CHAPTER 8

CONCLUSION

It is clear from the survey of awards in chapters 4,5,6 and 7 that there are certain common threads running through all the awards. The first thing which strikes is that the tribunals have systematically applied legal principles in their decisions. All the awards have given detailed reasons for their particular decisions. That is, the arguments are considered in legal terms only. The merits and demerits of the arguments are assessed in legal terms. The awards themselves contain legal justifications. The tribunals have justified the awards on the basis of the applicable substantive law. They have discussed and analysed in detail the system of law governing the merits. They have been at pains to emphasize that the rulings are based on positive law or that the tribunal must decide according to law. The tribunals have, in each case, adjudicated the dispute in accordance with applicable law.

The tribunals have frequently resorted to the precedents. It is true that a number of precedents in this particular area of international law - like in most other areas - are limited. But what is remarkable is that both sides to a dispute have resorted to the same precedents though their interpretations are opposed to each other. The tribunals have given their own view of the precedents. For example, in most of the awards, the parties and the

tribunals have placed their reliance on Chorzow and Aminoil cases though their interpretations have varied. But what is significant for our purposes is that the tribunals have placed their principle reliance on precedents. The tribunals have also emphasized the contractual obligations of the parties. They have systematically scrutinized the terms of the contractual stipulations. They have also put emphasis on principles of fidelity, good faith and fair dealing. They have frequently emphasized the principle of good faith.

A recurring and important aspect of the awards has been the primacy given to international law over municipal system of law. As was seen, most stipulations of applicable law contained a reference to international law. But even in those cases, where international law was not mentioned, the tribunals have always considered its applicability and in the event of any conflict with municipal law, has been given ascendancy over it. The tribunals have frequently resorted to general principles of law. They have done this particularly in those cases, where the proper law was not explicit. McNair's[1] tentative suggestions have found frequent application.

Another important feature of the awards has been that many of them have attempted to make a firm distinction between lawful and unlawful taking. For example, in Amoco award a clear distinction was made between lawful and

1. McNair, "General Principles of Law Recognised by Civilized Nations", The British Yearbook of International Law, vol.33 (1957), pp.1-19.

unlawful expropriations based on Chorzow case. The reason is that there are different practical consequences in terms of compensation. The remedies for claimants are more beneficial in the case of unlawful taking than are the remedies for a lawful taking. On the basis of legal analysis, the tribunals in all decisions have held the contracting states to the term of the contract and awarded damages or compensations. In most of the awards they have awarded full compensation. They have consistently held that under present law, in the event of expropriation, the alien contractor is entitled to full compensation for expropriated property. The tribunals have held that in only exceptional circumstances partial compensation can be justified. The consistency of the tribunals about desirability of full compensation has been remarkable.

As the various awards have shown, there is now firmly established an international contract law which governs the state's conduct towards aliens. These tribunals, in order to determine whether the termination of a state contact is arbitrary, have looked closely at the actual terms of the contract. What was agreed between the parties in the contract had inevitably been a factor in deciding whether there had been an arbitrary interference with the expected course of the contractual relationship or not. The essence of the wrong was what the state had done in respect of the contractual relationship itself. Moreover, the provisions of a contract or concession have been held to be relevant both in the assessment of reparation and of compensation.

Certainly it is a great advance from traditional international law, where in such situation there was only a remedy for delict. Jennings says:

> "Whatever might be the position today it is certain that an individual was not a subject of traditional law. International law was therefore incapable by reason of its very structure of accommodating any notion of reciprocal obligations arising at international law between a state and individual from their contract. For the protection of the individual, the introduction of the protecting state was necessary; and, therefore, there had to be a transformation of the claim out of the realm of obligations fixed by the parties in contract, to the realm of general duties owed by one state to another.And this is precisely a transformation from the realm of contract to the realm of tort or delict. This is the fundamental reason why the traditional law accepted almost as a dogma the idea that the mere non-performance by a state of its obligations under a contract with an alien individual does not in itself necessarily give rise to international responsibility. The classical law was incapable of providing any remedy other than a remedy for delict."[2]

What does this jurisprudence hold for the developing

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2. R.Y. Jennings, "State Contracts in International Law", British Yearbook of International Law, vol.37, (1961), p.164.

Mann had denied the theoretical possibility of existence of an international contract law. The contrary view, according to Mann, "stems from a fundamental error which would not have arisen if public international lawyers had due regard to the character and teachings of private international law; in the type of case where there is room for the problem at all under customary public international law, not breach of contract in fact occurs, and consequently, the principle *pacta sunt servanda* is not infringed. Contracts are governed by the law determined by the private international law of the forum. That law 'not merely sustains but because it sustains may also modify or dissolve the contractual bond.' These words of Lord Radcliffe

countries? What comfort can they draw from this? Is there any pattern? Certainly the developing countries cannot draw much comfort from a jurisprudence which places primary emphasis on payment of full compensation in cases of expropriation of foreign property. This manifestly puts lot of strain on the economic capacity of the paying state. It hinders also the programme of large-scale nationalization or any other economic restructuring in the society. Payment of full compensation can bring disaster on the weak economies.

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footnote 2 continued
express a principle of universal application. It is nowhere doubted, and has frequently been affirmed by the highest tribunals, that a contract is subject to its proper law as it exists from time to time.These rules of private international law demand the rejection of any idea of "breach" of contract also in the case in which the state enacting the new law of general impact is itself a party to the contract."
F.A. Mann, "State Contracts and State Responsibility", The American Journal of International Law, vol.54, (1960), p.581.

Bowett, as late as 1988, says that at present there are no international law rules of contract law. He finds it difficult to identify any such body of rules present though he does not doubt the capacity of international law to develop such rules. "There is no intrinsic reason why international law should not develop a body of rules regulating the state's power to contract with aliens. After all, there is a body of rules, in the law of state responsibility, regulating a state's conduct towards aliens. And international law has already developed the doctrine of restrictive sovereign immunity, designed to preclude a state from invoking immunity in cases involving its commercial relations with aliens."
D.B. Bowett, "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach, British Yearbook of International Law, vol.59,(1988), p.54.

Politically and ideologically also developing countries find it offending and humiliating to pay full compensation.

At the same time in today's interdependent world it is better that there should be less and less idealism and rhetoric and more realistic approach to conduct of international relations. Moreover, the legacies of colonial rule is receding in the past. The predominant requirement to cure today's economic ills is more and more foreign investment.At the same time, this investment is more likely to be made by private investors rather than by the governments, most of whom are already in trouble. So if seen from this perspective -- the perspective of growing interdependence and desirability of foreign investment -- there is much in the jurisprudence of tribunals which is salutary. Thus, a recurring theme of many opinions has been the need to recognize this interdependence. An able articulations of this idea is to be found in Holtzman's separate opinion in INA:

> "Thus, it can be seen that whatever 'reappraisal' of customary international law may have occurred in recent years it has not led courts or arbitral tribunals to adopt a standard of partial compensation. There are sound reasons of law and policy why this should be so. For justice demands, as it always has, that a party who has been deprived of his property should be made whole; and in an economically interdependent world the law should encourage investment, not discourage it by increasing its risks.[3]

Similarly,arbitrator Mosk highlights the beneficial role

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3. Separate Opinion of Holtzman in INA Corporation v. Iran, Yearbook Commercial Arbitration, vol.11, (1986), p.325.

of foreign capital in his concurring opinion in AIG v. Iran:

> "There are some who suggest that less than full compensation may constitute appropriate compensation. Although I do not agree with this suggestion, various factors cited with regard to a determination of whether less than full compensation should be awarded support full compensation in the instant case.Claimant American International Group and its subsidiaries (collectively AIG) made their investment with the encouragement of the Iranian government. Presumably, both were interested in the development of an Iranian insurance industry. AIG devoted time and money to supply expertise, train Iranian personnel in the business of insurance industry and otherwise assist the Iranian insurance industry.The investment was not made in a 'colonial' or 'quasi-colonial' country and did not have any adverse effect on Iran. AIG did not commit any improper acts and there is no indication that AIG derived excess or unwarranted profits. Indeed it appears that AIG encouraged Iran America to take measures favouring long-term stability over short-term profits. Thus, although the investment was not a relatively old one, it was intended to be one of long duration. It may be assumed that AIG made its investments in reliance, not only on Iranian government cooperation, but also on the explicit provisions of the Treaty of Amity. Thereafter Iran took over the assets of the company as part of its program to expand the insurance industry over the entire state and to nullify and liquidate all activities of 'representatives of foreign insurance companies. Thus, Iran, by its taking, became the beneficiary of all of the efforts of AIG, as well as of the business of Iran America. I do not suggest that any of these factors is relevant to the determination of what is adequate compensation under customary international law; they are relevant to the theories that I do not accept. I mention them, however, to point out that even under these theories. The claimants are entitled to full compensation.[4]

4. AIG v. Iran, International Legal Materials, vol.23, (1984). p.19.
Revere Copper award delivered by American Arbitration Association also speaks of a needy government inviting foreign capital by offering inducements:

Another point should be kept in mind in this context. The fate of the economies keep on changing. Today's developing countries may become tomorrow's developed world. Two big economies - that of United States and Britain -- are already in trouble. On the other hand new economic powers are emerging even among Third World countries. Many

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Footnote 4 contd...
"The situation in Jamaica with respect to the aluminium companies in 1957, 1966 and 1967, was the almost classic one of a government seeking to obtain substantial long term commitment from foreign investors for the economic development of its natural resources and for that purpose providing substantial inducement in the way of tax and other assurances for limited periods of time. If the sovereign power of a state can not be fettered in this manner by entering into binding contracts, the state would be deprived of the power by such contracts to meet essential needs. Inevitably, in order to meet the aspirations of its people the government may, for certain periods of time, impose limits on the sovereign powers of the state, just as it does when it embarks on international financing by issuing long term government bond on foreign markets. Under international law the commitments made in favour of foreign nationals are binding notwithstanding the power of Parliament and other governmental organs under the domestic constitution to override or nullify such commitments. Any other position would mean in this case that Jamaica could not in the exercise of its sovereign powers obtain private foreign capital to develop its resources or attract foreign industries. To suggest that for the purposes of obtaining foreign private capital the government could only issue contracts that were non-binding would be meaningless. As the contracts were made in the same sense that the commitments were set out in unqualified legal form, international law will give effect to them."
Award by American Arbitration Association in Revere Copper and Brass Inc. v. Overseas Private Investment Corporation, International Legal Materials, vol.17,. (1978) p.1343.

The "Saphire award also noted and emphasized the need of foreign investor to be protected against arbitrary state

countries of the Middle East are themselves exporter of capital abroad. India also is an important investor abroad. So it is in the interest of developing countries themselves that investors should be paid full compensation in the event of expropriation.

Mosl again:

"...Although there has been controversy over the standard of compensation required by customary international law... I believe such law requires full compensation. The notion that property can ~~to~~ taken without full compensation is incompatible with fundamental fairness and other public and international interests. The risk of inadequate compensation for taking may discourage much needed international investments in the developing countries or at least will raise the cost of those investments. In addition, developing countries will have an increasing interest

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FOOTNOTE 4 CONT...

action because such foreign capital was useful to the host nations. In this award, sole arbitrator Cavin, while discussing substantive law, noted that Saphire was bringing financial and technical assistance to Iran, which involved it in investments, responsibilities and considerable risks. It found it natural that they should be protected against any legislative changes which might alter the character of the contract and that they should be assured of some legal security.

Again,

"...Such a solution seems particularly suitable for giving the guarantees of protection which are indispensable for foreign companies, since these companies undergo very considerable risks in bringing financial and technical aid to countries in the process of development."

Saphire International Petroleums Ltd. v. National Iranian Oil Company, International Law Reports, vol.35, (1967), p.175.

in protecting the foreign investments of their own nationals."[5]

The tribunals have been at pains to emphasize the legality of the relationship. They have emphasized that the legal framework of any international economic order should not be undermined by arbitrary state actions. On the other hand, everything should be done in order to strengthen the incipient legal order which is emerging at international level. They have emphasized the virtue of stability in commercial and trading relations. They have put particular emphasis on principle of good faith.[6]

~~FOOTNOTE 5 CONTD~~...

5. Ibid.
Significantly, the Aminoil award, frequently relied upon by both parties, also emphasizes that it is in the interests of states of Third World also to strengthen legal principles because their own nationals are becoming investors abroad:

"But as regards states which welcome foreign investment, and which even engage in it themselves, it could be expected that their attitudes 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 will, therefore, confine itself to registering that in the case of the present dispute there is no room for rule of compensation that would make nonsense of foreign investment" (para 146).

Kuwait v. Aminoil, Yearbook Commercial Arbitration, Vol.9 (1984), p.85.

6. Dupuy, the sole arbitrator in TOPCO/CALASIATIC, an award again frequently relied upon by the parties as well as the tribunals, put special emphasis on principles of good faith in commercial dealings:
"One should conclude that a sovereign state which nationalizes cannot disregard the commitments undertaken by the contracting state; to decide otherwise would in fact

It must be acknowledged in all fairness that the tribunals have been faced with the unenviable task of reconciling the irreconciliables - the Hull principle of 'prompt', 'adequate' and 'effective compensation' with the principle of permanent sovereignty over natural resources. Prof.Khan says that "international tribunals have been afflicted by this cleavage..."[7] But it seems that they have done their best to arrive at solutions which can be defended on strictly legal principles.

So much for the principles of law or legality. The tribunals have proceeded on legal principles, done the analysis in legal terms and their *ratio decidendi* is such that can be defensible in legal terms. But it must be at once admitted here that much more than law is involved. For

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FOOTNOTE 6 CONTD...
recognize that all contractual commitments undertaken by a state have been undertaken under a purely permissive condition on its part and are therefore lacking of any legal force and any binding effect. From the point of view of its advisability, such a solution would 'gravely harm the credibility of states since it would introduce in such contracts a fundamental imbalance because in these contracts only one party - the party contracting with the state - would be bound. In law such an outcome would go directly against the most elementary principle of good faith and for this reason it can not be accepted." [para 91].
TOPCO/CLASIATIC award, International Legal Materials, vol.17, (1978) p.31.

7. Rahamatullah Khan, The Iran-United States Claims Tribunal: Controversies, Cases and Contribution (Dordrecht: Martinus Nijhoff, 1990), p.253.

decades, the overwhelming majority of the people in developing world have got little or no real opportunity to participate in the existing global economic order. They got little benefit from it. One may legitimately ask whether these deprived countries are not justified in insisting upon radical systematic changes in order to rectify the inequalities, which according to them are inherent in present international economic order. One can wonder if the international law principle of compensation cannot meet the test of the contemporary and future common interests, then surely it ought to be replaced by another international law which is more responsible to the common interests of humanity.

Jennings has cautioned against any hasty change in the existing law. He acknowledges that there are eloquent voices impatient with present international law but suggests that there is no need to discard the existing system. It would seem perverse, according to him, even to wish to do so at present moment when international law is needed as never before. He says, "Yet it is important not to carry the campaign for a new international law so far as possibly to weaken the authority and respect which our present international law enjoys. And it is still important to distinguish between *lege lata* and proposals *de lege* ferrenda..."[8] Jennings has a point, but the trouble is that

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8. Robert Y. Jennings, "An International Lawyer Takes Stock", International and Comparative Law Quarterly, vol.39(1990), p.528.

if the developed countries do not respond swiftly and adequately to the poor countries' increasingly urgent and entirely understandable developmental appeal, more and more countries will question the legitimacy and the content of existing law which may eventually lead to the collapse of whatever system there is. In such a situation a pragmatic approach would only work. Only those policies should be formulated and applied which would accommodate the developmental goals of the Third World with the need of foreign investor in being assured of a minimum protection of his investment. Only then a new world will be opened in which the present international law with its excessive emphasis on rights and duties will be supplemented by an international law of co-operation in which more empahsis will be put on common interests. If such an attempt is made sincerely, then it will in due course of time strenghten the bonds of international unity and the realization that the rule of law conceived in a larger sense of justice is the hope of humanity's progress.