the Tribunal also holds that its decisions on requested Declarations Nos. 2 through 6 technically ought to be qualified as *delafgørelser.*'

As regards the effect in law of the finality of the award the arbitrator concluded:

'The Tribunal concludes that to admit a competence on the part of arbitration tribunals to re-open proceedings which have been brought to an end by the rendering of an award conceived of as final in character would be tantamount to setting aside the fundamental rule which is at the very basis of Danish arbitration law. The argument of the Claimant that the competence conferred upon Danish courts in Sect. 7 of the 1972 Act is non-exclusive is not convincing. It has indeed never been suggested in the course of the *travaux préparatoires* that concurrent jurisdiction could be exercised by arbitration tribunals in regard to invalidity issues. It is *prima facie* unlikely that the Danish legislative authorities, if made aware of the question, would have considered an arbitral tribunal which allegedly had violated, e.g., basic procedural safeguard rules, to be a proper forum for passing judgment upon its own acts. As a general proposition, therefore, it would be impossible to hold that under Danish law, an arbitral tribunal is competent to re-open the proceedings in circumstances such as the present.

'Nor has the Tribunal found any support, or even a suggestion, in the Danish legal literature for the proposition that an arbitral tribunal, outside the scope of an application by analogy of Sections 221 and 423 CCP, has competence to re-open proceedings that have been finally closed.

'. . . The Claimant submits that it has not invoked Sect. 423 as the basis for a re-opening of the first stage of the proceedings. The Tribunal therefore is unable to consider whether an application for such a re-opening may be granted by analogous application of Section 423 CCP and cannot even enter into a discussion of the various principles and distinctions contained in that Section that, directly or indirectly, might have a bearing on the issue to be decided.'

For these reasons the arbitrator decided that, on the basis of BP's request, he was not competent to re-open the proceedings of the first stage of the arbitration for the purpose of considering the matters indicated in the Memorandum mentioned above under II.

The arbitrator further decided to order BP to present a memorial setting forth its case with respect to its request for Declaration No. 5, except as decided in the award on the merits, and to its claim for damages, accompanied by all supporting documents and other relevant materials, on or before April 1, 1975, or such other date as the arbitrator would later fix.[25]

25. As BP and Libya reached a settlement on November 20, 1974, the arbitrator ordered the discontinuance of the proceedings on March 24, 1975. See further footnote (*) at beginning of this extract.

COMPARATIVE TABLE
TOPCO v. LIBYA AND BP v. LIBYA

prepared by
Dr. Albert Jan van den Berg

TOPCO v. LIBYA (extract appearing in *Yearbook* Vol. IV (1979) pp. 177–187)	BP v. LIBYA (extract appearing in this *Yearbook* pp. 143–161).
I. FACTS	
Date of Agreement	
Between 1955–1968, modified between 1963–1971.	December 18, 1957 (Mr. N. Hunt), 50% assigned to BP on June 24, 1960, modified in 1966.

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Subject Matter of Agreement	
To search for and extract petroleum in designated area during 50 years.	
Nationalization	
Law No. 66 of September 1, 1973, directed at 9 companies; Law No. 11 of February 11, 1974, directed at TOPCO and CALASIATIC.	Law No. 115 of December 7, 1971, directed at BP.
Institution of Arbitration	
September 2, 1973.	December 11, 1971.
Default of Libya	
Memorandum of July 26, 1974, submitted by Libya to President ICJ, declining arbitration.	No response.
Appointment of Sole Arbitrator (by President of ICJ)	
December 18, 1974, Prof. René-Jean Dupuy (France).	April 28, 1972, Mr. Justice Gunnar Lagergren (Sweden).
Place of Arbitration	
Geneva, Switzerland.	Copenhagen, Denmark.
Date of Award	
November 27, 1975 (preliminary). January 19, 1977 (merits).	October 10, 1973 (first stage, merits). August 1, 1974 (on re-opening first stage; not further mentioned in this Table).
II. AGREEMENT	
Virtually identical as concession agreements were based on standard form annexed to Petroleum Law 1955. Identical are in particular: – arbitral clause (Clause 28) – choice of law clause (Clause 28, para. 7) – stabilization clause (Clause 16)	
III. CLAIMS	
Requested the arbitrator to rule:	Requested the arbitrator to declare:
'That the Deeds of Concession are binding on the Parties'. (No. 1)	'The said breaches were and are ineffective to terminate the Concession Agreement, which remains in law valid and subsisting'. (Decl. No. 2) 'The Claimant is entitled to elect, at any time so long as the Respondent's breach continues, to treat the Concession Agreement as at an end'. (Decl. No. 3)

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'That Libya in adopting the Decrees of 1973 and 1974 and by its subsequent action pursuant thereto, breached its obligations under the Deeds of Concession'. (No. 2)	'The Libyan Nationalization Law of 7 December 1971 and the subsequent implementation thereof were each a breach of the obligations of the Libyan Government owed to the Claimant under the Concession Agreement and so remain'. (Decl. No. 1)
'That Libya be held to perform the Deeds of Concession and fulfill their terms'. (No. 3)	'The Claimant is entitled to be restored to the full enjoyment of its rights under the Concession Agreement'. (Decl. No. 4) 'Performance of Claimant's obligations under the Concession Agreement is suspended for so long as the Libyan Government remains in breach thereof'. (Decl. No. 6)
No such request was made.	'The Claimant is the owner of its share of any crude oil extracted from the area of the Concession Agreement after as well as before 7 December 1971 and of all installations and other physical assets, and the Libyan Government has no right to any such oil, installations or physical assets, which it can enjoy or transfer to any third party'. (Decl. No. 5)
'That Libya have ninety days after the award, being from the time of declaration of the award or from the date fixed by the Sole Arbitrator, to inform the Arbitral Tribunal of the measures which it has taken in order to comply with and to execute the award'. (No. 4)	No such request was made.
'Assuming that the Sole Arbitrator would not accept or would only partially accept the conclusions of the Companies formulated above [Nos. 1–4], to reserve for a later stage of this Arbitration the examination of all other questions which might arise and to reserve to the Companies the right to assert their grounds for any claims in this regard'.	'The Claimant is entitled to damages in respect of the interference by the Libyan Government with the Claimant's enjoyment of its rights under the Concession Agreement. If the Claimant does not exercise its rights under Declaration (3) above, then it is entitled to damages accruing up to the date of the final award herein. If the Claimant does exercise the rights under Declaration (3) above, it is entitled to all damages arising from the wrongful act of the Libyan Government'. (Decl. No. 7)
'To reserve the continuation of the proceedings in the situation where Libya does not comply with the arbitral award in the fixed time allowed'.	'The Claimant further respectfully requests the Sole Arbitrator to reserve for a subsequent stage of the proceedings the assessment of the damages due under Declaration (7) above'.

TOPCO v. LIBYA	BP v. LIBYA
III. PROCEDURAL ASPECTS	
Law Governing Arbitration	
Governed by international law because State is party. (= *Aramco* award) (extr. III, beginning)	Governed by national arbitration law because parties' intention is to create an effective remedy. (= *Sapphire* award) Danish arbitration law applicable because seat of arbitration is in Copenhagen. (extr. III.2)
Competence-Competence	
Affirmed, because it is a traditional rule followed by international case law, Treaties, and scholars. Moreover, Clause 28, para. 5: '. . . the sole arbitrator, shall determine the applicability of this clause and the procedure to be followed in the arbitration'. (extr. II.1)	Affirmed without discussion. The arbitrator referred only to Clause 28, para. 5, quoted in the left column. (extr. III.1)
Separability Arbitral Clause	
Hypothetical termination of Agreement does not affect arbitral clause. Principle of separability upheld in international case law and Treaties as well as in domestic law. Moreover, Clause 28, para. 1, provides: 'If at any time during or after the currency of this Concession any difference or dispute shall arise . . .' (extr. II.2)	Not discussed. Probably affirmed as arbitrator held that the Concession was terminated 'except in the sense that the BP Concession forms the basis of the jurisdiction of the Tribunal . . .' (extr. IV.B.3 in fine, and IV.D at Decl. No. 2)
Effect of Libya's Default	
Arbitrator kept Libya informed of all stages of the proceedings.	
Not discussed. Arbitrator paid due attention to Memorandum of July 26, 1974, submitted by Libya to President ICJ, declining arbitration. (extr. I in fine)	Default award permitted under applicable arbitration law (i.e., Danish law). Arbitrator endeavoured 'to the greatest extent possible' to eliminate any adverse effect for Libya of its decision not to participate in the arbitration. He based his award 'on broader considerations of the issues than permitted by the format of Claimant's argument in support of its claims'. (extr. III.3)
IV. SUBSTANTIVE ASPECTS	
Nature of Concession	
On the basis of general principles of law and teachings of comparative law Concession held to be of contractual nature as it expressed an agreement of wills of the conceding State and of the Concession holders. (extr. III.1.A)	Held to be of contractual nature without further discussion. (extr. IV.A.2)

COMPARISON LIBYA AWARDS

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Administrative Contract	
Concession is not an administrative contract as this type of contract is not sufficiently widely and firmly recognized in the leading legal systems of the world as to regard them as corresponding to a general principle of law. (extr. III.2.A)	Arbitrator accepted submission of BP that concession was an administrative contract, without attaching further consequences thereto. (extr. IV.A.2)
Applicable Conflict Rules	
'International law . . . empowered the parties to choose the law which was to govern their contractual relations'. Arbitrator applied the principle of autonomy of the will of the parties to an international contract, which principle is recognized by all legal systems. (extr. III.1.B.(i))	Danish conflict rules. These are not only those of the *lex arbitri*, but also 'provide a wide leeway for free exercise of party autonomy'. (extr. IV.A.1). The arbitrator then turned to para. 7 of Clause 28 (see next item).
Choice of Law	
Text of Clause 28, para. 7: 'This Concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law; if not, application of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals'.	
Interpretation by both arbitrators: Primary application of the principles of Libyan law common to principles of international law; if not, application of general principles of law. (extr. IV.A.3)	
(extr. III.1.B)	
Reference to principles of Libyan law does not rule out application of principles of international law: '. . . it simply requires . . . to combine the two in verifying the conformity of the first with the second'. (extr. III.1.C)	In the event that international law and Libyan law conflict, the general principles of law apply (extr. IV.A.3).
International Contract	
'Internationalization' of contract because: 1. reference to principles of international law in Clause 28, para. 7; 2. provision for international arbitration; 3. contract between State and private person. (extr. III.1.B.(ii) (b) and C)	Not discussed.

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Nature of Nationalization	
The right to nationalize is unquestionable today and is recognized by international law. This right is, however, not a sufficient ground to empower a State to disregard its commitments. Permanent sovereignty over natural resources can justify nationalization only in the case of an effective alienation of sovereignty. The latter is not the case with a petroleum concession. The UN Resolutions 3171 of 1973 and 3201 of 1974 according to which nationalization must be settled in accordance with domestic law, is not applicable because they do not reflect the majority of States representing all various groups. (extr. III.2.B and C)	Not discussed.
Breach of Contract by Libya?	
Nationalization is breach of contract by Libya, especially in view of stabilization clause (Clause 16). (extr. III.2)	Nationalization is breach of contract by Libya as it violates public international law, it being arbitrary, discriminatory and confiscatory. (extr. IV.A.4)
Effect of Breach of Contract	
Contract is not terminated. It would be against the principle of good faith that in a contract between a State and a foreign private party only the latter would be bound. (extr. III.2.B and C)	Contract is terminated. Arbitrator's reasoning not entirely clear: the contract is terminated either because it has never been held that a contract between a State and a private party continues to be in force in a case like the present one, or because the remedy of *restitutio in integrum* has never been granted in a case like the present one. (extr. IV.B)
Restitutio in Integrum	
Restitutio in integrum is the principal remedy in this case. (extr. III.3)	*Restitutio in integrum* is not available in this case. (extr. IV.B.2)
It is a principle of Libyan law. (extr. III.3.A)	No opinion could be formed under Libyan law as 'the argument presented by Claimant . . . appears less than exhaustive'. (extr. IV.B.2*a*)
Not discussed.	The Law of Treaties, Vienna, 1969, does not give a solution on this question. (extr. IV.B.2*b*)
It is supported by international case law and practice. Arbitrator referred, inter alia, to *Chorzów*-case, *Mavrommatis*-case, *Temple of Preha-Vihear*-case, *Martini*-case, *Anglo-Iranian Oil Co.*-case, and *Barcelona Traction*-case. (extr. III.3.B (a))	It is not supported by international case law and practice. Arbitrator referred to most of the cases cited in the left column, but concluded that in none of them *restitutio in integrum* has ever been granted. (extr. IV.B.2*c*)

COMPARISON LIBYA AWARDS

TOPCO v. LIBYA	BP v. LIBYA
It is supported by the overwhelming majority of scholars in international law. (extr. III.3.B (b))	Discussed summarily without making a conclusion. (not included in extract)
Not discussed presumably because remedy was already found to be upheld both under Libyan law and international law.	As regards the general principles of law, the arbitrator found that English, American, Danish and German law varied on the availability of the remedy. (extr. IV.B.2*d*)
No such or similar consideration was ventured.	'A rule of reason dictates that [the sole remedy is damages] which conforms both to international law . . . and to the governing principle of English and American contract law'. (extr. IV.B.3)
Property Rights	
Not discussed.	BP has no property rights of the oil extracted after the Nationalization Law of 1971. Whether BP is the owner of oil extracted before that date, depends on further evidence. (extr. IV.C.1)
Damages	
Not discussed.	BP is entitled to damages only, which have to be assessed in further proceedings. (extr. IV.C.2)
V. DECISIONS	
(extr. III.5)	(extr. IV.D)
Nationalization is breach of contract by Libya.	
(No. 2)	(At Decl. No. 1)
Concession remains to be binding on parties. (No. 1)	Nationalization terminates concession, except for arbitral clause. (at Decl. No. 2)
Libya is bound to perform and to take measures to implement the award within 5 months. (Nos. 3–5)	Libya is no longer bound to perform. (at Decl. Nos. 2–4 and 6)
	BP is not the owner of the oil extracted after the Nationalization Law of 1971. (at Decl. No. 5)
	Damages to be assessed in further proceedings. (at Decl. No. 7)
VI. SETTLEMENT	
US $152 million in Libyan crude oil.	UK £17.4 million.