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The Impact of Arbitral Awards on the Development of International Law: The Development of the International Law Concerning the Taking of Foreign-Owned Property

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THE IMPACT OF ARBITRAL AWARDS ON THE DEVELOPMENT
OF INTERNATIONAL LAW: THE
DEVELOPMENT OF THE INTERNATIONAL LAW CONCERNING
THE TAKING OF FOREIGN-OWNED PROPERTY

by

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of The University of Georgia in Partial Fulfillment
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THE IMPACT OF ARBITRAL AWARDS ON THE DEVELOPMENT OF INTERNATIONAL LAW: THE DEVELOPMENT OF THE INTERNATIONAL LAW CONCERNING THE TAKING OF FOREIGN-OWNED PROPERTY

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I. INTRODUCTION

Arbitration of whatever kind\(^1\) primarily is a method to settle disputes. That is also true for adjudication. Besides dispute settlement, however, judgments of courts have a second major effect. They develop the law.\(^2\) That is obvious in Common Law countries, where at least the judgments of higher courts, which state principles and create within certain limits new rules of law, have precedential value, in other words, where they are the law. But that is also true for judgments rendered in Civil Law countries and judgments of the International Court of Justice, which have authority. These judgments might develop some kind of customary law or might influence a legislature or another lawmaking institution in the law creating process. The thesis tries to show that some arbitral awards have a similar effect. It focuses on arbitral awards rendered in disputes between states and on those rendered in investment disputes between states and aliens. The impact of those awards on the development of international law\(^3\) is examined. Awards rendered in disputes between states and foreign nationals which are not investment disputes are not discussed here. Those disputes, which usually deal with \textit{e.g.}, international business transactions
involving sales, supply of equipment, industrial property licenses, and agency contracts, generally are not governed by international law. Therefore, awards deciding those disputes hardly have any impact on the development of that body of law.\textsuperscript{4}

In Chapter II theoretical considerations concerning the influence of arbitral awards on the development of the international law are made. Chapter III, which examines the impact of arbitral awards on the development of some rules of the international law concerning the taking of foreign-owned property, illustrates the role which arbitral awards rendered in investment disputes play in the development of international law.

The thesis concludes that arbitral awards do have an impact on the development of international law. Strengthening the trust and confidence of potential parties in the arbitration mechanism and providing for arbitration of disputes which deal with uncertain and highly disputed fields of international law may bring about some certainty in these fields of law and solve problems which would be unsolvable politically in an international forum.
Endnotes to Chapter I:

1. There is an enormous variety of different kinds of arbitrations. There is national and international arbitration, commercial arbitration, labor arbitration, and maritime arbitration. There is arbitration between states, between states and private nationals of other states, and between private parties. There is ad hoc arbitration and institutional arbitration. There is arbitration in Paris, London, New York, Stockholm, Washington, to name only a few centers of international arbitration. There is national arbitration in important commercial cities all over the world.

2. See generally B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-141 (1921); for the development of international law through the International Court of Justice see e.g. H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (1985).

3. For the different use of the term international law and public international law in the United States and in other countries see ALI, Restatement of Foreign Relations Law of the United States, Tentative Draft No. 6 1985 (hereinafter: Restatement, Draft No. 6), paragraph 101, comment c), which points out, that international law as it is used in the United States and in this thesis in most countries is referred to as public international law.

4. Those awards may have an impact on the development of the so-called lex mercatoria, which is said to be a developing body of law, mainly independent of national legal systems, and which regulates commercial transactions in the international business community; see e.g. Lando, The Lex Mercatoria in International Commercial Arbitration, 34 INT'L & COMP. L.Q. 747-767 (1985); R. DAVID, ARBITRATION IN INTERNATIONAL TRADE (1985), at 14 and 352 et seq., where the author expresses some doubt as to whether arbitral awards can develop a new lex mercatoria; Cremades, The Impact of International Law on the Development of Business Law, 31 A. J. COMP.L. 526 (1983).
II. THEORETICAL CONSIDERATIONS: THE IMPACT OF ARBITRAL AWARDS ON THE DEVELOPMENT OF INTERNATIONAL LAW

International law, as any law, develops. Its development is influenced by a variety of obvious and hidden factors. There is no doubt that published arbitral awards rendered by international tribunals to settle international disputes on the basis of international law and accompanied by reasons are among those factors. International arbitral awards, published and accompanied by reasons, therefore, do have an impact on the development of international law. The questions which are discussed in this chapter take some impact of arbitral awards on the development of international law for granted and focus on different views towards international law which explain the role of arbitral awards in the international law developing process (subchapter A), on the methods by which rules are developed in arbitral awards (subchapter B), and on the factors which determine the extent to which arbitral awards have an impact on the development of international law (subchapter C). Subchapter D concludes this part of the thesis.

A. The Development of International Law and the Role of Arbitral Awards therein

The role of arbitral awards in the development of international law can best be described in
examining this role of arbitral awards from different viewpoints.

1. Traditional Approach towards International Law in its modern Form and Arbitral Awards

International law traditionally is described as consistent of "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se as well as with some of their relations with persons, whether natural or juridical".\(^3\) Rules of international law are those which have been "accepted as such by the international community of states in the form of customary law, by international agreement, or by derivation from general principles common to the major legal systems of the world".\(^4\) International law develops through the development of its sources, that is primarily through the development of either customary law or treaty law.\(^5\) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.\(^6\)

Arbitral awards as such are neither customary law, because they do not result from a practice of states, nor, obviously, treaty law. It follows that the rules and principles on which the awards are based are not as such international law. Consistent with this deduction, there is no rule of _stare decisis_,\(^7\) which would bind the arbitrators as to the rules of law they have to apply and which would
indicate that the rules, on which a previous award is based, are as such international law.

International arbitral awards give evidence as to whether a rule or a state practice has become international law. But this is only part of what arbitral awards do. In deciding disputes arbitrators have to fill up gaps in the international law, they have to interpret established rules and to develop new rules. The rules developed in this process may become international law only, if they become either customary international law or treaty law. They become customary law, if they are applied in a general and consistent practice of states, followed by them out of a sense of legal obligation. They become treaty law, when states base a provision of a treaty on a rule developed in an award.

2. International Law as a Developing Process and Arbitral Awards

International law is not a static body of law, but a developing process. This developing process is influenced by a variety of factors. Such factors are the positions, which different states or organizations take as to what the content of the rules of international law are, judicial decisions, existing customary and treaty law, power, ideas of what is fair and just, scholarly writing, to name some. All these factors together may influence the perceptions of states of what the law at a certain stage of its development is and what their positions and practice
towards a specific legal question should be. Where the rules of international law are clear, which is seldom the case, and where a state wants to act in accordance with that rules, this rule may easily be found in a treaty or court decision. Where the rules are uncertain and vague, as they are especially in rapidly developing fields of international law, a state, which wants to act in accordance with international law, may look at all the above mentioned factors, including arbitral awards, to develop its legal policy. The state may then act accordingly. In acting in accordance with what the state thinks is international law it is an actor which develops, in the interplay with other states, new international customary law.

Arbitral awards together with other judicial decisions play a distinctive role in that process. Different from some of the other factors they usually do not represent a one-sided view towards a legal question, but have taken already some balancing view upon the different standpoints towards the question at issue. This impartial approach supplements the judicial decisions with a higher amount of authority. Judicial decisions also often produce a degree of certainty where previously confusion and obscurity existed. Since they are in search of certainty some states give them high authority. The judicial decisions including arbitral awards, therefore, are an important factor in the development of perceptions of the lawmaking
states and thus in the development of international law itself.

Concluding this subchapter it may be stated that while arbitral awards do not develop international law themselves, but rather can and do have an impact on its development.

B. The Methods by which Arbitrators develop International Law

Since awards do not develop international law but do influence its development, arbitrators do not develop law, but rather create international rules which have an impact on the development of international law.

Arbitrators develop international rules more or less the same way as the judges of the International Court of Justice do. They may create new rules through the interpretation of accepted rules of international law, through laying down of principles, where there is no generally accepted rule of international law, and through the application of general principles of law. They also may develop rules through the reliance on principles which have done no more than give effect to and draw the consequences from parallel developments in other spheres of international law and through ex aequo et bono decisions.13

Arbitrators in formulating international rules on which they base their awards often have enormously wide discretion. In contrast to national judges whose lawmaking power is usually restricted by the constitutional division
of power, international judges and arbitrators are not restricted by any well defined powers of a permanent international legislature.\textsuperscript{14} Furthermore, international law, the law which arbitrators have to apply as substantive law in disputes between states, if the parties did not agree otherwise, and in disputes between states and foreign nationals at least if it were agreed upon, is only vaguely formulated. The sources of the international law, which are described in article 38 (1) of the ICJ-statute, themselves leave wide room for arbitral discretion to determine the contents of a rule of international law.\textsuperscript{14a} Even "equitable considerations" are, as integral part of the international law, a source on which arbitrators and judges may base their awards.\textsuperscript{15} The wide discretion, however, is not only typical for decisions of arbitrators, but also for decisions of the judges of the International Court, who also have to decide on the basis of article 38 (1) of the ICJ-statute and who are not restricted by any powers of a permanent international legislature. The similarity shows, that the discretion of arbitrators is due to the structure of international law and not to the structure of arbitration as a method of dispute settlement. It, therefore, does not support the argument that arbitrators cannot develop international rules because their awards are not based on law but on non-legal discretionary considerations.
Arbitrators and judges have an even wider discretion if the parties have empowered them to decide *ex aequo et bono*. In this case the arbitrators and judges can base their decisions not on specific rules of international law, but on what they think is a fair and just solution of a dispute.\(^{16}\) This is not the place to discuss, whether it is possible to render an *ex aequo et bono* decision, which is not based on any kind of legal rule. In any case, *ex aequo et bono* awards can have an impact on the development of international law only if they are based on some kind of legal rule. This rule may not be stated explicitly in the award, but has to be the reason behind the decision of the Tribunal.

In investment disputes between states and foreign nationals arbitrators may apply the national law of the state party, if the parties do not agree otherwise. In these cases awards may create international rules only insofar, as choice of law issues are concerned. They may, e.g., create the rule that such investment disputes are governed by the national law of the state party.\(^{16a}\) Insofar as an award applies only national substantive law, it is unlikely that there is any kind of impact of the award on the development of international law.

C. Factors which Determine the Extent of the Impact of Arbitral Awards on the Development of International Law

It is difficult, if not impossible, to measure the impact of certain arbitral awards and arbitral awards in
general on the development of international law. That is especially difficult when a field of law is rapidly developing under the influence of a variety of different factors. However, there are two approaches which lead to a better understanding of the impact of arbitral awards on the development of international law. The first approach is to find the factors which determine the extent to which an arbitral award has an impact on the development of international law. This approach will be discussed in this subchapter. The second approach focuses on the rules which are discussed today in certain fields to be those of international law and on whether these rules were developed or at least applied in arbitral awards. This second approach will be taken up in Chapter III.

The extent of the impact of an arbitral award on the development of international law through the influence on perceptions of states of what the law is, is generally determined by the authority accorded to an award. This authority results from an interplay of a variety of factors which are discussed in this subchapter.

1. Uniqueness of the Issue

There are awards, which are highly respected, but which do not have any impact on the development of law. That happens where the legal questions involved are unique.

In submitting a dispute to arbitration the parties can stipulate in the compromis which issue they want to
have decided by the arbitrators. Where the stipulated issue is so special that a comparable problem might not arise in any other case, the awards do not have an impact on the development of law.

The lack of impact of these kinds of awards on the development of international law is illustrated by a statement of the International Court of Justice in the Barcelona Traction Case. The Court was asked to apply solutions of legal problems already developed in arbitral awards. The court said: "The parties have also relied on the general arbitral jurisprudence which has accumulated in the last half century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunals or claims commissions and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case."

2. Lack of Decisions of the International Court of Justice

A factor which determines the authority of an award rendered by an international tribunal is whether there is or whether there might be a decision of the International Court of Justice on the issue decided in the award. Decisions of the International Court of Justice are by far the most authoritative on the international plane. An arbitral award which solves legal problems contrary to a decision of the International Court of Justice, rendered
before or after the decision of the Court was made, might therefore have limited authority.

Questions which the Court has not decided yet or especially questions of international law which might seldom or never arise before the Court may be decided by arbitral tribunals and the awards may have highest authority. Arbitral awards rendered in disputes between states and foreign nationals involving international law problems, which generally would not be decided by the International Court because of lack of jurisdiction,\textsuperscript{22} for example, therefore may enjoy high authority.

3. Deciding Authority

Very important factors which determine the authority of an award are the composition of the deciding tribunal, the reputation and expertise of the arbitrators, and whether an arbitration institution is involved or not. These factors generally determine whether an arbitral tribunal makes its decision as independently, as competently, and as impartially as possible. The more independent, more competent, and more impartial decisions usually have more authority.

An arbitral tribunal composed of three independent arbitrators\textsuperscript{23} is more likely to render an independent arbitral award than a tribunal which consists out of two arbitrators, each selected by one party, and an chairman selected by the two arbitrators.
The competence of a tribunal is not only a question of the number of arbitrators, but also one of the international legal experience of the arbitrators. It might also happen that a three person tribunal, of which two arbitrators were sent by the disputing parties, is highly competent, because the arbitrators themselves know very well the national legal systems, which play a role in the dispute. Much depends here on the circumstances of each arbitration.

The involvement of an arbitration institution might further strengthen the authority of an award. Such institutions, like the International Center for Settlement of Investment Disputes (ICSID) or the Court of Arbitration of the International Chamber of Commerce (ICC), generally provide for a balanced system of procedural arbitration rules, which suit for a variety of different disputes. Ad hoc arbitration agreements may also provide for balanced procedures. However, the use of an institution renders more likely that the process will be impartial, competent, and independent. If, for example, an award is rendered in a dispute between a state and a foreign national under the auspices of ICSID, it is likely that this award is considered highly authoritative. The reason is that ICSID provides for a complex system of procedural rules, for an independent composition of an experienced tribunal, for an annulment proceeding in case of doubts as to the independence of the arbitrators, and that the
constituting Convention of which is ratified by nearly 100 states.

4. Reasons

Another major factor determining the authority of an award is the stating of reasons in an award. The reasons of an award, which show that the arbitrators dealt carefully with all the involved problems, which show that they discussed the leading legal opinions on a problem, and which elaborate a convincing solution, are likely to give an award high authority.

The importance of stating reasons primarily is based on the consideration that the loosing party should be convinced that the way in which a dispute is decided is reasonable. As it was said in the Kloeckner v. Cameroon Annulment Award: "it is not enough that justice be done, it must be seen manifestly to be done".

Reasons are also important for the law developing function of arbitral awards. Without reason it is not known which rules have been applied and developed by the arbitrators. Without reasons there are no substantive rules in an award which could have an impact on the development of law.

Contrary to the field of commercial arbitration, in which there is still controversy as to whether arbitral awards should state reasons or not, it is an established rule that awards rendered in disputes between states have to state reasons. Arbitral awards rendered in disputes
between states and foreign nationals under the auspices of ICSID also have to state reasons.\textsuperscript{34} It is doubtful, whether this principle also applies to \textit{ad hoc} or other arbitrations of international law disputes between states and foreign nationals. In view of the importance of the disputes, however, awards rendered in disputes between states and aliens generally do state reasons.

5. Publication

If awards are not published they do not have an impact on the development of law, because those who create the law generally do not know what rules and principles have been applied in the unpublished award.

Arbitral awards rendered in disputes between states are published in the United Nations Reports on International Arbitral Awards.\textsuperscript{35} Awards rendered in disputes between states and foreign nationals are sometimes published, sometimes not.\textsuperscript{36}

6. Field of Law with which an Award deals

The field of law with which an award primarily deals also is an important factor, which determines the award's authority. Arbitral awards rendered in fields of international law which are rapidly developing and which are therefore especially uncertain and vague, often have high authority because they may create more certainty and foreseeability in this field of law.
7. Concurring and Conflicting Awards

If there is a line of awards which decide a legal question the same way, then it is quite likely that the similar rules applied in these awards have strongly influenced the development of law.

If two awards decide a particular legal issue differently, and if both awards have a similarly high authority as a result of the reasons mentioned supra under 2. through 5., then it is quite likely that they have dealt with an issue which is highly disputed in international law. The impact of these awards on the development of a consensus as to what the rules of international law are, is limited. These awards may clearly point out the different standpoints as to the question which is disputed, which might have been unclear and uncertain before. They thus may further the development of new solutions to the disputed problem.

D. Conclusion to this Chapter

Arbitral awards rendered in disputes between states and in disputes between states and foreign nationals can have an impact on the development of international law. There are factors which in their interplay determine the extent of that impact. Much depends on the circumstances under which each award was rendered. Rules developed in awards rendered in disputes between states may sometimes have no impact on the development of international law,
because the factual and procedural circumstances under
which they were developed have been unique.
Endnotes to Chapter II:

1. Arbitral awards which might have an impact on the development of international law are primarily those rendered either to settle disputes between states or to settle disputes between states and foreign nationals. While the latter are discussed under III of this thesis, some remarks concerning arbitral awards rendered in disputes between states may be made in this endnote: arbitration, which has been used as a method to settle disputes between states for more than 2000 years (see L.B. Sohn, The function of International Arbitration today, RCADI 1, 9 (1963), with further references), is also today, as article 33 (1) of the United Nations Charter shows, accepted as a peaceful means of dispute settlement. There have been around 200 international arbitrations in the 19th century (id.) and some 100 arbitrations leading to arbitral awards in this century before the Second World War (see A.M. STUYT, SURVEY OF INTERNATIONAL ARBITRATION, 1794-1940, 2d ed. 1972; these figures do not count the cases in which claims commissions rendered a large number of similar awards like in the disputes between the European Nations and the United States on one side and Venezuela before the First World War, and Mexico after that war, on the other, or the awards rendered against Germany in connection with the First World War). Most of the awards dealt with territorial and border disputes, questions of international law concerning neighbor relations, disputes between warring parties and neutral states based upon discriminatory measures taken against the latter as part of the conduct of the wars or based upon questions of internment, disputes involving the law of the sea, settlement of debts, postal disputes and disputes concerning the treatment of another state's nationals in breach of international law (see von Mangoldt, Arbitration and Conciliation in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, MAX PLANCK INSTITUT FOR COMPARATIVE PUBLIC AND INTERNATIONAL LAW, Heidelberg, 416-552 (1974), 466 et seq.). Since World War II there have been less than 20 arbitral awards, rendered in disputes between states, most of them dealing with disputes involving claims resulting from World War II against Germany, Japan, or Italy, and border and neighbor disputes (see supra A. M. STUYT).

2. see e.g. W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964) at 145 et seq.; L. HENKIN, HOW NATIONS BEHAVE (2nd ed. 1979) at 25-26; J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW (9th ed. 1984) at 47 et seq.


4. Restatement, Draft No. 6, section 102, paragraph 1.
5. the development of international law through the development of the general principles of law common to the major legal systems of the world does not interest here.

6. Restatement, Draft No. 6, section 102, paragraph 2.

7. see e.g. Restatement, Draft No. 6, paragraph 103, Comment b); L. HENKIN, R.C. PUGH, O. SCHACHTER, H. SMIT, INTERNATIONAL LAW (1980) (hereinafter: HENKIN, INTERNATIONAL LAW) at 87 et seq.

8. Restatement, Draft No. 6, section 103; Article 38 (1) (d) of the statute of the International Court of Justice, which lists judicial decisions as "subsidiary means for the determination of rules of law".

9. for details see infra subchapter B.


12. Schachter, see supra note 10., at 767; at 766 the author gives a further argument for the importance of judicial decisions: "international lawyers have a strong tendency to welcome the decisions of judicial tribunals especially those of the International Court of Justice, as authoritative as law, even as the touchstone of law."

Jennings, What is International Law and how do we tell when we see it, 37 SCHW. J. I.R. (1981), at 73 et seq., says: "There has long been no room for doubt that international law has become very much case law... The great value of decided cases for the development and clarification of the law is largely because thought is stronger than fiction, and real life throws up circumstances which the most imaginative writers never thought of.... Certainly judicial decisions must become even more important in direct ratio with the quantity and contradictory nature of modern material evidence of law. The difficulty of deciding what the customary law is, can only add authority to a judicial decision resulting from the careful considerations and weighing of such material."

14. see e.g. HENKIN, INTERNATIONAL LAW, supra note 7, at 89.

14a. The wide discretion of arbitrators makes decisions of them often not foreseeable. State parties, therefore, tend to refer disputes, which are very important to them, not to arbitration, but rather settle them by other means as, e.g., negotiations. This is said to be one of the reasons why there are so few arbitral awards rendered in disputes between states since the last World War (see v. Mangoldt, supra note 1., at 533).

15. see ICSID: Decision of the Ad Hoc Committee setting aside the Award rendered on the Merits in the Arbitration between AMCO ASIA CORPORATION et al. and INDONESIA, 25 I.L.M. (1986) 1439, 1446; see also the opinion of Judge Hudson in a case before the P.C.I.J. in H.J. STEINER, D.F. VAGTS, infra note 24, at 326; both with further references.

16. see v. Mangoldt, supra note 1, at 537 et seq. Arbitrators can only decide ex aequo et bono if the parties expressly instructed the arbitrators to do so, J.S. SIMPSON, H. FOX, INTERNATIONAL ARBITRATION (1959) at 43.

16a. for details see infra, at page 59 et seq.

17. see supra at page 11 et seq.

18. "It is a basic rule of international law that states cannot be required to arbitrate a dispute unless they have given consent thereto, either before or after the controversy has arisen.... (see T. BUERGENTHAL/H.G. MAIER, PUBLIC INTERNATIONAL LAW, 1985, at 70); where the parties consent is given after the controversy has arisen, it is generally contained in the compromis. "This agreement contains provisions for the designation of the arbitral panel, if that subject has not been previously agreed upon. It will identify the issues that are to be decided, specify the rules of procedure to be followed, and state the understanding of the parties to abide by and implement the award" (id.); see also J.C. SIMPSON, H. FOX, supra note 16., at 42 et seq.


20. id., at 40.


22. see article 34 of the statute of the International Court of Justice; a dispute between a state and a foreign
national may be decided by the International Court, if the
state of which the alien is a national decides to exercise
diplomatic protection within the limits of international
law. Then the parties of the dispute are the involved
states, the disputed legal questions, however, remain the
same; in several cases attempts by states to obtain access
to the ICJ to vindicate claims of economic injury to their
nationals failed on various jurisdictional grounds: see e.g.
the Anglo-Iranian Oil Co. Case (United Kingdom v.
Iran) 1952 I.C.J. 89, and the Barcelona Traction Case,
supra note 19.

23. for the composition of arbitral tribunals in dis-
putes between states see v. Mangoldt, supra note 1., at
523 et seq.

24. ICSID is an international institution founded
through the Convention on the Settlement of Investment Dis-
putes between States and Nationals of other States
(hereinafter: the Convention; 4 I.L.M. 532 (1965)), which
came into force on October 14, 1966. Its purpose is
stated in article 1 (2) of the Convention, which provides:
"The purpose of the Center shall be to provide facilities
for conciliation and arbitration of investment disputes
between contracting states and nationals of other contract-
ing states in accordance with the provisions of this
Convention". Its establishment was sponsored by the World
Bank. The World Bank, which is vitally concerned with
capital flows from the developed to the developing
countries, in sponsoring the Convention expected that, by
reducing the likelihood of unsolved conflicts between host
countries and private investors through ICSID arbitration
or conciliation, the investment climate would improve, and
thus private foreign capital would flow to developing
countries. The seat of ICSID is in Washington at the prin-
cipal office of the World Bank. ICSID is composed of the
Administrative Council, the Secretariat, the Panel of Con-
ciliators and the Panel of Arbitrators. By October 1986,
95 states had signed the Convention, out of which 88 also
had ratified it. See generally Broches, The Convention on
the Settlement of Investment Disputes between States and
Nationals of other States, 136 RCADI 331-410 (1972);
Delaume, ICSID Arbitration Proceedings: Practical Aspects,
5 PACE L. REV. 563-589 (1985); Sutherland, The World Bank
Convention on the Settlement of Investment Disputes, 28
ICLQ 367 (1979); Shihata, The Settlement of Disputes
Regarding Foreign Investment: The Role of the World Bank,
with particular Reference to ICSID and MIGA, 97
"In a statement in support of the Convention, the Legal Ad-
visor to the State Department said: 'The World Bank Conven-
tion does not lay down any substantive rules regarding
investment, responsibility of states to alien property holders, due compensation for the taking, and the like. The Bank's judgment, in which we concur, is that any attempt to lay down such rules could not have won the substantial support this convention has found among the less-developed states. However, it is anticipated that decisions through the Convention's mechanism will create a significant new body of international law. Thus international law in this area can be expected to grow as the result of this Convention." H.J. STEINER, D.F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS, 3rd ed. 1986, 552.


25a. Somewhere between ad hoc and institutional arbitration are the arbitrations before the United States-Iran Claims Tribunal. Because of the number of the claims which are pending and the procedure according to the slightly modified UNCITRAL arbitration rules (see Pierre Bellet, Foreword, 16 L. & POL'Y INT'L BUS. 667 (1984), at 671), the rendered awards may have some impact on the development of international law.

The Iran-United States Tribunal was established by the Algier Accords, which settled the crises that arose following the seizure of the American Embassy in Tehran by Iranian militants. The Tribunal is composed of nine members: three chosen by the United States, three by Iran, and three neutral arbitrators selected by the six party-appointed arbitrators. The members of the Tribunal are divided into three-member chambers composed of two party-appointed arbitrators and a presiding neutral arbitrator. The Claims Settlement declaration empowers the Tribunal to decide claims by U.S. nationals against Iran and Iranian nationals against the United States. Under the Algier Accords, the Tribunal is to "decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of trade, contract provisions and changed circumstances." (art. V of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, Jan. 19, 1981, reprinted 20 I.L.M. 230 (1981)). The United Nations Commission on International Trade Law's (UNCITRAL) Arbitration Rules govern the conduct of Tribunal procedures. Tribunal awards are final and enforceable in the municipal courts of any nation. One

26. see article 25 through 27 and 36 through 63 of the Convention.

27. Articles 37 through 40 of the Convention.

28. Article 52 of the Convention.

29. see supra note 24.


32. id.

33. J.L. SIMPSON, H. FOX, supra note 16., at 224.

34. see article 48 (3) and 52 (1) (e) of the Convention.


36. the Convention leaves it to the parties whether they want to publish the award, see article 48 (5) of the Convention. Published are, e.g., Lena Goldfields Ltd. v. Soviet Government, 1936, 36 CORNELL L.Q. 31 (1950)

37. a problem which arises in the infra discussed awards rendered in investment disputes.
III. THE IMPACT OF ARBITRAL AWARDS ON THE DEVELOPMENT OF THE INTERNATIONAL LAW CONCERNING THE TAKING OF FOREIGN-OWNED PROPERTY

The international law concerning the taking of foreign-owned property is ideal to illustrate the impact of arbitral awards on the development of international law. The reasons are manifold. There are around a dozen published arbitral awards rendered in disputes between states and aliens dealing with this field of law. The international law of takings today is uncertain and vague. The International Court of Justice has not dealt with nationalization questions in the past several decades.¹ The law concerning the taking of alien-owned property, finally, is an economically extremely important issue for foreign private investors and states. All these circumstances indicate that arbitral awards rendered in this field of law might have a strong impact on its development.

As said earlier² the impact of awards on the development of law can be shown by examining which rules, applied and developed in arbitral awards, are discussed today as being within the scope of international law. This chapter, therefore, after drawing an overview of the economic, political, historical, and legal background of the international law rules on the taking of foreign-owned property
(subchapter A), examines the reasoning in arbitral awards as to currently controversial questions in that field of law. Those questions deal with the definition of nationalization and with compensation, with the influence of investment agreements on the law of nationalizations, with the applicable law to investment agreements, with the conflict between the sovereign right of a state to nationalize and the principle of pacta sunt sevanda, with stabilization clauses, and finally with remedies (subchapter B). Subchapter C endeavors to summarize and evaluate the which arbitral awards play in the development of the law concerning the taking of foreign-owned property.

A. The Law Concerning the Taking of Foreign-Owned Property: Overview

There have been quite a number of nationalizations of foreign-owned property in this century. Latin-American countries like Mexico nationalized alien property in the first third of the century to reduce the influence and dependence of their countries from European nations and the United States and to gain control over their natural resources. The Soviet Union and other socialist countries nationalized foreign property to achieve social justice and wealth for all their people in planned economies. Regions and countries in which natural resources had been exploited by foreigners, such as oil in the Middle East, copper in Chile and bauxite in Jamaica, nationalized foreign property to obtain the
profits from these exploitations for themselves for use in
the development of their countries. Some politically
unstable developing countries, in which private foreign
investment did not further development as expected,
nationalized foreign property because their governments
thought that a planned economy and state property in means
of production might provide for the welfare of their people
more successfully. In 1979 the Iran nationalized out of
ideological reasons. France, finally, nationalized in 1982
parts of its industry with the objective of getting better
control over the nation's economy, to improve the welfare
system and reduce unemployment, and to improve the interna-
tional competitiveness of the national industry.7a

The common final goal of most of these nationaliza-
tions was to further the welfare of the people of the
nationalizing country.

Private investors invested in foreign countries to
make as much profits as possible. The undertakings often
were risky, because of the many unforeseeable circumstances
of a foreign investment. Even though investments in for-
egn and especially developing countries, were interesting,
because the prospected profits were higher than those at-
tainable in the home countries of the investors or in other
developed states, the foreign investor was generally not
much interested in the development of a country.

While foreign private investment in the beginning
primarily was seen to be aimed to benefit the investor,
this view is modified today. In the aftermath of the Second World War a huge number of former colonies became independent states, widened the international community of states and joined the group of the underdeveloped nations. Since then the economic development of those nations has been one of the major problems of mankind.\(^8\) From those days on there seemed to be broad consensus that not only international organizations or governments of developed nations should be responsible for worldwide economic development, but that a major force for development was foreign private investment.\(^9\) Even though the negative environmental, political, and economic effects, which foreign investments sometimes had, are seen more clearly today, foreign private investment is still considered to be important.\(^10\) Developing countries have been very anxious to attract foreign investment to the benefit of the economic development of their countries.

Today, consequently, both sides, states and foreign private investors, are interested in investments in host states. The conflict arises over the question how to share the benefits and risks of an investment between the investor, whose goal is profits, and a state, which has to further the public welfare.

The international law concerning the taking of foreign property deals with the legal problems arising out of the just mentioned conflicting interests.
It raises different legal issues. These issues are those of the appropriate international economic order, of property as a human right, and of the allocation of political and economic risks of foreign private investments. The positions of the states of the world as to these issues are manifold. They are influenced by widely differing underlying conceptions of private property and contracts and their function in society, as well as by different views towards the question which kind of national economic system is more efficient and suitable to reach certain objectives defined by a government of a state.\textsuperscript{11} The different positions are generally taken by capital exporting western states, of which the investors usually are nationals, on one hand, and by the capital importing developing countries on the other.

In 1962 the General Assembly of the United Nations adopted Resolution No. 1803 (XVII) on Permanent Sovereignty over Natural Resources\textsuperscript{11a} by a vote of 87 in favor to 2 opposed with 12 abstentions (principally the Soviet Union and Eastern European countries).\textsuperscript{11b} The nonbinding Resolution was the last one in which a compromise between the capital exporting and the developing nations on the international law of the taking of foreign owned property was reached. Article 4 of the resolution provides: "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, 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 measures in the exercise of its sovereignty and in accordance with international law. ..."\textsuperscript{11c}

In the late 1960s the discussion about the international economic order and the international law of the taking of foreign-owned property grew. It reached its peak after the adoption of the \textit{United Nations Declaration on the Establishment of a New International Economic Order}\textsuperscript{12} and the \textit{Charter of Economic Rights and Duties of States}\textsuperscript{13} by the General Assembly of the United Nations in 1974.\textsuperscript{14} The international economic order erected after the Second World War primarily by Western developed countries was based on principles of equal and non-discriminatory treatment of all countries in matters of trade and economic relations.\textsuperscript{15} This economic order resulted in a disproportionate growth of wealth in developed and developing countries to the disadvantage of the latter.\textsuperscript{16} Through the resolutions the Third World expressed their view as to an appropriate economic order, different from the traditional concept. They wanted the sharing and redistribution of wealth through the creation of new international law and focussed on issues like a code of conduct of transnational corporations, transfer of technology, international trade and investment, the law of the sea, and on permanent sovereignty over natural resources.\textsuperscript{17} Based on the claim of permanent sovereignty over natural resources, which includes all
wealth and economic activities of a country, the Third World as to nationalizations took the position, that arising legal questions should be governed by national laws. Each country itself consequently should determine the standard whether, how and to which extent compensation for expropriation has to be paid.

The positions held in developing countries have been sharply rejected especially by Western developed nations. Their view is that the international law of taking of foreign-owned property governs nationalizations at least as a minimum standard and that it is based on the traditional conception of state responsibility. The traditional conception is expressed in the so-called Hull-formula. According to the Hull-formula no government is entitled to expropriate private property, for whatever purpose, without provisions for prompt, adequate, and effective payment therefor. "Despite the challenge by developing states, the United States and other capital-exporting states have refused to agree to any change in the traditional principles, and have denied that these have been replaced or modified in customary law by state practice."

Scholars have suggested ways towards a consensus of the conflicting views. It was pointed out that neither the conception held by developed countries on the basis of the traditional law of state responsibility nor the conception based on the New International Economic Order could be considered to be the basis of international law on the taking
of alien property, because neither conception is based on international consensus. The law applicable under such circumstances cannot coincide with the 'legal opinion' held by one of the contesting groups; a strictly consensual view of international law is thus excluded. As a result, the law will have to be found by searching for common elements and by determining what will satisfy the broader interests of the international legal community. It was suggested that in finding the international law concerning the taking of foreign property national law conceptions of nationalizations, and the human right of property should be taken also into account. Arbitral case law may also play an important role on the road towards consensus.

B. The Awards

The pages that follow set forth only those legal problems of the law on the taking of foreign-owned property are discussed that have played a decisive role in recent arbitral awards.

1. Nationalization in General

There are some rules concerning nationalizations which are accepted as such of international law in recent awards. The right of a state to nationalize is unquestionable today. "It results from international customary law, established as the result of general practices considered by the international community as being the law. The exercise of the national sovereignty to nationalize is regarded as
the expression of the state's territorial sovereignty. Territorial sovereignty confers upon the state an exclusive competence to organize as it wishes the economic structures of its territory and to introduce therein any reform which may seem to be desirable to it."\(^{27}\)

A nationalization is lawful under international law when it is carried out for a public purpose and not discriminatory.\(^{28}\)

A lawful nationalization will impose on the government concerned the obligation to pay compensation.\(^{29}\)

2. Elements that Constitute a Taking

Early arbitral awards already stated that damages in international law may arise from a variety of types of wrongful interference with the property, e.g., trespass, use or occupation, sequestration, expropriation, confiscation, injury or destruction.\(^{30}\) Special rules of the law of state responsibility already had been developed, such as the principle that where unsuccessful insurgents destroy property, damages are not recoverable.\(^{31}\)

Nussbaum summarized the facts of the Lena Goldfields award\(^{33}\) as follows: \(^{34}\) "The Lena Goldfields, Ltd., which had operated in Siberia as early as Tzarist times, received from the Soviet Government in 1925 - that is during the conciliatory N.E.P. ... period - a vast exploring, mining and transprotation concession ... After N.E.P. was replaced in 1929 by the Five Year Plan, the Soviet Government withheld from Lena performances, in part of vital nature, owed
under the concession contract... This was followed by a class war against the Lena employees, as serving a capitalistic enterprise. Thereupon the company's staff resigned in large numbers. As a result the company was disorganized... Finally, on the night of December 15, 1929, the Government ... carried out a formidable raid at practically all of Lena's many establishments which were separated from each other by thousands of miles. The employees, among them the leading officials ... were seized and searched and their plans and reports of a technical character taken away together with confidential documents; twelve officials were arrested and prosecuted on charges of 'counter-revolutionary activity and espionage'... Under these circumstances the company discontinued the operation of the plants which, together with the secret technical process described in the seized documents, were taken over by the Soviet Government." The Tribunal awarded compensation on the basis of the principle of "unjust enrichment" because facts were created by the Soviet Government which "brought about ... a total impossibility for Lena of either performing the concession agreement or enjoying its benefits."35

According to the Restatement, Draft No. 6, an expropriation may be "formal" or "creeping." "While a formal expropriation involves a taking by a state and transfer of title to the state, a state may seek to achieve the same result by taxation and regulatory measures designed to make
continued operation of a project uneconomical so that it is soon abandoned."

Recent awards have dealt with that issue in the following manner.

In *Benvenuti & Bonfant v. Congo* the parties entered into a series of contracts to set up the Plasco company to manufacture plastic bottles in the Congo. Benvenuti & Bonfant, an Italian company, held shares in Plasco. As a result of a "radicalization" policy of the Government of the Congo, state agencies interfered in the management of the Plasco Company. Furthermore, "[b]elieving that their personal safety was no longer guaranteed and on the advice of ..., the Charge d'Affaires of the Italian Embassy in Brazzaville, according to whom the arrest of Mr. Bonfant was imminent, Mr. Bonfant and most of the Italian staff of Plasco hastily left the Congo.... The head office of Plasco was subsequently occupied by the army." There was no formal act of nationalization. Because the Government treated Plasco as a state company and because of the institution of criminal proceedings against Mr. Bonfant without any proven reason, the tribunal held that Benvenuti & Bonfant was de facto expropriated of its corporate shares in the Plasco company. The Tribunal decided on the basis of Congolese law. However, it also referred to international law. It is not clear from the award whether the Tribunal was of the opinion that the just stated principles were only those of Congolese law.
Judge Aldrich, the U.S. arbitrator in Chamber Two of the IRAN-UNITED STATES claims tribunal, in a concurring opinion to the award on agreed terms in the ITT case stated: "Property may be taken under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected... ..., while assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate, that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact." In that case ITT owned IKO, a Swedish corporation, which owned 25% of IKO Iran. In accordance with the Act for the Protection and Development of Iran Industries, the directors of IKO Iran were appointed by the Iranian Government in December 1980, thus ousting the one director previously selected by ICO Sweden. ITT had received no profits from the company, not even profits accrued prior to the assumption of control by the government, no information on the affairs of the company, and no opportunity to vote or even to attend meetings of
shareholders or of the board of directors, or otherwise to participate in the management of the business.

In the Starrett Housing interlocutory award one of the main issues was whether and especially when there was a taking of Starrett Housing property by the Government of the Islamic Republic of Iran. Starrett Housing Corp. and its subsidiaries (collectively called "Starrett") were involved in a program to construct a residential community consisting of 6000 apartments on a 1500 hectare area. "The claimants contend that their property interests in the project have been unlawfully taken by the Government of Iran which has deprived them of the effective use, control and benefit of their property by means of various actions that prevented Starrett from completing the project." By the end of 1978 and the beginning of 1979 conditions in Iran made it necessary for most of Starrett's 150 American supervisors to leave Iran. Strikes and work stoppages had a devastating impact on securing building materials and carrying on construction at the project in 1978 and 1979. The collapse of the banking system, the nationalization of the project financing bank, the freeze of accounts of the project managing company during 1979 followed. In February 1979 four armed men with machine guns entered the office of the project managing company and took the project manager of Starrett to the headquarters of the Revolutionary Guard in Tehran. Further measures followed. On January 30, 1980 the Ministry of Housing appointed Mr. Erfan as temporary
manager of the project managing company to direct all further activities in connection with the project on behalf of the Government.

Judge Lagergren in his award of the Tribunal first held, as had previous awards, that property may be taken by a state without formal law or decree or transfer of legal title. He further held that there can be little doubt that at least at the end of January 1980 the claimants had been deprived of the effective use, control and benefits of their property in the project managing company. "It has, however, to be borne in mind that assumption of control over property by the government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law." The award then examined the request of Iran towards Starrett to conclude the project and the allegation that Starrett had abandoned the project for economic reasons and whether these circumstances would be reason enough not to declare the measure taken by Iran as takings.

The Tribunal concluded that there was not sufficient evidence that Starrett could conclude the project itself and that Starrett gave up the project for economic reasons. Lagergren then held: "There is no reason to doubt that the events in Iran prior to January 1980 to which the claimants refer, seriously hampered their possibilities to proceed with the construction work and eventually paralysed the
project. But investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lockouts, disturbances, changes of the economic and political system, and even revolution. That any of these risks materialized does not necessarily mean that property rights affected by such events can be deemed to have been taken. A revolution as such does not entitle investors to compensation under international law." The American arbitrator Holtzmann concurred. He was of the opinion, however, that the circumstances previous to January 30, 1980, already constituted a taking. He referred to previous awards and he particularly considered the reasoning of Judge Lagergren concerning the risk allocation in revolutions to be misleading.

The reasoning in the SEA-LAND award is similar to that in the just described STARRETT HOUSING award. Sea-Land was a United States corporation engaged in the international transportation by water of containerized cargo. Sea-Land claimed that it was deprived by the Iranian Government of the right to continue use of a containerized cargo facility constructed and operated by it at the port of Bandar Abbas and added that it suffered losses as a result. As to the issue of expropriation of its rights the tribunal held: "Against the background of continued uncertainty and changes in control, it strikes the tribunal as virtually impossible to use .. [certain] ..acts as the basis of a finding of expropriation. The tribunal is
mindful of the fact that the events of which Sea-Land complains, all took place before August 1, 1979, during the very period of foment and disorder which preceded and accompanied the Revolution, and not as a result of the implementation of post-revolutionary policies. A finding of expropriation would require, at the very least, that the tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operations, the effects of which was to deprive Sea-Land of the use and benefit of its investment."51

The Tribunal, therefore, dismissed the claim of Sea-Land based on expropriation. The American arbitrator, as in the previous case, took strong exception to the majority's general statements concerning the elements of a claim of expropriation, especially as to the sentence cited above, because it is contrary to the concurring opinion of Judge Aldrich in the ITT case. There Judge Aldrich stated that the intent of the government in taking foreign property is less important.

The TAMS award,52 finally, was rendered by Chamber II of the IRAN-UNITED STATES tribunal. It contains nothing new as to the issue of what constitutes a taking.53

3. Compensation

In LENA GOLDFIELDS54 the tribunal stated, as to the amount of money which had to be paid as compensation for the taking of Lena Goldfield's rights by the Soviet Government, that the present value of Lena's rights and future
profits has to be paid. The problem is, therefore, similar to that of ascertaining a fair purchase price for a going concern.

Other early arbitral awards held that where the claimant has been illegally disposed of a mine by force or violence, damages will be allowed not only for the value of the claimant's interest in the mine, but also for any ore seized.

"In Administrative decision No. III, the Mixed Claims Commission, U.S. and Germany established under the agreement of August 10, 1922, passed upon the 'Measure of Damages in all Claims for Property taken'. In that Connection Umpire Parker (for the Commission) stated that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of the taking in the condition it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place.... This rule the Commission will apply in all cases based on property taken during the period of neutrality." Subsequently, on May 25, 1925 the same Commission stated: "In computing the reasonable market value of the business done, their earning capacity based on previous operations, urgency of demand and readiness to produce to meet such demand, which may conceivably force the then market value above reproduction costs, even the goodwill of the
business, and many other factors, have been taken into account. But this is quite a different thing from assessing damage for loss of prospective earnings or profits for a period of years computed arbitrarily or according to the earnings of competitors whose properties were not destroyed, and the awards made by this Commission do not embrace the items claimed of prospected earnings and prospective profits".59

Supporters of the NIEO have introduced a new perspective on these issues. The view as expressed by, for example, Arechaga is that any "measure of nationalization or expropriation constitutes the exercise of a sovereign right of the state and is consequently entirely lawful."60 Compensation has to be paid and is based on the concept of unjust enrichment.61 "The measures which bring about a transfer of wealth in favor of the nationalizing state or one of its agencies are those which give rise to a duty to compensate. Measures such as the total suppression, for reasons of general policy, of a detrimental or inconvenient industrial or commercial activity, are not subject to compensation. The reason is that in those cases no enrichment is gained by the nationalizing state, even if a loss has been experienced by the foreign owner. Similarly, goodwill will not be a ground for compensation when the abolition of free market conditions of competition nullifies the value of this intangible asset."62
Contrary to this view is that one of the Restatement, Draft No. 6. According to the draft compensation has to be paid in case of a taking and compensation has to be just. "The elements constituting just compensation are not fixed or precise, but, in the absence of exceptional circumstances, compensation to be just must be equivalent to the value of the property taken and must be paid at the time of taking or with interest from that date and in an economically useful form. There must be payment for the full value of the property, usually 'fair market value' where that can be determined. Such value should take into account 'going concern value' if any, and other generally recognized principles of valuation. Provisions for compensation must be based on value at the times of takings; ... interest must be paid from the time of taking."

Recent awards decided as follows:

In the TOPCO and in the AMINOIL award, which will be discussed in detail later on, it was stated at length, that the General Assembly Resolution 1803 (XVII) reflected the state of customary law existing in this field. Thus "appropriate compensation" was the decisive general standard.

In BENVENUTI & BONFANT the tribunal had the power to measure the amount of the compensation for the taking of the Plasco shares ex aequo et bono. It also primarily decided on the basis of Congolese law. The tribunal based the amount of compensation to be paid by Congo on the
amount of money which was invested by Benvenuti & Bonfant because it was the best "objective" criteria available. In doing so it took into account that Plasco was more or less a state enterprise, that there was no market value of the shares of Plasco, and that Benvenuti & Bonfant's investment was just made very few years before the taking.

In his concurring opinion in the ITT case Judge Aldrich measured compensation according to the Treaty of Amity between the Iran and the United States which in his view provided for the same principles as international law. He wrote: "... a taking of property must be accompanied by prompt payment of just compensation which is effective and adequate to compensate fully for the value of the property taken. In the absence of a market to determine market value, the tribunal must endeavor to find the value of the company as a 'going concern' at the time of taking." He further stated: "I am clear, however, that the relevant date for the determination of value is the date of the taking, not an earlier date prior to the revolution..., nor a date subsequent the taking. That Iran might experience revolution was a risk assumed by investors in Iran, as in any country; and any reduction in value of investments as a result of revolution cannot be ignored by the tribunal. The Islamic Revolution in Iran was not a 'wrong' for which foreign investors are entitled to compensation under international law."
One of the crucial problems in the AIG case was the amount of compensation which had to be paid for a taking. AIG held shares in the Iran American International Insurance Company ("Iran America"). On June 25, 1979 all insurance companies operating in Iran, including Iran America, were proclaimed nationalized by the Law of Nationalization of Insurance Corporations. The tribunal held that compensation had to be paid by Iran. The appropriate method "is to value the company as going concern, taking into account not only the net book value of its assets, but also such elements as good will and likely future profitability, had the company been allowed to continue its business under its former management." The relevant date for valuation is that of the nationalization. "In ascertaining the going concern value of an enterprise at a previous point in time for purpose of establishing the appropriate quantum of compensation for nationalization, it is... necessary to exclude the effects of actions taken by the nationalizing state in relation to the enterprise which actions may have depressed its value... On the other hand, prior changes in the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken should be considered."

The Tribunal then examined the reports of the accountants of the parties, made corrections according to the above stated principles, and finally reached an amount of
compensation to be paid somewhere in the middle of the accounting reports of the parties. The tribunal did not explicitly state whether it applied international law or not, and on which general compensation formula it based the valuation of the property taken. Mosk, the American arbitrator, concurred. Contrary to the award of the Tribunal he stated general traditional principles of state responsibility which should determine the amount of compensation. He concluded that the United States' claimant on the basis of the submitted material should have gotten a higher amount of compensation.  

In the TAMS award, the claimant TAMS, which created together with AFFA, TAMS-AFFA, an Iranian entity with the sole purpose of performing engineering and architectural services, wanted compensation for its expropriated shares measured by the dissolution value of its interests in TAMS-AFFA. The Tribunal made "only a very rough evaluation of the assets and liabilities." The INA award, similar to the AIG award, deals with the expropriation, through the Nationalization of Insurance Corporations Act, of a $285,000 share in an insurance company. The award of the Tribunal obviously is the result of a compromise between the arbitrators Holtzmann and Lagergren, who had conflicting views as to the issue of compensation. It, therefore, contains a result - INA got as compensation its amount invested - but no statement of general principles of the international law of taking of foreign property. The
separate opinion of Judge Lagergren is remarkable. He examined various conceptions of compensation standards and then stated: "The principles of 'appropriate compensation' taking into account all relevant circumstances has certainly found considerable support in recent commentaries, and would now appear to be regarded as the correct legal standard at least in cases arising out of large-scale nationalizations of commercial enterprises of fundamental importance to the nation's economy, where the Hull standard seems to be inadequate." Moreover, he stated, "I am also inclined to the view that 'appropriate', 'equitable', 'fair', and 'just' are virtually interchangeable notions so far as standards of compensation are concerned. Nor is there any single method of valuation to be used in all situations of compensation. Instead, there is a wide choice of well-established methods of valuation applicable and appropriate under different circumstances." Further, "A tribunal is... forced to undertake the task of carefully identify what factors should be placed on the scale in any given case in arriving at the 'appropriate' level of compensation." Judge Lagergren concluded, "that the application of current principles of international law, as encapsulated in the 'appropriate compensation' formula, would in a case of lawful large-scale nationalizations in a state undergoing a process of radical economic restructuring normally require the 'fair market value' standard to be discounted in taking account of 'all circumstances'."
However, such discounting may, of course, never be such as to bring the compensation below the point which would lead to 'unjust enrichment' of the expropriating state. It might also be added that the discounting often will be greater in a situation where the investor has enjoyed the profits of his capital outlaid over a long period of time, but less, or none, in the case of a recent investment... Holtzmann rejects this theory of Lagergren and extensively refers to more traditional standards for valuating expropriated rights.

4. Nationalization and Investment Contracts

Private investors, investing high capital amounts in foreign countries, try to enter into contractual agreements with the host state to acquire rights in the host state and to secure the investment. These investment contracts have a variety of forms and their contents is determined by the negotiation power and skill of the host country on the one hand, and by the foreign investor, on the other. Western developed countries with strong bargaining positions seldom enter into such agreements, but require the foreign investor to submit its investment to the national laws of the host state. Developing countries, however, which urgently need foreign investment are more willing to enter into such agreements. In the arbitrations between investors and developing countries discussed below investment agreements played an important role. The structure and form of these agreements has changed over the years.
Traditional concession agreements, which amounted to an alienation of control over a substantial area of land to the foreign investor used for the exploitation of natural resources, have been succeeded by, e.g., joint-venture or production sharing agreements between the host state and the foreign investor. 87

Part of the rules of the international law concerning the taking of foreign-owned property deals with legal rules concerning investment contracts, because a taking usually affects investment contracts concluded between the host state and the foreign investor. The different conceptions of the international law of nationalizations contain rules, which deal with the legal consequences of investment contracts on the law of nationalizations.

A crucial issue of all investment contracts is by which law they are governed, by national or by international law. In case international law governs, in other words when the contract is "internationalized", the effects of the investment agreement and its stabilization clause on the issue of compensation are disputed.

a) The applicable law with respect to investment contracts. Investment agreements may be governed either by municipal law or by international law. The question of the applicable law of investment contracts has been disputed. 88 The application of the municipal law of the host state means that it can by its laws based on its underlying conceptions of property and contract interfere in its
contractual obligations towards the private investor. Internationalization means that the private investor and the host state are equal partners to a contract which is governed by the international law rules of investment contracts. Whether national or international law applies decides the amount of damages or compensation that should be paid by the host state in case of breach of contract or nationalization of contractual rights.

Arbitral case law has developed a widely accepted approach.

(1) The oil concession cases

In the ARAMCO-case the Arabian American Oil Company held the rights of a concession agreement concluded between the Government of the State of Saudi Arabia and the Standard Oil Company of California in 1933. In 1954 the Government of Saudi Arabia concluded an agreement with Mr. A. S. Onassis and his company in which the company was given a thirty years right of priority for the transport of Saudi Arabian oil. The issue was whether the latter agreement violated the rights of ARAMCO resulting from the concession agreement from 1933. Though this is not an expropriation case, the award deals among others with the question of the applicable substantive law to the concession agreement of 1933. The tribunal stated: "The Arbitral Tribunal holds, ..., that it has to ascertain the law to be applied to the merits according to the indications given by the parties and, failing adequate indications of the
parties to determine this law by taking all the circumstances of the case into consideration."92 The tribunal then examined the contractual character of the concession agreement93 and pointed out that the parties had not decided the question which law was applicable to the concession agreement.94 From contractual conflict of laws principles and some provisions in the concession agreement the tribunal concluded that some questions in the dispute are governed by public international law and worldwide custom and practice in the oil business and industry. It rejected the sole application of Saudi Arabian law because "certain private rights - which must inevitably be recognized to the concessionaire if the concession is not to be deprived of its substance - would not be secured in an unquestionable manner by the law in force in Saudi Arabia."95

In the SAPPHIRE-case96 the National Iranian Oil Company, Ltd. (NIOC), and SAPPHIRE Petroleum Ltd. (SAPPHIRE), a company registered in Canada, entered into an investment agreement, setting up a joint company IRCAN to explore and later exploit oil in a certain area in Iran. Differences arose between the parties. NIOC alleged that SAPPHIRE had not fulfilled its obligations under the agreement and therefore terminated the agreement. SAPPHIRE initiated the arbitration and wanted among others to recover the costs of the explorations and lost profits. The case is not an expropriation case. As to the substantive law applicable to the interpretation and performance of the
concession agreement, the tribunal applied principles of law generally recognized by civilized nations.\textsuperscript{97} For the parties did not expressly choose an applicable law, the arbitrator determined the applicable law according to the intentions of the parties.\textsuperscript{98} From different contract provisions, arbitral case law, and other comparable contracts concluded between NIOC and foreign oil companies, and especially the idea of protection of the foreign investor, the arbitrator came to the conclusion, that principles of law generally recognized by civilized nations apply: "It is quite clear from the above that the parties intended to exclude the application of Iranian law. But they have not chosen another positive legal system, ... . All the connecting factors above point to the fact that the parties therefore intended to submit the interpretation and performance of their contract to the principles of law generally recognized by civilized nations, ... . The arbitrator will therefore apply these principles, by following, when necessary, the decisions taken by international tribunals. ... Such a solution seems particularly suitable for giving the guarantees of protection which are indispensable for foreign companies, since these companies undergo very considerable risks in bringing financial and technical aid to countries in the process of development. It is in the interest of both parties to such agreements that any dispute between them should be settled according to the general principles universally recognized and should not be
subject to the particular rules of national laws, which are very often unsuitable for solving problems concerning the rights of the state where the contract is being carried out, and which are always subject to changes by this state and are often unknown or not fully known to one of the contracting parties." 99

In the Libyan nationalization cases 100 the question of the applicable substantive law was not really a difficult issue. BP, the Libyan American Oil Company (LIAMCO), and Texaco Overseas Petroleum Company/California Asiatic Oil Company (TOPCO), had concession rights in Libya. They were nationalized by the Libyan government. All the concessions contained the similar, decisive and clear clause: "This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law, and in the absence of such common principles then by and in accordance with the general principles of law as may have been applied by international tribunals." 101 This clause was given effect - in the TOPCO award combined with a few other considerations - in all three arbitral awards.

In the AMINOIL case 102, where the rights of a concession and property rights of the American Independent Oil Company were nationalized by the Government of the State of Kuwait in 1977 the tribunal did not finally decide which law it applied, because the law of Kuwait and international law were the same as to the questions which had to be
decided in that case. "Public international law is necessarily a part of the law of Kuwait." The tribunal also referred to an agreement between the parties and to the arbitration agreement, which both referred to principles of law and practice prevailing in the modern world as applicable law.

(2) Other investment contracts

In ICSID arbitrations the question of the applicable law was not a problem. Article 42 of the Convention provides: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflicts of laws) and such rules of international law as may be applicable." Thus in ICSID arbitrations primarily the consensus of the parties determines the applicable law. Where the parties did not choose the applicable law, the national law of the State contracting party is applicable and such rules of international law as may be applicable. This last part of the sentence makes international law applicable either complementary, where there are no regulations in the national law concerning the legal dispute at hand, or corrective, where the national law violates principles of international law.

The arbitrators, however, "can have recourse to the principles of international law only after having
researched and established the contents of the law of the State party to the dispute and after having applied the relevant rules of that law."\textsuperscript{108}

In the \textit{S.P.P. Limited} case\textsuperscript{109}, a dispute decided under the auspices of the ICC, the Egyptian government entered into contracts with a foreign corporation to develop tourist projects in Egypt. The People's Assembly of Egypt investigated the desirability of the project and the named special tribunal for that purpose took an unfavorable view. As a result the Government cancelled the project. S.P.P. and its parent company claimed damages for breach of the agreement. There was no express choice of law by the parties. There was also no reference to ICSID. However, after citing article 42 of the ICSID Convention the tribunal further stated: "Obviously the specific provision of article 42 only applies to investment agreements and disputes that may arise thereunder. However, we take the view that in the world today, there is no reason why this solution should be limited to a particular category of state contracts. In other words, the rules formulated in article 42 can be considered as illustrative of a principle of wider application."\textsuperscript{110}

Put together as to the question of the applicable law to investment contracts there is a considerable amount of uniformity in the arbitral case law. Primarily the intent of the parties is decisive. If no consensus between the parties does exist, a general trend is discernable towards
the application of the national laws of the state party to investment contracts as far as they do not conflict with international law rules. Thus it is assured that an international minimum standard protects the foreign investment while the state party can apply its national law as far as the international standard is not devaluated.

b) Investment contracts and the principle of *pacta sunt servanda* in international law

Takings of foreign investments by host countries usually affect investment contracts concluded between the host state and the foreign investor. Where, for example, a concession right is given to a foreign investor in an investment agreement, a nationalization not only takes the property of the investor it also violates the agreement and thus conflicts with the principle of *pacta sunt servanda*. The conflict with that principle seems even more obvious if the investment agreement contained a stabilization clause, a clause which provides, that the contract will not be altered by whatever means during its term except with the consent of both parties. In these cases a nationalization conflicts with the words of an investment agreement.

How international law solves the conflict between the recognized sovereign right of a state to nationalize and the principle of *pacta sunt servanda* is disputed.

Closely connected with that question is another one which asks, which remedy is available in case of a nationalization where an investment agreement exist.
the sovereign right of a state to nationalize is given highest priority, then it is not possible that a contractual obligation can restrict that right. Consequently the termination of the investment agreement is not a breach of contract, but a nationalization of contractual rights. As a result, compensation for nationalization has to be paid. If the principle of *pacta sunt servanda* is given highest authority, then the termination of the concession is a breach of contract. The available remedy may then be either damages, a remedy which is traditionally provided for in Anglo-American legal systems, or *restitutio in integrum*, a typical remedy in continental legal systems. The difference between the solution which awards damages and the one which provides for compensation is that compensation according to some views has to be appropriate, while damages have to put the party in the same pecuniary position that it would have been in if the contract would have been performed.

Some illustrations may be given for the different standpoints. Arechaga, who expressed a moderate Third World view, as to nationalization and investment agreements wrote: "The agreement and the expectancies thereunder represent property interests subject to eminent domain of the territorial state. The measure would thus constitute the expropriation of the contractual right of a foreign company: consequently, its legitimacy would be subject to the payment of 'appropriate compensation' in accordance
with article 2, paragraph 2 (c), of the Charter". If a stabilization clause was contained in that agreement, this clause could also be lawfully breached. That such clause deprives the host state of the power to put an end to the concession except with the private party's consent, runs counter to the fundamental concept and purpose of the permanent sovereignty of a state over its natural resources and wealth. "This does not mean that such stabilization clauses have no legal effect and may be considered unwritten. An anticipated cancellation in violation of a contractual stipulation of such a nature would give rise to a special right to compensation; the amount of the indemnity would have to be much higher than in normal cases since the existence of such clause constitutes a most pertinent circumstance which must be taken into account in determining the appropriate compensation." From these words it is clear that Arechaga thinks that compensation is the available remedy if an investment agreement conflicts with a nationalization.

The opposite view, which is sometimes taken by private parties, is that, if a contract is governed by international law, that contract is converted into an international agreement, and any breach of the contract is a violation of international law. The reason given is that if a state freely submits its actions to international law it ordinarily should be held to its bargain.
Consequently, either damages or specific performance is the available remedy.

The Restatement, Draft No. 6, does not take a precise position as to the available remedy and the principle of pacta sunt servanda. It states: "it is a violation of international law if in repudiating or breaching the contract, the state is acting essentially from governmental motives (akin to those that operate in cases of expropriation) rather than for commercial reasons, and fails to pay compensation."\textsuperscript{114} Breaches of development or concession contracts are similar and often allied to expropriations, ..., and international law tends to treat the wrongs in similar ways."\textsuperscript{115} There is no need for the Restatement to make a distinction between compensation and damages, because compensation and damages as remedies according to 712 (2) of the Restatement, Draft No. 6, lead to the same results.

Arbitral case law has applied solutions as stated below:

(1) The oil concession cases

In the SAPPHIRE case\textsuperscript{116} which, as said, is not an expropriation case\textsuperscript{117} and which was decided in the early 1960s, general principles of internationalized contracts between a state and a foreign national were laid down. This case is important because the principle of pacta sunt servanda was recognized as applicable for contracts concluded between a state and a private foreign national. On
the basis of the facts\textsuperscript{118} the tribunal found that there was a breach of the agreement by NIOC. The tribunal said: "\ldots, it is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule \textit{pacta sunt servanda} is the basis of every contractual relationship..."\textsuperscript{119} "There is a general rule of private law to be found in positive systems of law, which says that a failure by one party to a synallagmatic contract to perform its obligation in breach of contract releases the other party from its obligation and gives rise to a right to pecuniary compensation in form of damages."\textsuperscript{120} "It is necessary ... to regard [the rule] set out above as a rule of positive law generally recognized by nations."\textsuperscript{121}

The Tribunal further stated: "According to the generally held view the object of damages is to place the party to whom they are awarded in the same pecuniary position that it would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion. They should be the natural consequences of the breach [ ]. This rule is simply a direct deduction from the principle \textit{pacta sunt servanda} since its only effect is to substitute a pecuniary obligation for the obligation which was promised but not performed. It is therefore natural that the creditor should thereby be given full compensation. This compensation includes the loss suffered (\textit{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 produced."

Whether this rule is modified in nationalization cases is the issue in the awards discussed below.

In the Libyan Nationalization cases different solutions of similar legal questions were found in the different awards.

In all cases long term concessions were granted to foreign oil companies which contained stabilization clauses. The stabilization clauses provided that "the contractual rights expressly created by this concession shall not be altered, except by mutual consent of the parties." In the early 1970s the concession rights were nationalized. Different arbitrators decided the cases. Different litigating tactics had been used by the counsel of the oil companies. Different procedural laws were applied. In the context of this thesis only the applied substantive legal principles as to nationalizations are interesting.

The arbitrator Lagergren in the BP-case, decided in 1973 and 1974, held that "the BP Nationalization Law and the actions taken thereunder by the Respondent, do constitute a fundamental breach of the BP concession as they amount to a total repudiation of the agreement and the obligations of the Respondent thereunder... Further, the taking by the Respondent of the property, rights and
interests of the Claimant clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character. Nearly two years have now passed since the nationalization, and the fact that no offer of compensation has been made indicates that the taking was also confiscatory. The arbitrator then examined at length the effects in law of this breach. He dealt with the question whether the concession survived the nationalization, and whether specific performance and *restitutio in integrum* were available remedies. After discussing different legal conceptions and systems, and after discussing international case law, he further stated: "The real issues of substance which require a resolution by the Tribunal are novel in character and scope in that they have not previously been scrutinised judicially. While certain trends in the law are discernable, there are no precise and clear rules that provide an obvious answer to any of the issues. The facts must be appraised and the law interpreted and applied in a balanced consideration of the intrinsic merits of the case and the *de facto* positions of the Parties. An expropriation, nationalization or taking, if and when implemented in full, is an act of finality where a State has exercised its sovereign territorial power to expel a foreign enterprise and appropriate its property and other rights. No State has ever reversed such an action by granting *restitutio in integrum*, and it is unlikely that any State exercising
diplomatic protection of its nationals will demand such a reversal without offering or eventually accepting the alternative remedy, exerciseable at the option of the defaulting State, of reparation in the form of monetary compensation. It has rarely been suggested that the subject-matter in dispute is not property, rights and interests of a purely economic nature on which, thus, a financial value can be put."¹²⁸ Lagergren then pointed out that awarding restitutio in integrum could practically lead to problems and then concluded that "when by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalization of the enterprise and its assets in a manner which implies finality, the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages."¹²⁹ There was no decision as to the amount of damages which had to be paid in this award.

Much was written about the TOPCO award¹³⁰ rendered by the arbitrator Dupuy.¹³¹ Some rules, developed in this award were seldom applied in later awards. Dupuy accepted the right of a state to nationalize.¹³² However, if there was a concession agreement with a stabilization clause a state did not have the right to disregard its contractual obligation: "... the recognition by international law of the right to nationalize is not sufficient ground to
empower a State to disregard its commitments, because the same law also recognizes the power of a state to commit itself internationally, especially by accepting the inclusion of stabilization clauses in a contract entered into with a foreign private party." A nationalization therefore does not end the internationalized concession agreement. The arbitrator then examined the legal consequences of Libya's non-performance of its contractual obligations. After an elaborate review of Libyan and international decisions and writings Dupuy concluded that restitutio in integrum is the normal sanction for non-performance of contractual obligations under international law and that this sanction is inapplicable only to the extent that restoration of the status quo ante is impossible. Thus according to the award Libya was obliged to perform its obligations under the concession agreement.

In the LIAMCO case the sole arbitrator Mahmassani stated: "a) The right of property, including the incorporeal property of concession rights, is inviolable in principle, subject to the requirements of its social function and public well-being. b) Contracts, including concession agreements constitute the law of the parties, by which they are mutually bound. c) The right of a State to nationalize its wealth and natural resources is sovereign, subject to the obligation of indemnification for premature termination of concession agreements. d) Nationalization of concession rights if not discriminatory and not
accompanied by a wrongful act or conduct, is not unlawful as such, and constitutes not a tort but a source of liability to compensate the concessionaire for said premature termination of the concession agreements. As to lost resources. As "equitable compensation" he liabiltiy to compensate the concessionaire for said premature termination of the concession agreements. The arbitrator went on to state that there is no difficulty that the compensation "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. As to lost profits he said: "In the light of such frequent contemporary international practice, the classical doctrine concerning the determination of compensation has undergone the influence of the recent evolution of the concept of the right of property and of the sovereign right of States to nationalize their natural wealth and resources. Because he did not find settled rules as to the question of lost profits common to international law and Libyan law he referred to the general principles of law as may have been applied by international tribunals and especially to the principle of equity. As "equitable compensation" he awarded LIAMCO for lost profits $66 millions instead of the claimed $186 millions.

The AMINOIL case was decided in 1982. AMINOIL, an US corporation, 1948 entered into a concession agreement with the ruler of Kuwait to explore and exploit oil and gas. Different changes in the terms of the agreement were
made over the years. The original agreement contained a stabilization clause. Later a renegotiation clause was added. In the 1970s Kuwait acquired step by step the ownership of the oil industry in its country. After 1975 AMINOIL was the only foreign private oil company in Kuwait with a market share of around 2.5%. Over the years pursuant to the terms of the renegotiation clause and subsequent negotiations the terms of the concession changed, steadily reducing the profits of AMINOIL. This finally led to long lasting negotiations in which the parties discussed the nationalization of AMINOIL and the change of the concession into a service contract. No consensus was reached. In 1977 the rights and property of AMINOIL in Kuwait were nationalized. As to the stabilization clause and nationalization the tribunal held that the clause did not expressly stabilize the contract against nationalizations and that the clause therefore did not make the nationalization unlawful. "No doubt contractual limitations on the State's right to nationalize are juridically possible, but what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the regulations governing the conclusion of State contracts; and it is to be expected that it should cover only a relatively limited period. In the present case however, the existence of such a stipulation would have to be presumed as being covered by the general language of the stabilization clauses, and over
the whole period of an especially long concession since it extended to 60 years. A limitation on the sovereign rights of the State is all the less to be presumed where the concessionaire is in any event in possession of important guarantees regarding its essential interests in the shape of a legal right to eventual compensation." Additionally, the tribunal pointed out that the concession agreement changed its character considerably over the years because of the many renegotiations. Thus, the tribunal concluded, that the stabilization clause did not any more prohibit any taking by the government. The nationalization as a unilateral act was also not consistent with the renegotiation clause, which provided that changes in the contract need the consent of both parties. The tribunal argued on the basis of the facts of the specific case: it was clear to the parties that the result of the negotiations would be the same as a nationalization. Only as to the terms of the nationalization disagreement existed. Under these circumstances the Tribunal did not declare the nationalization illegitimate because of the renegotiation clause. The Tribunal finally concluded that Kuwait owed indemnification to AMINOIL for the legitimate taking. As to general compensation principles the tribunal turned to the United Nations General Assembly Resolution No. 1803 (XVII) of December 14, 1962, on Permanent Sovereignty over Natural Resources, article 4, which provides for
appropriate compensation in case of lawful nationalizations. The award further stated: "The Tribunal considers that the determination of the amount of an award of "appropriate" compensation is better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion. Moreover the Charter of the Economic Rights and Duties of States, even in its most disputed clause (Article 2 paragraph 2c)) - and the one that occasioned reservations on the part of the industrialized States - recommended taking account of "all circumstances" in order to determine the amount of compensation - which does not in any way exclude a substantial indemnity." The two important general circumstances in this case are, first, that Kuwait itself is a country favoring foreign investment and an important investor abroad. "The Tribunal will therefore confine itself to registering that in the case of the present dispute there is no room for rules of compensation that make nonsense of foreign investment." The second important factor is that the parties invoked the notion of "legitimate expectations" for deciding on compensation. The tribunal on the basis of the specific facts of the case elaborately determined the amount of compensation, which had to be paid by Kuwait.

(2) Other cases

The number of other published nationalization cases involving investment agreement problems is small.
The AGIP case was decided under the auspices of ICSID. AGIP which was the 90% owner of "AGIP (Brazzaville) S.A.", operating in the oil products distribution sector, entered into an agreement with the Congo in which the latter bought 50% of the AGIP (Brazzaville) shares, undertook various other contractual obligations, and which contained a stabilization clause as to the status of AGIP (Brazzaville). As a result of a radicalization policy of the People's Republic of the Congo the government took over the company in 1975 and did not fulfill its contractual obligations towards AGIP. AGIP claimed compensation and damages. To most legal questions that arose in the dispute the tribunal applied Congolese law. The tribunal applied international law on effect of the stabilization clause. The tribunal stated that "although there can nowadays be no doubt concerning the right of a State to nationalize, in the light of consistent international practice, positive international law also recognizes that in concluding an international agreement with a private individual the State exercises sovereign powers from the moment consent is freely given." The unilaterally decided dissolution by the Congo through its Taking Order represented a repudiation of the stabilization clause. Consequently the Government was obligated to compensate AGIP for the damage it suffered from the nationalization. The amount of damages, including lost profits, was awarded according to Congolese law.
In the S.P.P. Limited case, principles of international law which were developed or applied in previous awards were confirmed. Though the award primarily applied Egyptian law, it also stated: "Reference to the Libyan cases is made only with a view to stressing the common principles emerging from the three arbitrations whereby the executive or even the legislative act of a sovereign power can be treated as a breach of contract. This finding leads to the conclusion that the principle pacta sunt servanda (common both to Egyptian and the international legal system) only apparently conflicts with the State's legitimate prerogative to issue expropriatory measures affecting business concerns operating on its territory." The tribunal then stated that there was a breach of the investment agreement by Egypt and that S.P.P. Limited was entitled to damages. The tribunal awarded damages including damnum emergens as well as lucrum cessans no greater than those which could have normally been foreseen at the time of entering into the contract according to Egyptian law.

In summary, it can be said that in most awards - other than the LIAMCO award - the principle of pacta sunt servanda has been given priority over the sovereign right of a state to nationalize. Damages has been the generally accepted remedy, except in the TOPCO award, if a nationalization was contrary to a stabilization clause. Standards for the validity of a stabilization clause were developed in
the AMINOIL award. It should be noted that damages have been said to include damnum emergens as well as lucrüm cessans. As is clear from the AMINOIL award there is a difference between damages and compensation.

C. Conclusion: The Impact of Arbitral Awards on the Development of the International Law Concerning the Taking of Foreign-Owned Property

The awards discussed above did not develop or apply a uniform system of international rules concerning the taking of foreign-owned property. To develop such a system a larger number of published awards would be necessary. The published awards also are not always concurring as to the applied rules. Contradictions do exist. However, some general rules or at least some trends in which the rules might develop can be said to exist at present. Examples of these rules are the definition of a taking, the principle that compensation has to be appropriate, the law applicable to investment contracts, and that restitutio in integrum is generally not the available remedy in case of breach of an investment agreement. Still unsolved are the details of the principles which determine the amount of compensation. Here solutions based on the circumstances of each case are suggested. They may lead to fair results in each case.

The rules applied in the awards are often a compromise between the extreme positions taken by the developing countries on one hand and by the developed, capital exporting countries on the other. The need to decide a case as
fairly as possible, to take responsibility for the outcome of a dispute, has obligated arbitrators to take positions which are usually where somewhere in the middle.

Deciding on a case by case basis arbitrators also may decide questions of detail regarding international rules whose development by treaties or by state practice would be difficult. The details of the rules according to which compensation has to be paid according to the circumstances of each case, is an example.

Arbitral awards can also solve newly arising problems and thus give directions to the development of international law. An example is the dealing with stabilization clauses in various awards.

The results of the arbitrations, though controversial, have in general been accepted by a broad majority of states. Otherwise it would be difficult to explain why more and more nations have ratified the ICSID Convention. The acceptance of awards may also be the result of the fact that modern investment protection agreements between states take the arbitral case law into account, sometimes only insofar as explicit provisions do provide for rules which are different from dispositive rules developed in the arbitral case law. No legal advisor to a government or a foreign investor can give good advice as to investment contracts, their applicable law, their arbitration clauses, or other provisions securing the investment without taking into account the rules developed in the
awards. Recent nationalizations, like the nationalizations in France in 1982, took the modern arbitral case law into consideration.\textsuperscript{161} In scholarly writing on expropriations the awards usually play an important role.\textsuperscript{162} However, it is difficult to say whether the rules applied in the awards are already those of international law. As explained in the second chapter, in the absence of treaty law and uniform principles of law recognized by civilized nations, state practice in accordance with the rules and acceptance of the rules as international law is necessary for the rules to be those of international law. Such common state practice as to the rules developed in the awards is difficult to find. It may be argued that the conclusion of the multitude of investment protection agreements between host countries and investors' home countries which usually provide for arbitration of disputes and the conclusion of the many investment agreements between the foreign investor and the host state containing arbitration provisions also is an expression that the parties accepted the rules which were developed and applied in existing awards as those of international law. This does not necessarily mean that the countries which are parties to such agreements do accept all rules developed and applied in each award as law. It may mean that the rules which were applied in most awards are accepted as international law. Thus arbitral awards rendered in the field of the law of taking of foreign-owned property created international law.
Another point has to be made. The rules applied in arbitral awards often have been developed previously in scholarly writings or have been formulated as legal positions of the disputing parties. What is the impact arbitral awards do have on international law, if the rules applied by the arbitrators were not new? If one goes so far to say, as in the previous paragraph, that some rules applied and developed in the awards in the field of taking of foreign-owned property are already international law, then their application in arbitral awards transformed the rules into international law. If one rejects that view, what arbitral awards do in applying such already developed rules is to give them more authority and make it more likely that states through practice as law later accept them as international law.

Put together it can be said that arbitral awards do have an impact on the development of the international law of the taking of foreign-owned property; it even can be argued that the awards created rules of law in this field. In any case the awards have brought more certainty to some questions of this field of law.
Endnotes to III:

1. The Chorzow Factory Case, Permanent Court of Justice 1926-29, see H.J. STEINER, D.F. VAGTS, supra endnote to II. 24, at 483, which illustrates the traditional approach towards expropriations, was decided in the 1920s; In the Anglo-Iranian Oil Co. Case, see supra endnote to II. 22, a dispute which arose out of nationalizations by the Iranian government, the Court primarily dealt with questions of jurisdiction. In the Barcelona Traction Case, see supra endnote to II. 19, in which nationalizations led the dispute before the Court, only procedural questions have been discussed, which do not interest here.

2. see supra at page 16.

2a. Nationalization in this thesis is understood to mean the acquisition and control of privately owned business by government; expropriation means the taking in accordance with international law; confiscation means an unlawful taking. There have been over 260 takings within the two decades before 1984, see D.T. Wilson, INTERNATIONAL BUSINESS TRANSACTIONS (2nd ed.) 1984, at 290.

3. as to the Mexican expropriations see, e.g., H.J. STEINER, D.F. VAGTS, supra endnote to II. 24, at 488-497, with further references.

4. see the facts of the BP-, TOPCO-, LIAMCO-, and AMINOIL-awards, supra endnote to II. 36.

5. as to the nationalizations in Chile see, e.g., H.J. STEINER, D.F. VAGTS, supra endnote to II. 24, at 510-524.

6. see W. PETER, ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS, 58-63 (1986), with further references.

7. -

7a. see G. Burdeau, DIE FRANZÖSISCHEN VERSTAATLICHUNGEN, in Abhandlungen aus dem gesamten Bürgerlichen Recht, Handelsrecht und Wirtschaftsrecht, 1984, at 14 et seq.

8. see, e.g., W. FRIEDMANN, supra endnote to II. 2, at 11 et seq.


10. id., at 44; see also The Economist, Bridging the Lending Gap, 20-26 June 1987, at 69.
11. as to the different conceptions of property and contract see, e.g., M. SORNARAJAH, supra note 9, at 26 et seq.; Seidl-Hohenvelder, The social Function of Property and Property Protection in Present-day International Law in Essays on the Development of the International Legal Order, 98 (1980). As to the importance of conceptions of economic systems see Petersmann, Internationales Recht und neue Internationale Wirtschaftsordnung, 18 ARCHIV D. VOELKERRECHTS 17-44 (1979/80).

11a. see H.J. STEINER, D.F. VAGTS, supra endnote to II. 24, at 528 et seq.

11b. id.

11c. which is shown by the fact that developed and developing countries voted for that resolution.


15. Petersmann, supra note 11, at 24 et seq.


17. id., at 5 et seq.

18. Charter of Economic Rights and Duties of States, supra note 13, art. 2 (2) (c), declares that every state has the right: "to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation
gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means."

19. Restatement, Draft No. 6, section 712, Comment b. Section 712 provides:

"Economic Injury to Nationals of Other States

A state is responsible under international law for injury resulting from:

(1) a taking by the state of the property of a national of another state that is (a) not for a public purpose, or (b) discriminatory, or (c) not accompanied by provision for just compensation; for compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and must be paid at the time of taking, or within a reasonable time thereafter with interest from that date, and in a form economically usable by the foreign national;

(2) a repudiation or breach by the state of a contract with a national of another state

(a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by other non-commercial considerations and compensatory damages are not paid; or

(b) where the foreign national is not given an adequate forum to determine his claim of breach or is not compensated for any breach determined to have occurred;

(3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state."

see also Smit, The United States Government Perspective on Expropriation and Investment in Developing Countries, 9 VAND. J. TRANSNAT'L L. 517-522 (1976).

20. see R. DOLZER, EIGENTUM, ENTEIGNUNG UND ENTSCHAEDIGUNG IM GELTENDEN VOELKERRECHT, 1985, at 20. et seq.; the Hull-formula goes back to a note of Secretary of State Hull of August 22, 1938 concerning the Mexican expropriations.

21. see H.J. STEINER, D.F. VAGTS, supra endnote to II. 24, at 491.

22. Restatement, Draft No. 6, Section 712, Note 1.

23. see Dolzer, New Foundations of the Law of Expropriation of Alien Property, 75 AJIL 553 (1983); Higgins, The Taking of Property by the State: Recent Developments in International Law, 176 RCADI 259-391 (1982), at 278 also suggests: "The time has come to think about the difficult questions of property-taking less as of conflict between
the developed and developing world, and more as a search for decision making about burdensharing in an interdepen-
dent world."

24. Dolzer, supra note 23, at 576 et seq.; see also more elaborate R. DOLZER, supra note 20., at 69 et seq.

25. Dolzer, supra note 23, at 581: "from the viewpoint of international law, no reasonable ground exists for an investor to expect a more favorable scheme of compensation from a host country than is indicated by representative standards accepted by those countries with both the highest standards of property protection and the highest level of capital export."


27. see TOPCO award, supra endnote to II. 36, at 21; see also AGIP award, supra endnote to II. 36, at 735; LIAMCO award, supra endnote to II. 36, at 186.

28. INA award, supra endnote to II. 36, at 312 et seq.; AIG award, supra endnote to II. 36, at 105; as to dis-
criminatory takings see INA award, id., separate opinion of Judge Lagergren at 315; LIAMCO award, supra endnote to II. 36, at 194.

29. INA award, id., at 313; BENVENUTI & BONFANT award, supra endnote to II. 36, at 758.


31. id., at 1418-1434.

32. -

33. see supra endnote to II. 36.

34. id., at 32.

35. id., at 51.

36. Restatement, Draft No. 6, Section 712, Note 7.

37. see supra endnote to II. 36.

38. id., at 20.

39. see supra endnote to II. 36. see generally as to the Iran-U.S. claims tribunal decisions
40. ITT award, supra endnote to II. 36, at 351 et seq.
41. see supra endnote to II. 36.
42. id., at 144
43. id., at 154.
44. id.
45. id., at 155.
46. id., at 156.
47. -
48. id., at 164 et seq.
49. id., at 178 et seq.
50. see supra endnote to II. 36.
51. id., at 166.
52. see supra endnote to II. 36.
53. id., at 225 et seq.
54. see supra endnote to II. 36.
55. id., at 51 et seq.
56. id., at 52.
57. M. WHITEMAN, see supra note 30., at 1444.
58. id., at 1528.
59. id., at 1529.
61. id., at 222.
62. id., at 222 et seq.
63. Restatement, Draft No. 6, Section 712, Comment d.
63a. see TOPCO award, supra endnote to II. 36, at 30 et seq.; AMINOIL award, supra endnote to II. 36, at 1032.

64. see supra endnote to II. 36.

65. id. at 758.

66. what was written supra at page 43 as to the application of international law by the tribunal in that case is also applicable here.

67. id., at 760.

68. see supra endnote to II. 36; see generally as to the question of compensation the barely convincing article Clagett, The Expropriation Issue before the Iran - United States Claims Tribunal: Is "Just Compensation" required by International Law or not?, 16 L. & POL'Y INT'L BUS. 813-891 (1984).

69. ITT case, id., at 354.

70. id., at 354 et seq.

71. see supra endnote to II. 36.

72. id., at 109.

73. id., at 106.

74. id., at 107.

75. id. at 118 et seq. See the discussion of this award in Recent Developments, Nationalization, 25 HARV. J. INT'L L. 491 (1984), where the author points out that the arbitral tribunal seems to have reached the right result (at 499), but concludes that the award did not bring certainty because it is not clear from the majority opinion, which international law standards have been applied (at 500); more appropriate seems to be the comment of Henry and Bainbridge in Recent Developments, Nationalizations 14 VA. J. INT'L L. 993 (1983-1984). At 1011 they write: "An approach to compensation based on an appraisal of the facts and equities of the individual case apparently has been adopted in a number of other nationalization decisions, and may be the best way to approach the issue. Such a result-oriented approach would focus not on the standard of compensation, but on its measure. It would avoid questions of terminology, but would emphasize the facts of the case, with an eye to balancing the recognized interests of the host State, the legitimate property rights of the former owners, and the needs of the international economy for development through protected investments. Therefore a case-by-case analysis of the facts surrounding the
nationalization, including social and economic conditions that affect the property's value, should reach the most sound and equitable result."

76. see supra endnote to II. 36.

77. id., at 226.

78. id., at 228.

79. see supra endnote to II. 36.

80. see supra endnote to II. 36.

81. see supra endnote to II. 36, at 317.

82. id., at 318.

83. id., at 319.

84. id.

It is noteworthy that M. WHITEMAN, see supra note 30, in the conclusion of Vol. II in 1937 already wrote: "There are numerous considerations that may well be, and often should be, borne in mind in fixing the amount of the damages. These considerations have been described in the cases hereinbefore set forth as market price, selling price, sale value, average value in the vicinity, reasonable market value, auction price, insured value, tax value, invoice value, original cost, actual cost, retail cost, cost of replacement, cost of repair, depreciation, etc. Any and all of these standards of value are properly considered as evidence of the amount that will fairly compensate the individual claimant in the light of the particular circumstances of a given case. And no one of these criteria is necessarily the sole guide if an intelligent measure of damage is made." (id., at 1548).

"Rules specifying that just compensation or fair compensation should be made, instead of stating how damages are measured, indicate what the final product should be. They describe the end sought to be reached. So too, the rules prescribing the making good of the damage, the placing of the claimant in as good a position as he was before the loss suffered, the reviving of the status quo ante, etc., describe the proper end to be attained, including the limits of the end sought, but leave much to be desired." (id., at 1548).

85. INA award, endnote to II 36, at 319 et seq.

86. see, e.g. Higgins, supra note 23, at 305-311, where the author describes the law and practice of agreements with oil exploiting investors in the United Kingdom.
87. see Sornaraja, supra note 9, at 81 et seq., with further references.

88. see supra page 37 et seq.


90. in general see Mann, The Theoretical Approach towards the Law governing Contracts between States and Private Persons, RBDI (1975) 562-567; Seidl-Hohenveldern, The Theory of quasi-international and partly international Agreements, RBDI (1975) 567-570.

91. see supra endnote to II. 36.

92. id., at 156.

93. id., at 164.

94. id., at 166.

95. id., at 169.

96. see supra endnote to II. 36; the case is discussed by Suratgar, 3 COLUM. J. TRANSNAT'L L 152 (1965).

97. id., at 164 et seq.

98. id., at 171.

99. id., at 176.

100. the BP case, the TOPCO case, and the LIAMCO case, see supra endnote to II. 36.

101. see TOPCO at 15, LIAMCO at 172, BP at 327 et seq.

102. see supra endnote to II. 36.

103. id., at 1000.

104. id.

105. e.g. AGIP case, BENVENUTI & BONFANT case, both see supra endnote to II. 36.

106. see supra endnote to II. 36.

107. Kloeckner Annullment Award, supra endnote to II 36, at 168.

108. id., at 170.
As to the applicable law a more traditional position combined with a barely convincing reasoning was taken by the arbitrators in the Revere Copper v. OPIC award (see supra endnote to II. 36). This award was rendered in an arbitration held under the auspices of the American Arbitration Association. Because only American parties were involved the authoritative value of this decision is doubtful. (see Dolzer, Nationale Investitionsversicherung und volkerrechtliches Enteignungsrecht, Bemerkungen zum Revere Copper Fall, 42 ZEITSCHRIFT FUER AUSLAENDISCHES UND EINFENTLICHES RECHT UND VOELKERRECHT 480 (1982). Revere Copper invested in the bauxite industry in Jamaica after concluding an investment agreement with the government. Jamaica breached the agreement which led finally to considerable losses and the close down of the operation. Revere Copper claimed compensation for losses resulting from expropriatory actions from OPIC, the Overseas Private Investment Corporation, on the basis of the foreign investment insurance contract concluded with OPIC. The investment agreement concluded between Revere Copper and Jamaica was silent as to the applicable law to that agreement. The tribunal held the agreement to be internationalized because it was an economic development agreement (id., at 276) and because of guaranty agreements concluded between the US and Jamaica (id., at 277 et seq.) which provided that Jamaica will recognize all rights of OPIC which OPIC acquires pursuant to fulfilling its obligation towards a US investor whose property in Jamaica was nationalized. Because these acquired rights then would be those between governments (OPIC is an US governmental entity) the investment agreement between Revere Copper and Jamaica was internationalized (id., at 278).

111. Arechaga, supra note 60, at 228.
112. id., at 229 et seq.
113. Restatement, Draft No. 6, Section 712, Note 9.
114. Restatement, Draft No. 6, Section 712, Note 8.
115. see supra note 113.
116. see supra endnote to II. 36.
117. see supra at page 61.
118. as to the facts see supra at page 61.
119. see supra endnote to II. 36, at 181.
120. id., at 182.
121. id., at 183.
122. id., at 185 et seq.
123. see supra note 100.
124. BP at 298; LIAMCO at 141; TOPCO at 24.
126. id.
126a. BP award, see supra endnote to II. 36, at 329.
127. id., at 353.
128. id., at 354.
129. id., at 355.
130. see supra endnote to II. 36.
131. see only Editorial Comment (Fatouros), supra note 89; White, Expropriation of the Libyan Oil Concessions: Two Conflicting International Arbitrations, 30 INT'L & COMP. L.Q. 1 (1981); Casenotes (Varna), Petroleum Concessions in International Arbitration: Texaco Overseas Petroleum Company v. Libyan Arab Republic, 18 COLUM. J. TRANSNAT'L L. 259 (1979); v. Mehren, Kourides, supra note 125.
132. TOPCO award, supra endnote to II. 36, at 21.
133. id., at 24 et seq.
134. id., at 36.
135. it was pointed out that the problem with Dupuy's solution is that the enforcement of such award will lead to difficulties and that it is doubtful whether the cited authority actually supports the view that specific performance is a rule in international law in case of non-performance of contractual obligations, see Varna, supra note 129, at 287 et seq.
136. see supra endnote to II. 36.
137. id., at 196 et seq.
138. id., at 201.
139. id., at 206.

140. id., at 209.

141. id., at 214.

142. see supra endnote to II. 36; the award is discussed by Teson, State Contracts and Oil Expropriations: The Aminoil-Kuwait Arbitration, 24 VA. J. INT'L L. 323 (1984); Tschanz, The Contribution of the Aminoil Award to the Law of State Contracts, 18 INT'L LAWYER 245 (1984).

143. see supra endnote to II. 36, at 990.

144. id., at 992.

145. id., at 1023.

146. id., at 1024.

147. id., at 1026.

148. see supra note 63a.

149. AMINOIL award see supra endnote to II. 36, at 1032.

150. id., at 1033.

151. for details see id., at 1034-1042.

152. see supra endnote to II. 36.

153. id., at 735.

154. id.

155. id.

156. id., at 736.

157. see supra endnote to II. 36.

158. id., at 774.

159. id., at 782.

160. to explain this development only with the pressures exercised by the World Bank in connection with the giving of credits to host states is not sufficient.

161. G. Burdeau, see supra note 7a, at 40.

162. an exception is Dolzer, supra note 20; in his 300 page book only on one page he cites the libyan oil cases in
the text. Reason may be that his approach towards the issue from the human rights viewpoint is not that of the majority of writers and of arbitral awards, which systematically locate the law of expropriation as being part of the economic development law.
IV. CONCLUSION: THE IMPACT OF ARBITRAL AWARDS ON THE DEVELOPMENT OF INTERNATIONAL LAW

The field of law in which the impact of arbitral awards on international law was shown was especially disputed on the international plane. International consensus as to the rules of law on the taking of foreign-owned property did not develop among states. Arbitral case law showed a path along which state practice might create international nationalization law based on consensus. The work of international arbitral institutions like ICSID, the still growing importance and acceptance of ad hoc or institutional arbitration as method of dispute settlement of investment disputes and the necessity to settle the disputes, have resulted in a number of published awards setting directions towards consensus.

Using arbitration as procedural way to reach an international consensus on substantial law issues could also be a method of promoting consensus in many other international disputes on legal questions raised in the United Nations Resolutions of the early 1970s.

The regulation of the international arbitral process has reached a standard, which can guarantee fair results and which is respected by many states. This respect particularly demonstrated by the large number of parties to the ICSID Convention, by the 1976 UNCITRAL arbitration
rules which were adopted unanimously by the United Nations General Assembly, and by the 1958 United Nations Convention on the Recognition and Enforcement of foreign Arbitral Awards which enjoys wide acceptance. Nevertheless, improvements in the arbitral process are still needed. The recent ICSID annulment awards are an example. Arbitration mechanisms comparable to the ICSID mechanism may be needed in other fields of international law. Where the arbitration process functions well and fair awards can be expected to be rendered by arbitrators, there is no reason why the rules applied in these awards, if supported by reasonable arguments, should not be cornerstones in international law.
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