AD HOC ARBITRATION

THE AMERICAN INDEPENDENT OIL COMPANY V. THE GOVERNMENT OF THE STATE OF KUWAIT

FINAL AWARD

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24 March 1982

Tribunal:
Paul Reuter (President)
Gerald Gray Fitzmaurice (Co-Arbitrator)
Hamed Sultan (Co-Arbitrator)

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Final Award

SECTION I. Account of the Proceedings

i. A dispute having arisen between the Government of the State of Kuwait (hereinafter called "The Government") and the American Independent Oil Company (hereinafter called "Aminoil"), an Arbitration Agreement was signed in Kuwait by the two Parties on 23 June,1979.

ii. Its terms are as follows :
ARBITRATION AGREEMENT

The Government of the State of Kuwait (hereinafter ref erred to as "the Government") and American Independent Oil Company, a corporation organized under the laws of the State of Delaware in the United States of America (hereinafter referred to as "the Company") hereby agree as follows:

I

Whereas, on 28 June 1948 the Government and the Company entered into a Concession Agreement with respect to petroleum and related resources in what was then the Kuwait-Saudi Arabia Neutral Zone, and subsequently entered into other agreements amending and supplementing that Agreement ; and

Whereas, the Government by Decree Law no 124 of 19 September 1977 declared the Agreement of 28 June 1948 to be terminated and the property and assets of the Company to be nationalized, and

Whereas, differences and disagreements have arisen between the Government and the Company with respect to the aforesaid Concession Agreement as amended, and the actions of the Government and the Company in relation thereto, and with respect to various payments made or allegedly owed by the Parties to each other; and

Whereas, both the Government and the Company are desirous of resolving all differences and disagreements between them on the basis of law ;

The Parties hereby submit the said differences and disagreements to transnational arbitration as provided in the following articles.

II

1. The arbitral tribunal (hereinafter referred to as "the Tribunal") shall be composed of three members, one appointed by each Party as recited in paragraph 2 of this Article, and a third member who shall act as president, to be appointed by The President of the International Court of Justice.

2. The member of the Tribunal appointed by the Government shall be Professor Doctor Hamed Sultan. The member appointed by the Company shall be Sir Gerald G. Fitzmaurice, G.C.M.G., Q.C.

3. If at any time a vacancy shall occur on the Tribunal by reason of death, resignation, or incapacity for more than sixty days of any member, such vacancy shall be filled in the same manner as for the original appointment to that position. If the vacancy is not so filled within sixty days after its occurrence, either Party may request the President of the International Court of Justice to make the necessary appointment, and such appointment shall be final and binding on the Parties. Upon the filling of a vacancy, the proceedings shall be resumed at the point at which the vacancy occurred, after allowing any new member sufficient time to familiarise himself with the proceedings up to that time.

4. Upon its constitution, the Tribunal shall appoint a secretary who shall possess qualifications as a lawyer in the country of the place of arbitration, who shall assist the Tribunal in the administrative arrangements for the proceedings. The Tribunal may also employ such stenographic and other assistance as it deems necessary.

III

I. The Parties recognise that the restoration of the Parties to their respective positions prior to 2C 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 :

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 n° 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 *I of Decree* Law n° 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.

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.

IV

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.

The Tribunal shall hold a first meeting with the Parties as soon as practicable after being constituted, for the purpose of establishing the rules of procedure to govern the arbitration. This meeting, together with any other preliminary meetings held to determine procedural matters, shall not be counted for the purpose of calculating the time limit specified in subparagraph 3(viii) of this Article.

In determining the procedures for the arbitration, the Tribunal shall observe the following provisions :

i) The language of the proceedings shall be English. However, the Parties may put forward references to authorities, decisions, awards, opinions and texts (or quotations therefrom) in French without translation.

ii) The seat of the arbitration shall be Paris.

iii) The Tribunal may, if it deems appropriate, engage experts. The Parties may also call such expert testimony (written or oral) as they wish. Both Parties shall have the right to question any such experts.

iv) The Parties shall also have the right to present the oral testimony of witnesses. The Parties undertake to use their best efforts to present witnesses only to the extent necessary to establish their claims and to refrain from calling witnesses where the presentation of documentary evidence will be equally satisfactory. Both Parties hereby express their intention that the oral hearings shall not he unduly prolonged.

v) All decisions of the Tribunal shall be by majority vote. All awards, preliminary or final, shall be in writing and signed by each arbitrator and shall state the reasons upon which the award is based. In the event that one arbitrator refuses to sign the award, the two arbitrators forming the majority shall state in the award the circumstances in which the signature of the remaining arbitrator has been withheld.

vi) If either Party fails within the prescribed time to appear or to present its case at any stage of the proceedings, the Tribunal may of its own motion or at the request of the other Party proceed with the arbitration and make an award.

vii) The Tribunal shall keep records of all its proceedings and decisions, and a verbatim record of all oral hearings.

viii) The final award shall be given within 18 months from the date of the first oral hearing on the substantive issues following the exchange of the Parties' first written submissions on those issues. The Tribunal may extend this period in its discretion. However, such extension shall not exceed 6 months, except that such period shall be extended by the number of days by which the Tribunal may be unable to conduct its business due to unforeseen circumstances beyond the control of the Tribunal or the Parties, such as periods of delay due to the death, resignation or incapacity of any member of the Tribunal, or except with the consent of the Parties.

V

The final award of the Tribunal shall be binding on both Parties who hereby expressly waive all rights of recourse to any Court, except such rights as cannot be waived by the law of the place of

arbitration. Each Party undertakes to comply therewith promptly and in good faith and within 120 days from the date of the final award.

VI

Each Party will pay its own costs and expenses. The expenses of the Tribunal, including the honoraria of its members, the remuneration of the secretary and staff, and the expenses incurred by them, shall be borne by the Parties in equal shares.

VII

1. This Agreement shall enter into force upon its signature by duly authorised representatives of both Parties. It shall be executed in three originals: one for each Party, and one to be delivered to the President of the Tribunal for deposit in the records of the Tribunal.

2. On the entry into force of this Agreement each Party will. discontinue any other proceedings it may have instituted against the other.

Signed on behalf of the Government at Kuwait on the 23rd day of July, 1979, corresponding to the 29th day of Shaban, 1399.

For the Government of the State of Kuwait :

SHEIKH ALI AL KHALIFA AL SABAH MINISTER OF OIL

Signed on behalf of the Company at Kuwait on the 23rd day of July, 1979, corresponding to the 29th day of Shaban, 1399, pursuant to authority granted by a resolution of the Company's Board of Directors adopted on the 5th day of July, 1979.

For American Independent Oil Company :

GEORGE E.TRIMBLE PRESIDENT

iii. As provided by Article VII, paragraph 1, of the Arbitration Agreement, the latter entered into force on the day of its signature.

iv. In application of its Article II, paragraph 1 the two Parties, on 23 July,1979, addressed a request to the President of the International Court of Justice for the appointment of a President of the Tribunal. By a letter dated 1 November, 1979, the President of the Court informed the Parties of the appointment of Monsieur Paul Reuter, Professor of Law at the University of Paris.

v. On 19 December, 1979, the Tribunal held a first meeting with the Parties in Paris, in order to organize the proceedings. At this meeting each of the Parties submitted to the Tribunal a draft project for the Rules of Procedure. The Tribunal, however, decided to leave the adoption of the Rules until later, but fixed 2 June,1980 as the date for the simultaneous deposit of the Parties' written Memorials, it being understood that the Counter-Memorials were to be delivered 120 days after that date, and the Replies 60 days after the Counter-Memorials.

vi. During the same Paris meeting, the Tribunal appointed Monsieur Philippe Cahier, Professor of Law at the Graduate Institute of International Studies, Geneva, as Secretary to the Tribunal, and Monsieur Bernard Audit, Professor of Law at the University of Paris, as Deputy-Secretary.

vii. At a private meeting of the Tribunal held in Geneva in July 1980, Rules of Procedure were adopted on the 16th of that month pursuant to Article IV, paragraph 2, of the Arbitration Agreement, in order to supplement and complete the procedural provisions of that Article. These Rules are set out in the Annex to the present Section.

viii. The Parties deposited their Memorials with the Secretary on 2 June,1980.

ix. By a letter dated 21 August, 1980, the Government of Kuwait requested an extension of the time-limit for depositing the Counter-Memorials, and Aminoil having been consulted, the Tribunal, by an Order of 12 September,1980, fixed 5 January, 1981 as the date for the delivery by both Parties of their Counter-Memorials, which were duly deposited on that date.

x. Aminoil, having on 30 January, 1981 requested an extension of the time-limit for the deposit of the Replies, and the Government of Kuwait having made no objection, the Tribunal, by an Order of 25 February,1981, fixed 27 April, 1981 as the date for such deposit, and this date was duly adhered to by both Parties.

xi. On 26 June,1981 the Tribunal held a meeting with the Parties in Geneva in order to settle various points in connection with the forthcoming oral hearings. Following upon this meeting, the Tribunal, by an Order dated 30 June, 1981, fixed 16 November as the date for the opening of the hearings in Paris. It was also provided that a week of the hearings should be devoted to receiving the oral evidence of witnesses and experts. In head X of the Order it was stated that

xii. "The Tribunal takes note of the mutual intention of the Parties to direct their respective accountants to produce, if possible, a joint report on questions of quantum or, if this is not possible, to produce separate reports for the Tribunal before 1 November".

xiii. As regards the order in which the Parties were to plead, head IV(a) of the Tribunal's June 30 Order specified that
"The questions to be dealt with by the Parties in accordance with the preceding paragraphs, and the Party to speak first on each question, without prejudice to the burden of proof, shall be as follows :

1. The system of law governing the arbitration as a whole and the system of law applicable to the substantive issues in the case : the Government to start.

2. The agreements at any time existing between the Parties before 1973, and the meaning and effect of particular clauses in issue between them : the Government to start.

3. The validity and effect of the instruments of 1973, including the question of the Abu Dhabi formula : Aminoil to start.

4. The validity and effect of the Government's Decree Law n° 124 of 1977 : Aminoil to start.

4. The breaches alleged by Aminoil : Aminoil to start.

6. The breaches alleged by the Government : the Government to start.

7. In so far as not already dealt with under previous heads and in any case exclusive of all questions of pure quantum :

i) Aminoil's claims : Aminoil to start;

ii) the Government's claims : the Government to start."

It was added (head IV(b)) that

"The wording of the foregoing questions implies no taking of position by the Tribunal in regard to any of them."

xiv. On 30 October, 1981, the Chartered Accountant firms of Peat, Marwick, Mitchell and Co., London, and Peat Marwick, Mitchell and Co., New York, sent the Tribunal a Joint Report on questions of quantum. In the absence of agreement on certain points, the first of the above mentioned firms deposited a separate Report on behalf of the Government of Kuwait.

xv. Under head VIII of its Order of 30 June, 1981, the Tribunal had provided for a second stage of the oral hearings to be devoted exclusively to questions of quantum. However, this was eventually found by the Tribunal to be unnecessary, and did not take place.

xvi. Oral hearings took place in Paris at the Hotel Hilton, from 16 November to 17 December, 1981. The Tribunal heard, on behalf of the Government of Kuwait Dr. Abdul Rasul Abdul Reda, as Agent, Mr D. A. Redfern, Professor A. S. El Koshen and Mr. J. m. H. Hunter, as Counsel; and on behalf of Aminoil Mr William L. Owen, as Agent, Maître Jean-Flavien Lalive, Mr. R. Young, Mr. J. L. O'Donnell and Mr. W. M. Ballantyne, as Counsel.

xvii. In the course of the week of 7 to 15 December, 1981 there were heard as witnesses and experts -on behalf of the Government of Kuwait : His Excellency Mr. Abdul Rahman Al Attiqi, Miss Siham Razzouki, Professor Z. Mikdashi, Mr. A. J. Zak and Mr Y. Matsui, - and on behalf of Aminoil : Messrs. L. Ison, *J-* T. Mitchell, J. B. Watson, T. M. Domguian, G L. Gates and W. C. Dougherty,and Dr. C. R. Hocott.

xviii. The Tribunal wishes to express its great appreciation for the help it has received from the Parties throughout the proceedings in the form of written and oral statements and documentation that have been in conformity with the highest professional standards.

xix. The Conclusions of the Parties, as given in their respective written Replies were as follows :

For the Government of Kuwait (GR p. 195) :

"The Government's claims against Aminoil may be summarised as follows : -

(1) Royalties and taxes	
(a) balance due under the 1973 Agreement for the period 1st January to 19th September, 1977 (see paragraph 3.4 et seq).	$32,876,000
(b) amount due for the period 1st November, 1974 to 19th September, 1977 in accordance with the principles established by the Abu Dhabi Formula (see paragraph 3,107 et seq).	$92,007,000 (or such amount as the Tribunal determines to be equitable)
(2) Aminoil's liabilities to third parties (see paragraph 3,153 et seq).	$18,588,867
(3) Aminoil's operations and installations	
(a) damages in relation to "lost oil" estimated at 190 million barrels -the Government's half share in the joint operations. (See para graph 5.21 of the Government's Counter-Memorial)	$5,780,750,000 (based on a figure of $30,425 per barrel and subject to adjustment).
(b) the Government's share of expenditure required at the oil fields at Wafra : -	
(i) repairing Active wells	$8,285,950
(ii) properly plugging and abandoning suspended wells	$3,346,350
(iii) other items referred to in REMI's reports (e.g. repairs to pipelines)	An amount to be determined by the Tribunal
(c) expenditure required to bring the refinery at Mina Abdullah up to a proper standard. The quantum of this claim depends upon the Tribunal's of the basis of compensation for the refinery (see paragraph 4,204)	$65,000,000 (based on assessment made by JGC of major items, and subject to adjustment)
(4) Interest	An amount to be determined by the Tribunal."

For Aminoil (AR p. 548) :

" Aminoil respectfully submits that the Tribunal should include in its Award :

(A) An award to Aminoil of the total of the following amounts :

(1) Lost profits in the amount of $2,587,136,000 ;

(2) If, for any reason, lost profits throughout the entire Concession period are not awarded, the value of physical facilities in the amount of $185,300,000 or such lesser amount as is appropriate by

reference to Table 12 of Annex XIII to Aminoil's Memorial ;

(3) Aminoil's other assets and liabilities in an amount as may be agreed by the Parties' respective auditors or, in the absence of agreement, the amount of $30,356,000 ;

(4) Overpayments made by Aminoil to the Government in the amount of 2423,072,000 ;

and

(5) Interest on the above amounts, from 19 September 1977 or 19 March 1980, as appropriate,

(B) The rejection of all the Government's claims made against Aminoil, except that an amount be credited to the Government for appropriate liabilities of Aminoil paid or assumed by the Government."

SECTION II. Statement of the Facts

xx. Aminoil is an American Company incorporated in 1947 in the State of Delaware with the object of exploring for, producing, refining and selling petroleum, natural gas and other hydrocarbons. At that time it was controlled by a group of other American oil Companies.

xxi. After having, on 26 June,1948, obtained the agrément of the Government of the United Kingdom, which was then in special relations with the State of Kuwait, Aminoil was, on 28 June, granted a Concession by its Ruler for the exploration and exploitation of petroleum and natural gas in what was then called the Kuwait "Neutral Zone". The location of the frontier between Kuwait and Saudi Arabia in this region was uncertain, and the British authorities, acting in agreement with those two countries, had in 1922 established this neutral zone to which both had access.

xxii. On 7 July, 1965, Kuwait and Saudi Arabia concluded a Treaty by which they shared this zone, henceforth to be known as the "Divided Zone". Aminoil's Concession was situated in the Kuwait part of the Divided Zone, while Saudi Arabia had granted a Concession in its part of the Zone to the Getty Oil Company. The two Companies, in their mutual interest, concluded an agreement on 26 June, 1956, approved by the Governments of these two States, and established a common and coordinated programme of exploitation in the Zone, with a common Authority (a Joint Operations Committee) to supervise their respective field operations.

xxiii. In 1961 the special relationship between Kuwait and the United Kingdom came to an end, and on 11 November, 1962 the Constitution of Kuwait was promulgated.

xxiv. The principal clauses of Aminoil's 1948 Concession relevant to the present dispute were as follows : By Article 1 it was provided that

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

Article 2(C) provided that

"The Company shall conduct its operations in a workmanlike manner and by appropriate scientific methods and shall take all reasonable measures to prevent the ingress of water to any petroleum-bearing strata and shall duly close any unproductive holes drilled by it and subsequently abandoned. The Company shall keep the Shaikh and His Foreign Representative informed generally as to the progress and result of its drilling operations but such information shall be treated as confidential".

Article 3 provided for the immediate payment to the Ruler of a sum of 625,000 dollars, followed after thirty days by a sum of 7.25 million dollars, and subsequently by an annual royalty of 2,50 dollars for every ton of Aminoil's petroleum won and saved (as defined by the Concession Agreement) subject to a minimum annual royalty of 625,000 dollars. There were also other payments clauses that need not be detailed here.

Article 3(h) - the "Gold Clause" - provided that

"Any obligation hereunder to pay a specified sum in United States Dollars shall be discharged by the payment of a sum in United States Dollars equal to the official United States Government purchase price in force at the date of payment for such quantity of gold, of the standard and fineness prevailing at the date of the signature hereof, as such specified sum would have been sufficient to purchase at the date of signature of this Agreement at the official United States Government price then in force. The principle underlying this paragraph is that the present value of the United States Dollar shall be maintained throughout the term of this Agreement".

By Article 11 it was provided that the Ruler would have the right to put an end to the Concession before the expiry of the covenanted term of 60 years in any of three specified cases, viz. (a) failure by the Company to perform its obligations under Article 2 (vide supra)"in respect of geological or geophysical exploration or drilling"; (b) failure by the Company to make any of the payments due under Article 3; and (c)"if the Company shall be in default under the arbitration provisions of Article 18" (vide infra).

By Article 13 it was provided that, at the end of the Concession,

"... all the movable and immovable property of the Company in the State of Kuwait and said Neutral Zone shall be handed over to the Shaikh free of cost. Producing wells or borings at the time of such expiry shall be handed over in reasonably good order and repair".

Article 17 provided that

"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 18 contained provisions for the reference to arbitration of "any difference or dispute... between the Parties... concerning the interpretation or execution hereof, or anything herein contained or in connection herewith, or the rights or liabilities of either Party hereunder".

xxv. Two other oil Companies were operating in Kuwait at about this time. Much the most important one, the Kuwait Oil Company (KOC), was jointly owned by the British Petroleum Company (BP) and the Gulf Oil Corporation (Gulf), and had had a Concession since 1934. The other, Arabian Oil Company (AOC), was Japanese owned, and in 1958 obtained a Concession relating to the Continental Shelf of the Divided Zone, outside a six-mile territorial sea belt and exclusive of certain islands.

xxvi. From information given by the Government of Kuwait (GM p. 31), it appears that Aminoil's share of the State's total crude oil production was always proportionally slight, amounting for instance, even as late as 1972, to only some 2.5% of total Kuwait output. Its undertaking was, from the start, carried on under special difficulties of extraction and refining, due inter alia to the nature of the ground and the chemical composition of the oil taken from it. It was what is called a "high cost, low yield" enterprise - see paragraph (xxxv) below.

xxvii. Aminoil's commercial production and exportation of petroleum products began in 1954, and in 1958 its refinery was opened at Mina Abdullah.

xxviii. As mentioned earlier, an Agreement dated 19 June, 1961 between the Ruler of Kuwait and the Government of the United Kingdom put an end to the special relationship between the two countries and Kuwait became fully independent.

xxix. Already during the preceding months, the Government of Kuwait and Aminoil had entered into negotiations for the revision of the 1948 Concession, which led to the signature on 29 July, 1961 of a Supplemental Agreement.

xxx. By Article 11, this Supplemental Agreement, was to be "construed as an amendment and supplement to the Principal Agreement" [the 1948 Concession], and "all the provisions of the Principal Agreement shall continue in full force and effect except in so far as they are inconsistent with or modified by this [Supplemental] Agreement".

xxxi. One of the main objects of the Supplemental Agreement was to modify the financial clauses of the 1948 Concession, resulting in increased payments to the Ruler. In addition, it subjected the Company to Kuwait Income Tax law, the details being embodied in a separate "Submission to Tax Agreement", also dated 29 July 1961. By this, Aminoil was made liable to a levy of 50% as from 1955, and of 57% as from 1961. To this was added by Article 3 of the Supplemental Agreement, a "make-up" payment equal to the excess, if any, of "the greater of... 50% of the Oil Profit or... 57% of the Oil Income" over "the aggregate of" the royalty and income-tax payments due under the Agreement.

xxxii. Under Article 4, the Company had the obligation both to "establish and announce", or procure the establishment and announcing, of "its posted prices".

Article 6 (2) provided that

"No moneys paid by the Company to the Ruler under this Agreement shall, except in the case of an error in accounting, be returnable in any circumstance whatever".

xxxiii. By Article 7 (g) a new Article 11 was substituted for the existing Article 11 of the 1948 Concession -

see supra - which was deleted. The new Article 11 (paragraph (A)) gave the Ruler the right to terminate the Concession in the event of a default by the Company in its payments, and then continued as follows :

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

(C) In any of the above mentioned cases the Ruler shall be entitled to terminate this Agreement without prejudice to any antecedent rights hereunder and the Company shall at that time transfer to the Ruler all its movable and immovable property within the State of Kuwait and the Concession Area to the extent that such property is directly employed in operations hereunder together with all such rights as it may have to the use of property so employed so far as such rights are transferable to whomsoever belonging, which are at that time enjoyed by it provided that the Ruler assumes from the date of transfer all the obligations devolving upon the Company in respect of its enjoyment of the said rights".

xxxiv. Finally a provision was incorporated as Article 9, reading as follows :

"If, as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the parties".

xxxv. A third understanding was reached, equally dated 29 July, 1961, in the shape of a "Confidential Letter", containing details and arrangements for taking account of the special conditions of Aminoil's undertaking. These were indeed technically complex. The crude oil was not of good quality; it was a low gravity oil, with high sulphur-hydrogen-sulphide, water and salt content, requiring expensive processing and refining, before marketing.
The great number of wells, requiring extensive gathering facilities, was also one of the factors of high cost. The marketing of such a crude oil and its product was difficult.

xxxvi. With reference to Article 9 (supra) of the Supplemental Agreement, it was provided by paragraph 9 of the Confidential Letter, as being understood, that "the word 'benefits' includes arrangements not involving payments".

o o o

xxxvii. On 11 November, 1962, as mentioned earlier, a Constitution was promulgated by the Ruler of Kuwait. Its Article 18 provided :

"Private ownership is safeguarded. No person shall be prevented from disposing of his property

save within the limits of the Law; and no person shall suffer expropriation save for the public benefit in the cases determined and in the manner prescribed by Law provided that he be equitably compensated therefor."

By Article 21 of the Constitution : "All of the natural wealth and resources are the property of the State."

Finally by Article 152 :

"Any concession for the exploitation of a natural resource or of a public utility shall be granted only by Law and for a determinate period."

xxxviii. Owing to the conditions of the petroleum market, the end of the 1960s was a difficult period for Aminoil which suffered financial losses and saw its production go down. In 1970 its shares were wholly bought by R. J. Reynolds Industries Inc..

xxxix. In the course of the sixties, negotiations had taken place between the Government and Aminoil concerning the financial aspects of the undertaking, particularly with respect to the expensing of royalties, i.e. the charging of royalty payments as a cost against the Company's income rather than as a credit against income tax obligations (resulting in greater tax obligations for the Company). A draft agreement was prepared in 1968 but was never signed.

xl. In February 1971, an agreement known as the Teheran Agreement was concluded between some of the Gulf States and a number of the major oil Companies. Its object was to apply various resolutions of OPEC, and in respect of the period 1971 to 1975 it provided for an increase in posted prices and an increase in the level of tax payments to 55%, the Companies receiving in exchange certain guarantees as to stabilization, particularly in the matter of governmental participation in their undertakings.

xli. However, in view of the weakness of the dollar, a new agreement was concluded in January 1972 (the Geneva I Agreement). It provided for an increase of 8.49% in posted prices and made further adjustments in oil revenues based on an index for measuring changes between the exchange rate of the dollar and nine specified currencies. Another agreement of June 1973 (the Geneva II Agreement) added two more currencies to these nine.

xlii. These Agreements led to new negotiations between the Government and Aminoil, the Government aiming at the application of the (Teheran and Geneva) Agreements, while Aminoil placed the emphasis on the special conditions of its undertaking. In a Memorandum of 24 May, 1971, the Company adumbrated a transformation in its Concession, declaring that ;
"Aminoil believes... its basic relationship with the Government should change and that under the new relationship Aminoil should become a contractor, with the Government becoming the owner of all the Kuwait assets of the Company". - (GCM App. VI.3)

xliii. This idea was not accepted by the Government, and the negotiations continued, ending in 1973 in a projected revision of the concessionary Agreements of 1948 and 1961. This projected revision was

embodied in a Draft Agreement dated 16 July, 1973. The Draft Agreement proposed to bring about numerous changes in the relationship between the Parties.

xliv. As to the financial terms, the principal changes contemplated by the Agreement were :

(1) an increase in the tax rate applicable to the Company's net income, from 57% to 80%, and

(2) an increase in the rate of computation or "make-up" payments, from 57% to 80%, both as of January 1, 1973 ;

(3) the expensing of royalties ;

(4) acceleration of payment of income tax and "make-up" payments (thereby reducing the 'lag' between operations and tax payments from about twelve months to about two and a half months) ;

(5) application to the Company of the Teheran Agreement, as supplemented by the two Geneva Agreements (Article 2(1)).

xlv. In a First Annex, various other amendments to the 1961 Agreement were introduced :

(a) the following paragraph was substituted for Article 2(C) of the Principal Agreement :

"(C) The Company shall at all times conduct its operations in the Concession Area in a proper and workmanlike manner and by appropriate scientific methods in accordance with good oilfield practice and shall take all reasonable measures to prevent fire and to prevent the ingress of water into petroleum-bearing strata and to prevent the pollution of the sea and shall close all unproductive holes drilled by it and subsequently abandoned. The Company shall keep the Appropriate Authority fully informed as to the progress and the results of its operations but such information shall be treated as confidential by the Appropriate Authority save insofar as it is required for the purpose of settling a dispute between the parties hereto."

(b) The above mentioned gold clause (Article 3(h) of 1948 - see paragraph (xxiv) supra) was deleted (Article 7, First Annex, First Part).

(c) The Government undertook to enact a new tax law in Kuwait, which the Company had requested in order to be able to claim double taxation immunity in the United States.

(d) The Draft Agreement also provided 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." (First Annex, Second Part, V)

(e) A choice-of-law clause was introduced

(First Annex, Second Part, XIII) and a new arbitration clause was inserted (First Annex, Second Part, XIV).

xlvi. The coming into effect of the Draft Agreement was made subject to its ratification in accordance with the laws of Kuwait (Article 4), that is by the Parliament.

xlvii. Before the Draft Agreement was ratified, the "October War" broke out in the Middle East (1973). A consequence of it was the decision of OPEC members on October 16 to take into their hands the fixing of posted prices, hitherto decided by the Companies - see Article 4 of the 1961 Agreement, supra. Thus Aminoil, like other Companies, was instructed that posted prices would be raised a first time, as of October 16 and, a second time, as of November 1, 1973, and that further "adjustments" would be notified periodically as required by the Government. It was stated that Companies which would not agree should stop production. Aminoil, like other Companies, complied with these new conditions.

xlviii. At the same time, the Government began to press the Company for immediate payments under the Draft Agreement of July 1973, that is to say without awaiting its formal execution and ratification by the Kuwait authorities. This, together with modifications to the Draft Agreement, was discussed at meetings between the Parties held in Kuwait between December 10 and 17, 1973 (AR Vol. V, Exh. 9). The Company eventually agreed to comply with the Government's request. Its acceptance was formalized in a crucial letter dated December 22, 1973 addressed by Mr. Ison, Vice President and General Manager for Kuwait Operations of Aminoil, to His Excellency Abdul Rahman Salem el Attiqi, Minister of Finance and Oil of Kuwait, who signed it as being agreed on December 22, 1973.

xlix. In the first paragraph, the representative of the Company formally "accepted" the 1973 Agreement"as drafted in July of this year", together with language changes agreed during the December meetings. In addition, the two paragraphs before the last read :
"The Company will make payment of obligations arising under the 1973 agreement and the Kuwait (Specified Territory) Income Tax Decree n° 23 of 1961 with the amendments in the proposed 1974 Income Tax law in the same manner as if the 1973 agreement was effective on the date the Minister of Finance and Oil signs this letter and the proposed 1974 Income Tax law had come into force on that date and will treat all of the terms and provisions of such agreement as being effective on that date.

It is our understanding that the 1973 Agreement will be signed as soon as the final documents can be prepared, and that you will then take appropriate steps to obtain due ratification thereof." (AM Vol. VIII, Exh. 29)

l. After the signing of this letter, the Company made a payment of approximately $13 million in respect of the retroactive effect of the financial arrangements, and it thereafter effected payments under the new terms contemplated in the July 1973 Agreement. But the proposed 1974 Income Tax Law was never passed, or even presented as a bill to the Parliament. Indeed, the 1973 Agreement was modified three times in the year 1974 at the request of the Government and in a manner that increased significantly the payments due by the Company to the Government. In February of 1974, a "final draft of the 1973 Agreement" was prepared, incorporating further changes, mainly for the application to the Company of future changes in the Teheran and Geneva Agreements, both retroactively and for the future (new Article 2(1), see AM Vol. VIII, Exh- 34). On July 16, the Government notified the Company of an increase in the royalty rate from 12 1/2% to 14 1/2% as of 1 July, 1974, (AM Vol. VIII, Exh. 35). On October 7 the Government notified the Company of an increase

in the royalty rate to 16.67% as of 1 October, 1974, and an increase of the percentage of the oil profit payable to the Government to 65.75% (AM Vol. VIII, Exh. 36). All this was done by way of unilateral decision by the Government. In fact, the Government was implementing decisions taken by OPEC members (respectively on June 18 and September 13). But it may be recalled here that the official, or "posted", price of oil was quadrupled during the year 1974, so that although the Company complied with the now more onerous terms imposed by the Government, its profits rose from $3,990 million in 1973 to $24,670 million in 1974 and later $30,637 million in 1975, and to $40,649 million in 1976.

li. In 1974, the Government acquired a 60% share in KOC and, in conjunction with the Saudi Arabian Government, a 60% interest in the AOC Concession (GM p. 9 et seq.). The following year, the entire KOC Concession was taken over by the Government ; agreement was reached as to compensation for its foreign shareholders and a long-term supply agreement was concluded. This left Aminoil as the sole totally private operator in Kuwait.

lii. In the same period Conservation Regulations were adopted in Kuwait, pursuant to Law n° 19 of 1973 on the Conservation of Petroleum Resources (GM App. IV.1), and came officially into force in 1976, after a trial period of six months.

liii. In the fall of 1974, OPEC countries had begun discussing new financial terms to be imposed on the Companies in the form of taxation. In November, three Gulf States, members of OPEC, put up royalty levels to 20%, and tax levels to 85%, on posted prices; and in December 1974 a resolution was formally adopted in Vienna by the other Gulf States, Kuwait amongst them, embodying the same terms which are generally referred to as the "Abu Dhabi Formula". These terms were enforced against major concessionaires. As between the Government and Aminoil, the question of the application of the "Abu Dhabi Formula" was informally raised in the course of 1975, but no formal request to that effect was made by the Government until October 2 of that year. After informing the Company of a new increase in posted prices, the Government stated :
"We also reconfirm our verbal advice given to you some time ago that effective 1st November 1974, royalty rate is twenty per cent of posted prices and applicable rate for oil income ---- is eighty-five percent generally applied since then in Gulf area" (AM Vol. VIII, Exh. 39).

In acknowledging this the Company denied having received advice from the Government "either verbal or written" of the new terms, and indicated that application of such terms would put it at a loss on every barrel produced. The Company then requested a formal discussion of the matter (AM Vol. VIII, Exh. 40).

liv. There followed a round of negotiations initiated by a letter from the Government to the Company dated January 25, 1976 (AM Vol. VIII, Exh. 41). The avowed purpose of the Government was (i) to devise financial terms as close as possible to those of Abu Dhabi and (ii) to have those terms applied retroactively in order to recoup what it termed "windfall profits", i.e. profits which were attributable to the "explosion" of oil prices rather than to the concessionaire's efforts.

lv. Negotiations took place from February 23 through April of 1976, formal discussions being held, inter alia, on February 23 (Government's minutes of meeting in GM App. VII. 2) and 24, March 19 and 29, and April 4 and 5. In the course of these negotiations - more precisely on March 19 -the Company made a written proposal (GM App. VII.1; AR Vol, V. Exh. 12) to the effect that it would accent in

principle the Abu Dhabi Formula (subject to particular reference prices) and its application as from October 1, 1975 (the day preceding the Government's formal request). The reference price was to be adjusted so that the Company would have the opportunity of realizing a "reasonable level of earnings" on its Kuwait operations. The Company valued at about $18 million the profit necessary to maintain the required level of capital expenditures (the Government's take being valued at $202.5 million). Oil income rate would in that case be increased from 85%to 90%.

lvi. No agreement was reached on this proposal and there followed a long gap in the negotiations. During that time, the Parties were operating under the terms agreed to in December 1973, as amended in 1974.

lvii. On March 27, 1977, a Committee was appointed by the Government to complete all negotiations of pending matters with the Company within a period of fourty-five days. The discussions which followed may be divided into two phases.

lviii. In the first phase the Company, on 15 April, 1977, submitted a written proposal, essentially updating that of March 19 of the previous year, whereby its profits would amount to $18 to $20 million a year, corresponding to 70 ¢ a barrel (GM App. VII.1). The proposal was discussed formally, first at a meeting held on April 19 (Government's minutes GM App. VII.2; Company's memorandum AR Vol. V, Exh. 18). The Government's position as expressed during the meeting, was that a net return of $4,5 to $6 million would be fair enough to the Company, considering its investment, and that such profit would be achieved by applying a rate of income tax of 97 1/2%. During the following days, meetings took place between the Company and the Government's Technical Affairs Department (T.A.D.), on April 21 (Company's memorandum AR Vol. V, Exh. 19) and 23 (Company's memorandum AR Vol. V, Exh. 20), when the question of capital expenditure was discussed.

lix. During a second official meeting between the Committee and the Company's representatives, held on April 24 (Government's minutes, GM App. VII.2; Company's memorandum, AR Vol. V, Exh. 22), the Company handed out a new written proposal revising that of April 15 (AR Vol. V, Exh. 21 ; GM App. VII.1). Under the new suggested terms, the Company would make retroactive payments as from November 1, 1974, of over $37 million, and oil income rate would be gradually raised from 85% in 1974 to 95$ from 1978. The proposal was immediately discussed, but the Government's representative (although not as an official response) indicated that the Company's proposal was still not acceptable.

lx. On May 7, the Parties met again (Government's minutes, GM App. VII.2; Company's memorandum AR Vol..V, Exh. 23). The Company had no new proposal to make and the Government offered orally that the Company be allowed a profit in the order of $7.5 million a year, insisting that this was not actually a new proposal but an ultimate effort on its part in order to reach an agreement. This figure (corresponding, although this was not officially stated, to. some 25 ¢ profit per barrel) would be applicable as from January 1, 1975 and therefore would entail a retroactive payment by the Company to the Government of about $56 million. Discussions followed on the same day and at a meeting held on May 8 (Government's minutes, GM App. VII.2; Company's memorandum, AR Vol. V, Exh. 24). A group of experts also met on May 9 to work on the figures involved in the various proposals and on other technical matters (AR Vol. V, Exh. 25). At the next formal meeting, held on May 10, both Parties expressed the view that their respective positions were irreconcilable. The Company's representative accounted for the gap between the return per barrel requested by

Aminoil and that achieved by other Companies, by the fact that the latter were not putting up any capital or engaging in refining and marketing; therefore their return could be regarded as a mere management fee. However, this explanation was not followed up by any suggestion as to how the difference should be taken into account. The meeting was adjourned without any date being fixed for the next one (Government's minutes, GM App. VII.2; AR Vol.V, Exh. 26).

lxi. The time set by the Government to reach an agreement expired, and on May 21, the Government set a new deadline of one month for coming, to a conclusion, under threat of a shut-down of the Company's operations in Kuwait. This opened a new round of negotiations.

lxii. In this second phase, after informal discussions had taken place in late May between Mr. Ison and several high officials of the Government, the Company presented a totally new proposal in a letter dated June 22, 1977 (GM App. VII.1). The existing Concession would be terminated and replaced by a renewable ten-year service contract. The Government would take over the Company's assets free of charge, and all financial claims pending would be abandoned. The Company would manage the technical and administrative operations for a service fee based on oil income.

lxiii. On June 26, the Council of Ministers of Kuwait endorsed the principle of a take-over and invited the Committee to resume negotiations for this purpose.

lxiv. A formal meeting on June 27 (Government's minutes,GM App. VII.2; Company's memorandum, AR Vol. V, Exh. 30) and a meeting of experts on June 28 (Company's memorandum, AR Vol. V, Exh. 31) were devoted to the clarification of the Company's proposal; and at a second formal meeting on June 29, the Government indicated its position (Government's minutes, GM App. VII.2; Company's memorandum, AR Vol. V, Exh. 32). Concerning the take-over, the Government insisted that compensation should be calculated on the basis of net book value and that all past financial claims be negotiated between the Parties. Concerning the future, the Government favoured a simple marketing contract (or, alternatively, the sale of oil by the Government to the Company at a discounted price), for a period of three to five years. In the negotiations that followed, the main discussions turned around the valuation of the Company's assets in Kuwait and the sum which the Company would be prepared to pay in addition, in satisfaction of the Government's retroactive claims (meeting of July 26, Government's minutes, GM App. VII. 2; Company's memorandum, AR Vol. V, Exh. 33). By a letter of August 6, 1977 the Company informed the Government that, based on a valuation of its Kuwait assets, net of liabilities, of $44.6 million, it was prepared to make a $5 million cash payment (AR Vol. V, Exh. 34; GCM App. VI. 2). No answer was received.

lxv. On September 19, 1977, the Government of Kuwait issued Decree Law n° 124, "Terminating the Agreement between the Kuwait Government and Aminoil". Its main provisions were as follows (English translation of the Arabic, taken from the Middle East Eco- nomic Survey) :

" Article 1

The Concession granted to the American Independent Oil Company in accordance with the afore-mentioned Agreement dated 28 June 1948 shall be terminated.

Article 2

All the interests, funds, assets, facilities and operations of the Company, including the refinery and other installations relating to the afore-mentioned Concession, shall revert to the State.

Article 3

A committee named the Compensation Committee shall be set up by a decision of the Minister of Oil whose task it will be to assess the fair compensation due to the Company as well as the Company's outstanding obligations to the State or other parties. It shall decide what each party owes the other in accordance with this assessment.

The State or the Company shall pay what the Committee decides within one month of being notified of the Committee's decision.

Article 4

A committee shall be set up by a decision of the Minister of Oil to make an inventory of the assets, funds and facilities which have reverted to the State in accordance with this Law. This inventory shall be turned over to the Executive Committee." (AM Vol. VII, Exh. 3; GM App. II.8).

lxvi. In an Explanatory Memorandum accompanying this Decree Law, it was stated that it had been rendered necessary in the national interest by Aminoil's failure to agree to the Government's terms ; and at a press conference on the following day this explanation was repeated with the addition that there had "from the beginning... been a specific plan for the State to take over full ownership of its oil resources and put them under national management." (AM Vol. VII, Exh. 3).

lxvii. The take-over was formally protested by the Company in a letter dated October 20 (AM Vol. VII, Exh. 4). Meanwhile, the Government undertook the operation of the Company's concession, and the operations were later entrusted to KOC and a newly created Kuwait National Oil Company (KNOC) (GM App. II. 10).

lxviii. On December 20, the Company notified the Ministry of Oil of its intention to initiate proceedings for arbitration, pursuant to Article 18 of the Concession Agreement of 1948.

lxix. The Compensation Committee set up by Decree Law n° 124 was established, and it invited a high Company representative to represent the Company's point of view at one of their meetings (letter of January 7, 197 8, GM App. V.1). The Company declined in view of the arbitration proceedings initiated (letter of January 8, 1978; ibid.).

lxx. Under Article 18 of the 1948 Agreement, the place of arbitration was to be London, unless otherwise agreed. At the request of the Government, the Parties eventually agreed to hold an ad hoc arbitration in Paris. Thus the Arbitration Agreement of July 12, 1979 was concluded and the London arbitration initiated by the Company discontinued. Thenceforward the arbitral proceedings progressed as described in the immediately preceding Section I of this Award.

SECTION III. The Applicable Law

1. The Parties have approached the question of "the applicable law" by distinguishing the procedural law of the arbitration - or law governing the arbitration as a whole - and the law governing the substantive issues in the case.

2. On these topics they have furnished rival analyses and concepts which, on the scientific and academic levels, possess very great interest; but the Tribunal, in carrying out the function entrusted to it, has not experienced any difficulty as to the determination of the applicable law. The essential reason for this is twofold : the Parties themselves, by their mutual arbitral commitments, have defined with adequate clarity what the applicable law is ; and the legal systems that either do, or may, call for consideration in this connection have characteristics such that, for this case, the solution of the problem becomes easy.

3. With regard to the law governing the arbitral procedure in the broadest sense, it is not open to doubt that the Parties have chosen the French legal system for everything that is implied in the statement in Article IV,1 of the Arbitration Agreement to the effect that the proceedings are subject to "any mandatory provisions of the procedural law of the place where the arbitration is held" (namely Paris) ; and both Parties "expressly waive all rights of recourse to any Court, except such rights as cannot be waived by the law of the place of arbitration (Article V).

4. But this does not in the least entail of itself a general submission to the law of the tribunal's seat which was designated as Paris. In actual fact the Parties themselves, in the Arbitration Agreement, provided the means of settling the essential procedural rules, when they conferred on the Tribunal the power to "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" (Article IV,1), which was done by the Rules adopted on 16 July, 1980.

5. Having regard to the way in which the Tribunal has been constituted, its international or rather, transnational character is apparent. It must also be stressed that French law has always been very liberal concerning the procedural law of arbitral tribunals, and has left this to the free choice of the Parties who, often, have not had recourse to any one given national system. French law has thus befriended arbitrations the transnational character of which has been well in evidence. This tendency has been enhanced for the future by recent French legislation (Decree n° 81-500 of 12 May, 1981) which, even more specifically than before, affords recognition to transnational arbitration.

6. Respecting the law applicable to the substantive issues in the dispute, which is what is really at stake between the Parties regarding the applicable law, the question is equally simple in the present case. It can hardly be contested but that the law of Kuwait applies to many matters over which it is the law most directly involved. But this conclusion, based on good sense as well as law, does not carry any all-embracing consequences with it, - and this for two reasons. The first is that Kuwait law is a highly evolved system as to which the Government has been at pains to stress that "established public international law is necessarily a part of the law of Kuwait" (GCM paragraph 3.97(5)). In their turn the general principles of law are part of public international law - (Article 38.1(c) of the Statute of the International Court of Justice), - and that this specifically applies to Kuwait oil concessions,

duly results from the clauses included in these. For instance, in the 1973 Agreement between the Parties, First Annex, Second Part, XII (GM App. I.9) the following provision is to be found (punctuation of second sentence added) :

"The parties base their relations with regard to the agreements between them on the principle of goodwill and good faith. Taking account of the different nationalities of the parties, the agreements between them shall be given effect, and must be interpreted and applied, in conformity with principles common to the laws of Kuwait and of the State of New York, United States of America, and in the absence of such common principles, then in conformity with the principles of law normally recognized by civilized states in general, including those which have been applied by international tribunals".

Although the Parties did not, in the course of the present arbitral proceedings, make any reference to this particular text, it is of all the more interest to note that the ideas it embodies are no isolated features of Kuwait practice.

7. Equally, the Offshore Concession Agreement of the Arabian Oil Company (AOC) (AR Vol.VI, Exh. 39) contains the same provision, except that reference is made to the principles common to Kuwait and to Japanese law (Article 39). The Oil Concession Agreement with the Kuwait National Petroleum Company and Hispanica de Petroleos, concluded in 1967 (AR loc. cit.), refers to the principles common to Kuwait and to Spanish law. Yet it would be quite unrealistic to suppose that these three Concessions were governed by three different regimes. Clearly, it must have been the general principles of law that were chiefly present to the minds of the Government of Kuwait and its associates.

8. But there is a second consideration which has greatly eased the task of the Tribunal, namely that the Parties have themselves, in effect, indicated in the Arbitration Agreement what the applicable law is. Article III, 2 of the Agreement provides that

"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."

Although it may in theory be possible for a litigation to be governed by an assemblage of rules different from that which, before the Arbitration, governed the situations and matters that are the object of the litigation, there must be a presumption that this is not the case. Thus, to the extent that Article III,2 of the Arbitration Agreement calls for interpretation, such an interpretation ought to be based on that provision which not only was freely chosen by the Parties in 1973 (see paragraph 6 supra), but also reflects the spirit which has underlain the carrying on of the oil concessions in Kuwait.

9. Article III,2, with good reason, makes it clear that Kuwait is a sovereign State entrusted with the interests of a national community, the law of which constitutes an essential part of intra-community relations within the State. At the same time, by referring to the transnational character of relations with the concessionaire, and to the general principles of law, this Article brings out the wealth and fertility of the set of legal rules that the Tribunal is called upon to apply.

10. The different sources of the law thus to be applied are not - at least in the present case - in contradiction with one another. Indeed, if, as recalled above, international law constitutes an integral part of the law of Kuwait, the general principles of law correspondingly recognize the rights of the State in its capacity of supreme protector of the general interest. If the different legal elements involved do not always and everywhere blend as successfully as in the present case, it is nevertheless on taking advantage of their resources, and encouraging their trend towards unification, that the future of a truly international economic order in the investment field will depend.

SECTION IV. The Contractual Obligations of the Parties

11. Seen as a whole, the present litigation is essentially concerned with the contractual obligations of the Parties and must be determined in the light of those obligations. The Tribunal will not, however, in this Section of the Award, go into all of them, and will reserve two groups for another Section - one relatively subsidiary but the other of primary importance.

12. To the first of these groups belong (a) certain obligations technically distinct from the others, and requiring separate study, namely those relating to what is known as "good oil-field practice"; and (b) the question of Aminoil's obligation to refund certain amounts paid out by the Government in discharge of the unpaid liabilities of the Company towards third parties, still subsisting at the date of the take-over. Both these matters are dealt with in Section VI below.

13. To the second group belong the obligations entering on what are known as the "stabilisation clauses" of the Concession. These are so intimately connected with the question of the validity and effect of Kuwait Decree Law n° 124, imposing the take-over, that they are best considered in that context in Section V below.

14. In consequence, the subject-matter of the present Section, in historical order of occurrence in the relationship of the Parties, will be :
(A) - The meaning of Article 9 of the Supplemental (Concession) Agreement of 1961, which has been the vehicle of numerous modifications made to the Concession.

(B) - The legal signification of certain other agreements - in particular the one known as the"1973 Agreement".

(C) - The application of the "Abu Dhabi Formula" - (see Section II, paragraphs (liii) and (liv) above) - and the negotiations of 1976-77 in that connection.

(A) Interpretation of Article 9 of the Supplemental Agreement of 1961.

15. The meaning of this Article depends basically on its text which reads as follows :

"If, as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the Parties".

This text, it should be noted, received a kind of application even before it was drafted, for it was a generalization of the 50/50 sharing of profits formula which led both to a revision of the financial terms of the Concession in 1961, and at the same time -by means of Article 9 - to giving expression to the principles on which that revision was itself founded.

16. A corresponding clause, incorrectly called in professional circles the "most-favoured-Nation" clause, was inserted into most of the Gulf concessionary contracts; but although the principle thus proclaimed has been applied elsewhere, even in the absence of express clauses, the Tribunal will, for the purposes of this analysis, proceed upon the basis of the wording employed in Article 9 of the Supplemental Agreement of 1961.

17. Three constituents can be drawn from the text of this Article (see paragraph 15 above) :
(i) it institutes a procedure for consultation,

(ii) when certain conditions are fulfilled,

and

(iii) with a view to reaching an agreement presenting certain features.

18. As to (i) - "consultation" - the text differs from what became the practice. It lay with the Government - which alone ranked for the purpose of receiving the benefits of the modifications requested -and not with Aminoil, to take the initiative ; and it was more a matter of "negotiation" than of "consultation", as is shown by the long and difficult dealings that took place on frequent occasions from 1964 to the end of the Concession.

19. As to (ii) - to give rise to the right to claim the initiation and pursuit of negotiations, some development had to have occurred generally in Middle-Eastern oil concessions in the direction of fresh benefits going to the concessionary States. A first estimate has to be made by the two Parties as to whether such a development has indeed occurred. Assuming that it has, the Company does not thereby recognize only its obligation to negotiate, but also the existence in principle of an obligation, of which only the numerical computation remains unsettled prior to the negotiation. It is not always a simple matter to determine whether some process of change has become general in the Middle-East - for, as the case of Aminoil shows, certain provisions of the agreements concerned remain confidential. Also, while Article 9 itself only functioned in respect of financial benefits, a phrase in the "Confidential Letter" of 29 July, 1961 (GM App. I.8; and paragraphs (xxxv) and (xxxvi) of Section II above) stated that

"It is understood that the word "benefits" includes arrangements not involving payments".

20. As to (iii) - Article 9 provides details concerning the object of the negotiations : it is a matter of concluding an agreement which had to have some noteworthy characteristics, - the agreement has to introduce, in favour of the Government, changes in the previous provisions of the Concession, and yet remain "equitable to the parties" - i.e. to Aminoil also. It is neither stated, nor to be presumed from this, that the original contract of concession was not "equitable to the parties" at the time when it was drawn up, - for a freely concluded agreement establishes as a matter of principle an equilibrium of interests between the parties. In spite of that, this original equilibrium will be modified in favour of another equilibrium deemed equally equitable. It seems therefore that the system established by Article 9 rests on the implied concept of a progressive process of justice revealing itself in the course of a sufficiently general historical evolution to be recognized for what it is by the Parties. This is how they can be said to have based themselves in advance on the assumption that a division of profits equitable today will need to be modified in order still to be regarded as equitable tomorrow.

21. Article 9 is somewhat more explicit about the factors to be taken into consideration in deciding on the amendments to be made in the Concession ; - this is to be done"in the light of all relevant circumstances, including the conditions in which operations are carried out and taking into account all payments made". From this phraseology there follows an important consequence, namely that the requisite changes must be based on a study of all the financial aspects of the Concession, past as well as future. Adjustments to a concession must necessarily be special to each undertaking and highly individualized. Their expression in figures has nothing of the automatic about it, and often comes up against real difficulties. The long and arguous negotiations between the Government and Aminoil regarding the application of Article 9 demonstrate these difficulties.

22. Attempts have been made to clarify the sense of Article 9 by appealing to general juridical concepts or doctrines. It has been attempted to liken this article to the clausula rebus sic stantibus of public international law, or to the theory of the unforeseen as enshrined in certain modern legal systems such as that of Kuwait. The Government has had recourse to such exercises, which are not without their usefulness; but the Tribunal will keep to what the text of Article 9 requires : in effect, it institutes an appeal from an original equilibrium to a more mature one, when the latter has become generalized throughout an extensive circle of contractual relationships. As to this, the existence of divergences between the Parties on two essential points must be emphasized.

23. The first point is that the usual tendency of the Government - without denying that the putting into effect of Article 9 depended on negotiation and mutual agreement - was to reduce the scope of the negotiation as much as possible by seeking to make the extension to Aminoil's Concession of the changes generally applied in the Middle-East, as automatic as possible. This is readily understandable. For one thing, the Government wished to obtain the greatest benefits available, - for another, it could fear that by granting Aminoil more favourable conditions than to other concessionaires, these might then claim equivalent advantages even if their particular situation did not justify that. Legitimately, Aminoil pleaded the reverse by requesting that its appreciably higher costs of production should be fully taken account of.

24. The second point is that the process contemplated by Article 9 did not provide for any other method of applying the criteria enunciated than agreement by mutual consent. The question here involved -one of those that are central to the present litigation - is a difficult one, known to all legal systems. An obligation to negotiate is not an obligation to agree. Yet the obligation to negotiate is not devoid

of content, and when it exists within a well-defined juridical framework it can well involve fairly precise requirements. In some cases the failure of the negotiations can be attributed to the conduct of one of the parties, and if so, the matter becomes transposed onto the plane of responsibility, and must find its solution there. It is not unknown for this possibility to materialize in practice; but international, as well as national precedents show that it occurs rarely. In other cases a study of the remaining clauses of the contract, as also of its juridical setting, must determine the way in which it can be modified or brought to an end. However, if the system instituted by Article 9 does not suffice of itself to indicate what the concrete content of the new obligation is to be, the Parties' agreement to put it into effect operates as a recognition of the principle of the obligation.

25. The discussion of this matter is, for the present, left at this point to be resumed in connection with the concrete topic of the Abu Dhabi Formula in Subsection (C) below, paragraph 49 et seq.

(B) Legal relevance of certain Agreements : in particular that of 1973.

26. Aminoil's legal obligations derive from two groups of sources: the contracts that were concluded in solemn form (the 1948 Concession and the Supple-mental Agreement of 1961); and the simple form undertakings of which the chief consists in the letter of 22 December, 1973 (herein called the "December 1973 Agreement"), together with others even less formal. It is this second (informal) group that has given rise to the legal difficulties which have to be resolved here. These are the validity and effect of the 1973 Agreement, includ-ing the complaint of duress; and the question of certain informal arrangements and tacit consents.

(1) The 1973 Agreement

(a) Validity and effect in general

27. The lengthy and arduous negotiations kept up over many years, with the object, on the Government's part - and in the light of the contractual transactions of 1961 - of bringing about accession to its requirements based on Article 9, were to finish in 1973. After the interchanges in May of that year, a draft agreement was drawn up on 16 July (AM Vol. VII, Exh. 23). The events of October 1973 created some new difficulties, inasmuch as the Government decided to take into its own hands the fixing of posted prices - a matter that under Article 4 of the 1948 Concession had hitherto been for the Company to effect. The Parties met again on the 10th December, when the Government called for the immediate putting into execution of the July draft, even prior to its ratification by the Kuwait Parliament, and also for certain amendments to be made to it.

28. It was thereupon - by means of a Letter of 22 December, 1973 (hereinafter called the "December 22 Letter"), signed by Aminoil and counter-signed by the Minister of Finance and Oil - that a legal agreement between the Parties materialized. In the opening paragraph of this Letter it was stated on behalf of Aminoil that

"We accept the 1973 Agreement as drafted in July of this year with the language changes agreed at the afore-mentioned meetings and with the following amendments requested by the Ministry..."

By these words the Company seems definitely to have accepted the July 1973 Agreement. The Letter continued :

"The Company will make payment of obligations arising under the 1973 agreement and the Kuwait (Specified Territory) Income Tax Decree n° 23 of 1961 with the amendments in the proposed 1974 Income Tax law in the same manner as if the 1973 agreement was effective on the date the Minister of Finance and Oil signs this letter and the proposed 1974 Income Tax law had come into force on that date and will treat all of the terms and provisions of such agreement as being effective on that date.

It is our understanding that the 1973 Agreement will be signed as soon as the final documents can be prepared, and that you will then take appropriate steps to obtain due ratification thereof.

We shall be obliged if you will signify your agreement with the foregoing amendments and procedures by signing and returning the accompanying copy of this letter (AM Vol. VIII, Exh. 29)."

29. No instrument in the form of the July 1973 draft was annexed to the December Letter, and the representatives of the Parties endeavoured to draw up an authentic text early in 1974, with a view to getting it signed and ratified. A text in which a fresh modification was introduced was prepared in February (AM Vol. VIII, Exh. 34). Other amendments were effected in June and October (ibid. Exh. 38), after which the draft was not further amended, and the Government made no further reference to its intention of taking the steps mentioned in the December Letter as being its concern, although Aminoil went on applying the provisions of the 1973 Agreement "as if" they were in force.

30. The Company, relying on these facts, has maintained that the agreement brought into being by the December 22 Letter did not constitute a proceeding which now binds Aminoil as to the past -and this for several reasons : first, the Letter only had a provisional character, - and next, Aminoil wanted a counterpart, a quid pro quo, -finally, the Government had incurred responsibility by failing - whether from lack of diligence or serious intention - to take the necessary steps to bring the projected July 1973 Agreement into force.

31. The estimate arrived at by the Tribunal proceeds from a different standpoint. According to this, the 22 December Letter constituted an agreement separate and distinct from what would have been that of July 1973 if it had come into force. The December Letter, which the Parties sometimes (and in the actual course of the present arbitral proceedings) referred to as an "arrangement", is in fact an agreement viable per se and with its own characteristics.

32. Both in national and international practice, cognizance has often been taken of cases of contracts or treaties, the final conclusion of which as a legal transaction required a somewhat lengthy course of dealing, but which the parties wished to bring into force without delay, on a provisional, or rather, an interim basis - as to all or part of the text -(Article 25 of the Vienna Convention on the Law of Treaties). This is what the Parties did in the present case. Such an interim agreement does not act as an exemption from continuing to seek the definitive putting into force of the main agreement itself; and the December 22 Letter never took the place of the July 1973 Agreement, or of the Kuwait Tax

Law which was to be passed by virtue of it, but was not.

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.

34. A second difference exists between an interim and a definitive agreement, namely the right for either Party to put an end to the former, the "provisional" not being intended to last for ever -so that, despite silence on the point in the interim agreement, it would be natural that a party to it should be able to give notice to bring it to an end if the conclusion of the definitive agreement was unduly delayed. This is what Article 25 of the Vienna Convention may be taken as implying; but in the present case, neither Party thought to notify any termination of the interim agreement, which remained in force until 19 September, 1977 (date of the take-over).

35. In addition to the question of "duress" (considered under the next sub-head) Aminoil puts forward one more argument. The Company had signed the December Letter in the hope of obtaining a quid pro quo in the shape of the conclusion of a definite agreement by means of the ratification of the July 1973 draft agreement. Its expectation would therefore have been frustrated, and for this the Government would bear a certain responsibility.

36. The Tribunal considers it to be hardly open to doubt that the Company experienced a very real need for stability, and that in its absence the normal requirements for the management of an undertaking were not satisfied. The fact that it did not have the benefit of that stability, without there having been any negligence on its part, is not wanting in legal consequence, and the Tribunal will revert to the point later. But whether responsibility for this failure can be attributed to the Government of Kuwait is quite another question.

37. To begin with - in regard to the process of ratification - a Government possesses a large measure of discretionary power that does not allow that mere delay in taking the final decision should be held against it. Then, reasons are not lacking for thinking that it could have been in the Company's own interests not to have the Agreement submitted to the Kuwait Parliament at the very time when decisions falling to be taken about the influential Kuwait Oil Company could create difficulties there for the Government. Finally, the Government of Kuwait - a participator in the decisions taken in OPEC and the Arab world - was concerned about instability in economic petroleum relationships; so that it can hardly be said that the very real difficulties that resulted for Aminoil were tied up with malevolent intentions or neglectfulness on the Government's part.

38. Aminoil has attributed special importance to the fact that in not formally adopting a new Tax Law, legally characterizing as tax payments an important part of the amounts paid over to Kuwait, the Government deprived the Company of the benefit of certain provisions of American law, allowing it (so far as that law was concerned) credits for the avoidance of double taxation. In a case of this

kind, the Tribunal believes, it would be possible to enquire whether the Company did not suffer some disturbance in the financial equilibrium of its interim agreement with the Government, and if so, to take account of that in the final reckoning, even in the absence of all tortious action imputable to the Government. However, since Aminoil has not given any precise indication of the damage caused, the Tribunal has not been led to consider the matter in any more detail.

39. Moreover, referring to the study of Article 9 of the 1961 Agreement already effected, it is pertinent to observe that in the year 1973 Aminoil not only recognized that the extant situation was of the kind contemplated by that provision, but also recognized that the solutions propounded in the projected July Agreement of that year were "equitable for the Parties". In those circumstances the revocation of the agreement realized by the December 1973 Letter, and of its effects, would have left intact the problem it was supposed to resolve.

(b) The complaint of duress

40. With regard both to the lengthy negotiations which preceded the July 1973 Agreement, and to the changes that immediately preceded and followed the December 1973 Letter, Aminoil has claimed that its consent was vitiated because its undertaking was threatened with "shut-down" or, what comes to the same thing, that all exportation would be prohibited, if it did not agree to give its consent to certain demands. These threats had been tendered both on the occasion of the conclusion of the interim agreement and on that of certain measures taken before or after it.

41. The object of this complaint was as follows. For Aminoil it was a question of destroying the obligatory force of the Letter of 22 December; and what is involved therefore is the nullification of that agreement. If however, as will be demonstrated, the nullity of the consents given by Aminoil is not established, it will not in any way follow from this that those consents were forthcoming under all the conditions that could be wished for in respect of a consent. These consents were evidently given in circumstances which, for the Company, constituted strong economic pressure, and this can result in depriving such consents of certain supplementary or side effects. In particular their application should not be enlarged by means of extensive interpretations. To take a concrete example, in October 1973 the Government of Kuwait, contrary to the terms of the Concession then in force (Article 4 of 1948), prescribed of its own motion the level of posted prices. By conforming to this behest in the circumstances of the moment, and without making any protest, the Company surrendered the right to claim the nullity of its acquiescence. But although, even in the absence of duress, it then laboured under constraints, it did not thereby forfeit the right on another occasion to withhold its consent in analogous conditions, though in point of fact it did not do so.

42. Next, as the Tribunal will again be led to say, consents that are legally valid as regards the abandonment of a specific individual right, but which have been given under economic constraint, cannot serve as precedents for establishing a customary rule of general validity.

43. That reservation having been made, it is necessary to stress that it is not just pressure of any kind that will suffice to bring about a nullification. There must be a constraint invested with particular characteristics, which the legal systems of all countries have been at pains to define in terms either of the absence of any other possible course than that to which the consent was given, or of the illegal

nature of the object in view, or of the means employed. But the illicit character of the threats directed against Aminoil has not been fully proved.

44. Supposing however that there were such threats, Aminoil gave way without even making the qualification that the Company was conscious that something illicit was being imposed upon it. It is understandable that it avoided resort to arbitration because of the delays, risks and costs of arbitral proceedings - but Aminoil entered neither reservations of position nor protests. In truth, the Company made a choice; disagreeable as certain demands might be, it considered that it was better to accede to them because it was still possible to live with them. The whole conduct of the Company shows that the pressure it was under was not of a kind to inhibit its freedom of choice. The absence of protest during the years following upon 1973 confirms the non-existence, or else the abandonment, of this ground of complaint.

45. This outcome does not involve any denial of the fact that since 1971 the balance of advantage in the Gulf region had tilted in favour of Governments, and that Aminoil had been subjected to strong pressure to accept the repeated demands of the Kuwait Government. But - and this is the only point the Tribunal has to decide - it has not been shown that these constraints were of such a nature as to cause the nullification of the interim Agreement of 1973, or of certain other consents (as to which see sub-section (2) below).

46. Having recognized the validity of the interim Agreement of December 1973, the Tribunal does not need to go into the question that any finding to the contrary would raise concerning the applicability of the "gold clause", figuring as Article 3(h) of the 1948 Concession, - and in any case that clause was cancelled by paragraph 7 of the First Annex, First Part to the July 1973 Agreement (supra, Section II, paragraphs (xxiv) and (xlv).

(2) Informal arrangements and tacit consents

47. Apart from the case of the interim Agreement of 22 December,1973, Aminoil consented promptly to several requests made by the Government. Instances already indicated above were the Government's October/November 1973 invitation to bring posted prices up to a specified level; and the 1974 amendments to the projected July 1973 Agreement in respect either of the application by Aminoil of the Teheran and Geneva Agreements, or of the level of the financial payments to be made by the Company. It may well be asked what juridical characterization should appropriately be given to some of these transactions. The minatory tone of certain of the demands presented by the Government gives them occasionally the look of an order. Thus at the time of the opening of Middle-Eastern hostilities in 1973 an embargo on shipments of oil and petrol to certain countries was proclaimed; and although not provided for under the various contracts of concession, the embargo was validly imposed upon the concessionaires.

48. In the case of other demands not in themselves justified (for they were inconsistent with the relevant contracts), it was the consent given by Aminoil that conferred upon them their validity, whether this result is arrived at on the basis of the mutual conduct of the Parties as constituting an informal agreement, or whether - denying the existence of any contractual element - it is considered that the Company simply acquiesced in an unjustified compulsion. Whatever view is taken

however, the content of the Company's obligations was to that extent modified.

(C) The interpretation and application of the Abu Dhabi Formula, and the negotiations of 1976-1977.

(1) The nature and signification of the Abu Dhabi Formula

49. The application of Article 9 of the 1961 Supplemental Agreement had always been troublesome and difficult, involving long delays and retroactive payments clearly adverse to a rational management of the undertaking. On the morrow of the interim Agreement constituted by the Letter of 22 December, 1973, Aminoil's financial future was uncertain. According to the evidence given to the Tribunal by its directors, some of them feared that the new financial liabilities would be too heavy, while others thought they would be reasonable. But the increase in posted prices imposed upon the concessionaire Companies by OPEC as a body, and hence by Kuwait upon Aminoil, brought about an appreciable amplification of their revenues. Yet at the same time, as from 1974, the Kuwait authorities specified what changes would have to be made in the current interim Agreement in order to raise the level of the payments coming from Aminoil. The latter accepted them without reservation or objection, the overall outcome being so advantageous that it was thought better not to bring up any question of principle.

50. Towards the end of 1974 the outlines became visible of a new process of change that was to prove to be the origin of the final crisis. The nature of this change, and the reasons why it led to the ending of Aminoil's Concession, must now be described. Whereas previous increases in the liabilities of the oil Companies had nevertheless left them a certain margin of managerial scope, those entailed by the "Abu Dhabi Formula" were more severe. The Gulf States that were members of OPEC and propounded this formula, no doubt weighed its advisability, for it was only three of them that, in November 1974, decided immediately to nut up the royalty level to 20%, and the tax level to 85% on posted prices which, for the Companies that used actual receipts as their tax base would have been a very drastic step. The other Gulf States, Kuwait amongst them, waited for the 42nd (Vienna) meeting of OPEC (12 and 13 December, 1974) to adopt a decision known only through a press communiqué as follows :

"The Conference... decided to adopt a new pricing system based on the financial effect of the decision taken on the 10th and 11th November, 1974, in Abu Dhabi. In accordance with this decision the average Government take from the operating oil companies will be $10.12 per barrel for the marker crude."

In point of fact this decision had a revolutionary effect, not only on prices but on the very nature of the concessions. It embodied the notion that the revenues left to the Companies would be pre-determined on a fixed (package) basis of 22 cents per barrel of the product of reference - "marker crude" - thereby transforming the concessions de facto into service contracts. Equally, the system was based on a pre-determined estimate of costs, fixed at 0.12 cents a barrel, which could at a pinch be regarded as an acceptable mean for the case of "normal" oil deposits (taking account also of the

other advantages which the major Companies had in respect of certain categories of products), but had no relation to the net costs of the products of Aminoil's Concession.

51. It is not without significance that simultaneously with this, negotiations were starting in Saudi Arabia for the nationalisation of the Aramco Company, which made it possible to foresee a general end to the concessionary regimes. Indeed, it was clear that for a Company such as Aminoil, these events would bring about difficult negotiations tending to reduce its financial returns to the point where there would be a risk of putting it into deficit, coupled with the ever-present shadow of potential nationalisation.

52. The negotiations which are the subject of the next subsection below, have been described above in Section II, paragraphs (liv) to (lxiv), but will to some extent be recapitulated where necessary in order to make the reasoning clear.

(2) The negotiations between Aminoil and the Government

53. The negotiations between the Kuwait authorities and Aminoil concerning the Abu Dhabi Formula have a major importance for the solution of some of the questions that the Tribunal has to deal with - and in particular the following ones :
(i) Did the two Parties respect the letter and spirit of Article 9 in these negotiations ? If in fact either Party was in default under that head, this would have important consequences for the ensuing responsibility thereby incurred,

(ii) Do the negotiations throw light on the situation of the Parties in regard to their contractual relations generally ?

(iii) Do the negotiations enable the situation of the Parties concerning the application of the Abu Dhabi Formula to be precisely defined ?

54. Before outlining certain features of the negotiations it must be observed that their content was made known to the Tribunal by means of two sets of descriptions which, in a general way, are mutually corroborative, the one on the Government side containing more in the nature of administrative information, and that on the Company's side furnishing greater indications as to the atmosphere of the meetings and the attitudes of the participants.

55. It is certain that the heads of the Company understood at once the gravity of the situation in which it was to find itself: the criterion adopted in Vienna (supra, paragraph 50) would soon become general, and would set in motion the mechanism of Article 9; the Company would see itself obliged, in part retroactively, to give up some of the profits it had been making - yet the Abu Dhabi Formula could not be literally applied to it without causing immediate ruin. Thus the negotiations would be arduous.

56. The local representative of the Company therefore at once made unofficial contact with the Kuwait

authorities, and tried to sound them as to their intentions, but without success, - and it was not until ten months later, on 2 October, 1975, that the Government notified Aminoil in New York, of its intention to apply to the Company retroactively "a royalty rate of 20% of posted prices and rate of 85$ for oil profits". Aminoil immediately asked for the opening of negotiations, and the Minister fixed the date for 23 February, 1976. Here there is straightway apparent a significant feature of the negotiations, namely the delays that characterised them into 1977. After preliminary contacts on 23 and 24 February, 1976, Aminoil sent in, on March 19, a very complete formal proposal explaining and justifying its position; and further meetings were held on 29 March and 4 and 5 April, limited however, on the side of the Kuwait representatives, to asking for information and clarification, without otherwise making their own position known. To enquiries about the future of the negotiations, several times put in by Aminoil, the answer given was that resumption was not for the moment being contemplated. In short, the year 1976 was a year of contacts only, and the real negotiations did not start until 9 April, 1977.

57. This process of delay is somewhat surprising. It has been explained by reference to the overload of work weighing on the Kuwait technical and administrative staff. It is also possible that the Kuwait authorities wanted to bring the nationalisation of the Kuwait Oil Company (KOC) Concession to a successful conclusion in order to put themselves in a position the more easily to settle the case of Aminoil afterwards. Be that as it may, in so proceeding the Government did no more than act within its rights: yet this conduct had important consequences.

58. First of all, Aminoil remained for more than two years in uncertainty as to the receipts that would ultimately be still available to it; and the technical and financial management of its affairs undoubtedly suffered from that. But in any case important sums were destined to end up in Aminoil's banking accounts abroad; and this fact, far from facilitating negotiation, was going to make it more difficult, by inevitably arousing feelings of mutual suspicion.

59. The above-described "contact" phase of the negotiations, indicates what the position of Aminoil was, respecting not only its general contractual relations with the Government but also as regards the application of the Abu Dhabi Formula. Granted that a party cannot be held to attitudes taken up in the course of negotiations - involving, as is often the case, concessions and renunciations offered for the sake of reaching an agreement - the same is not true of an initial position taken up at the outset of the negotiations, for this reflects, at least grosso modo, the way in which that party assesses its rights and obligations on the juridical plane.

60. It is therefore important briefly to evaluate Aminoil's formal proposal of 19 March, 1976, contained partly (in general terms) in a letter from the President of the Company to the Minister of Oil, and as to its details in an information booklet attached to that letter (AR Vol. V, Exh. 12; GM App. VII.1). The Company, within certain bounds, started from the basis of the prevailing tendency to transform oil concessions by placing an upper limit on the returns that these should bring. Hence the Company accepted that agreements should be drawn up giving it the possibility (but not any guarantee) of earning limited profits, - in this differing from contracts known as service contracts which guarantee a minimum return. Thus the proposal implied a renunciation of one of the attractions of the classical concession which, subject to the payments to be made to the concessionary authority, leave the remainder of the realized revenues to the concessionaire.

61. To set against this, the Company estimated its costs at a fairly high figure so as to cover itself against

various risks; and in particular asked that the possible returns should be such as to enable it to finance investment for modernization and development. It was therefore the Company which took the initiative in raising this further matter. The last important investment - for a desulpherizer - went back to 1968 ; and now certain installations needed to be brought up to date, while new exploration teams were required. The Company therefore requested that, in accordance with normal practice in the industry, returns should be such as to allow such expenditure to be financed out of revenue. It must be recognized that this attitude on the Company's part was in line with the one it had taken up in the past (AR Vol. V, Exh. 10 - and see to similar effect a letter of 28 July, 1972, GCM App. VI.9).

62. The Tribunal however registers equally that the Company, from the outset, recognized that Article 9 was, as such, applicable, and that in consequence the principle of a re-adjustment (which could only be in favour of the Government) had to be admitted - see the 19 March 1976 Letter (ubi supra) in which it was stated that

"We recognize the Government's concern that the royalty rate, oil profit rate and crude postings applied to Aminoil be consistent with those used in other OPEC countries and we have no objection to adopting Abu Dhabi terms provided that our product reference prices are modified as discussed below".

But in spite of this statement the real negotiations were not to start until 1977, and in a very different style from those of 1976. At once, a speeding-up of the exchanges is to be noticed. On 27 March, 1977, the Government had appointed a "Negotiating Committee", giving it 45 days in which to finish. Meetings were held on 21, 23 and 24 April, and on 7, 8, 9 and 10 May; and then, on the basis of new offers from Aminoil, meetings took place on 27, 28 and 29 June and again on 25 and 26 July.

63. In the course of these meetings the Government unmistakeably brought out the nature of the change it intended to effect in the essential principle of Aminoil's Concession. It offered as a basis of the normal annual return to be obtained by the Company, a definite amount, at first 6 million dollars, which was afterwards increased to 7.5 million; whereas Aminoil had asked for 18 million. But the Government, regarding the Concession as "matured", failed to recognize that the Company had recently carried out a new programme of investment, and refused to take its present proposed programme into account (Minutes of the first meeting, GM App. VII.2). The Company was thus faced with being allocated a fixed basis of return, deemed by it insufficient; and it was afraid of not being protected against inflation, and generally of finding itself in a less easy and more precarious position than with a contract of service.

64. This second phase of the negotiations saw the introduction of a new prospect - that of nationalisation. It may not be entirely clear which side took the initiative over that. It was on 21 May,1977 that the Minister of Oil requested Aminoil to table new proposals, and on 22 June that Aminoil suggested a "take-over" (GM App. VII.1). The course of the negotiations, as sketched above, had shown that they would come to this. The notion of a nationalisation had equally not been absent from the mind of the Government which, as far back as 5 April, 1976 (AR Vol. V, Exh. 14), had unofficially proposed it, tempered by the suggestion of a contract of service.

65. However, Aminoil's take-over proposition not only did not resolve the issue of the Abu Dhabi

Formula, but brought that issue into the question of the compensation to be afforded in respect of a nationalisation. Indeed, rather than have these two matters dealt with separately, Aminoil proposed to eliminate the compensation question on the basis of a retention by the Company of a substantial part of the profits received by it since 1975 but liable to revert to the Government on Abu Dhabi account. In addition, the Company wanted the benefit of a service contract. This solution was intended by Aminoil to by-pass a difficult exercise - that of evaluating the compensation that would be due to it for renouncing the benefit of the Concession.

66. This proposition did not obtain the concurrence of the Government, - whether because the latter was chiefly concerned with improving its own position, - or rather, because it wanted to be able to present its Parliament with a more clear-cut transaction, separately detailing all the various elements of the settlement.

67. Account must also be taken of the fact that, amongst other causes of the ultimate failure of the negotiations, a marked deterioration in the "climate of attitude" occurred in 1977, although personal relations between the Kuwait Authorities and Aminoil's representatives always remained perfectly courteous. On both sides, oppositions of feeling and contradictory preoccupations had developed.

68. The Government of Kuwait had just crowned its petroleum policy by the completed nationalisation of the Kuwait Oil Company. In the world at large, the view points of the petroleum-producing countries and of OPEC had in great measure triumphed. Even when the companies' oil revenues, amassed in consequence of the increases in the price of petroleum products, were lodged abroad in foreign bank accounts in the name of the concessionaire company, they were psychologically considered by the producing States as being morally their property, apart from the modest amounts the Governments would be willing to leave to the Companies as remuneration for their services of extraction, processing and marketing. In the case of Aminoil, the delays in applying the Abu Dhabi Formula had, from the Government's stand-point, allowed an important capital sum to accumulate in the hands of the Company which, in the eyes of some, appeared as the holder of a stake, the restitution of which was being bargained for. Thence, annoyance and suspicion, perhaps. hastening the oncoming of a "shut-down" the possibility of which had never been excluded.

69. As for the Company, it felt itself helpless. It had learnt from experience that no one was much interested in the ultimate fate of small or middle-sized producing companies. The major companies, in the arrangements they entered into, could find an indirect satisfaction in the operations of processing, converting and marketing. The smaller undertakings did not enjoy similar advantages, yet had to submit to the rigours of a regime not fashioned to their situation. Such feelings had been vividly experienced by the representatives of Aminoil at each negotiation about Article 9, - and not without some reason they feared that the Company's fate over compensation, in the event of a nationalisation, would be worse still.

70. Thus, in reviewing the history of the negotiations in the light of hindsight, it would be possible - as with all negotiations that have come to grief - to pin-point lost opportunities, and chances of agreement that were disregarded. It is not the Tribunal's function to weigh these up, but to state the law. As to that, the main points are as follows :
(i) A scrutiny of the negotiations fails to reveal any conduct on either side that would constitute a shortcoming in respect of Article 9 of the 1961 Supplemental Agreement, or of the general principles

that ought to be observed in carrying out an obligation to negotiate, - that is to say, good faith as properly to be understood; sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise. The Tribunal here makes reference in particular to the well known dicta in the North Sea Continental Shelf and Lac de Lanoux cases.

(ii) With constancy, Aminoil kept to the line which it always followed throughout the difficulties arising from Article 9, and experienced in the course of operating, namely - (regarding its contractual position with the Government) - to maintain for itself, as far as circumstances permitted, the essential features of a contract of concession, while being willing to confine its profits within the limits of a "reasonable return" so that when, confidentially, but at a high level, the possibility was mooted of turning the contract of concession into a contract of service, the Company's representative stated on 5 April, 1976 that he preferred "to continue for several years under the present arrangements with modifications in the level of payments (AR Vol. V, Exh. 14).

(iii) The Company recognized that there was occasion to apply Article 9, and the Government was at one with the Company in recognizing that there was nothing automatic about the application of the Abu Dhabi Formula, and that a reasonable rate of return must remain available for the Company. It also appeared, according to the position taken up by the Company, that in applying the Abu Dhabi Formula, the question of assessing a reasonable rate of return could have a certain connection with that of the indemnification of the Company, should the possibility of terminating the Concession be simultaneously raised.

(3) The Tribunal's competence to apply the Abu Dhabi Formula

71. The competence of the Tribunal is a question that only arises if it is established that something is due from Aminoil under this head. Since the Tribunal finds affirmatively on this point it must begin by considering whether it has jurisdiction to go into the matter.

72. The respective attitudes of the Parties in this respect involve important questions of principle. As far back as in its Counter-Memorial (ACM paragraphs 34 and 282), Aminoil - citing international precedent in the shape of the Tacna-Arica question - expressed the view that

"... it must be doubted whether this Tribunal is competent to prescribe for the Parties the terms of an agreement which they could not make for themselves. The equitable revision of the terms of an agreement is not a function which a tribunal will normally undertake unless the intent of the Parties to confer such an extended competence upon it is clearly expressed."

In its Reply (GR paragraphs 3,105 and 3,106) the Government observed that

"In the present arbitration, however, the Government is not asking the Tribunal to make a new contract. There is no need to do so. The Government is asking the Tribunal to determine "the amount payable to the Government... in respect of royalties, taxes or other obligations of the Company" (see Article III, 1 (iii) of the Arbitration Agreement).

The reference to the "other obligations of the Company" in the Arbitration Agreement is plainly a reference to such legal obligations as Aminoil owed to the Government, including its obligation to implement the Abu Dhabi Formula. Accordingly, the Tribunal has jurisdiction to determine, first, whether Aminoil was under any obligation to implement the Abu Dhabi Formula and, secondly, if it was, how much it should nay to the Government under that Formula, either as royalties and taxes, or as damages for breach of the obligation".

In the course of the Oral Hearings the representatives of Aminoil made the following statements (Day 10,pp. 26, paragraph: H, 27, paragraphs A, B, C, 47, paragraph F and 48 paragraph A)

"I want to make clear that Mr. Redfern's version of the Company's position on this point is unfounded. It goes back to statements in Aminoil's Counter-Memorial, which were replying to proposals in the Government's Memorial, that this Tribunal should determine (Government Memorial, para. 4.17): "What can be considered 'equitable to the parties' on the basis of the Abu Dhabi formula". In its Reply at that time (Amin-oil Counter-Memorial 282). Aminoil questioned whether it would be proper for this Tribunal to make such a determination on an "equitable basis" and on the basis of the formula. The reason was that the Tribunal was directed to decide according to law, and that the application of the formula was in itself an issue in the Arbitration.

Aminoil, in no way then or now, intended to suggest that the Tribunal was not fully competent to decide, in accordance with the Arbitration Agreement, and on the basis of law, on the amounts which may be payable by either party to the other".....

"... the Parties did not reach a mutual agreement as envisaged by Article 9. Since they did not do so, there was no amendment whatever to the terms between them which existed at the time. The current arrangements stood. Therefore, no payment of any kind, or in any amount, is due by Aminoil to the Government by means of their failure to agree on an equitable application of the Abu Dhabi terms or otherwise and that is very fundamental.

I close my rebuttal by completing Mr. Redfern's reference to Article 3(1) of the Arbitration Agreement. The Tribunal will recall that that Article provides that the Tribunal shall decide according to law."

73. The Tribunal has thought it necessary to quote fully these views, expressed by the Parties, because in this matter it is its own competence that is in question, and this depends entirely on the common will of the Parties. The international aspects of the Tribunal's mandate create a special duty for it to be scrupulous regarding jurisdiction. Its competence relative to this question is challenged in two quite distinct respects : that of the power of a tribunal to complete an incomplete contract; and that of the right of an arbitral tribunal to proceed on the basis of equity. These will be considered in turn.

74. As to the first, there can be no doubt that, speaking generally, a tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations - or to modify a contract - unless that right is conferred upon it by law, or by the express consent of the parties. The law does often give a tribunal this right, and precedents in many countries could be cited of cases in which, on the basis of the applicable law, courts have completed a contract: But arbitral tribunals cannot allow themselves to forget that their powers are restricted. It is not open to doubt that an arbitral tribunal -constituted on the basis of a "compromissory" clause contained in relevant

agreements between the parties to the case, and seized in the matter unilaterally by one of the parties only - could not, by way of modifying or completing a contract, prescribe how a provision such as the Abu Dhabi Formula must be applied. For that, the consent of both parties would be necessary.

75. But in the present case, the Tribunal thinks that it is not really a question of modifying or completing the contract of concession. The Tribunal is not expected to devise new provisions that will govern the contractual relations of the Parties for the future, but to liquidate the Various consequences of their past conduct, and of the contractual clauses that once bound them but are now at an end. Under this head, the Arbitration Agreement founding the competence of the Tribunal is widely drawn, and confers jurisdiction to investigate whether, as part of a general settlement of the issue pending between the Parties, and on the basis of their respective attitudes and of the principles, the Tribunal must rely on for effecting such a settlement, a liability can be ascribed to Aminoil on Abu Dhabi account.

76. As to this, the Tribunal, before going further, takes note of the fact that, during the whole course of the negotiations between the Parties on this matter, Aminoil never questioned but that the requisite conditions for bringing Article 9 into play were present, and that a liability, of which only the actual amount remained unsettled, existed.

77. The second objection made to the jurisdiction of the Tribunal in respect of this matter (see paragraph 73 above) was to the effect that it could not proceed to apply Article 9 because, by the very terms of that provision, such a process could only be based on equitable considerations, whereas, by virtue of the terms of the Arbitration Agreement, the Tribunal cannot decide except according to law.

78. This argument cannot however be accepted in the context of the assessment of a sum of money -for if it had to be, it would by that very token cause the Tribunal to lack capacity to make an assessment of the amounts due to Aminoil by way of compensation for the nationalisation. It is well known that any estimate in money terms of amounts intended to express the value of an asset, of an undertaking, of a contract, or of services rendered, must take equitable principles into account. As the International Court of Justice said in a well known case concerning a tribunal which had held that "redress will be ensured ex aequo et bono by the granting to the complainant of the sum set forth below" :

"It does not appear from the context of the judgement that the Tribunal thereby intended to depart from principles of law. The different intention was to say that, as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the tribunal fixed what the Court, in other circumstances, has described as the true measure of compensation and the reasonable figure of such compensation (Corfu Channel Case, Judgement of December 15th 1949, I.C.J. Reports 1949 p. 249)."

As was declared even more forthrightly by the same Court in the case already cited above of the North Sea Continental Shelf, paragraph 85 :

"... in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles....."

79. To sum up, - the foregoing enquiry into the circumstances of the 1976-1977 negotiations leads the Tribunal to come to the following conclusions :
(1) - In the course of these negotiations, both Parties observed the obligations incumbent on them as well in regard to Article 9 as to the general principles of law.

(2) - The requisite conditions for the application of Article 9 in respect of the Abu Dhabi Formula were present, and this was recognized by both Parties. From this it follows that in principle something is owing by Aminoil to the Government on Abu Dhabi account.

(3) - The total due must consist of the sum of the profits received by the Company in excess of what would have constituted a reasonable rate of return, after taking account of its operating conditions, - such a rate of return having always been the basis of its position and legitimate expectations at this time.

(4) - Within the framework of a general settlement of the consequences of the cancelling of Aminoil's Concession, which is the object of the special Arbitration Agreement concluded by the Parties, the Tribunal has jurisdiction to determine the amount due.

SECTION V. The question of the validity of Kuwait Decree Law n° 124

80. The question of the validity of Decree Law n 124 lies at the core of the present litigation. It was therefore to be expected that a full and sometimes fine-drawn set of arguments on this topic should have been submitted to the Tribunal by the Parties. An important part of this controversy puts in question the interpretation of certain articles of the Concession which the Tribunal has had occasion to consider in Section IV above. The present Section will be concerned with, on the one hand, the "stabilisation" clauses (Article 17 of the 1948 Concession Agreement, and Article 11 as amended by the Supplemental Agreement of 1961); and, on the other hand, the impact of the "adaptation" clause (Article 9 of 1961), already considered in Section IV.

81. Before proceeding to a general examination of the essential questions here involved, it is desirable to call attention in a preliminary way to certain fundamental points.
(1) No failure on the part of the Company can be alleged in determining the validity of the Decree Law. At the start of the written proceedings, the Government of Kuwait seemed to attach much importance to two aspects of the Company's behaviour that might be regarded as inconsistent with its contractual undertakings: to begin with the Company was said not to have conformed to its obligations under Article 9, - and, furthermore, not to have paid due regard to its obligations concerning "good oil-field practice" a matter that will be gone into later (see Section VI (B)). These two alleged shortcomings were said to be at the root of the Decree Law. Later, and in particular during the oral proceedings, this attitude was modified, and the Government put forward arguments directed to establishing the validity of the Decree Law without calling in question the Company's conduct.

(2) As regards the problem of non-conformity with Article 9, the Tribunal has already analysed that

provision (Section IV(C)) and indicated the conditioned and limited obligation it created. It considers that the negotiations held in 1976 and 1977 do not reveal any bad faith on the part of the Company, which sought consistently and with flexibility for the means that might lead to an agreement, so that no complaint can be made against it on that score.

(3) With reference to the complaint of "bad oil-field practice", it was recognised that this had not been formulated at any time prior to Decree Law n° 124. It follows that it cannot in any way be taken into account for the purpose of determining the validity of that Decree. The Government's claim under this head raises a different issue -dealt with in Section VI (B) below.

(4) Another observation of a fundamental kind must be made about the characterisation to be given to Decree Law n° 124. The operation brought about by the Decree Law had a double aspect : it constituted at one and the same time the termination of a contract, and also a nationalisation. Indeed the two are linked. However, the arguments of the Parties distinguished, and to a certain extent contrasted, these two aspects. For Aminoil the nationalisation was carried out only in order to resolve a difference of view between the Parties arising in a contractual setting and falling to be resolved within that setting by the prescribed methods. On behalf of the Government it was maintained after a certain amount of hesitation that the essential character of the Decree was to put into execution an act of nationalisation even if this simultaneously terminated a contractual situation that could not go on indefinitely.

82. In order to go fully into the competing contentions of the Parties the Tribunal will consider in turn the following questions :
(A) Would Decree Law n° 124 have been legitimate if no account were taken of the lack of success of the negotiations for the revision of the agreements relating to the Concession ?

(B) Supposing Decree Law n° 124 to have been legitimate on the basis of question (A), would it remain so having regard to the fact that it occurred at the very time when a difficult negotiation between the Parties was still in progress ?

(C) Should there have been recourse to arbitration before Decree Law n° 124 was issued ?

Question (A)

83. Various objections to the validity of the nationalisation ordained by Decree Law n° 124 have been put forward, - on the one hand that it did not conform to certain general requirements for the validity of an act of nationalisation; on the other, that it was contrary to some precise contractual undertakings applicable in the circumstances. These different objections will now be considered.

84. The Parties are at one in saying that a nationalisation is effected by a transfer, in the public interest, of property from the private to the public sector. However, in order to distinguish nationalisation from other comparable measures, it is also claimed that a nationalisation must apply to the totality of a given sector of the economy -that is to say, without discrimination, to an assemblage of undertakings.

85. In regard to Decree Law n° 124, it has been objected that by reason of its specific character, it took the form of a single measure not directed to any object of general interest. This contention does not seem to be well founded. It is generally known that all Middle-Eastern States belonging to OPEC (as well as other producing countries) have always considered that their overall petroleum policy must, in its final phases, result in the nationalisation of the whole local petroleum industry, and it is the fact that the entity operating much the most important concession in the land (the Kuwait Oil Company) - after having been made the object of a 60% participation in its share capital by the Government - was subjected very soon afterwards, and before Decree Law n° 124, to a total nationalisation. In short, after having nationalised over 90$ of petroleum production in its territory, the Kuwait Government, now in possession of staff and plant already in situ, was able without difficulty to nationalise Aminoil's much less important undertaking.

86. The Tribunal does not see why a Government that was pursuing a coherent policy of nationalisation should not have been entitled to do so progressively. It is hardly necessary, additionally, to stress the reasonable character of a policy of nationalisation operating gradually by successive stages, in step with the development of the necessary administrative and technical availabilities. The 1976-1977 negotiations are revealing on this point. As the Tribunal has indicated earlier (Section IV(C)), these brought out the existence of tendencies much in favour of nationalisation. As early as the meeting of 23 February, 1976, the representative of the Government was declaring (AR Vol. V, Exh. 10; GM Apr. VII.2) that nationalisation was not contemplated "at this time" (emphasis added); and see also per Mr. Adasani, Under-Secretary of State at the Ministry of Oil, in GCM App. II.4). It may be added that the official stand taken by the Kuwait Government in the statements following upon the Decree Law cited the carrying out of a general programme, - for in a press conference held on 20 September, 1977 the Minister for Oil (AM Vol. VII, Exh. 3) made a declaration which, subject to the correctness of the press translation, was as follows :

"I would like to clarify and stress one point : from the beginning there has been a specific plan for the State to take over full ownership of its oil resources and nut them under national management."

87. If however, the progressive character of the measures of nationalisation concerned does not justify the assumption that there was no general plan of nationalisation, another question emerges. In 1977 nationalisation was not extended to both of the Companies then operating as concessionaires, viz. Aminoil and the "Arabian Oil Company" (AOC). The latter was spared. The question accordingly arises whether the nationalisation of Aminoil was not thereby tainted with discrimination, and whether this differentiation does not show that the Decree Law had other objects than that of realising a programme of economic development. The Tribunal does not think so. First of all, it has never for a single moment been suggested that it was because of the American nationality of the Company that the Decree Law was applied to Aminoil's Concession. Next, and above all, there were adequate reasons for not nationalising Arabian Oil. At the press conference mentioned above, the Minister for Oil had touched upon this question and had given the following reasons for the non-nationalisation of AOC - which there is no difficulty in finding convincing :

"AOC's high-cost off-shore production operations are such as to give it a special position which requires a high degree of expertise. At the same time, it is working within the framework of a concession granted by both Kuwait and Saudi Arabia, so its position is completely different. Any modification of the concession must be agreed to by both countries." (AM Vol. VII, Exh. 3)

88. Accordingly, the Tribunal sees nothing in the conclusions to be drawn from an examination of the above-mentioned circumstances that would prima facie prevent recognition of the validity of the nationalisation effected by Decree Law n° 124. Nevertheless, 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... "

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 he 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.

90. Other Government arguments were as follows :
(1) It was contended that the stabilisation clauses - initially valid and effective - were annulled by the emergence of a subsequent factor in the shape either of the Kuwait Constitution of 1962, or of a public international law rule of jus cogens forming part of the law of Kuwait. The relevant provisions of the Kuwait Constitution were those registering the permanent sovereignty of the State over its natural resources, and in particular Articles 21 and 152 which provided as follows (translation from the Arabic taken from AM Vol. VII, Exh. 13):

Article 21 : "All of the natural wealth and resources are the property of the State. The State shall preserve and properly exploit those resources heedful of its own security and national economy requisites."

Article 152 : "Any concession for the exploitation of a natural resource or of a public utility shall be granted only by Law and for a determinate period. Preliminary measures shall guarantee the facilitation of exploration and discovery and shall ensure publicity and competition."

However, it does not appear from these provisions that they in any way prevented the State from granting stabilisation guarantees by contract. Even if they should be interpreted as doing so, it was the State's duty towards its co-contractant to notify the latter of the putting into force of the resulting constitutional modifications to current contracts. This was not done; nor was it done either at the time of the revision of 1961, or of that of 1973.

(2) Equally on the public international law plane it has been claimed that permanent sovereignty over natural resources has become an imperative rule of jus cogens prohibiting States from affording, by contract or by treaty, guarantees of any kind against the exercise of the public authority in regard to all matters relating to natural riches. This contention lacks all foundation. Even if Assembly Resolution 1803 (XVII) adopted in 1962, is to be regarded, by reason of the circumstance of its adoption, as reflecting the then state of international law, such is not the case with subsequent resolutions which have not bad the same degree of authority. Even if some of their provisions can be regarded as codifying rules that reflect international practice, it would not be possible from this to deduce the existence of a rule of international law prohibiting a State from undertaking not to proceed to a nationalisation during a limited period of time. It may indeed well be eminently useful that "host" States should, if they so desire, be able to pledge themselves not to nationalise given foreign undertakings within a limited period; and no rule of public international law prevents them from doing so.

(3) Another argument advanced by the Government of Kuwait requires consideration. According to this, Aminoil's Concession belonged to the general category of "administrative contracts" in respect

of which - as much by Kuwait law as on the basis of general legal principles - special faculties were reserved to the State, of which account must be taken in the interpretation of the stabilisation clauses.

91. The " administrative contract ", as it was originally developed in French law, and subsequently in other legal systems such as those of Egypt and Kuwait, is based on the idea that certain contracts concluded by the State, or by public entities, are governed by special rules, the two principal ones being as follows :

(i) - The public Authority can require a variation in the extent of the other party's liabilities (services, payments) under the contract. This must not however go so far as to distort (unbalance) the contract; and the State can never modify the financial clauses of the contract, - nor, in particular, disturb the general equilibrium of the rights and obligations of the parties that constitute what is sometimes known as the contract's "financial equation". This characteristic is also to be found in certain ordinary private law contracts, and respect for the equilibrium of reciprocal undertakings is a fundamental principle of the law; of contracts. But in the present case it has to be realized that the main difficulties that arise are not about respect for the financial equation that reflects the contractual equilibrium, but about the method of applying Article 9, - that is to say not over respect for the original equilibrium, but over the search for a new, equitable, equilibrium.

(ii) - The public authority may proceed to a more radical step in regard to the contract, namely to put an end to it when essential necessities concerning the functioning of the State (operation of public services) are involved, It is with this second aspect of the notion of an administrative contract that the present case could in theory be concerned. Yet even if Aminoil's Concession belonged to this category of contract, it would still be necessary that exigencies connected with essential State functioning should be such as to justify Decree Law n° 124.

92. In order to find an answer to this question, in connection with that of the effect of the stabilisation clauses of the Concession, the matter has to be seen in its historical perspective.

93. It seems fair to say that what the Parties had in mind in drafting the stabilisation clauses in 1948 and 1961, was anything which, by reason of its confiscatory character, might cause serious financial prejudice to the interests of the Company. Thus, as mentioned earlier, Article 7(g) of 1961, instituting a new revised Article 11 of 1948, enumerated and strictly limited all the instances in which the Concession can terminate through a forfeiture of the concessionaire's rights (for failure in its obligations), but is silent as to all acts that would lead to the ending of the Concession without having a confiscatory character. It can be held that the case of nationalisation is precisely one of those acts, since as a matter of international law it is subject inter alia to the payment of appropriate compensation.

94. The case of nationalisation is certainly not expressly provided against by the stabilisation clauses of the Concession. But it is contended by Aminoil that notwithstanding this lacuna, the stabilisation clauses of the Concession (Articles 17 and revised 11) are cast in such absolute and all-embracing terms as to suffice in themselves -unconditionally and in all circumstances - for prohibiting nationalisation. That is a possible interpretation on the purely formal plane; but, for the following

reasons, it is not the one adopted by the Tribunal.

95. No doubt contractual limitations on the State's right to nationalise 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 stabilisation 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.

96. Such is the case here, - for if the Tribunal thus holds that it cannot interpret Articles 17 and 7(g) - revised 11 - as absolutely forbidding nationalisation, it is nevertheless the fact that these provisions are far from having lost all their value and efficacity on that account since, by impliedly reouiring that nationalisation shall not have any confiscatory character, they re-inforce the necessity for a proper indemnification as a condition of it.

97. There is another aspect of the matter which has weighed with the Tribunal. While attributing its full value to the fundamental principle of pacta sunt servanda, the Tribunal has felt obliged to recognize that the contract of Concession has undergone great changes since 1948: changes conceded -often unwillingly, but conceded nevertheless - by the Company. These changes have not been the consequence of accidental or special factors, but rather of a profound and general transformation in the terms of oil concessions that occurred in the Middle-East, and later throughout the world. These changes took place progressively, with an increasing acceleration, as from 1973. They were introduced into the contractual relations between the Government and Aminoil through the play of Article 9, or else as the result of at least tacit acceptances by the Company, which entered neither objections nor reservations in respect of them. These changes must not simply be viewed piece-meal, but on the basis of their total effect, - and they brought about a metamorphosis in the whole character of the Concession.

98. This Concession - in its origin a mining concession granted by a State whose institutions were still incomplete and directed to narrow patrimonial ends - became one of the essential instruments in the economic and social progress of a national community in full process of development. This transformation, progressively achieved, took place at first by means of successive increases in the financial levies going to the State, and then through the growing influence of the State in the economic and technical management of the undertaking, particularly as to the control of pricing policy, taken over in 1975, and the regulation of works and investment programmes. The contract of Concession thus changed its character and became one of those contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages.

99. In relation to Aminoil's undertaking therefore, the State thus became, in fact if not in law, an associate whose interests had become predominant. Moreover, in spite of its unfinished, and in certain ways improvised character, the text of the projected Agreement of July 1973, made applicable by the 22 December, 1973 Letter, bears witness to this evolution.

100. The faculty of nationalising the Concession could not thenceforward be excluded in relation to the régime of the undertaking as it resulted from the sum total of the considerations relevant to its functioning. This conclusion concerning the interpretation of the stabilisation clauses, as being no longer possessed of their former absolute character, which the Tribunal has thus reached, is in harmony with that régime as it stood in 1977, - and a contrary interpretation would, in addition, disregard its other contractual components.

101. The Tribunal wishes however to stress here that the case is no: one of a fundamental change of circumstances (rebus sic stantibus) within the meaning of Article 62 of the Vienna Convention on the Law of Treaties. It is not a case of a change involving a departure from a contract, but of a change in the nature of the contract itself, brought about by time, and the acquiescence or conduct of the Parties.

102. The Tribunal thus arrives at the conclusion that the "take-over" of Aminoil's enterprise was not, in 1977, inconsistent with the contract of concession, provided always that the nationalisation did not possess any confiscatory character.

Question (B)

103. Does Decree Law n° 124 - supposing it to be lawful within the meaning of Question (A), remain so, having regard to the fact that it supervened at a moment when a difficult negotiation between the Parties was still in progress ?

104. The Tribunal has just found that, leaving out of account the negotiations for revision taking place in 1977, a lawful nationalisation of Aminoil's undertaking had occurred. It is nevertheless quite undeniable that the state of relations between the Company and the Government at the time of the Interruption of negotiations played a major part in the termination of the Concession involved by the Decree Law. The official documentation of the period openly shows it, and the contentions out forward by the Government in the course of the arbitral proceedings make such of the condition of relations between the Parties on the eve of the Decree.

105. On the juridical level, the Government at a certain moment even went so far as to profess that it was the attitude of the Company that had brought about this lack of success of the negotiations, through a failure to respect the obligations incumbent upon it under Article 9 of 1961. Later, the Government confined itself to saying that the perpetuation of this state of affairs created a situation on the contractual level that could not be indefinitely prolonged, and that even involved an "intolerable" aspect. Hence, this condition of the contractual relationship would for the Government constitute an additional motive for nationalisation, and would in some degree strengthen the basis of the one that was declared by Decree Law n° 124.

106. For Aminoil on the other hand, this aspect of the Decree Law constituted one of the chief elements of its lack of validity. The fundamentally important circumstance was the disagreement that occurred in the course of the negotiations for the revision of the Concession. The Decree Law, by its recourse to the concept and forms of nationalisation would in this case only be a stratagem, a procedural malversation employed to resolve a dead-lock which, according to Article 9 of 1961,

ought to be resolved by agreement, but which could in no event be resolved unilaterally, and thus it was that the Government had committed a fundamental breach of contract.

107. The dialectic thus developed by the two Parties highlights an essential facet of the difficulties which arise in contract law in those cases where - for the amendment of certain provisions, or the formulation of supplementary ones - the Parties have created an obligation to negotiate, the results of which will depend entirely on the freely given consent of both of them. If the negotiations break down, what then is the legal position ? In private law, as in international law relationships, there are only palliatives. Judicial annulment of the contract has the drawback of abolishing it entirely: termination unilaterally pronounced by one of the parties is worse still.

108. As regards certain contracts (the "administrative contracts" of French law), the right reserved for the benefit of the party representing the public authority, of terminating the contract unilaterally, is practicable only because the regularity of such acts is subject to the control of judicial organs enjoying the confidence of both the parties. If this were not the case, and if the State had to be regarded as being entitled to have recourse to nationalisation at its discretion, there would be an end to any possibility of a negotiation that enabled reasonable account to be taken of the interests of both parties, since the negotiation would only be conducted under the threat of a nationalisation that would supervene at the first serious difficulty.

109. Thus the apprehensions that motivated the reasoning of the Company can be perfectly well understood, and it can be conceded in its favour that a nationalisation whose alleged justification lies solely in the advantages to be derived from putting a term to a contractual dispute, would not be regular. Nevertheless, in the circumstances of the present litigation, that is not precisely the point. It is incontrovertible that, though without haste, Kuwait had consistently pursued a general programme aimed at placing the State in control over the totality of the petroleum industry, and that a nationalisation of Aminoil was in itself lawful (see answer to Question (A) above). The problem is to decide whether this nationalisation, in itself legitimate, became illegitimate because it additionally enabled an end to be put to a contractual situation which had been the subject of a difficult negotiation that had not reached a result during the preceding months.

110. The Tribunal does not think it possible to go so far. The existence of this situation may have been decisive for the choice of the date of the nationalisation, but the latter obtained its justification from a general policy duly established and substantiated. In the concrete case submitted to the Tribunal, it would be all the more unacceptable to claim the contrary, seeing that although the first stage of the negotiations of 1976-1977 was about a revision of the Concession, the Parties subsequently sought an agreement for realising the nationalisation of the Concession: the negotiations, without departing from their initial aim, were enlarged, so that it became indeed a question of the conditions for the transfer to the State of all the components of the undertaking in Kuwait territory. As from that point, it becomes difficult to contend (merely because there was, for the moment, no outcome to a negotiation having as its object to settle terms of nationalisation by mutual agreement) that a nationalisation subsequently imposed by the public authority was rendered illegitimate in principle solely by virtue of that fact.

Question (C) - as to the obligation to have recourse to arbitration.

111. Even on the assumption that all the foregoing conclusions are correct Aminoil has also contended that since there was a dispute between the Parties, the most serious complaint to be made against the Government was that it did not have recourse to the arbitral procedures provided for in the contract, but clinched the matter unilaterally. This being so, the Tribunal believes that some comments are called for on the place of arbitration in the present context.

112. The Tribunal will disregard the controversy between the Parties as to whether, failing the arbitration clause in the July 1973 Agreement which Aminoil did not recognise, the analogous clause of the Concession Agreement was operative; and it will be assumed that there did exist some provision enabling a Party to set the machinery of arbitration in motion. But in the present context the possibility (prior to the issuing of Decree Law n° 124) of seizing an arbitral tribunal with the particular question over which the Parties had failed to come to an understanding - namely the application of the Abu Dhabi Formula - did not exist, because unless and until the Government took some concrete step -such as nationalisation - in consequence of that failure, there would have been no definite complaint with which to seize any arbitral tribunal (see Section IV above, paragraph 74). Therefore, to all intents and purposes the Parties would have had to request the arbitrators to draw up fresh contractual provisions applying that formula. Technically, the conclusion of a Special Agreement ("Compromis") to that effect was possible; but it is not at all clear that the Parties would have been able to agree on the terms of such a Compromis, and no complaint could have been made against either for not being able so to agree. The only definite issue for arbitration would therefore have been the claim of one of the Parties that the termination of the Concession ought to be pronounced in the absence of an understanding as to the conditions of a revision, the principle of which both Parties accepted as legally necessary. The complaint made by Aminoil against the Government consequently comes to this, that by unilaterally terminating the Concession, the Government took a step which it ought to have left to an arbitrator to take, - but which the arbitrator could not have taken without first deciding what were the terms for the application of the Abu Dhabi Formula that the Parties ought to have agreed upon, but had failed to do.

113. However, quite apart from the impracticable nature of such a course, at that stage, this argument does not appear well-founded since, as the Tribunal has already ruled, the Concession had become a contract under the changed régime of which the State had, over the years, acquired a special position that included the right to terminate it, if such a step became necessary for the protection of the public interest, and subject to the payment of adequate compensation. In the course of the long delays inseparable from the arbitral process, sums of money, of which a preponderant part might eventually redound to the State, would have gone on being accumulated abroad. The Company, in a situation of absolute uncertainty as to its future, and as to what sums would ultimately remain at its disposal, would have continued not to be able to carry out the major work of renovation and development which each passing day made more urgent.

114. Looked at in this way, Decree Law n° 124 appears, and did legitimately appear to the Government of Kuwait, as a necessary protective measure in respect of essential national interests which it was bound to safeguard. By subsequently submitting the totality of its dispute with Aminoil to the present arbitral process, the Government of Kuwait has accorded to international arbitration its due place.

115. Subject to the foregoing observations, the Tribunal considers that Decree Law n° 124 did not constitute a violation by Kuwait of its obligations towards Aminoil, as these stood in 1977.

SECTION VI. Other Government Counter-Claims

116. The Government of Kuwait has made two counter-claims against Aminoil which, in its Final Conclusions (see Section I above, paragraph (xix)), are entitled Aminoil's Liabilities to Third Parties and Aminoil's Operations and Installations. The first concerns amounts due but unpaid by the Company on 19 September, 1977 (the date of the take-over), for which the Government, in the normal course of business, assumed responsibility. The second concerns what has been called "bad oil-field practice". These claims, which involve totally different questions, and have weighed very unequally with the Parties, must be dealt with separately.

(A) Aminoil's liabilities to third parties

117. The relevant Agreements between the Parties did not contain any provisions regulating the situation resulting from a possible end of the Concession by reason of the unilateral act of the public Authority. Decree Law n° 124, and the measures taken under it, determined the transfer of the Company's assets and operations on the basis of the clause in the Concession providing for a normal completion of its term (GM App. V).

118. This way of dealing with the matter was not opposed by Aminoil. The transfer of the assets gave rise to a credit in its favour, whereas that of the liabilities created a debt. The sums due at the date of 19 September, 1977, and paid by the Government, have to be refunded by the Company, as provided in Ministerial Decision n° 53 instituting a Compensation Committee and instructing it to pay "any debts relating to the Company's operations" (AM Vol. VII, Exh. 3, p. IV).

119. The Government claims certain refunds from Aminoil (GM paragraph 4.20; GCM paragraph 4.27) and the latter has conceded the principle of this (ACM paragraph 54) while requesting that the amounts involved should be checked and a guarantee given for the final extinction of the debts vis-à-vis third parties.

120. Both sides were in agreement during the proceedings to submit these matters to a joint audit (ACM paragraph 62, GCM paragraph 4.27, and GR paragraph 3,154). This audit was carried out in respect of the sum total of Aminoil's liabilities by the London and New York branches of the accounting firm of Peat, Marwick, Mitchell & Co., who are the regular auditors of Aminoil's books on behalf, respectively, of the Government and of the Company. Their Joint Report, dated 30 October, 1981, was duly furnished to the Tribunal which will have occasion to revert to it (infra, paragraph 172). In this Report (p. 14) the Accountants say :

"We have spent considerable time assessing and reviewing the various figures produced and in particular the liabilities referred to in the report of the Inventory Committee appointed by the Government. We have not been able to verify or reconcile completely all the various figures

produced, but we have been able to reach broad agreement. The areas of difference between us are mostly of an immaterial amount or are differences concerning the basis of valuation. We consider that, in view of the amounts involved and of the nature of the differences between us, no point would be served in attempting* to arrive at a closer agreement."

Accordingly, the Tribunal has gone by the figures of this Joint Report, adopting their mean where they differ.

(B) The claim of "bad oil-field practice"

121. The Government of Kuwait makes a financial claim against Aminoil based on an allegation according to which the Company was said to have failed in respect of certain usages applicable to the technological operation of the undertaking. These usages make up a body of rules that may be called in a general way the rules of "good oil-field practice".

122. An initial distinction must be drawn with reference to the juridical character of the rules the infraction of which is alleged: they can either emanate from the legislative or regulatory power of the State, or be embodied in the contracts of Concession. In the latter case they have a contractual character, and make reference to professional standards and practices traditionally of general acceptance. Historically as regards Kuwait, the case is one of the original contractual provisions of the 1948 Concession, slightly modified as to their wording by subsequent amendments to it, but without substantial alteration - (Article 2(C) of 1948; Article 8, paragraphs (3) and (6) of 1961; and Article 6 of the First Part of the First Annex to the July 1973 Agreement). The standards contemplated by these provisions are professional ones : "in work-manlike manner", "appropriate scientific methods", "all reasonable measures", "according to good oil-field practice", etc. It was only at a late date that Kuwait introduced any legislation - (Law n° 19 on the Conservation of Petroleum Resources - see GM App. IV.1) - and still later that Regulations on that matter were issued by the Minister of Oil, in 1974, to be applied only in 1976 however, and on a trial basis of 6 months before coming officially into force.

123. These provisions instituted a detailed and strict regime not suited to the special conditions of Aminoil's undertaking; but subsection 4 of Section 1 of Part E of the Regulations provided for a relief procedure, under which Aminoil had made applications that were in the course of consideration at the moment of the take-over. The correspondence between Aminoil and the official Kuwait technical services shows that the Company's conduct in its relations with the Administration over this legislation could not be faulted.

124. There remains for consideration the behaviour of the Company regarding those general standards of practice with which the relevant contractual provisions, as mentioned above, were concerned.

125. It must first of all be noticed that never, during the whole period of the Concession, was any complaint of failure proffered by the Kuwait authorities against the Company. Even allowing for the inevitable delays for installing in a newer State the technical services requisite for the supervision of the concessions, this fact raises an extremely strong presumption that the conduct of Aminoil had

been correct. This presumption is further reinforced by the fact that all its oil-field operations were carried on by agreement and in common with another oil Company - Getty - which also functioned in the Divided Zone (see Section II, paragraph (xxii) above) under a Concession from, and subject to the super-intendance of Saudi Arabia - and that Aminoil's operations never gave rise to any criticism coming from Getty or the Saudi Arabian authorities. If the various obligations to report, which were incumbent on the Company under the contracts of Concession, are taken into account, as well as the supervisory powers available to the concessionary Authority, it has to be concluded that the latter was in possession of all the means of being perfectly well informed.

126. There is a further necessary general observation: the standards governing the practices which should prevail in an oil-field undertaking must inevitably possess a considerable element of flexibility; and it scarcely needs saying that they undergo an evolution in the light of scientific progress. This was considerable between 1954 (when exploitation by Aminoil began) and 1977. Such an evolution is also influenced by certain economic factors. Standards concerned with safety, and the protection of human life, have an absolute character, - but it cannot be so with standards for the exploitation, in the economically most rational way, of natural resources. Thus, expenditures that would be quite unjustified when the barrel of oil was worth little more than a dollar, become normal when it rises to thirty dollars.

127. Passing now to the criticisms advanced in respect of Aminoil's operations, and in order to assess these more concretely, two groups of installations must be distinguished - on the one hand surface installations exclusive of wells, but including refineries; and, on the other, the oil wells themselves.

128. As regards the surface installations -conduit pines, reservoirs for stocking, refinery and sundry other plant - the objection made by the experts who were consulted by the Government was not that these installations were not in a fit state to function at the date of the take-over, - nor could it have been, for these installations went on functioning after that date, and in the same condition as before - a condition which had not called forth any expression of disapproval from the competent governmental services. The objection made by the experts called by the Government was that one of the components of the refinery (the desulphurizer) worked unsatisfactorily in a refinery itself of inferior design. In this connection is certainly not possible to impute any lack of factual information to one of those experts, for it was his own business undertaking which had carried out the task of planning and executing the work on the component and plant concerned. However, such objectivity in the giving of evidence would have been more convincing if it had not been at the expense of his former clients.

129. The Tribunal believes that the Management of Aminoil was extremely anxious to keen its expenditures down to the minimum - (thus the general look of the plant would not have given an impression of opulence) - and also, as much as practicable, to defer putting important works in band until a later date. That was why the Company took the initiative of requesting that, in the assessing of the reasonable return the allocation of which it was asking for in the course of the 1976-1977 negotiations, there should be included at least a part of the amounts that would be needed for investments of which the State would ultimately be the chief beneficiary. But no quarrel can be picked with the Company for operating under a regime of some austerity when a similar restrictiveness was being forced upon it in respect of its own final profits.

130. It was however, with the topic of oil-well construction and maintenance that the written and oral

proceedings, and the testimony of the witnesses and experts of the Parties, was mainly concerned. Here, the Government's contentions did not, as in the case of the surface installations just considered, stop at alleging that the oil-well equipment was not in a condition that could be called brilliant. The allegation was that the oil-well casings both in themselves and as to their upkeep against corrosion; the defective sealing off of wells the working of which was in suspension; the delays in repairing leaking wells, etc. - had collectively caused a major deterioration in one of the oil-reservoirs (at First Eocene level) by means of infiltrations of external water of a high degree of salinity. These infiltrations had not only led to a faster deterioration of the wells, and an increase in the costs of treating and refining the oil raised, but bad also, by reason of the abnormal quantity of water coming into the deposit of oil, resulted in the loss of a large volume of otherwise recoverable oil, and/or to the considerable expenditure required for such recovery, in particular by the sinking of new wells in order to work deposits cut off from the main mass by the abnormal level of the water.

131. Substantial expert reports, and the oral evidence of witnesses and experts called by both sides, were devoted to this matter, which puts in issue the correct running of the oilfields, back to a somewhat remote date between 1954 and 1962.

132. On the legal plane the question is one of establishing whether, at the time of the alleged bad oil-field practices, these practices were such as to be inconsistent with the course that should have been followed by a skilled and circumspect operator. The Tribunal considers that this has not been affirmatively established, - and that is the essential point. Moreover, if there existed in this First Eocene reservoir a large quantity of water rich in chlorides, it has not been denied that the level concerned has an extremely complicated geomorphic structure. The levels above it (the Dammam formation) seem to have characteristics that can lead to infiltration despite all the precautions that can be taken by the concessionaire.

133. The most that might be allowable in the light of the technology of today, and of the present price of oil, would perhaps be to regret that some extra care was not taken over certain of the operations of more than twenty years ago. But this could in no way affect the fundamental finding that neither a departure from the standards applicable at that time, nor the nexus of cause and effect between the practices followed and the actual condition of the oil reservoir concerned, has been established.

134. The Tribunal is satisfied as to the impartiality and thorough knowledge of the experts whose views were placed before it in regard to a multiplicity of technical questions, turning in particular on the salinity and external presence of the water; the effects of the presence of that water; the size of the oil deposits lodged in the reservoir, etc... If these assessments reflect serious divergences of view, these are not due to any lack of qualifications on the part of those who support them, any more than to a want of rigour, but to the complexities of the subject and to the impediments to scientific development that exist even to-day.

135. The multiplication of expert opinions could only bear witness to the difficulties and limitations involved. In these circumstances the Tribunal considers that it is not called upon to conduct an independent investigation of its own, as one of the Parties has suggested.

136. The Tribunal therefore disallows the Government's claim under this head.

SECTION VII. The question of Indemnification

1. Principles and Methods

137. The Tribunal notes in the first place that there is a very considerable gap between the amount of the claim made by the Company following upon Decree Law n° 124, and the offer made by the Government. The latter maintains that, all in all, it owes no more to the Company than the "net book value" of the assets transferred to the State. The Company on the other hand calculates the amount of the payment due to it by bringing in all the revenues which it would have received up to the expiry of the concessionary period, - these revenues being quantified on the basis of the 1961 Agreement by means of projections as to the amount of oil produced, the cost of producing it, and the price of oil during the period 1977 - 2008.
Before going into this question as a matter of law, the Tribunal will make certain general observations.

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.

140. Many regulations agreed upon by Convention have also been arrived at during this period, particularly in the field of nationalisations in the petroleum industry; and it has been sought to maintain that these furnish a body of precedent from which it is possible to deduce rules of customary international law. This important matter will be reverted to later.

141. First however, a caveat of a general kind must be entered concerning the succession of events taking place on the world plane in the petroleum industry since 1971, which have been abundantly

invoked in the course of the present case. These events, in their totality, have undoubtedly constituted an important general historical episode because of their political and economic repercussions. They call for appraisals of every kind, political, moral, economic and ideological, all of which are quite outside the competence of the Tribunal. These events have led to the frequently progressive elimination of foreign investments from producing countries. The final result of the nationalisations concerned is today secured as a matter of law, and is no longer contested. This consolidation has resulted from consents given by the interested Companies, and sometimes by the States they belong to. These facts do not compel the conclusion that, at the time when it was taken, each of these measures (the combined effect of which has led to the now existing situation) was then necessarily in conformity with the obligations incumbent on the State instituting Them. This Tribunal is not however called upon to pronounce on such matters, alien to the present litigation.

142. What the Tribunal does have to do - as was provided in the Arbitration Agreement and was stressed by the Parties in the course of the proceedings - is to decide according to law, signifying here principally international law which is also an integral part of the Law of Kuwait. The Tribunal will first indicate the general legal rules applicable to the case, and will then enquire into the circumstances intrinsic to it.

A. The applicable general rules

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 illegitimate 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) -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.

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 - 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 (see Section VI, paragraph 117).. 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" - i.e. the Government - "free of cost" - 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) - 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) - 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 restitutio 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) - 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) - Next - and this constitutes the second aspect of the difference between the Tribunal's and Aminoil's positions - the Tribunal cannot accept the projections as to the future of the petroleum industry based on the consultations of experts that the Company has 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, - 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 1971-77. 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 - 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 - 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 - 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 -

(i) If reliance is to be placed on the precedents just mentioned - and always supposing them to be conclusive about the order of size of the indemnity (which, as has been seen, they are not) -it would still be necessary for them to constitute an expression of the opinio juris - (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 -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 nationalisation, whereas the contract of concession did not forbid nationalisation, the stabilisation clauses inserted in it (and equally - by 1977 - 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 1976-77, 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 (GCM App. VI.9 and "Notes on Meetings of 12 and 13 May, 1973" GCM App. VI.1), and in the opening proposals for the 1976 negotiation (AR Vol. V, Exh. 12). 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) - 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, - for in that event the risk (for the concessionaire) has ex hypothesi vanished.

(ii) - 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 -fair in principle - 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) — 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, - 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 concreto 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)) the text of which will be found in Section II, paragraph (xxiv) supra. 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 (AR Vol. V, Exh. 14, p. 3; Exh. 18, p. 2; Exh. 21, p. 6; Exh. 22, p. 1; and Exh. 30, p. 6).

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.

2. the Figures

172. In order to calculate the amount of the indemnification due, the Tribunal has available to it numerous elements furnished by the Parties and by the experts they have commissioned for that purpose. In particular, the Tribunal has had available to it the Joint Report dated 30 October, 1981, referred to in paragraph 120 above. This Report had been the subject of head X of the Order of the Tribunal of 1 July, 1981, which stated
"The Tribunal takes note of the mutual intention of the Parties to direct their respective accountants to produce, if possible, a joint report on questions of quantum or, if this is not possible, to produce

separate reports for the Tribunal before 1 November."

173. Having given careful consideration to this Report and to the analyses, statements and counter-statements to be found in the written proceedings and furnished by Counsel and experts during the oral hearing, the Tribunal is persuaded that it is not indispensable for the final adjustment of the present case to hear the Parties again on matters of quantum, and the Parties were so informed in a communication from the Secretary of the Tribunal. Where there are differences between the accounting firms above-mentioned, the Tribunal has taken the mean of the two totals indicated.

174. The Tribunal has however determined for itself certain factors in respect of which it did not possess any data as numerically worked out as those that are included in the above-mentioned Joint Report. As regards these factors the Tribunal had a choice between various alternatives the merits of which were comparable although they could lead to different results. Where this was the case, the Tribunal has taken each of these factors into account within the global conspectus of a balanced indemnification.

175. The Tribunal must now first determine the balance-sheet of the financial rights and obligations of the Parties as at 19 September, 1977. It will then be possible to determine the situation at the date fixed for the carrying out of this Award. The state of the Parties' rights and obligations as at 19 September, 1977 involves examining seriatim their respective debts and credits at that time.

176. The debts of Aminoil -

(1) Under the 1973 Agreement, Aminoil still owed, on 19 September, 1977, and amount as to which there is a slight difference of view between the two sets of accountants, - $33,210,000 as against $31,247,000. Taking the mean between these two figures gives $32,228,500. No difficulty of interest on this amount, nor of inflation, arises, since it is basically founded on the price of petrol, and only becomes payable after 19 September, 1977.

(2) the Application of the Abu Dhabi Formula, resulting from the decisions collectively taken in mid-December 1974, does not have to be contemplated until, at the earliest, January 1975. Here, a balanced appraisal of the circumstances leads the Tribunal to fix $10 million as a reasonable rate of return for Aminoil given the fact that the important works which were to have been carried out by the Company in the near future, and, financed, at least partly, out of the profits of the undertaking, ceased to be a charge on it. This total (of 10 million), valid for the year 1975, must be increased by 10% per annum to take account of inflation; but, allowing this return for only 261 out of 365 days in 1977, the amount for that year is $8,652,000 - say $29,652,000 for the three years 1975-77 inclusive. This sum is deductible against the total profits going to Aminoil in those three years. As to these, the Joint Report of the accountants gives two fairly close figures, of which the Tribunal has taken the mean - say $101,615,000. Deducting from this the above mentioned $29,652,000, an amount of $71,963,000 is shown as due from Aminoil under the Abu Dhabi Formula. For this total, inflation does not have to be allowed for, since this is already reflected in the price of oil. Nor does it call for the allowance of interest, if the late date of the opening of the negotiations proper is borne in mind, together with the practice of the Government of Kuwait of not requiring payment of interest in cases of this kind - see the evidence of Dr. Nurredin Farrag (GCM App. II.V, p. 12).

(3) Finally, with reference to the liabilities of Aminoil to third parties, discharged by the Government, the two Parties being in agreement about the principle, the figures given in the accountants' Joint Report ($19,114,000 and $18,585,000) will be taken at their mean by the Tribunal - say $18,849,500.

177. Thus, the total liabilities of Aminoil as at 19 September, 1977, come to $123,041,000.

178. Amounts due to Aminoil -

(1) These are made up of the values of the various components of the undertaking separately considered, and of the undertaking itself considered as an organic totality - or going concern - therefore as a unified whole, the value of which is greater than that of its component parts, and which must also take account of the legitimate expectations of the owners. These principles remain good even if the undertaking was due to revert, free of cost, to the concessionary Authority in another 30 years, the profits having been restricted to a reasonable level.

(2) As regards the evaluation of the different concrete components that constitute the undertaking, the Joint Report furnishes acceptable indications concerning the assets other than fixed assets. But as regards the fixed assets, the "net book value" used as a basis merely gives a formal accounting figure which, in the present case, cannot be considered adequate.

(3) For the purposes of the present case, and for the fixed assets, it is a depreciated replacement value that seems appropriate. In consequence, taking that basis for the fixed assets, taking the order of value indicated in the Joint Report for the non-fixed assets, and taking into account the legitimate expectations of the concessionaire, the Tribunal comes to the conclusion that, at the date of 19 September, 1977, a sum estimated at $206,041,000 represented the reasonably appraised value of what constituted the object of the takeover.

(4) According to the above mentioned data, the sum total of the amount due to Aminoil as at 19 September, 1977, comes to $206,041,000 less the liabilities of $123,041,000, that is to say $83,000,000. This represents the outcome of the balance-sheet of the rights and obligations of the Parties as at 19 September, 1977.

(5) In order to establish what is due in 1982, account must be taken both of a reasonable rate of interest, which could be put at 7.5%, and of a level of inflation which the Tribunal fixes at an overall rate of 10%, - that is to say at a total annual increase of 17.5% in the amount due, over the amount due for the preceding year.

(6) Capitalizing the above-mentioned figure of $83,000,000 at a compound rate of 17.5% annually, gives the amount specified in the Operative Section (Dispositif) below.

SECTION VIII. OPERATIVE SECTION (DISPOSITIF)

179. For these reasons,

THE TRIBUNAL, unanimously, having regard to all of the above mentioned considerations,

AWARDS to Aminoil,

THE SUM OF ONE HUNDRED AND SEVENTY NINE MILLION, SEVEN HUNDRED AND FIFTY THOUSAND, SEVEN HUNDRED AND SIXTY FOUR UNITED STATES DOLLARS ($179,750,764) calculated on the basis of being payable on 1 July, 1982.