Revue générale de droit

Some Evidence of a New International Economic Order in Place

Gabrielle Marceau

Volume 22, Number 2, June 1991

URI: https://id.erudit.org/iderudit/1058127ar
DOI: https://doi.org/10.7202/1058127ar

See table of contents

Publisher(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (print)
2292-2512 (digital)

Explore this journal

Cite this article

Marceau, G. (1991). Some Evidence of a New International Economic Order in Place. *Revue générale de droit*, *22*(2), 397–410. https://doi.org/10.7202/1058127ar

Article abstract

In the course of a meeting held in La Malbaie (Québec, Canada) on August 5th to 7th, 1990, thirty european, north-american and african jurists and economists exchanged ideas on the evolution of international economic law.

This first colloquium organised by the SDIE (Canada) in cooperation with the SDIE (France) covered historical, theorical, practical and ethical aspects of this sector of law which covers the organisation of trade and production, monetary and financial relations, international trade law, resources management and environmental protection.

The present document reproduces the texts submitted by the speakers in their original language. The first two papers aim at giving a general perspective of the variables of International Economic Law. The following papers focus on specific areas of international economic law where changes are taking place.

NOTES, INFORMATIONS ET DOCUMENTS

Société de droit international économique (SDIE)* Colloque international de La Malbaie (1990) sur la transformation du droit international économique

International Economic Law Society (SDIE)* La Malbaie International Colloquium (1990) on Transformation of International Economic Law

RÉSUMÉ

Réunis à La Malbaie du 5 au 7 août 1990, une trentaine de juristes et d'économistes européens, nord-américains et africains ont échangé sur l'évolution du droit international économique.
Ce premier colloque organisé par la SDIE (Canada) en collaboration avec la SDIE (France) aborde les aspects historique, théorique, pratique et éthique de ce secteur

ABSTRACT

In the course of a meeting held in La Malbaie (Québec, Canada) on August 5th to 7th, 1990, thirty european, north-american and african jurists and economists exchanged ideas on the evolution of international economic law.
This first colloquium organised by the SDIE (Canada) in cooperation with the SDIE (France) covered historical, theorical, practical and ethical aspects of this sector of

* Nous tenons à remercier Philips & Vineberg, M^cs^ Bruno Deslauriers, Godin, Raymond, Harris, Thomas ainsi que Jolicoeur, Lacasse, Simard, Normand et associés pour leur soutien financier dans la publication de ces actes de colloque, monsieur Jacques Paquet ainsi que monsieur Ernest Caparros, de la *Revue générale de droit*.

* We would like to express our thanks to Philips & Vineberg, Mes Bruno Deslauriers, Godin, Raymond, Harris, Thomas and Jolicoeur, Lacasse, Simard, Normand & associates for the financial support in publishing these acts Mr. Jacques Paquet and to Mr. Ernest Caparros of the *Revue générale de droit*.

du droit qui couvre l'organisation de la production et du commerce, les relations monétaires et financières, le droit du commerce international, la gestion des ressources et la protection de l'environnement.
Le présent dossier reproduit, en français ou en anglais, les principaux exposés. Les deux premiers textes traitent de questions générales et du cadre dans lequel se développe le droit international économique. Les exposés suivants présentent divers aspects de ce secteur du droit en cours de transformation.

law which covers the organisation of trade and production, monetary and financial relations, international trade law, resources management and environmental protection.
The present document reproduces the texts submitted by the speakers in their original language. The first two papers aim at giving a general perspective of the variables of International Economic Law. The following papers focus on specific areas of international economic law where changes are taking place.

SOMMAIRE/TABLE OF CONTENTS

Some Evidence of a New International Economic Order in Place

GABRIELLE MARCEAU
Ph.D. Candidate, London School of Economics (London)[1]

This paper pertains to some practical legal changes brought about by certain resolutions of the United Nations General Assembly (UNGA) and by some on the actions of transnational corporations. My intent is to show the influence of transnational corporations as subjects, objects and "catalysts" of International Public Law and the impact of some of the UNGA resolutions on the actions of transnational corporations and States. These new features of our international legal system confirm that a certain "New International Economic Order" has arisen since the 1970's.

For the sake of brevity, the discussion will focus upon a few "oil arbitration cases" dealing with the expropriation of Texaco's,[2] BP's,[3] Liamco's[4] and Mobil Oil Iran's assets[5] by their host licensing country.[6]

In the "1970 oil crisis", Libya, Iran and other OPEC Countries rebelled against foreign presence on their territories by nationalizing assets of foreign companies. These confrontations provoked litigation leading international arbitrators to discuss the difficult and contradictory question of the "applicable law" governing agreements between States and foreign corporations ("State-contracts").

I. HISTORICAL BACKGROUND OF THE "GREAT OIL ARBITRATION CASES"

Following the revolution in Lybia in 1969, the Libyan Revolutionary Command Council began enacting nationalization statutes which expropriated

1. The author is grateful for the teachings of Professor Higgins, London School of Economics, on the "United Nations" and on "International Law of Natural Ressources".
2. *Texaco* vs *Libya*, (1978) 53 *ILR* 389.
3. *BP* vs *Lybia*, (1978) 53 *ILR* 297.
4. *Liamco* vs *Lybia*, (1982) 62 *ILR* 140.
5. *Mobil Oil Iran et Als* vs *Iran*, (1987-III) *Iran-USA Claims Tribunal*, Report 16, p. 3.
6. I must however add that many other litigations have arisen since 1973 and before and certainly not only oil cases but these few cases should demonstrate very important principles.

assets belonging to foreign corporations under concession or licensing agreements which, for most of them, had been concluded some 15 years before.

In 1971, the Libyan Revolution Command Council promulgated a law nationalizing 51 % of Liamco's concession rights concluded in 1955; in February 1974 the remaining 49 % was also nationalized. In September 1974, 51 % of Texaco/Calasiatic's rights in 14 deeds of concession signed between 1955 and 1968 were expropriated. On 7 December 1974 Libya passed a law nationalizing BP's rights in a concession agreement signed in 1966.

Different reasons were stated by the then governments. For instance, in the case of the BP's nationalization, the Libyan Government declared that it took this action against a British corporation in retaliation for what it regarded as the United Kingdom's failure to prevent Iran's occupation of the three islands in Persian Gulf.[7]

Following these actions of the Libyan government,[8] the three companies initiated the arbitration process contained in the concession agreements which will be examined below.

The awards of the Iran-USA Claims Tribunal are also very relevant. When Iran began its "holy war" against, among others, the United States of America, it expropriated the rights and properties of American corporations. American hostages were kidnapped. The USA government then commanded American banks worldwide, to freeze Iranian assets. In order to reach a peaceful settlement of all these disputes, the Iran-USA Claims Tribunal was set up.[9] One of the objectives of this tribunal was to examine the legitimacy of the Iranian expropriations and if necessary, to evaluate compensation due. The money frozen by banks was kept in London to be used to pay compensation which might be ordered by this tribunal.

II. THE LEGAL ISSUES OF THESE ARBITRATION CASES

The question in the Lybian arbitration cases was: "Can Libya, one of the parties to these concession agreements, validly enact statutes by which the rights of BP, Texaco or Liamco are terminated 15, 20 or 30 years early". It is known that profits from these kinds of investments usually come towards the end of the contracting period, some massive investments having been injected into in the projects during the initial years.

---

7. [...] In our opinion Britain is primarily responsible for Iran's occupation of the islands and we hold it responsible for the consequences of this action through which it has demonstrated its malice towards the Arabs and its failure to fulfil its pledges.
[...]
My government, an Arab Government, replied in the only way understood by the imperialists — by nationalizing the oil interest of Great Britain in the Libyan Arab Republic and withdrawing our deposits from British Banks [...]

8. Or of its representatives.

9. This new tribunal was set up under the Claims Settlement Declaration made on 19 January 1981 by the Government of Iran and USA.

To answer that question the arbitrators had first to determine the legal nature of such "concession agreements" and their "applicable system of law". Assuming that concession agreements are simple contracts and that international law principles can find application in these State-contracts, the question is then: does international law regulate breaches or the early termination of such concession agreements? Would these early terminations of contracts amount to "expropriations" for which rules of International Public Law provide some parameters?

III. THE LEGAL NATURE OF "CONCESSION AGREEMENTS"

In order to ascertain the rights and obligations of the respective parties to these concession agreements between transnational corporations and a licensing country, one must first determine the legal nature of such agreements. The answer given by the three libyan arbitrations was categoric: concession-agreements are contracts.

In the *Texaco* case, the sole arbitrator Professor Dupuy, stated "that it is now generally accepted that concessions are simply contracts which could not unilaterally be altered".[10] In the *BP* case, the arbitrator Lagregen concluded that the concession constituted a "direct contractual link between the respondent and the claimant".[11] In the *Liamco* case, the arbitrator took a similar view. According to Dr Mahmassani, the stabilization clause emphasized the contractual basis of the concession.[12]

However, if concession agreements constitute simple contracts what system of law governs these contracts?

IV. THE SYSTEM OF LAW APPLICABLE TO STATE-CONTRACTS

The standard "applicable law" clause of the *BP*,[13] *Liamco*[14] and *Texaco*[15] agreements reads as follows:

> This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and

10. *Texaco* case, *supra*, note 2, pp. 438-441.
11. *BP* case, *supra*, note 3, p. 237.
12. The stabilization clause (which was also in *BP* and *Texaco* agreements) reads as follows: "[...] The contractual rights expressly created by this Concession shall not be altered except by mutual consent of the Parties". According to the arbitrator, these stabilization clauses were used "to strenghten this contractual character in Liamco and similar other concession agreements as a precaution against the fact that one of the partners is a State". *BP* case, p. 322.
13. *BP* case, *supra*, note 3, p. 322.
14. *Liamco* case, *supra*, note 4, p. 172.
15. *Texaco* case, *supra*, note 2, p. 450.

> in the absence of such common principles then by and in accordance with the general principles of law, including such those principles as may have been applied by international tribunals.

In support to the validity of its nationalization statutes, Libya argued that the concession agreements were governed principally by the domestic law of Lybia. The said agreements could therefore be terminated if a Lybian statute to this effect was validly enacted, even during the life time of the concessions.[16]

The opposite argument, from multinational corporations, was that State-contracts should be governed by and must respect rules of international public law. According to BP, Texaco and Liamco, Libya did not have the right to alter unilaterally the duration of these concession agreements. So, what system of laws govern the agreements?

In *BP*, Juge Lagergen held that

> [...] the governing system of law is what that clause expressely provides viz in the absence of principles common to the law of Lybia and international law, the general principle of law including such these principles as may have been applied by international tribunals.[17]

In *Liamco*, Dr Mohmassani concluded that the principal proper law of the contract is Lybian domestic law but he emphasized that the clause excluded any part of Lybian law which is in conflict with the principles of international law.[18]

The most interesting analysis is in *Texaco*. Professor Dupuy interpreted that clause as *being primarily a choice of public international law*. According to him, the fact that parties had opted to have disputes resolved by international arbitration suggested that the concession might be governed by international law.[19] Moreover, the character of such agreement, the size of the investment involved, the importance of the contract for the economic development of the contracting State, the long term nature of such "economic development agreement",[20] and their need for stability due to the importance of investment involved, rendered international law the only suitable system of law. The *Texaco* award suggests that once a contract can be characterized as an "economic development agreement", that fact alone may be sufficient to internationalize it.[21] This

16. As preliminary objection to the case, Libya refused to recognize the jurisdiction of any arbitrator over the dispute.

17. *BP* case, *supra*, note 3, p. 329.

18. *Liamco* case, *supra*, note 4, pp. 171-176.

19. *Texaco* case, *supra*, note 2, pp. 454-455.

20. *Id.*, pp. 447-457.

21. C. GREENWOOD, "State Contracts in International Law: The Libyan Oil Arbitrations", [1982] *BYIL* 27.

automatic internationalization of a contract was revolutionary. Although criticized, the new test has since been used many times.[22]

Even if one admits that these contracts can be governed by "international public law" rules, how should one judge the legality of Libya's actions? Are there any rules of international public law applicable to the early and unilateral termination of such contracts? Is there an international contract law?

IV. INTERNATIONAL LAW OF STATE-CONTRACTS

In traditional "International Public Law", the old principle of sanctity of contracts, *Pacta Suant Servanda*, is applicable only to relationship between States. Recently again, Sornarajah scaffed at the idea of State liability in case of a breach of contract concluded with a foreign corporation: "It has been the object of this article to establish that international contract law is a myth founded upon unsound juristic premises".[23]

However, other experts such as Professor Hans Wehberg in 1959, argue that States should be liable for damages they cause to foreign corporations:

> We have described [...] the rule of Pacta suant servanda as a general principle of law that is found in all nations. It follows, therefore, that the principle is valid exactly in the same manner, whether it is in respect of contracts between States or in respect of contracts between States and private companies [...] No economic relations between states and foreign corporations can exist without the principle Pacta suant servanda.[24]

Moreover in 1960, Professor Jennings (now Judge at the International Court of Justice) affirms that rules of international public law do find application in contracts between States and foreign corporations:

> What then is the relevance of rules of public international law to a State contract made in the local municipal law with an alien? [...] the local municipal law, when functioning as the proper law of State contract, just as in other situations, must conform to any requirements laid down by international law governing the conduct of States [...]
>
> Thus, a termination or alteration of the contract by a change made in the proper law [...] may nevertheless amount to a breach of international law [...]

22. In such cases as *Revere Copper* vs *OPIC*, (1980) 56 *ILR* 257, also pp. 274-275), *Mobil Oil of Iran* vs *Iran*, ((1987-III) *Iran-US Claims Tribunal*, report 16, p. 3) and other similar cases from the Iran-USA Claims Tribunal.

23. J. SORNARAJAH, "The Myth of International Contract Law", [1981] *JWTL* 187, p. 216.

24. H. WEHBERG, "*Pacta Suant Servanda*", (1960) 54 *AJIL* 581.

> But it is possible now to envisage the development of law towards a stage where delictual element will have atrophied and the essentially contractual nature of the remedies will have come to force [...]
>
> This part of international law, like so many other branches of the law, is in great need of elaboration. This can best be accomplished by its application to concrete cases by arbitral tribunal [...][25]

What an astute comment 15 years before this plethora of litigation!

But like Sornarajah, some authorities still refuse to accept that *Pacta Suant Servanda* can receive application with non-state parties: States being sovereign, cannot limit or restraint their sovereignty, they cannot bind themselves with corporations.

However, in our three Libyan oil cases, this discussion was simplified because the breaches of contracts amounted to "complete deprivations of property rights", to "expropriations" by the Libyan government; and it is well established that International Public Law governs expropriation of foreign corporation's assets. Consequently arbitrators were lead into the discussions on international law rules applicable to early termination of state-contracts when it amounts to expropriation.

V. Rules of International Law applicable to expropriation of foreign corporations' assets

International law does not regulate the situation where a government expropriates the property of its own nationals, even without compensation.[26]

On the international level, the position is different. It has always been accepted that aliens are entitled to both, equality of treatment with nationals and minimum international standards, depending upon which is more favorable. That stipulation covers the right to possess, to enjoy, to dispose of private property and to be secured in ownership against assaults. Furthermore expropriations always had to be done for public benefit and without discrimination. In any case, the compensation had to be "prompt, adequate and effective".[27]

---

25. R. Jennings, "State contracts in International Law", (1961) 37 *BYIL* 156.

26. Art. 2.7 UN Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State [...]».

27. See for more details: Y. Lapres, "Principles of compensation for Nationalized Property", (1977) 26 *ICLQ* 97: Dawson and Weston, "Prompt, adequate and effective: a universal standard of compensation?", (1962) 30 *Fordham Law Revue* 727; J. de Arecgaga, "State Responsibility for the Nationalization of Foreign Property", (1978) 11 *NYUJ of Int. Law and Politics* 189; Kissam & Leach, "Sovereign expropriation of property and abrogation of concession contracts", (1959) 28 *Fordham Law Revue* 177.

In the three Libyan cases studied, after having established that the system of "International Law" could find application in State-contracts, arbitrators went on to examine if Libya's expropriations were legal or illegal according to that system of law. They questioned if Libya were liable for damages suffered by the foreign corporations or if, to the contrary, Libya could benefit from an exception of International Law when it enacted nationalization statutes: did Libya have a special right to expropriate and deprive these companies of their assets?

In searching for the appropriate rules of international law on expropriation of foreign corporations' rights, the arbitrators analysed Libya's argument that since the "New International Economic Order" was in place, countries were entitled to expropriate foreign corporations without compensation. The arbitrators had then to examine and discuss the legal nature of the United Nations General Assembly resolutions of the "New International Economic Order". In doing so, they underlined the active role played by multinational corporations in determining the parameters of this new legal order.

A. THE NEW INTERNATIONAL ECONOMIC ORDER: ITS BACKGROUND

After World War II, the United Nations Charter declared sovereignty and equality of all its members. Although judicially equal, some were "more equal than others", being stronger economically. It thus became quite obvious that the existing economic order served the developed countries and not the developing countries and was in fact, widening the gap between them.

In order to abrogate extensive rights granted under colonial regimes, the Less Developped Countries (LDC) intensified pressures for changes. Finally on 14 December 1954, as the result of the hard work of both the Commission on Permanent Sovereignty over Natural Resources (1958) and the Economic and Social Council, the Resolution 1803 on "Permanent Sovereignty of States over their Natural Resources" was adopted by the United Nations General Assembly.

It is important to note that the vast majority of countries agreed with the content of this resolution, although it introduced changes to traditional international law rules on expropriation. In fact, this resolution seemed to recognize the right of States to expropriate foreign corporations' assets, provided that an "appropriate compensation" were paid. The vote for this resolution stood at: 87 for (including USA and UK), two against (France and South-Africa) and 12 abstentions.[28]

28. Bulgaria, Burma, Byelorussia SSR, Cuba, Chezcoslovacia, Ghana, Honaria, Mongolua, Romania, Poland, Ukrania SSR, and USSR abstained.

But the need for more changes was requested by LDCs. The percentage of the Third World countries' international trade had then lowered from 32% in 1950 to 17% in 1972; and to 10% if oil is excluded.[29] Following the work sessions through UNCTAD (United Nations Commission on Trade and Development) from 1964 to 1974 and the successful collective action of OPEC (Oil Producer Exporting Countries) in 1973, the LDCs officially demanded changes in international economic relations. On 1 May 1974 the General Assembly adopted, without any vote but with the agressive opposition of the western countries, the resolution 3201 on the "Declaration on the Establishment of a New International Economic Order".[30] In December 1974, the UNGA adopted the Resolution 3281, the "Charter of Economic Rights and Duties" (CERD). The votes for the CERD were: 120 for, 6 against (Belgium, Denmark, Germany, Luxemburg, UK and USA) and 10 abstentions.[31]

In few words, the purpose of the CERD was to be "an effective instrument towards the establishment of a new system of international economic relations based on Equity, Sovereign Equality, Interdependance, Common Interest and Co-operation among all States, irrespective of their economic and social system" (preamble). The Charter was conceived as a "kind of basic code", an instrument of change to give effect to a strategy for redistribution of wealth and power: "to promote the establishment of a New International Economic Order [...] and urge the advancement of more rational and equitable international economic relations".[32]

In trying to ascertain the principles of international law applicable to the expropriations by the Lybian government, arbitrators had to reconcile these various UNGA resolutions and to decide if these resolutions had changed traditional international law on expropriation of foreign corporation's assets.

B. THE LEGAL VALUE OF THE RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY

A reading of the relevant resolutions is necessary. Articles 4 and 8 of the UNGA Resolution 1803 read as follows:

---

29. K. HOSSAIN (ed.), *Legal Aspects of the New International Economic Order*, London, Nichols, 1980.

30. The different declaration of more than 38 countries can be consulted in the 1974 *United Nations Yearbook* or from the *United Nations Official reports*.

31. Austria, Canada, Ireland, Israel, Italy, Japan, Netherland, Norway, Spain abstained.

32. See as well many excellent articles from Chowdury, Bulajicc in: HUSSAIN (ed.), *Legal Aspects of the New International Economic Order*, London, 1980: ROZENTHAL "The Charter of Economic Rights and Duties and the New International Economic Order", (1976) 16 *Virg. J. Int. Law* 309.

> The General Assembly, [...] declares that:
>
> 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or national interest which are recognized as overriding purely individual or private interest, both domestic and foreign. In such cases the owner shall be paid *appropriate compensation*, in accordance with the rules in force in the state taking such measure in the exercise of its sovereignty and *in accordance with international law* [...]
>
> 8. *Foreign investment agreements* freely entered into by, or between, foreign states *shall be observed in good faith*; States and international organisations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

The establishment of an *appropriate* compensation is a notion quite different from the former *prompt, adequate and effective* compensation principle. One can nevertheless still read in article 4 the express reference to *international law principles* in the evaluation of this appropriate compensation.

With regard to the UNGA Resolution 3281, the CERD, the dispositions on nationalization read as follow:

> Article 2.
>
> 2. Each State has the right:
> (a) To regulate and exercise authority over foreign investment within its national jurisdiction *in accordance with its laws and regulations* and in conformity with its national objectives and priorities [...]
> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, *taking into account* its relevant laws and regulations and *all the circumstances that the State considers pertinent*. In any case where the question of compensation gives rise to a controversy, it shall be settled under *domestic law* of the nationalizing State and by *its tribunals*, unless freely and mutually agreed by all States concerned that other peaceful means [...]

It is noticeable that in UNGA Resolution 3281 there is no reference whatsoever to international law. Moreover, the expropriating State was allowed to "take into account" its own laws and "all the pertinent circumstances". The circumstances could include such things as past profits, colonialist attitudes, political tensions etc. Another crucial element is that only domestic laws and domestic tribunals of the expropriating State were empowered to settle the dispute.[33]

In the arbitration cases, Libya argued that if International Law were the applicable system of law (which Lybia denied, since it alleged that domestic law only should govern the contract, see *infra*, Section IV) then only Resolution 3281 would set the proper rules to be applied by a tribunal.

---

33. Nor is there any mention of any requirements of a public purpose for nationalization, nor any reference to the prohibition on discrimination.

In other words, Libya claimed that it maintained exclusive jurisdiction to settle any controversy and to decide if a financial compensation had to be paid.

The multinational corporations denied that UNGA Resolution 3281 ever had any binding authority and sustained two types of argument. They maintained that in International Public Law, contracts are binding: *Pacta Suant Servanda*. The same principle should be applied to contracts between States and foreign corporations: they cannot be unilaterally terminated. The second argument was that if the said expropriations might have been valid exceptions to the *Pacta Suant Servanda* principle, the legality of these expropriations ought to be judged according the rules stated in the UNGA Resolution 1803 of 1954.

So which of the two resolutions states the content of international law, which should prevail? In any case, what is the legal nature of the General Assembly's resolutions?

> What are we to make of these resolutions? To what extent do they change international law? To some jurists, the answer is apparent: General assembly resolutions have no legal effect and are merely empty assertions or aspirations. Others emphasize that resolution 1803 and the Charter of Economic Rights and Duties were each carefully prepared, and emerged after careful legal study and (in the case of the Charter) after protracted intergovernmental negociations. This, it is said, gives the resolutions a heavier weight. Yet others draw the line in a different place, as sole arbitrator Dupuy in the Texaco-Lybia arbitration. [...] For him what was relevant was "the examination of voting conditions and the analysis of the provisions concerned": [...] if some of the UNGA resolutions can have a legal value this legal value differs considerably depending on the type of resolution and the conditions attached to its adoption (*Texaco*, p. 490).[34]

Indeed for Professor Dupuy, since Resolution 1803 was passed by 87 States with only 2 States voting against it, and since several western countries voted for the text, including the USA, that resolution had legal value. However there was insufficient consensus for the UNGA Resolution 3281, the CERD, to have affected such a substantial change in the content of customary international law.[35] There is no doubt that the United Nations General Assembly[36] provides a concentrated forum for the practice of

34. R. HIGGINS, in *Recueil des Cours de l'Académie de droit international de La Haye*, Leiden, Sijthoff, p. 292.

35. As for the UNGA Resolution 3201 (the "Declaration on the Establishment of a New International Economic Order"), although it was adopted without a vote, statements made by 38 delegates "showed clearly and explicitly [...] that the most important Western countries were opposed to abandoning the compromise solution contained in UNGA Res. 1803 (XVII)" (*Texaco* case at p. 489).

36. The same comments are even more applicable to the resolutions of the Security Council since its acts can be binding.

States on a wide range of issues.[37] The arbitrator, Professor Dupuy, seems to go further and concludes that resolutions adopted by the United Nations General Assembly can change or at least confirm a change of International Law.

The UNGA Resolution 1803 seems to be the "Law" applicable to nationalizations of foreign corporations' assets and this resolution has changed the traditional international customary law on this subject matter (some authors say that the adoption of Resolution 1803 was only the *occasion* at which International Customary Law was understood to have changed). Nevertheless these cases emphasized that the right of States to nationalize foreign corporations' assets is still subject to limitations and conditions imposed by international law and stated in the UNGA Resolution 1803.[38]

However, in the *Texaco*, *BP* and *Liamco* cases, there was always an "Applicable Law" clause in the concession-agreements which expressly referred to International Law. This is where the arbitration case *Mobil Oil Iran* vs *Iran*[39] becomes so important. Article 29 of the *Mobil Oil* concession agreement did not refer to international law at all:

> This Agreement shall be interpreted in accordance with the laws of Iran. The rights and obligations of the Parties shall be governed by and according to the

37. "[...] the United Nations political organs provide "sources formelles" — the evidences of a recognized source of law in the form of state practice showing the existence of a custom. The Security Council and the General Assembly also contribute to the "sources matérielles" of international law. Not only are they organs in which States may make pronouncements and vote, thus revealing state practice, but they are bodies which are themselves engaged in acts *qua organs*. R. HIGGINS, "The United Nations and the Law making of the Political Organs", (1970) *Proc. ASIL* 38.

38. One question remains in view of the "Stabilization Clause" of these Concession agreements. If three arbitrators from France, Sweden and Iran, all agreed that the concessions were simple contracts, one can ask for the purpose, the need and the effect of a "stabilization clause" where the Libya agreed expressly not to alter dispositions of the concession agreement. Could the stabilization clause supercede the sovereignty of a State over its natural resources, preventing any form of nationalization? Could a State surrender its sovereignty in favor of a foreign corporation.
The nature and the effect of this type of clause were further studied in *Kuwait* vs *Aminoil*, (1983) *ILM* 983). Although the arbitrators came to the conclusion that this particular stabilization clause did not prevent a State from nationalization, they seem to have foreseen such a possibility: "The case of nationalization is certainly not expressly provided against by the stabilization clause of the concession and a restraint on the right to nationalize would be a particularly serious undertaking which could have to be expressely stated for". Professor Higgins in her *Hague Lecture* concluded from this award:

> [...] the greater the incompatibility of State action with the clause, the more it will be necessary for specific provisions to have been written in if they are to be found unlawful under the concession. [...] in respect of apparent major breaches, as these will be termed so based on State sovereignty [...] they will not be deemed covered by the clause in the absence of express provision to that effect.

39. (1987-III) *Iran-US Claims Tribunal*, report 16, p. 3.

> provisions of this Agreement. The termination before expiry date or any alteration of this Agreement shall be subject to the mutual agreement of the Parties.[40]

The question was then more accurately: is International Law still the applicable system of law when Parties to the concession agreement have referred only to the laws of Iran? The Tribunal concluded:

> [...] Reference is made to Iran Law solely for the interpretation of the agreement [...] In view of the international character of the SPA (Sales and Purchase Agreements), concluded between a State, a State agency and a number of major foreign companies, of the magnitude of the interests involved, of the complex set of rights and obligations which it established, and of the link created between this Agreement and the sharing of oil industry benefits throughout the Persian Gulf Countries, the Tribunal does not consider appropriate that such an Agreement be governed by the law of one Party [...]
>
> Accordingly, the Tribunal determines that the law applicable to the Agreement is Iranian law for interpretative issues, and the general principles of commercial and international law for all other issues. For reasons previously set forth, the law applicable to the liability of Iran, [...] is international law.[41]

It would be difficult to get a more conclusive judgement on this controversial affair. According to *Mobil Oil*, International Public Law seems to find application automatically in economic development agreements between States and foreign corporations.

VI. RULES FROM THIS CASE STUDY

This brief analysis of a few arbitration cases confirms that:

1. Concession agreements are simple contracts;
2. Stabilization clauses confirm the contractual nature of these agreements;
3. These stabilization clauses can be written in such a way that a State relinquishes, for a set period of time, its special powers as a State;
4. Rules of international public law can find application in State-contracts with foreign corporations;
5. According to Professor Dupuy's theory, once a contract be characterized as being an "economic developement contract", that fact alone is sufficient to "internationalize" it and have it governed by rules of international public law;
6. Some experts affirm that any contractual or delictual breach of State-contracts should be governed by International Public Law. Consequently principles such as *Pacta Suant Servanda* should find application and States should be considered liable for damages suffered by foreign corporations;

40. *Mobil* case, *supra*, note 5, p. 20.
41. *Id.*, p. 25.

7. In any case, when a breach or an early termination of State-contracts amounts to an expropriation of the foreign corporation's rights, rules and principles of International Law govern the situation;

8. Some experts say that the UNGA resolutions can be direct source of International law. These resolutions voted by all countries in the United Nations, can confirm a "practice of states", give rise to a general *opinio juris* and, in the same way, can elucidate and develop customary international law. For some authorities they can even prescribe principles of International law. In any case these UN resolutions suggest a dynamic interpretation of the UN Charter as the constitution of the United Nations;

9. At present, UNGA Resolution 1803 seems to provide for an "index"[42] of the content of international law regarding the sovereignty of States over their natural resources, their conditional right to nationalize foreign corporations' assets and the appropriate compensation to be paid.

But in this paper, cases where arbitrators were not so clear about the governing system of law have been ignored. In fact a more accurate view would be to conclude that international law seems to have become the applicable system of law when litigation is handled by international arbitrators.[43]

> All of this leads me to the following conclusion: it does not matter too greatly what the governing law is stated to be, or indeed if there is a specified governing law. It is far more important to concentrate on the question of fora for dispute settlement, and still a lot to be said for externalising this if at all possible.[44]

VII. CONCLUSION: A NEW INTERNATIONAL ECONOMIC ORDER EXISTS

Even if the "New International Economic Order" as described in the UNGA Resolutions 3201 and 3281, has not been applied exhaustively, some practical and legal facts confirm a real change in the relationship between the Western world and the Less Developed Countries.

For instance, some resolutions of the UN General Assembly, Parliament of the world where Less Developed Countries hold the majority of votes, have been used in arbitration cases as a "rule of law" with real financial and dire consequences.

Another important legal fact is that multinational corporations are now recognized as creative actors of international law. In the negotiation and the drafting of state-contracts and during these arbitrations, multinationals push through arguments and give birth to rules of jurisprudence which enrich public international law.

---

42. I. BROWNLIE, *Basic documents in International Law*, Oxford, Clarendon Press, 1983, p. 230.

43. R. HIGGINS, "Legal Preconditions of Foreign Investments", (1986) *Energy Law Review* 236.

44. *Id.*, p. 241.

Another evidence of this new international economic order is the birth of Investment Protection Treaties. In case of a dispute involving one of the signatories and a multinational corporation from another signatory, these treaties oblige parties to refer the litigation to international arbitration[45]. This avoids narrow applications of a domestic law and involves international experts to deal with the problems.

The "Convention on the Settlement of Investment Disputes between States and Nationals of other States", and the creation of its specialized tribunal[46] also strengthen the conclusion that trade relation patterns between LDCs and rich countries have altered.

The existence of an international insurance programme administered by the World Bank,[47] as well as programmes offered by States to their own corporations investing abroad, do confirm again the influence of LDCs on international trade and investments.[48]

Unfortunately this article cannot deal with changing rules on the evaluation of compensation in case of expropriation. Nor have we discussed the more subtle problems of "indirect takings".[49] We could have also analysed the binding character of the UNGA resolutions as an "organ" over its member states and its non-member states.[50] In all these discussions one can only realise the legal changes brought about by the pressures of Less Developed Countries, the consequent actions of multinational corporations and the adaptation of international law to this reality.

All these new features of our international legal system confirm changing trends in world economic order. A New International Economic Order is in place.

---

45. See for instance F. GALLINS, "Bilateral Investment Protection Treaties" (1984) 2 *JER Law* 1977; DENZA & BROOKS, "International Protection of Investments Treaties", (1987) 36 *ICCQ* 909.

46. The International Centre for the Settlement of Investment Disputes, ICSID,

47. The Multilateral Investment Guarantee Agency, MIGA.

48. S. CHATTERJEE, "The Convention Establishing the Multilateral Guarantee Agency", (1987) 36 *ICLQ* 58; J. ZAKARIYE, "Insurance Against Political Risks in Oil Development", (1986) 4 *JENRL* 217; S. SHIATA, "Towards a greater Depoliticization of Investment Disputes: The role of ICSID and MIGA", (1986) 1 ICSID Rev. 1; S. AKINSANYA, "International Protection of Direct Foreign Investment in the Third World", (1987) 36 *ICLQ* 58.

49. R. HIGGINS, *op. cit.*, note 34; DOLZER, "Indirect Takings", (1980) *ICSID Rev.* 41; *Revere Copper Case*, (1980) 56 *ILR* 257; *Sola Tiles* vs *Iran*, 14 *Iran-USA Claims tribunal Reports* 1; *Starrett Housing Case* 4, *Iran-USA Claims Tribunal Reports* 122.

50. R. HIGGINS, *The Development of International Law by the political organs of the UN*, O.O.P. for the Royal Institute of International Affairs, London, 1963, also discussed in [1965] *Proc. ASIL* 116 by the same author under the same title.