The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)

AD HOC

Award of May 24, 1982

Arbitrators: Prof. Paul Reuter (President); Prof. Hamed Sultan; Sir Gerald Fitzmaurice, Q.C.

Parties: Claimant: Govt. of the State of Kuwait; Defendant: The American Independent Oil Company (AMINOIL)


Subject matter:
- nationalization [not included in Trans-Lex]
- applicable law [not included in Trans-Lex]
- duress [not included in Trans-Lex]
- Abu Dhabi Formula and competence of arbitral tribunal [not included in Trans-Lex]
- validity of nationalization [not included in Trans-Lex]
- stabilization clauses in concession contract [not included in Trans-Lex]
- indemnification

[...]

FACTS

On June 28, 1948, Aminoil was granted a Concession by the Ruler of Kuwait for the exploration and exploitation of petroleum and natural gas in what was then called the Kuwait "Neutral Zone". Revision of the 1948 Concession, after the
special relationship between Kuwait and the United Kingdom ended in 1961, led to the signature on July 29, 1961, of a Supplemental Agreement. Revision of both concessionary Agreements was envisaged in 1973 and embodied in a Draft Agreement of July 16, 1973. Before this Agreement was ratified the "October war" broke out in the Middle East (1973). With some modifications this draft agreement was, by letter of December 22, 1973, accepted by the Company in Kuwait. Negotiations then took place in the next period between the parties, concerning, a.o., the application of the so-called "Abu Dhabi Formula". However, on September 19, 1977, the Government of Kuwait issued Decree Law no. 124, terminating the Agreement between the parties. All assets and interests of the Company were taken over by the State. The Company, on December 20, 1977, notified the Ministry of Oil of its intention to initiate arbitration proceedings under Article 18 of the Concession Agreement 1948.

The Government of Kuwait and the Company "desirous of resolving all differences and disagreements between them on the basis of law" concluded in Kuwait an Arbitration Agreement on June 23, 1979. From this Agreement may be quoted Article III.

"1. The parties recognize that the restoration of the parties to their respective positions prior to 20 September 1977 and/or the resumption of operations under the 28 June 1948 Agreement (as amended) would be impracticable in any event, and the Company will therefore seek monetary damages instead. Accordingly, the parties agree to limit their claims against each other to claims for monetary compensation and/or monetary damages.

"The Tribunal shall decide according to law:

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i. The amount of compensation, if any, payable by the Government to the Company in respect of the assets acquired by the Government under Article 2 of Decree Law no. 124.

ii. The amount of damages, if any, payable by the Government to the Company in respect of termination of the Agreement of 28 June 1948 by Article 1 of the Decree Law no. 124.

iii. The amount payable to the Government by the Company, and/or the amount payable to the Company by the Government, in respect of royalties, taxes or other obligations of the Company, in which connection the Tribunal shall determine the validity or invalidity of any amendments or supplements to the 28 June 1948 Agreement which are relevant.

iv. The amount of interest, if any, payable by either Party to the other, the rate of such interest and the date from which it shall be payable to be awarded at the discretion of the Tribunal.

"2. The law governing the substantive issues between the Parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world."

and the first paragraph of Article IV:

"1. Unless otherwise agreed by the Parties, and subject to any mandatory provisions of the procedural law of the place in which the arbitration is held, the Tribunal shall prescribe the procedure applicable to the arbitration on the basis of natural justice and of such principles of transnational arbitration procedure as it may find applicable, and shall regulate all matters relating to the conduct of the arbitration not otherwise provided for herein."

At the request of the Government the parties agreed to hold an ad hoc arbitration in Paris.

**EXTRACT**

[...]

[33. Such an interim agreement is different in two respects from the definitive agreement the place of which it provisionally takes. The first is that it can be concluded in simplified form, - such is its raison d'être. On the Kuwait side it was concluded by the Minister of Finance and Oil. It is a matter entirely of Kuwait law whether that Minister had capacity so to act, and Aminoil has correctly accepted him as duly authorized, and the Government of Kuwait has always recognized that the Minister legally bound the State. Thus this Agreement (December 1973) was always valid ab origine, and the Tribunal only needs to point out that it is entirely normal and useful that, in transnational economic relations, the capacity of the Minister in charge of economic matters should be presumed, as is that of a Minister for Foreign Affairs in inter-state relationships.

- citation taken from ILM 1982, 976, 1005/1006]

[...]


4. Validity of the nationalization ordained by Decree Law no. 124

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B. Is the nationalization lawful in view of the "stabilization" clauses contained in Aminoil's concessionary contract?

"88. Aminoil's concessionary contract contained specific provisions in the light of which it may be queried whether the nationalisation was in truth lawful. The provisions concerned are Articles 1 and 17 of the Concession Agreement of 1948, and Article 7(g) of the 1961 Supplemental Agreement which introduced a new version of Article 11 of 1948. The relevant part of Article 1 of 1948 provided that

'The period of this Agreement shall be sixty (60) years from the date of signature.'

"89. The Tribunal will begin by discarding two arguments which it does not consider reliable.

"Firstly, the more radical one consists in affirming that these clauses do no more than embody general principles of contract law, and that in consequence the legal regime of the Concession is the same as that of any contract, and that these clauses add nothing to what would in any event be the legal position. This argument cannot be accepted, for it is a well-known principle of the interpretation of contractual undertakings (and indeed of all juridical instruments) that the interpretation to be adopted must be such as will give each clause a worth-while meaning or object. In the present case, as Aminoil has pointed out, that object resides precisely in the fact that one of the Parties, being a State, had available to it all the powers of a public Authority and, by using them, could take those steps against which it was the very object of

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Article 17 of 1948 provided as follows:

'The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement.'

Finally, Article 7(g) of the Supplemental Agreement of 1961 provided for the deletion of Article 11 of 1948 and the substitution for it of a new Article 11. This new version, after indicating in a first paragraph (A) certain events (not here relevant) in which the Ruler of Kuwait would be entitled to terminate the Concession, went on in a second paragraph (B) to state

'(B) Save as aforesaid this Agreement shall not be terminated before the expiration of the period specified in Article 1 thereof except by surrender as provided in Article 12 or if the Company shall be in default under the arbitration provisions of Article 18.'

These clauses combined, but especially Article 17, constituted what are sometimes called the 'stabilisation' clauses of the contract. A straightforward and direct reading of them can lead to the conclusion that they prohibit any nationalisation. Such is the view maintained by the Company. The Government of Kuwait on the other hand, in a series of arguments the merits of which the Tribunal must now consider, maintained that, on the contrary, these clauses did not prevent a nationalisation.

"89. The Tribunal will begin by discarding two arguments which it does not consider reliable.

"Firstly, the more radical one consists in affirming that these clauses do no more than embody general principles of contract law, and that in consequence the legal regime of the Concession is the same as that of any contract, and that these clauses add nothing to what would in any event be the legal position. This argument cannot be accepted, for it is a well-known principle of the interpretation of contractual undertakings (and indeed of all juridical instruments) that the interpretation to be adopted must be such as will give each clause a worth-while meaning or object. In the present case, as Aminoil has pointed out, that object resides precisely in the fact that one of the Parties, being a State, had available to it all the powers of a public Authority and, by using them, could take those steps against which it was the very object of
these clauses to protect the concessionaire.

"Secondly, according to an initial Government contention, these provisions had a 'colonial' character and were imposed upon Kuwait at a time when that State was still under British protectorate, and not in possession of its full sovereign powers. On this basis the stabilisation clauses were devoid of value. However, quite apart from any attempt to enquire into the factual circumstances in which these clauses were adopted, this contention cannot be upheld, for they were expressly confirmed on the occasion of the 1961 revision of the Concession after the attainment of complete independence by Kuwait, and again in 1973 when the text of the '1973 Agreement' was put into operation.

[...]

5. Indemnification

"138. The determination of an indemnification has always presented technical difficulties. This has been the case in regard to indemnifications due in consequence of illicit acts, where it is as the equivalent of a *restitutio in integrum* that the calculation is in principle effected. But it has been so especially for indemnities due in consequence of acts of expropriation or of legitimate nationalisations. Indeed, in this last case, the difficulties are added to by controversial questions of foreign investments, and operations involving an important economic complex. Since the end of the 19th century, every kind of economic, moral and ideological consideration has been put forward by 'host' countries in the endeavour to keep in their own hands the evaluation of the indemnifications due, and to reduce them to the minimum or nothing. When the international political outlook was favourable, the investing States espoused more or less energetically the Claims of their nationals and, at least on the level of principle,

upheld the rule of equivalence in monetary terms to the value of what had been taken.

"139. Since the end of the second World War, nationalisations have multiplied, and have given rise to much regulation by Convention, but to few arbitrations. Through decolonisation and the development of older countries that were never colonised, or became independent much earlier, a 'Third World' has emerged, dominating the debates in the United Nations. This has led to the adoption of numerous General Assembly Resolutions which, with few exceptions, have more often than not been the occasion of confrontations between the older investing countries, reduced to a small numerical minority, and large majorities of newer countries wanting to render nationalisations as easy as possible."

A. The applicable general rule

"143. The most general formulation of the rules applicable for a lawful nationalisation was contained in the United Nations General Assembly Resolution n° 1803 (XVII) of 14 December, 1962, on Permanent Sovereignty over Natural Resources, Article 4 of which provides that

'Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised 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.'

This text which obtained a unanimous vote in the General Assembly, codifies positive principles, recognised by the Constitution and Law of Kuwait, that have not been contested in the present proceedings. It calls for a concrete interpretation of the term 'appropriate compensation'. Other disputes have long since turned upon different terms such as 'fair', 'just', 'equitable', not to speak of 'adequate', 'effective', 'prompt', etc. There are indeed, several tendencies, all appealing to the same principle, one of which however reduces compensation almost to the status of a symbol, and the other of which assimilates the compensation due for a legitimate take-over to that due in respect of an illegimate one. These tendencies were in mutual opposition in the United Nations when the Resolutions following n° 1803 were voted, none of which obtained unanimous acceptance, and some of which, such as the Charter of the Economic Rights and
Duties of States, have been the subject of divergent interpretations.

"144. 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) â€“ and the one that occasioned reservations on the part of the industrialized States â€“ recommended taking account of 'all circumstances' in order to determine the amount of compensation â€“ which does not in any way exclude a substantial indemnity.8

"145. Careful consideration of the circumstances proper to each case sometimes enables certain difficulties to be set aside. Thus the opposition manifested by some States to any but the most incomplete compensation may be explicable on the basis that their object is to do away with foreign investments entirely, because they do not welcome foreign capital and are even less favourable to investing abroad themselves. What they want is to break loose from the round of foreign investment; and it can be concluded that in their own mutual relations inter se such States apply very restrictive rules in the matter of compensation.

"146. But as regards States which welcome foreign investment, and which even engage in it themselves, it could be expected that their attitude towards compensation should not be such as to render foreign investment useless, economically. In this respect it is not disputed that Kuwait is a country favouring foreign investment, and itself an important investor abroad. The Tribunal does not intend either to examine, or resolve the complex of juridical problems created by the fact that there are some States that are motivated by very different sets of conceptions about foreign investment, possibly involving within the framework of the international community what the International Court of Justice has called an 'intense conflict of systems and interests' (Barcelona Traction, etc., case, I.C.J. Reports 1970, p. 48, paragraph 49). 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 would make nonsense of foreign investment.

"147. This is a fundamental precept. It is pertinent during the life-time of a concession; it is equally pertinent when a concession comes to an end. Compensation then, must be calculated on a basis such as to warrant the upkeep of a flow of investment in the future.

"148. Both Parties to the present litigation have invoked the notion of 'legitimate expectations' for deciding on compensation. That formula is well advised, and justifiably brings to mind the fact that, with reference to every long-term contract, especially such as involve an important investment, there must necessarily be economic calculations, and the weighing-up of rights and obligations, of chances and risks, constituting the contractual equilibrium. This equilibrium cannot be neglected â€“ neither when it is a question of proceeding to necessary adaptations during the course of the contract, nor when it is a question of awarding compensation. It is in this fundamental equilibrium that the very essence of the contract consists.

"149. For assessment of that equilibrium itself, and of the legitimate expectations to which it gives rise, it is above all the text of the contract that signifies, and it is of moment that this text should be precise and exhaustive. But it is not only a question of the original text; there are also the amendments, the interpretations, and the behaviour manifested along the course of its existence, that indicate (often fortuitously) how the legitimate expectations of the Parties are to be seen, and sometimes seen as becoming modified according to the circumstances.

"150. It is on the footing of these general principles that the Tribunal will now enquire into the circumstances specific to the case of Aminoil."

B. Circumstances specific to Aminoil's case

"151. The first and principal question is to ascertain on what basis Aminoil's compensation is to be evaluated. Some long-term concessionary contracts expressly provide for the possibility of a termination prior to the maturity of the concession, and therefore regulate the conditions of it; but this is not so as regards Aminoil's Concession. In order to resolve certain of the problems produced by the nationalisation, the Parties to the present litigation have, up to a point, derived
instruction from the rules provided by the Concession for its termination at the end of its period of 60 years. The most important of these was Article 13 of 1948 which provided that at the expiry of the Concession, the entire undertaking should be 'handed over to the Shaikh' â€“ i.e. the Government â€“ 'free of cost' â€“ that is, without compensation. Since, however, this is not appropriate to the present circumstances, the factors that have to be taken into account for the indemnification of Aminoil have still to be determined. In order to do so, the Tribunal will consider the arguments of the Parties in turn, which will lead it progressively to define its own position, to be reverted to later.

"152. On behalf of Aminoil, it has been shown that there was a choice between two methods:

(i) â€“ a method based on the sum total of the anticipated profits, reckoned to the natural termination of the Concession, but discounted at an annual rate of interest in order to express that total in terms of its 'present value' on the day when the indemnification is due; and without taking account of the value of the assets that would have been transferred to the concessionary Authority, 'free of cost', upon that termination;

(ii) â€“ a method whereby total anticipated profits are counted and discounted in the same way over a limited period of years only, but taking countervailing account of the value of the assets (for this, Aminoil furnished examples of results calculated over ten-year periods).

"153. Subject to what is stated later as to the system for determining the annual profits involved, the Tribunal agrees in principle that both of the methods suggested by Aminoil are acceptable, and can be checked against each other. But, while aware that the first method may have been adopted in certain arbitrations, the Tribunal considers that in effecting a general evaluation, it is preferable to employ a combination of methods, according to the different factors that have to be taken into account. Moreover, the Tribunal disagrees with Aminoil's assumptions and calculations on two basic points. In this connection the Company has furnished an estimate on the lines of the principle of a restitution in integrum founded on the assumption that the Concession should have continued for its full term under the contractual conditions fixed in 1961, without modification. This calculation is based on a projection of the quantities of oil recovered, the prices, the costs of production, and the operations to be undertaken until the end of concession. The Company has also produced its estimate of the value of the assets, in case the Tribunal should choose the second method.

"154. The two basic points on which the Tribunal differs from Aminoil's position are as follows:

(a) â€“ First, in respect of the foundation for the calculation of anticipated profits, which Aminoil takes as being exclusively the financial arrangements of 1961, the Tribunal has already found in Section IV above, both that the 1973 Agreements were valid, and that something is owing to the Government on Abu Dhabi account. Not only is no refund due of moneys paid to the Government under the 1973 arrangements, but the latter are also a component of the present 'legitimate expectations' of the Company. Even more pertinent, the negotiations between the Parties about the application of the Abu Dhabi Formula involved a recognition of the principle of a monetary obligation to the Government, and of a modification for the future of the financial relations of the Parties. It is therefore on a combination of these data, not on those of 1961, that the indemnification of the Company must be proceeded to.

(b) â€“ Next â€“ and this constitutes the second aspect of the difference between the Tribunals and Aminoil's positions â€“ the Tribunal cannot accept the projections as to the future of the petroleum industry based on the consultations of experts that the Company had relied upon. These have been criticized by the Government. If, however, the Tribunal does not accept them, this is not because they include speculative elements, since all methods of assessment, whatever they may be, will do that. It is because the Tribunal thinks that in the present case, as will be shown later, the Parties adopted a different conception in the course of their relations and negotiations, â€“ namely that of the reasonable rate of return. This it is, therefore, that must guide the Tribunal.

"155. On behalf of the Government, it was maintained that the only compensation Aminoil was entitled to claim must be determined by precedents resulting from a series of transnational negotiations and agreements about compensation. These precedents, so it was said, had instituted a particular rule, of an international and customary character, specific to the oil industry. Attention was called to the fact that a number of nationalisations of oil concessions had occurred in the Middle East, and elsewhere in the world, in the years 1971 â€“ 77. However, the solutions adopted in the case of these precedents were not identical but had certain common features: the compensation granted was very incomplete and had reference only to the 'net book value' of the redeemable assets. These precedents, it was claimed, had generated a customary rule valid for the oil industry â€“ a lex petrolea that was in some sort a particular branch of a general universal
lex mercatoria. That was why Kuwait, in the course of the 1977 discussions, had offered no more than the net book value of the redeemable assets as compensation for the expropriation.

"156. The Tribunal cannot share this view, for reasons of fact, as of law.

"As regards reasons of fact â€“ it must be noticed that the overall results of negotiations about compensation are, more often than not, complex. They do not simply comprise the payment of an indemnity but also include bilateral arrangements of every kind â€“ contracts of service, long term supply, contracts covering particular benefits, etc. Such contracts have not all been made public,

and even the amounts of compensation paid and the method of computing them are not always known with certainty. What is certain is that in addition to the compensation, a preferential relationship was often instituted or maintained between the State and the foreign entity concerned (whereas in the case of Aminoil all relations were severed). It would be difficult to express in figures the value in terms of money of these preferential arrangements; for the advantages they bring depend on the structuring and policy of the former concessionaire Company. What can be affirmed is that the advantages for major integrated concerns are often considerable. But even if such relations had been maintained for the benefit of Aminoil, their value could not have been the same because of the modest dimensions of that undertaking, not similarly integrated economically. At the most, it might be possible to go so far as to say that certain large transnational groups may have preferred compensation that had no relation to the value of their undertaking, if it was coupled with the preservation of good relations with the public authorities of the nationalising State with, possibly, resulting prospects for the future giving promise of greater worth than the compensation forgone.

"157. As regards the reasons of law â€“

(i) If reliance is to be placed on the precedents just mentioned â€“ and always supposing them to be conclusive about the order of size of the indemnity (which, as has been seen, they are not) â€“ it would still be necessary for them to constitute an expression of the opinio juris â€“ (North Sea Continental Shelf case, I.C.J. Reports 1969, p. 45, paragraph 77). But, as it happens, the conditions in which these compensation agreements were concluded were peculiar, and the documentation submitted to the Tribunal brings out certain relevant aspects of the matter. These are the circumstances in consequence of which the concerted petroleum policy of OPEC as from 1973 had to be taken into account; the progressive character of the steps taken; the crucial preoccupations of concessionaire Companies to ensure the continued supply of petroleum products to consumers; and the passivity of the importing States. All this led the major transnational Companies to accept de facto what the exporting countries demanded. It can be maintained that such acceptance was wise â€“ but it would be somewhat rash to suggest that it had been inspired by juridical considerations: the opinio juris seems a stranger to consents of that type.

(ii) Such consents were given under the pressure of very strong economic and political constraints; and in connexion with the consents given by Aminoil, the Tribunal has already considered whether these constitute a case of 'duress', leading to invalidation, and has given a negative answer. Speaking generally, it can be held that the consents given in the course of this period were not obtained by means amounting to duress, and they were valid and final. But the economic pressures that lay at the root of them had nothing to do with law, and do not enable them to be regarded as components of the formation of a general legal rule. A juridical entity has the faculty, even in the case of pressure exercised through economic constraints, to handle its own business affairs in such a way as to produce concrete valid results; but it cannot be claimed that such dealing is apposite for generating general rules of law applicable in other cases too.

"158. The Tribunal now comes to the basis on which the evaluation of the legitimate expectations of Aminoil must proceed. There exist, as well in the contract of Concession as in the attitude of Aminoil, indications concerning this, which it is right to recall and describe.

"159. To start with, as was mentioned earlier in connexion with Aminoil's nationalization, whereas the contract of concession did not forbid nationalisation, the stabilisation clauses inserted in it (and equally â€“ by 1977 â€“ not forbidding that) were nevertheless not devoid of all consequence, for they prohibited any measures that would have had a confiscatory character. These clauses created for the concessionaire a legitimate expectation that must be taken into account. In this context they dissipate all doubts as to the strength of the respect due to the contractual equilibrium.
"160. But above all, account must be taken of the position of Aminoil in its relations with the Government of Kuwait. From the time when its rate of production reached a satisfactory level, Aminoil was in the position of an undertaking whose aim was to obtain a 'reasonable rate of return' and not speculative profits which, in practice, it never did realise. As stated earlier it was threatened with two dangers. One was not to be able to dispose of products the high net cost of which made their sale on the market difficult; and the other was to have to agree to payments to the Government of Kuwait that did not allow the Company to ensure the viability of the enterprise. The persistent desideratum of its representatives was to see the prospect of retaining for it a reasonable rate of return. It was on this note that it opened the negotiations of 1976â€“77, and in the light of this expectation that appropriate compensation has now to be assessed.

"161. It is correct to say that the attitudes taken up by a party over the long course of a negotiation that eventually breaks down cannot be made the basis of an arbitral or judicial decision. But there is no question here of facing Aminoil with the latest proposals it made in 1977 in a final effort to come to terms. The point is simply to register the fact that, over the years, Aminoil had come to accept the principle of a moderate estimate of profits, and that it was this that constituted its legitimate expectation.

"162. There are not wanting indications given by Aminoil as to what could be a reasonable rate of return. They appear in particular in a letter of 28 July, 1972, and in the opening proposals for the 1976 negotiation. Moreover, in the Second Part of the First Annex to the July 1973 Agreement, Section V, it was stated that:

'Any future discussions between the Government and the Company regarding concession provisions will take into consideration that the Company should not be denied a reasonable opportunity of earning a reasonable rate of return (having regard to the risks involved) on the total capital employed in its business attributable to Kuwait.'

"163. Here three points need to be brought out

(i) â€“ Assuming that a normal level of profits has been determined having regard to the total capital invested, it would be ordinary business practice in the case of a concession intended to last, to add a reasonable profit margin that would preserve incentives, and allow for risks whether commercial or technological. But this necessity disappears when it is a question of deciding on the amount of compensation due for a concession that has already been terminated, â€“ for in that event the risk (for the concessionaire) has ex hypothesi vanished.

(ii) â€“ As regards a Concession which provides that, ultimately, all the installations and assets are to be handed over to the concessionary Authority 'free of cost',

it would be normal that at least a part of necessary current investment should be effected out of profits. Such was the position â€“ fair in principle â€“ of Aminoil at the start of the 1976 negotiations, and that was why, for the Company, the reasonable return of which it was claiming the benefit had to include an amount for operations that would ordinarily prove indispensable. But again, this point has not much relevance when the Concession has come to an end.

(iii) â€“ A third point is that in the present case the reasonable rate of return has to be determined for two distinct purposes. First, in connection with the Abu Dhabi Formula, over the period stretching from 1 January, 1975 to 19 September, 1977, â€“ this is a period for which the profits of Aminoil's undertaking are known, and in respect of which, it is not necessary to provide for the financing of works that were never carried out, or for what would constitute an incentive for further development. Secondly, the reasonable rate of return, assessed on a somewhat more liberal scale, constitutes one of the elements of compensation.

"164. Having thus described the place occupied by the notion of a reasonable rate of return in the indemnification of Aminoil, the Tribunal must now indicate what principles are, in its view, valid for determining the compensation due in respect of the Company's assets. As the Tribunal has stated earlier, it considers it to be just and reasonable to take some measure of account of all the elements of an undertaking. This leads to a separate appraisal of the value, on the one hand of the undertaking itself, as a source of profit, and on the other of the totality of the assets, and adding together the results obtained.

165. As regards deciding on a method for valuing the physical assets, it is not possible to postulate any absolute rule. Doubtless it is necessary in all cases to consider the value of the assets as at the date of transfer, taking due account of the depreciation they have undergone by reason of wear and tear and obsolescence. But in general, only values for
accounting or taxation purposes can be utilized and they must always be reasonably arrived at. Thus, the method called that of the net book value may be suitable when it is a case of a recent investment, the original cost of which was not far from that of the present replacement cost. But when that is not so, other methods are indicated.

"166. This leads to a last general observation, touching upon the combined evaluative problems concerning Aminoil. If these problems had arisen in a stable economic world, it would be possible to express matters in terms of some given monetary unit for instance to regard the dollars of 1948 and succeeding years as being assimilable to those of 1977 or 1982. But the proportions assumed by world inflation must lead to appraisals that are more in line with economic realities, and the determination of an indemnification cannot be tied down to the inflexible consequences of a purely monetary designation. That is why, in calculating the value of depreciating assets, it would be unfair to settle it on the basis of a superannuated cost consisting of the original purchase price, when that price has no relation to the actual present cost.

"167. One of the most pertinent economic considerations justifying the profits claimed by the countries producing non-renewable oil or other minerals, is that these profits are not truly in the nature of income, but represent a capital value, since the State must aim at reconstituting the worth of the oil or mineral deposits against the day when these will be exhausted. But it is no less of a necessity for the oil or mining undertaking to reconstitute in real terms the capital value of the investment it put into it. Such an undertaking can in no way be assumed to go out of business at the end of its Concession: it must carry on elsewhere or in another form. It must re-invest.

"168. Moreover, the need not to neglect the economic effects of inflation goes beyond the case of assets liable to depreciation. For instance, in the course of the oral proceedings, different appraisals were made, bringing in various factors expressed in money terms and stretching from 1948 to 1977 being either added together or compared. But for such calculations to be in point they must be carried out on the basis of components expressed in units having a comparable economic signification, and if it were thought necessary to arrive at the total figure of the capital invested by Aminoil in its undertaking, it would be appropriate to do so without holding the dollars of 1977 to be equivalent to those of 1948.

"169. The Tribunal has to point out that the general principle of the preservation of the value of money which has just been discussed is consistent with the spirit of the contract of Concession and, grosso modo, with the attitudes of the Parties, in particular during the petroleum crisis after 1973; in the negotiations for the revision of the Concession; and in the proceedings before the Tribunal. Thus the original (1948) Concession contained a 'gold clause' (Article 3(h)). A similar preoccupation with expressing values for economic transactions in a manner independent of purely monetary fluctuations is equally apparent in the politics of petrol prices. Such was the case at the level of the Gulf States and the major oil Companies in respect of the Geneva Agreement of January 1972 which adopted the principle of adjusting oil revenues by reference to a 'basket of currencies'. It was the same in the relations between Aminoil and Kuwait: for the July 1973 Agreement on the one hand cancelled Article 3(h) of the 1948 Concession containing the 'gold clause' (see head (7) of the First Part of the First Annex to the 1973 Agreement), and, on the other hand (Article 2(2)(v) of the main Agreement), took account of 'the purchasing power or real value of revenues related to oil exported from Kuwait'.

"170. This need for stability is such that in the present proceedings the Government of Kuwait has argued that in the event of the 1973 Agreement not being held applicable, and of the relations between the Parties remaining governed by the 1961 Agreement, the Tribunal ought, even in the absence today of any 'official United States Government purchase price' for gold (see Article 3(h) of 1948), to have reference to other equitable standards in order to replace that official price. But this problem is no longer actual, since the Tribunal has found that the 1973 Agreement was applied by the two Parties up to the end of the Concession. However, the position taken up by the Government on the subject remained significant, and if the correspondence exchanged between the Parties, and the minutes of their meetings are looked at, it can be seen that inflation had an important place in their discussions. Especially in the negotiations of the years 1976 and 1977, did Aminoil adjust its proposals to take account of it. The Government sometimes discussed from this point of view the evaluations that were made, and did not reject the principle.

"171. The Tribunal has not overlooked the fact that there may be different ways of assessing the levels of inflation. As regards the payments made by Aminoil
under the 1973 Agreement, or any to be made under the Abu Dhabi Formula, these have, by reason of the method of calculating them, been automatically indexed on the petroleum products market in the Gulf States. In the compensation to be paid to Aminoil, it would be natural to take account of the progress of inflation generally, and in particular by reference to the price of refined petroleum products on the American market."

[...]

As was recently stated by the United States Court of Appeals for the Second Circuit in Banco Nacional de Cuba vs. Chase Manhattan Bank, (4 August, 1981), 'It may well be the consensus of nations that fall compensation need not be paid "in all circumstances" . . . and that requiring an expropriating state to pay "appropriate compensation" â€• even considering the lack of precise definition of that term, â€• would come closest to reflecting what international law requires. But the adoption of an "appropriate compensation" requirement would not exclude the possibility that in some cases full compensation would be appropriate'.

Referring Principles:

- IV.2.3 - No repudiation of contractual consent by state party
- IV.5.3 - Interpretation in favor of effectiveness of contract
- XI.1 - Compensation for expropriation