares of the joint company nationalized by the Congo. The panel also held that the Government must be substituted in place of AGIP for all subsequent obligations contracted by the company. The panel categorized these losses as *damnum*.
emergens.

For the appropriation of Sisa's drilling rigs, as part of its damage claim, Sedco sought the lost revenue from the loss of use of the rigs for the period of time from their appropriation by Iran until they could be replaced. Sedco denominated this claim as one for lost profits, but the Iran-US Claims Tribunal "determined that the claim is in fact 'a direct loss resulting from the unavailability of the rigs to claimant for use elsewhere and as such is damnum emergens'". The panel accepted Sedco's estimate that it would take nine months to replace the rigs, but deducted two months during which the rigs would be moved, and thus, would be without any revenue. The tribunal awarded such lost revenue for seven months per rig in the total amount of US$ 4,817,064. The panel also held that, because of the award of loss of use damages until replacement, it would not be appropriate to award interest on the value of the appropriated property until the theoretical replacement date. With respect to the loss of use of Sediran's rigs, the tribunal denied this claim because Sedco claimed damages for the expropriation of its shareholder interest in Sediran, and since Sediran's rigs were not taken by Iran, there was no loss of revenue to Sediran. Therefore, Sedco was amply compensated otherwise.

(2) Loss of profits (lucrum cessans)

Considerable controversy surrounds the question of whether lost profits may be awarded for an expropriation, although it is likely that lost profits may be included in the compensation if the expropriation is unlawful under international law. Because of this dispute, some arbitral tribunals have noted that parties have resorted to creative ways to claim lost profits, without calling them such.

The arbitral tribunal in Sapphire International Petroleums v. NIOC considered whether lost profits may be awarded for breach of a concession in an area not yet prospected. The tribunal observed that the existence of both commericalable quantities and damages were uncertain, and it framed the issue as whether the plaintiff had a right to compensation for loss of a "chance" to discover oil. The plaintiff established a sufficient probability of success, which gives the concession a market value, based on the expert testimony of a geologist. The geologist testified that the minimum loss Sapphire would suffer was its Investment of US$ 8 million and the most would be lost profits of US$ 46 million. The tribunal decided this analysis did not fully account for all risks involved such as prospecting in a desolate region and the possibility of wars and price recessions. With these factors in mind, the tribunal decided that lost Profits could be awarded and gave Sapphire US$ 2 million for such Profits.

A fall analysis of the recoverability of loss of profits can be found in the sole arbitrator's award in LIAMCO v. Libya. There, the arbitrator found that most municipal law systems permit lost profits as part of the damages for breach of contract, that both Libyan law and Islamic law also allow the recovery of lost profits, and that classical international law allows the recovery of lost profits for both wrongful taking of property and lawful nationalizations. The tribunal determined, however, that the recent evolution of international law indicated that there was no constant and uniform rule for the compensation of lost profits for nationalizations, at least not all future profits. While awarding fall damages claimed for the physical plant and equipment seized and US$ 66 million as 'equitable compensation' for the nationalization of Concession No. 20, the tribunal specifically rejected lost profits for Concession No. 17 because such profits were not "certain and direct", were doubtful and were not probably realizable. Therefore, lost profits were rejected for that concession. Lost profits were not rejected outright for Concession No. 20, but were considered as part of equitable compensation.

The panel in Kuwait v. AMINOIL considered profits to a certain extent. There, the tribunal took into account a reasonable rate of return for AMINOIL, noting that it "had come to accept the principle of a moderate estimate of profits, and ... this ... constituted its legitimate expectation". The panel seemed to adopt as its method the value of "the undertaking itself, as a source of profit", as well as the value of the assets seized. AMINOIL received an award of US$ 179,750,764 in that case.

In AGIP v. Congo the arbitral tribunal opined that the principle of fall compensation for losses is limited in certain circumstances, but held that those circumstances were not present because the Government had not invoked any contributory negligence or other fault by AGIP and the nature of the damages was not unforeseeable. The tribunal held that the Congo had breached the contracts independent of the nationalization itself. AGIP limited its claim for loss of profits to a symbolic sum of FFr 1 for each of its three claims: (1) failure to pay dividends, (2) loss of profits under the
Assistance Agreement and Trade Marks Agreement, and (3) loss of profits for breach of Art. 14 of the Protocol Agreement. On the basis of these claims, the panel awarded AGIP FFr 3 for *lucrum cessans*.

A brief discussion of Mobil's, and the other Consortium members', claims for lost profits was included in *Mobil Oil v. Iran*. Having decided that the parties mutually agreed to terminate the SPA and negotiate the question of compensation, which negotiations were interrupted and never completed because of the Revolution, the tribunal concluded it had to determine what the parties could have legitimately expected from good faith negotiations. In this context, the panel noted that the Consortium members did not lift the total crude oil to which they were entitled in the last years of performance, and NIOC ceased to give priority to the companies' requirements. Therefore, the tribunal held that the claimed loss "cannot easily be ascertained with the degree of certainty necessary to allow a finding that the profits claimed were within the legitimate expectations of the parties". Lost profits, therefore, were rejected by Chamber Three of the Iran-US Claims Tribunal.

A lengthy discussion of lost profits as an element of compensation was undertaken by the Iran-US Claims Tribunal in *Amoco International Finance v. Iran*. There, Chamber Three decided that for a lawful expropriation, the going concern value at the time of dispossession is the measure and limit of compensation, while for an unlawful expropriation, lost profits might be added. This indicates that lost profits are not included in the going concern value at the date of the taking, although future prospects are considered. The Discounted Cash Flow (DCF) method suggested by Amoco was rejected by the tribunal because, inter alia, it neglects the *damnum emergens* and makes *lucrum cessans* the sole element of compensation, which "opens a large field of speculation". In issuing its opinion, the tribunal awarded Amoco 50% of the going concern value of Kharg Chemical Co., "without addition of future lost profits beyond such value".

(3) Net book value

Beginning with the Libyan oil nationalizations in 1971, governments have contended that, at least for a lawful expropriation, they owe only the net book value of the tangible assets seized. Libya's Prime Minister explained net book value in these terms:

"... 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 ...."

The arbitrator in that case considered Libya's position that only net book value was owed to be an "extreme" position, and rejected it. The arbitrator, similarly, rejected LIAMCO's argument for *restitutio in integrum* or lost profits for all concession reserves as an equally "extreme" position. In lieu of these two "extremes", the arbitrator adopted the principle of *equitable compensation*.

The Government of Kuwait argued very strongly for net book value as the standard for compensating AMINOIL for a 1977 nationalization in *Kuwait v. AMINOIL*. In that case, the Government suggested that a number of negotiations and settlements during the period of 1971-1977 "had generated a customary rule valid for the oil industry - a *lex petrolea* that was in some sort a particular branch of a general universal *lex mercatoria*". The Government contended that the compensation in these cases had reference only to the net book value of the redeemable assets. The tribunal rejected Kuwait's claim because the negotiations included many complex factors other than merely the parties' legal rights, were held under strong economic and political pressures, and the companies and the importing States had a strong need to continue a steady supply of petroleum products. The arbitral panel did note that the net book value standard might be appropriate if the matter involved a recent investment so that the original cost and present replacement cost are close in amount. Otherwise, however, the panel held that other methods, of determining compensation should be used.

A rather careful analysis of the net book value compensation standard is found in *Amoco International Finance v. Iran*. Iran claimed that net book value is "the normal standard of compensation in case of lawful expropriation, especially in the oil industry ...." The Third Chamber of the Iran-US Claims Tribunal observed that this standard had "the advantage of being easily and objectively assessed", but the tribunal refused to credit Iran's argument, saying:
"... the theory that net book value is the appropriate Standard of compensation in all cases of lawful expropriation overlooks the fact that a nationalized asset is not only a collection of discrete tangible goods (equipment, stocks and, possibly, grounds and buildings). It can include intangible items as well, such as contractual rights and other valuable assets, such as patents, know-how, goodwill and commercial prospects. To the extent that these various components exist and have an economic value, they normally must be compensated, just as tangible goods, even if they are not listed in the books."

In the *Amoco* case, the tribunal stated that the traditional approach under international law is to compensate the net value of the transferred assets, both physical and intangible, including the profitability of an ongoing enterprise, and went on to adopt the going concern value of Amoco's interest in the Kharg Chemical Company, Ltd.

(4) Equitable compensation

The arbitrator in *LIAMCO v. Libya*, found no common principles between the domestic law of Libya and international law as to the compensation due for a nationalization and rejected the traditional damage formulas of "prompt, adequate and effective" compensation and "fall and prior" compensation. The sole arbitrator labeled as "extreme" both compensation views of net book value and recovery of fall profits of the concession reserves. Instead, the tribunal held that "it would be reasonable and just to adopt the formula of 'equitable compensation' as a measure for the estimation of damages ...". Relying on this compensation formula, the tribunal awarded LIAMCO US$ 13,882,677 for its 25.5% interest in the physical plant and equipment and US$ 66 million (out of LIAMCO's US$ 186,270,000 claim) for its rights in Concession No. 20.

(5) Discounted Cash flow (DCF) method

The Iran-US Claims Tribunal explained the DCF method as calculating "the claimant's prospective net earnings over the term of the JSA and discount[ing] them to give their value at the date of taking, using a discount rate that takes into account the perceived risks". In the case of *Kuwait v. AMINOIL*, AMINOIL presented two methods for determining the value of its nationalized interests: (1) the sum of anticipated profits for the full term of the concession, discounted to present value, without considering the value of the assets, or (2) the total anticipated profits over a limited number of years, discounted over that limited period to present value, but taking account of the value of the assets. The first of these theories of recovery is equivalent to the DCF method. The ad hoc tribunal agreed in principle that both of these methods were acceptable, but preferred to consider a variety of methods. It focused on a method based on "the reasonable rate of return", which it ruled the parties used in their relations and negotiations, and seemed to adopt a going concern value taking account of the undertaking, as a source of profits, and the value of the assets. AMINOIL was awarded an this basis US$ 179,750,764.

The DCF method was specifically discussed by the Iran-US Claims Tribunal in *Amoco International Finance v. Iran*. The Third Chamber rejected this method because it held the expropriation to be lawful, and "the DCF method prima facie seems not fitted to the present issue". The panel determined that the DCF method fails to consider the *damnum emergens*, but instead, "lucrum cessans becomes the sole element of compensation". Because this method allows a projection of damages over a long time period, the tribunal noted it opened "a large field of speculation due to the uncertainty inherent in any such projection ...," and said it amounted to "a capitalization of hypothetical future earnings for all other elements of valuation". Although it said it was not rejecting the DCF method altogether, the panel appeared to do just that. In lieu of the DCF method, the tribunal adopted the going concern approach for valuing Amoco's interest.

Chamber Two of the Iran-US Claims Tribunal gave a more sympathetic hearing to the DCF method in *Phillips Petroleum v. Iran*. The panel understood the DCF method not as a request for future lost profits, but rather as a relevant factor in determining fair market value. The tribunal considered the DCF method to be "a relevant contribution", but determined it would not use it as the exclusive method of analysis. The panel also noted its disagree-
(6) Underlying asset valuation approach

The AMINOIL tribunal considered a method of valuing AMINOIL's expropriated interests, as an alternative to AMINOIL's DCF method, by which total anticipated profits are calculated for a limited term of years and discounted (over that same period) to present value, but also taking account of the depreciated replacement value of AMINOIL's nationalized assets.\textsuperscript{118} The tribunal held that this method was acceptable in principle, but applied instead a combination of methods based mainly on going concern value. This method, claimed by AMINOIL, is akin to the underlying asset valuation approach.

The Iran-US Claims Tribunal, Chamber Two, specifically decided to consider the underlying asset valuation approach as one method for valuing the claimant's nationalized interest in \textit{Phillips Petroleum v. Iran}.\textsuperscript{119} This approach was defined by the panel as valuing both Phillips' tangible investments and its intangible assets, including the profitability of its share of the going concern, and deducting the claimant's share of liabilities. This method is specifically applied by calculating the tangible assets at their depreciated replacement value, thereby adjusting the book value, and then quantifying "the intangible assets including profitability of the property interests taken" by determining an appropriate income figure based on historic earnings and applying a multiple, which takes into account legitimate expectations in oil venture. The tribunal used this method to confirm its compensation award of US$ 55 million, determining a depreciated replacement value of Phillips' tangible investment of US$ 22-23 million and an intangible asset value of approximately US$ 38 million based on US$ 3 million of annual income and a reasonable rate of return of 5%.

(7) Going concern value

The arbitral tribunal in \textit{Kuwait v. AMINOIL}\textsuperscript{120} adopted a standard for valuing AMINOIL's nationalized interest based on the value of the going concern. In that case, the tribunal ruled that it would take account of "all the elements of an undertaking", including separate appraisals of the value "of the undertaking itself, as a source of profit", as well as the depreciated replacement value of the fixed assets. Putting it slightly differently, the tribunal held that the amounts owed to AMINOIL included "the value of the various components of the undertaking separately considered, and of the undertaking itself considered as an organic totality - or going concern - therefore as a unified whole, the value of which is greater than that of its component parts, and which must also take account of the legitimate expectations of the owners". The panel ordered that AMINOIL receive US$ 179,750,764.

Chamber Three of the Iran-US Claims Tribunal decided that "the measure of such compensation [for a nationalization] shall be the full value of the asset taken", pursuant to the 1955 Treaty of Amity between the US and Iran.\textsuperscript{121} The full value was held to be the value of Amoco's 50% of the shares of the Kharg Chemical Company, Ltd. Since the company was a going concern at the time of the expropriation, the tribunal held that "[g]oing concern value, accordingly, is the measure of compensation in this case". This value was explained by the tribunal in the following words:

"Going concern value encompasses not only the physical and financial assets of the undertaking, but also the intangible valuables which contribute to its earning power, such as contractual rights (supply and delivery contracts, patent licenses and so on), as well as goodwill and commercial prospects. Although those assets are closely linked to the profitability of the concern, they cannot and must not be confused with the financial capitalization of the revenues which might be generated by such a concern after the transfer of property resulting from the expropriation (\textit{lucrum cessans})."

The value of a going concern ... is 'made up of the values of the various components of the undertaking separately considered, and of the undertaking itself considered as an organic totality - or going concern -therefore as a unified whole, the value of which is greater than that of its component parts."

The panel also noted that the liabilities of the company on the valuation date must be deducted from the total value. The panel left it for another occasion to determine the actual value of the going concern.

In \textit{Phillips Petroleum v. Iran},\textsuperscript{122} Chamber Two of the Iran-US Claims Tribunal made a similar holding. That panel began with the 1955 Treaty of Amity, which provided both for "the prompt payment of just compensation".
and that "[s]uch compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken ...". According to the tribunal, when the property taken is a going concern, this standard is met by "compensation that makes the claimant whole for the 'fair market value' of the property at the date of taking". The claimant's contract rights in the JSA were held to be only part of a going concern because it only had a right to participate in the management of the joint operating company and a right to take and export only its percentage share of the petroleum produced. Because NIOC and Iran took complete control over the going concern to the exclusion of the claimant's interest, the claimant was held to be entitled to the fair market value of its interest in the JSA on the date of the taking. The tribunal decided it must take into account all relevant circumstances, including equitable considerations. In determining a value, the panel took into account the DCF method, as argued by the claimant, but also considered the "underlying asset valuation" approach. On this basis, Phillips was awarded US$ 55 million for its expropriated interest in the JSA.

(8) Liquidation value

Sedco sought compensation for Iran's expropriation of its 50% shareholder interest in Sediran, an Iranian company, as of 22 November 1979. Instead of seeking compensation on the basis of Sediran's going concern value, Sedco asserted recovery for the liquidation value of the company as of the date of the expropriation. Sedco asked the tribunal to assume the winding up of Sediran's affairs and the disposition of its assets on the open market at the appropriate date. The panel agreed that the liquidation value was a "fair measure of value" for the case. "Thus, in compensation for the expropriation of its shares in SEDIRAN, claimant is entitled to one-half of the full value of all of SEDIRAN'S assets, including property, cash, securities, and accounts receivable, reduced by the liabilities of the company outstanding at the date of taking". On this basis, taking into account comparable sales, appraisals, the amount of insurance coverage, replacement value, and current net book value, the panel awarded Sedco the sum of US$ 30,783,090 for its 50% share of the liquidation value of Sediran on the date of the taking.

(9) Inflation

The question of including inflation in the calculation of damages was discussed by the tribunal in Kuwait v. AMINOIL. The panel took note of the high rate of inflation in effect in the late 1970's and early 1980's and said it would be unfair to determine a replacement value based on the original purchase price when it bore no relation to the present replacement value because of inflation. The tribunal also talked of profits not being true income but representing a capital value because of the need to reinvest them to replace depleted oil. The panel buttressed its findings by reference to the "gold clause" in the 1948 Concession, OPEC's use of a "basket of currencies", and the parties' discussion of inflation in their negotiations. In conclusion, the tribunal held, "In the compensation to be paid to AMINOIL, it would be natural to take account of the progress of inflation generally, and in particular by reference to the price of refined petroleum products on the American market." An annual inflation rate of 10% was fixed by the tribunal.

(10) Interest

LIAMCO requested a 12% interest rate on amounts it claimed for Libya's nationalization of its interests, although recognizing that setting the rate lay in the arbitrator's discretion. The Libyan Civil Code provided for interest of 4% in civil cases and 5% in commercial cases. The tribunal concluded that it was "just and equitable to consider the interest claimed not as usury (ribā), but as a compensatory equivalent consideration of the said discount rate...". The tribunal reduced the interest to the 5% rate allowed by Libyan law and granted interest only from the date of final assessment of damages because interest cannot be awarded on unliquidated damages before they are ascertained.

In the AGIP case, interest was awarded against the Congolese Government calculated from the dates on which the different amounts were due to AGIP, or were paid by it, up to the date of actual payment at the lowest rates in effect during the relevant periods on the markets concerned.

2. Production Sharing Contracts
A. Force majeure clause

The applicability of a force majeure clause to excuse an operator's failure to complete an exploration program arose as an issue in National Oil Corp. (NOC) v. Libyan Sun Oil Co. Libyan Sun Oil Co. (Sun Oil), a Delaware company, entered into an Exploration and Production Sharing Agreement (EPSA) with NOC, a state-owned Libyan corporation, in late 1980. The contract provided that it was to be governed and interpreted in accordance with the laws and regulations of Libya, including the Petroleum Law. Sun Oil was to be the operator and had a minimum exploration program obligation estimated at US$ 100 million. In late 1981, political tensions between the US and Libya worsened, and in December 1981, the US Government prohibited persons using US passports from traveling to Libya. Sun Oil repatriated its US personnel. In March 1982, the US Government issued regulations prohibiting the export of certain technology without a license. Sun Oil sought such a license, but its application was denied. Sun Oil invoked the force majeure clause, based on the US Government passport and export regulations, to justify its failure to carry out its exploration obligations. NOC challenged the applicability of the force majeure clause and initiated this ICC arbitration in Paris.

Libyan Civil Code Art. 360 provides three conditions for the invocation of force majeure: (1) the event must be beyond the control of the parties, (2) the event must be unforeseeable at the time the contract was executed, and (3) the event must render performance of the obligation absolutely impossible. The Supreme Court of Libya emphasized in a 1971 decision in the LATISSIS case that performance must be absolutely impossible by the means intended by the parties in order to constitute force majeure under the statute. The parties agreed that Art. 360 was not a public order provision and the parties were free in their contract to exclude force majeure or make it more flexible. Art. 22, the force majeure provision of the EPSA, provided that any failure to perform was excused "to the extent attributable to force majeure". The next sentence said: "Force majeure shall include, without limitation: Acts of God; insurrection; riots; war; and any unforeseen circumstances and acts beyond the control of such Party." The succeeding paragraph allowed the parties to terminate the EPSA if performance "is affected by force majeure" for a continuous period of one or two years.

The tribunal addressed the question of whether the parties intended by their force majeure clause to exclude the conditions of Libyan Civil Code Art. 360. The panel held that the EPSA did not define force majeure; the portion quoted above merely specified certain events that were deemed to fall within force majeure without defining per se the meaning of that term. The panel focused on the "impossibility" condition of Art. 360 and noted that the word "attributable" indicates a direct causal link between the event and the non-performance, while the term "affected" does not provide any indication as to the applicability of the "impossibility" test. While an increasing number of international contracts have included, within the circumference of the term force majeure, events that make performance "very difficult", "more expensive than anticipated", or events "which cannot be overcome by the use of reasonable means at reasonable costs", the tribunal said that "such exceptions to the common law of force majeure [the impossibility condition] must be expressly provided for; they should not be presumed or implied."

The panel held that the EPSA provision indicated an intent not to strictly apply the enforceability requirement, but it did not exclude the fundamental requirement of impossibility. The tribunal went on to hold that the first two requirements of Art. 360 - beyond the parties' control and the unforeseen circumstance requirement - were met by the US Government regulations.

As for the impossibility condition, the panel accepted Sun Oil's argument that the parties assumed that Sun Oil would perform the contract with its own US personnel and technology, but the tribunal found nothing in the contract that made it an "essential condition" that Sun Oil would use its own technology or US management personnel. The contract did not exclude Sun Oil from using non-US personnel or other companies' technology to perform. In fact, the agreement allowed Sun Oil to use contractors to perform the exploration operations and provided that Sun Oil would cause its patent and affiliates to aid in the performance of the agreement. The panel decided that Sun Oil could perform by having its Canadian, UK or other foreign affiliates send management personnel and technology to Libya to perform, without violating US regulations. Perhaps, the most convincing evidence to the tribunal was the fact that two US companies - Occidental and Coastal - had similar obligations in Libya that they had been able to perform despite the US passport and export regulations. Therefore, the ICC tribunal held that these regulations did not make it impossible for Sun Oil to perform, so it could not properly invoke the force majeure clause. Although deciding that Sun Oil had mistakenly invoked this provision, the panel held it did not do so in bad faith.

[...]
D. Damages/liquidated damages/mitigation

NOC sought an order requiring Sun Oil to pay the costs of the uncompleted portion of the exploration program pursuant to Arts. 8.2 and 25.2 of the EPSA.132Id. at 617. Sun Oil had undertaken a minimum exploration obligation estimated to cost US$ 100 million. Art. 8.2 of the EPSA provided that if any part of the exploration program for any area was not properly completed by the end of the exploration period for that area, then Sun Oil "shall immediately pay ... the costs of such uncompleted part...". Art. 25.2 said that in the event of a termination of the EPSA by NOC, all amounts owed by Sun Oil "shall become immediately due and payable".

Based on the specific language of Art. 8.2, the tribunal rejected Sun Oil's argument that this provision only comes into play when oil has been produced under the EPSA. Likewise, Sun Oil's claim that NOC suffered no loss because whatever oil ever existed remains in the ground and under NOC's control was also rejected. The panel accepted the view that if NOC suffered no loss, Art. 8.2 would be inapplicable. This view was grounded in Art. 227(1) of the Libyan Civil Code. The tribunal found, however, that "NOC did suffer some loss by losing its chance, within the exploration period, to discover oil in the Contract Area and, within the exploration period, to obtain all the information and data needed to assess the petroleum resources in the Contract Area." The panel held that Art. 8.2 provided the legal basis for NOC's claim, noting that the EPSA is a risk contract under which "Sun Oil undertook an unconditional and absolute duty" to timely complete the exploration operations or pay the costs of the uncompleted part.

NOC was held entitled to terminate the contract because "Sun Oil's cessation of performance in January 1982 [ as a result of the US Government passport and export regulations] and its failure to resume performance in July 1985 [after the tribunal's holding that the regulations did not constitute force majeure] were not legally justified and constituted a material breach of its contractual obligations." Next, the panel decided that NOC could only claim damages based on its "actually suffered loss", according to general contract law, because the amount payable under Art. 8.2 as liquidated damages would be "grossly exaggerated" - which is the standard set in Libyan Civil Code Art. 227(2) for disregarding a liquidated damage provision. This holding was based on three factors. First, the tribunal considered the full circumstances of the case, including the serious and unforeseeable difficulty for Sun Oil in replacing its US personnel, which was created by the US regulations. Second, the liquidated damages, estimated by NOC at US$ 200 million, were held to be very excessive and out of proportion to NOC's actual loss, which "consists of the damages flowing from the fact that NOC did not receive, within the exploration period, the geophysical information and data needed to assess the petroleum resources". In support of this point, the panel observed that there was, at the time it wrote, a surplus of oil on the world market, and crude oil prices were correspondingly low.

The third point was based on NOC's failure to mitigate its loss. This was explained in the following terms:

"... from July 1982 to the end of 1985, NOC made no effort to mitigate the loss caused by the cessation of exploration operations. In particular, NOC did not propose, or unequivocally declare its willingness to discuss, alternative plans that would have permitted the continuation of the exploration operations, perhaps on a more modest level through the use of outside contractors or another operator ...."

In particular, NOC did not respond to a 1983 telex from Sun Oil in which Sun said it would not interfere with efforts by NOC to find alternative means to go forward with the exploration program. Instead, "NOC persisted in its uncompromising attitude" demanding immediate payment by Sun Oil "on the unjustified ground" that Sun's conduct constituted a withdrawal from the EPSA.

Art. 227(2) of the Civil Code of Libya permits a judge to reduce the liquidated damages if they are grossly exaggerated, and the panel held this gave it broad discretion to determine the damages. The tribunal noted NOC's refusal, despite repeated requests, to produce any evidence of its "actual proven losses". Therefore, the tribunal held it "fair and equitable" to award damages of US$ 20 million for breach of contract, with the expenses of the arbitration to be borne 60% by Sun Oil and 40% by NOC.
H. Unjust enrichment

The *Wintershall* tribunal rejected the claimants' unjust enrichment claim, which was based both on the alleged deprivation of the claimants' economic interest in the natural gas discovered and on the appropriation of the well test and information about the field that resulted from the drilling and other costs incurred by the claimants. Art. 81 of the Qatari Code refers to an enrichment "without lawful cause" at the expense of another party. Because Wintershall had an implied duty under the EPSA to report information it obtained about natural resources, the Government did not obtain the data "without lawful cause". Moreover, title to the gas in the ground belonged to Qatar, not the claimants. Finally, since the panel ordered that the EPSA continued in force, it ruled that the contractual rights of the claimants were not taken, and there was no unjust enrichment by the Government.

J. Interest

If Wintershall elected the valuation option provided in the panel's award, and allowed the EPSA to terminate, then the tribunal ordered the Government of Qatar to pay interest from the date of the Final Award "at the generally prevailing LIBOR rate an the date of the award".

3. Operating Agreements

A. Misrepresentations or mistake

The Government and RAKOIL claimed they entered into the Assignment Agreement and the Operating Agreement as a result of misrepresentations by the Consortium that substantial quantities of oil had been discovered. DST rebutted the Government's claim by pointing to the fact that the Government received both daily reports and an analysis of test results showing that while hydrocarbons were present, it was impossible to say in what quantities, and stating that test results were not promising. The arbitral tribunal found no representations that commercial quantities had been discovered in either the Assignment Agreement or the 1976 Operating Agreement, and it found no representations otherwise. It, therefore, rejected the Government's argument that it was induced to enter into the agreements as a result of misrepresentations by the Consortium, and it also found no facts to indicate that the agreements should be held invalid an the basis of mistake.

E. Interest

The arbitration tribunal rejected DST's argument that the absence of the word "simple" in Paragraph XVIII(1) of the Operating Agreement implied that the parties intended to allow compound interest to be awarded. The tribunal held DST was entitled to simple interest an the sums awarded. The panel awarded DST interest up to the date of the award and for the period after the date of the award until paid at the rate of 3% per annum above the prime rate of Commerzbank, up to a maximum of 14% per annum. In total, DST was awarded US$ 4,635,664 against the Government and RAKOIL, which included accrued interest, and arbitration and legal costs.

[...]
Partner, Hughes & Luce, LLP, Dallas, USA; Vice Chairman, Institute of Transnational Arbitration; Fellow, Chartered Institute of Arbitrators; Editor, International Litigation Quarterly; Chairman, Southwest Arbitration Committee of the US Council for International Business; Alternate member, US delegation to the NAFTA Committee on Private Commercial Disputes.


11. Art. 16(1) UNCITRAL Model Law.


98. 21 Iran-US CTR p. 108 at p. 119.

Referring Principles:

IV.2.3 - No repudiation of contractual consent by state party

IV.7.3 - Right to avoid the contract for mistake in fact or law

VI.3 - Force majeure

VII.1 - Damages in case of non-performance

VII.3.1 - Limits to claims for damages

VIII.1 - Definition

VII.6 - Duty to pay interest

IX.1 - Basic rule

XI.1 - Compensation for expropriation

XIII.2.4 - Principle of separability of the arbitration clause