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STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

191

ORIGINAL DOCUMENTS IN SAFE

Case No. 173

Date of filing: 22 July 88

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

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- Date _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 173
CHAMBER THREE
AWARD NO. 378-173-3

HOUSTON CONTRACTING COMPANY,
Claimant,

and

NATIONAL IRANIAN OIL COMPANY,
NATIONAL IRANIAN GAS COMPANY,
and THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

AWARD

Appearances:

For the Claimant:

Mr. Robert B. Davidson,
Mr. Cleveland Stockmeyer,
Mr. Paul Franzetti,
Attorneys for Houston Contracting Company;
Mr. E. Blake Redding,
Counsel to Sedco/Forex;
Mr. Neil White,
Mr. J.W. Gully,
Representatives of the Claimant;
Mr. Tom Carpenter,
Witness.

For the Respondent:

Mr. Mohammad K. Eshragh,
Agent of the Government of the Islamic Republic of Iran;
Mr. Mohammad T. Naderi,
Legal Adviser to the Agent;
Mr. Ali Akbar Mahrokhzad,
Mr. Hamid Forodian,
Mr. Ali Azizsoltani,
Legal Advisors and Representatives of National Iranian Oil Company;
Mr. Abdolmohammed Eidinejad,
Mr. Javad Dehghani Tafti,
Mr. Alireza Babaie,
Representatives of National Iranian Oil Company;
Mr. Ali Mokarram,
Mr. Ghassem Nikonazar Azad,
Legal Advisors and Representatives of National Iranian Gas Company;
Mr. Keyhan Afshar Oromieh,
Mr. Assadollah Alirezaee Dizicheh,
Mr. Arsalan Razzaghi,
Mr. Ebrahim Roshanaie,
Representatives of National Iranian Gas Company;
Mr. Ebrahim Pyravi Vanak,
Mr. Seyed Mohsen Shahrestani,
Mr. Hassan Amirdjani,
Mr. Mostafa Bigdeli,
Mr. Mahmood Ghodratipour,
Mr. Ahmed Zad,
Mr. Peter Charles Becker,
Mr. A.S. McWhirter,
Witnesses.

Also present:

Mr. Michael F. Raboin,
Deputy Agent of the Government of the United States of America.

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. The Claimant, HOUSTON CONTRACTING COMPANY ("HCC"), is a corporation engaged in the business of civil and mechanical engineering and construction, including the design and construction of oil and gas pipelines and associated civil and mechanical works. The present claims arise out of alleged underpayments in the amount of U.S.$34,953,575[1] under (1) two agreements entered into between HCC and NATIONAL IRANIAN OIL COMPANY ("NIOC"), one for the construction of two oil pipelines between Esfahan and Rey, Iran ("the Esfahan-Rey Contract") and one for the construction of a gas pipeline and related facilities for the Gach Saran Associated Gas Injection Project ("the Gach Saran Contract") and (2) two further contracts between HCC and NATIONAL IRANIAN GAS COMPANY ("NIGC"), one for the construction of a gas pipeline from Ahwaz to the Ramin Power Station ("the Ramin Contract") and one for the replacement of the Ghom to Tehran spur of an existing pipeline ("the Tehran Spur Contract"). A further claim for the unlawful expropriation of equipment valued at U.S.$9,930,650[2] is directed against THE ISLAMIC REPUBLIC OF IRAN ("IRAN").

2. On 18 December 1981 HCC filed a Statement of Claim naming NIOC, NIGC and IRAN as Respondents.

3. On 1 March 1983 NIOC filed a Statement of Defense and Counterclaims. NIGC filed a Statement of Defense and Counterclaims on 15 April 1983. IRAN filed its Statement of Defense on 19 April 1983.

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[1] Originally claimed as U.S.$35,657,382.46.

[2] Originally claimed as U.S.$7,297,720.

4. The Parties have submitted extensive pleadings and documentary evidence on all issues of the Case and a Pre-Hearing Conference was held on 28 October 1985.

5. On 10 February 1986, following the decision of the Full Tribunal in Case A/16, pursuant to which the issue of whether an Iranian bank claim on a standby letter of credit can be joined as a counterclaim against the relevant contractor is reserved to each Chamber when considering jurisdiction, NIOC submitted a supplementary counterclaim arising out of the bank guarantees issued under the Esfahan-Rey Contract. This counterclaim was filed by NIOC on its own behalf against HCC on the grounds of unjust enrichment. Subsequently, on 29 January 1987, Bank Tejarat (formerly Iranians Bank, the issuer of the guarantees in question) submitted a similar counterclaim in its own right, by way of an attachment to NIOC's Brief. On 2 February 1987 Bank Tejarat also filed a counterclaim in respect of the letter of guarantee issued in connection with the Tehran Spur Contract.

6. HCC objects to the late filing of these counterclaims, whether raised by NIOC, NIGC or the bank, and requests that they be dismissed as untimely. HCC further notes that, following the Tribunal's decision in Case A/16, an Order was issued by Chamber Two on 20 March 1985 which, it states, may include a time limitation as to the filing of any relevant counterclaim.

7. A Hearing was scheduled for 13 and 14 April 1987 but was postponed by two days at the Respondents' request and held on 15 and 16 April 1987.

8. At the Hearing HCC objected to the late filing of Rebuttal Memorials and evidentiary material by the Respondents. Rebuttal Memorials had been required to be filed by all Parties by 16 March 1987 and on 26 March 1987 the Tribunal had directed the Respondents to file such

submissions forthwith. The Claimant requested that Documents Nos. 176, 177, 178 and 179, filed by NIOC on 26 March 1987, be rejected on the basis that they allegedly contain new material and arguments relating to the Gach Saran Contract. Alternatively, the Claimant requested that it be permitted to respond in writing to such arguments. The Tribunal reserved its decision on this request to the present Award.

9. The Tribunal determines that the material contained in the disputed filings is not solely evidentiary but forms part of the Respondents' pleadings. It relates to the Claimant's claim, which has been fully presented. In order to preserve equality between the Parties, and given that such documents were filed on the same day as the Tribunal's Order, the Tribunal decides not to reject these filings.

10. The Tribunal has also reviewed the Order of 20 March 1985 referred to in paragraph 6, supra. This does not contain any time limit as to the filing of a bank counter-claim in an existing case, nor has this Chamber specified such a time limit. The Tribunal will therefore deal with this issue in the appropriate sections of this Award.

II. JURISDICTION

A. The Claimant's Nationality

11. HCC states that it is a United States corporation organized and existing under the laws of the State of Delaware and qualifying as a United States national within the meaning of the Claims Settlement Declaration. It states that it is a wholly owned subsidiary of Sedco, Inc. ("Sedco"), which is asserted to be a corporation organized and existing under the laws of the State of Texas, and the shares of which are more than 50% owned by United States citizens.

12. As evidence thereof HCC has submitted a copy of a certificate of incorporation and good standing dated 15 April 1983 from the Secretary of State of the State of Delaware together with the sworn affidavit of Mr. E. Blake Redding, General Counsel of Sedco/Forex, as Sedco is now known, which refers to and attaches a certification by an international accounting firm attesting that Sedco owned 100% of the shares of HCC between the years 1978 through 1982.

13. The Respondents contend that HCC has not set forth sufficient proof of its United States nationality, but have produced no evidence to rebut that submitted by HCC. The Tribunal has held previously that Sedco is a United States national for the purpose of Article VII, paragraph 1, of the Claims Settlement Declaration. (See Sedco, Inc. and National Iranian Oil Company, Award No. ITL 55-129-3 (28 October 1985), reprinted in 9 Iran-U.S. C.T.R. 248.)

14. The Tribunal finds sufficient evidence in the record that HCC is a wholly owned subsidiary of Sedco, and is, therefore, a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration, pursuant to the standards set forth in the Order of 20 December 1982 in Flexi-Van Leasing, Inc. and Islamic Republic of Iran, Case No. 36, (Chamber One), reprinted in 1 Iran-U.S. C.T.R. 455, and the Order of 21 January 1983 in General Motors Corp. and Government of the Islamic Republic of Iran, Case No. 94, (Chamber One), reprinted in 3 Iran-U.S. C.T.R. 1.

B. NIOC As A Proper Party To The Case

15. NIOC challenges the Tribunal's jurisdiction over the claim under the Gach Saran Contract on the ground that this agreement was entered into between HCC and Oil Service

Company of Iran ("OSCO"). NIOC states that its relationship with OSCO is one of employer and contractor and not that of a principal and its agent arguing that HCC "never considered NIOC as party to its contract."

16. NIOC further contends that the Gach Saran Contract was executed on the basis of Article 17 of an agreement entered into in 1973 between NIOC and a consortium composed of major multinational oil companies, referred to as "Consortium Members," pursuant to which OSCO was incorporated as an Iranian corporation to implement its provisions. According to NIOC, the Special Committee established by the Revolutionary Council to review oil agreements declared the 1973 Agreement null and void on or about 1 May 1980. Therefore, argues NIOC, the Gach Saran Contract is ipso facto also null and void.

17. Insofar as these arguments relate to issues of jurisdiction, the Tribunal has held previously that contractual obligations and debts arising out of agreements entered into by OSCO are binding upon NIOC as OSCO's de facto successor. (See Oil Field of Texas, Inc. and Iran, Award No. ITL 10-43-FT (10 December 1982), reprinted in 1 Iran-U.S. C.T.R. 347). This holding has been confirmed in other cases in which the Tribunal has issued awards on claims asserted against NIOC in connection with contracts entered into with OSCO and which confirm that such contracts did not become automatically null and void. (See, e.g., Santa Fe International Company and Islamic Republic of Iran, Award No. 211-10/11-2 (17 February 1986), reprinted in 10 Iran-U.S. C.T.R. 365; Halliburton Company and Islamic Republic of Iran, Award No. 200-12/13-1 (20 November 1985), reprinted in 9 Iran-U.S. C.T.R. 310; Reading & Bates Corporation and Islamic Republic of Iran, Award No. 95-28-1 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 199.) The Tribunal therefore finds that it has jurisdiction over claims against NIOC arising under the Gach Saran Contract.

C. NIGC And The Forum Selection Clauses

18. NIGC alleges that the dispute resolution clauses contained in the Ramin and Tehran Spur Contracts operate to exclude any claims arising thereunder from the Tribunal's jurisdiction, pursuant to Article II, paragraph 1, of the Claims Settlement Declaration. NIGC alleges that these contracts were implemented in Iran and are stated to be governed by Iranian law and that therefore all disputes arising thereunder must be settled in Iran by Iranian courts. The Claimant denies this assertion, alleging that the dispute resolution clauses do not provide "for the exclusivity of such courts for the resolution of contractual disputes."

19. The Ramin Contract dispute resolution clause (Clause 61 of the General Conditions) reads as follows:

> Settlement of disputes
>
> If any disputes or difference of any kind whatsoever shall arise between the Engineer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works it shall be referred to claims and settlement committee established by the Company and the matter shall be discussed in presence of the Contractor. If the decision of the said committee shall not be acceptable by the Contractor then the Contractor may after receiving such decision require that the matter or matters in dispute be settled in accordance with Iranian Laws.

20. The Tehran Spur Contract dispute resolution clause (Clause 61 of the General Conditions) provides as follows:

> Settlement of disputes
>
> If any disputes or difference of any kind whatsoever shall arise between the parties hereto in connection with or arising out of the execution of the Contract or its interpretation or the carrying out of the Works, which cannot be settled amicably through negociations [sic], then the matter(s) in

> dispute shall be settled in Iran in accordance with Iranian Laws.

21. Article II, paragraph 1, of the Claims Settlemnt Declaration excludes from the Tribunal's jurisdiction "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position." The language of the clauses quoted above does not refer to the settlement of disputes solely by Iranian courts. The Tribunal has already found that a contractual clause providing for the settlement of disputes according to Iranian law does not constitute a forum selection clause contemplating the sole jurisdiction of Iranian courts. See Gibbs & Hill, Inc. and Iran Power Generation and Transmission Company, Award No. ITL 1-6-FT (Part II) (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 236. Consequently, these provisions in the Ramin and Tehran Spur Contracts do not exclude the Tribunal's jurisdiction over claims based on such contracts.

D. Subject Matter Jurisdiction

22. In the absence of any objections having been raised, the Tribunal holds that the subject matter of each of these claims is within its jurisdiction, pursuant to Article II, paragraph 1, of the Claims Settlement Declaration.

E. Jurisdiction Over Counterclaims

23. Issues of jurisdiction relating to the counterclaims are examined in the relevant sections below.

III. THE MERITS

A. The Claims And Counterclaims Involving NIOC

1. The Claims And Counterclaims Under The Esfahan-Rey Contract

a. Factual Background

24. On 12 October 1975 HCC and NIOC entered into Contract No. CC-741, the Esfahan-Rey Contract, for the design, engineering and construction of a 371.5 kilometer oil pipeline system from the Esfahan pump station to an oil terminal in Rey, Iran. In consideration of a lump sum contract price of Rls. 7,395,537,000 HCC undertook to design and construct, on a turnkey basis, two independent pipelines along the route, one a 24 inch pipeline designed to supply 220,000 barrels of crude oil per stream day and the other an 18 inch pipeline to supply 110,000 barrels per stream day. HCC was responsible for "all work comprising detailed engineering and design including cathodic protection and hydrulic [sic] studies, the supply of all material and equipment, construction, testing, commissioning and remedying of defects of the Works ..." (Esfahan-Rey Contract, Section I).

25. Pursuant to Section III of the contract documents, the plant to be provided and the work to be done were divided into three categories, namely Part A: design and engineering; Part B: supply of imported materials; and Part C: installation and supply of all other material required for the project. The Form of Agreement in Section III also provided a lump sum cost breakdown for each part of the work, as follows: Part A - Rls. 110,593,000; Part B - Rls. 3,039,167,000; and Part C - Rls. 4,230,777,000. The project was to be completed by 12 October 1977, followed by a 12-month maintenance period prior to final acceptance, pursuant to Clause 6 of the Form of Agreement and Clause 33.1 of the General Conditions.

26. The procedures for payment to HCC are contained in Clauses 107-112 of the Particular Conditions, as amended by Contract Addendum No. 1, dated 9 March 1977. Clause 108 of the Particular Conditions provided for HCC to receive a 20% down payment of the contract price, secured by a letter of guarantee from HCC which was to be amortized in proportion to progress payments made. HCC was then required to submit monthly applications for payment to the Engineer, Moody International (Middle East) Ltd., Inc. ("Moody"), showing the progress of the work and the amount claimed for work performed under Parts A and C. After approval by the Engineer, the statements and a Payment Certificate were to be forwarded within 10 days to NIOC, which was required pursuant to Clauses 107.1, 107.3.b., 108.1.2. and 108.3.2. of the Particular Conditions to make payment within 20 days of receipt thereof or within 30 days of receipt by the Engineer, less a 10% retention.

27. The balance of payments for goods and materials supplied under Part B were to be reimbursed to HCC in U.S. Dollars by drawing down on a letter of credit opened by NIOC, upon presentation of the shipping documents, under Clause 108.2.3 of the Particular Conditions. Clause 112 of the Particular Conditions and HCC's Tender provided for 60% of the payments in respect of Parts A and C to be made in U.S. Dollars at the "Bank Markazi selling rate of exchange at the date of payments" and the balance in Iranian Rials. Clause 19.24 of the Instructions to Tenderers provided for adjustments to be made if the exchange rate fluctuated more than 1% from the rate at the Tender date.[3]

28. Pursuant to Clauses 108.1.3. and 108.3.3. of the Particular Conditions, the 10% retention monies were to be

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[3]The rate of exchange at the Tender date (24 August 1975) was U.S.$1 = Rls. 68.15. The Claimant has used this rate for all conversions unless stated otherwise.

released to HCC in two equal installments, one payable at the date of "handing over," i.e., the date certified by the Engineer in a "taking-over certificate" as defined in Clause 32.1 of the General Conditions, and the other "after satisfactory completion of the period of Remedy of Defects, specified in Clause 33.1 of the General Conditions of Contract or when all relevant defects at that time, ... have been rectified, whichever is the later." Part B payments were not subject to a 10% withholding but the letter of guarantee provided by HCC to secure the 20% advance payment was to be reduced proportionately so that it would stand at 10% of the value of Part B on delivery of all the materials. Under Clause 108.2.4. of the Particular Conditions, this guarantee was also then to be released in two equal parts, in the same manner as for Parts A and C.

29. Clause 34.1 of the General Conditions provided that the Engineer could expand or modify the original scope of the work by issuing Variation Orders and adjusting the contract price accordingly. Payments for such variations were to be made in the same way as payments under each part of the Esfahan-Rey Contract, i.e., by monthly progress payments under Parts A and C or by draw-down against the letter of credit under Part B.

30. As well as receiving additional payments for work performed pursuant to Variation Orders, HCC was entitled, pursuant to Clause 48 of the Particular Conditions as amended by Contract Amendment No. 1, to recover the costs of any increases in materials and construction prices by submitting escalation invoices. These were to be paid within 30 days of submission, subject to a 10% retention to be released in the same manner as for regular progress payments. Again, materials escalation invoices were payable wholly in U.S. Dollars and those for civil and mechanical work 60% in U.S. Dollars and 40% in Iranian Rials.

31. HCC commenced work on this project in October 1975. Completion Certificate No. 1 was issued by NIOC on 29 June 1977, covering all the work except 17 minor items and the installation of the cathodic protection system. A separate certificate, Completion Certificate No. 2, was issued on 20 September 1977 for the cathodic protection system, subject to completion of an additional 13 minor items.

32. Following site inspections conducted on 8, 9 and 10 October 1978 a meeting was held on 18 October 1978 at which both HCC and NIOC were represented, and a handwritten document was prepared entitled "Final Acceptance of Esfahan-Rey Pipeline N.I.O.C. Contract No CC 741," dated 31 November 1978. This lists 10 points still outstanding.

33. Due to civil unrest arising in the course of the Iranian Revolution, HCC suspended its remedial work on the Esfahan-Rey Contract in early 1979, but returned to Iran later that year and completed the work. NIOC representatives inspected the site again in August 1979 and on 1 September 1979 issued another handwritten document which records that:

> It was agreed by all present that nine defects recorded as per minutes of meeting 18 October 1978 were completed (1,2,3,4,5,6,7,9,10) to N.I.O.C.'s satisfaction and H.C.C.'s obligations under the Remedy of Defects Clause 33 of the Contract were completed. However, item 8 of the referenced minutes is subject to contractual financial considerations by N.I.O.C. legal department, N.I.O.C. board of directors and H.C.C.

This document was signed by representatives of both NIOC and HCC. On the same day NIOC also issued a Final Certificate, which states:

> OUTSTANDING ITEM [sic] ARE: -
>
> 1) H.C.C. to provide Final W.S.I.O. Clearance Certificate to N.I.O.C. Contract office.
> 2) H.C.C. has completed finally the project and Guarantee No. 8/356 will be released.

3) According to NIOC letter Ref. ≠195/4502/ 316 N.I.O.C. will deduct Rials 10.000.000 from H.C.C. final payment.
4) Pipeline capacity throughput test will be performed by N.I.O.C. and agreed sum will be deducted from amounts due H.C.C.
5) H.C.C. will complete disposal of temporary imported equipment.

Note: Both Parties agreed to take the item 3 to arbitration.

34. HCC alleges that, despite the fact that it adequately performed all its obligations from the effective date of the contract until full completion of the work, NIOC refused to pay certain invoices, made wrongful deductions from invoices, failed to release retention monies and otherwise breached the terms of the Esfahan-Rey Contract. On these grounds, HCC seeks from NIOC a net sum of U.S.$3,481,276 (after rounding), as follows: (1) U.S.$84,496 in outstanding progress payments; (2) U.S.$160,671 for wrongful deductions from approved Payment Certificates; (3) U.S.$1,498,888 (less contractor's tax) in outstanding escalation invoices; (4) U.S.$1,096,890 (less contractor's tax) in unpaid exchange invoices; (5) U.S.$482,308 (less contractor's tax) for outstanding variation order invoices; (6) U.S.$138,814 release of retention monies; and (7) U.S.$207,696 for payment due under the Supplied Materials letter of credit. The gross total of these figures is U.S.$3,669,763. Against this HCC offsets a net credit to NIOC of U.S.$19,192 in respect of the capacity test to reach the total claimed, after deduction of 5.5% contractor's tax where applicable, of U.S.$3,481,276.

b. Outstanding Progress Payment - Payment Certificate 21C

35. HCC claims the sum of U.S.$84,496.33 allegedly due in respect of the dollar portion of Payment Certificate No. 21C. HCC contends that this Payment Certificate was for a total of Rls. 9,597,444, of which NIOC has paid the 40% payable in Iranian Rials but not the equivalent of Rls.

5,758,466, being the 60% payable in U.S. Dollars. To evidence its contention HCC has submitted a copy of Invoice No. 78-004R dated 21 February 1978, a copy of Payment Certificate No. 21C signed by NIOC's representative, and a copy of NIOC's check in the amount of Rls. 3,838,978, representing the rial portion of the payment.

36. NIOC does not dispute that this sum has not been paid. However, it challenges HCC's entitlement to receive this amount. According to an affidavit from Mr. Zad, NIOC's Project Manager ("the Zad affidavit"), the monies were properly withheld from Payment Certificate No. 21C, pursuant to Clause 20.12 of the Particular Conditions, which required HCC to submit a clearance certificate from the Social Insurance Organization prior to final payment.

37. Clause 20.12 of the Particular Conditions does impose an obligation on HCC to produce such a clearance certificate in order to claim final payment. This provision, however, does not negate the existence of a debt admittedly outstanding. It is not disputed that the money withheld under Payment Certificate No. 21C was due and payable. Furthermore, this payment, although the last to be made, is not fully in the nature of a "final" payment but was a progress payment for work actually performed. In view of the fact that it has not been denied by NIOC that the work was completed and given that there is no provision in the Esfahan-Rey Contract for deduction of Social Security contributions from progress payments, there exists no contractual reason for NIOC to withhold the monies. The Tribunal therefore awards HCC the sum of Rls. 5,758,466.

c. Deductions From Payment Certificates

38. HCC also asserts that NIOC wrongfully deducted a total of U.S.$160,671.28, being the equivalent of Rls. 10,949,748, from Payment Certificates Nos. 15C, 19, 20 and 21C.

39. More specifically, HCC argues that NIOC made a wrongful deduction of 3.2% of the gross amount under Payment Certificates Nos. 19, 20 and 21C, over and above the 10% deduction for retention monies and the 5.5% deduction for contractor's tax permitted by the Esfahan-Rey Contract. The allegedly improper deductions under these three Payment Certificates total Rls. 1,099,892. In addition to these deductions, HCC contends that NIOC also erroneously deducted Rls. 8,194,306 from the amount due under Payment Certificate No. 20 for the purported amortization of a cash advance paid by NIOC to HCC and that NIOC wrongfully deducted Rls. 1,655,550 from Payment Certificate No. 15C, dated 21 August 1977, in settlement of expenses allegedly incurred by HCC.

40. As evidence of its contentions, HCC has submitted copies of Payment Certificates Nos. 15C, 19 and 20, which show the amounts payable and the deductions, together with a copy of a letter from NIOC, dated 5 November 1977, in which NIOC acknowledges that HCC has produced evidence of direct payment by it of the expenses deducted under Payment Certificate No. 15C and states "the necessary adjustment will be made in your favour pertaining to this deduction." With regard to the deduction from Payment Certificate No. 20, HCC denies receipt of any such advance in an affidavit from Mr. Neil White, HCC's Contract Administrator at the time ("the White affidavit").

41. NIOC does not deny that deductions of 3.2% of the gross amounts payable to HCC were made from Payment Certificates Nos. 19, 20 and 21C, but contends that the amounts withheld thereunder have been paid to the Social Security Organization on HCC's behalf. To evidence this, NIOC relies upon an internal memorandum dated 13 February 1984. With regard to Payment Certificate No. 20, NIOC admits in the Zad affidavit that the amount of Rls. 8,194,306 has been erroneously deducted and "will be credited to HCC's account." Furthermore, NIOC admits in the same document that it withheld an amount of Rls. 1,655,550 on Payment

Certificate No. 15C on account of its alleged indebtedness towards Iran-Japan Petrochemical Company Ltd. and that, as HCC has settled this amount directly, HCC is entitled to an equivalent credit. However, NIOC maintains that it is not required to release any of these sums to HCC until such time as HCC produces a clearance certificate from the Social Security Organization pursuant to Clause 20.12 of the Particular Conditions.

42. HCC refutes this contention and asserts that it has made all necessary payments to the Social Security Organization and submits in evidence a letter to NIOC, dated 3 November 1979, which states, in relevant part:

> H.C.C. has paid contributions direct to the W.S.I.O. against labour payroll. Similarly H.C.C. have provided a bank guarantee for 5% of contract value (Rials) pending issue of a W.S.I.O. final clearance certificate.
>
> However, N.I.O.C. are now deducting 3.2% from progress payments. We would suggest that this "triple" cover for N.I.O.C. is excessive and request that you discontinue deductions.
>
> We would respectfully request you instruct Contracts Department to (a) the refund these amounts to H.C.C. or (b) to issue to H.C.C. a letter identifying the amount of deductions to-date in order that we may claim an allowance/or refund from W.S.I.O. in our final settlement.

43. As stated above, NIOC admits that Rls. 9,849,856 is payable to HCC under Payment Certificates Nos. 15C and 20. For the reasons discussed in paragraph 37, supra, the Tribunal rejects NIOC's contention that these amounts cannot be released until production of a Social Security clearance certificate. The Tribunal also finds that there is no basis in the Esfahan-Rey Contract for the withholding of an additional 3.2% from Payment Certificates Nos. 19, 20 and 21C. Clause 108 of the Particular Conditions expressly stipulates the amounts that can be properly withheld. HCC's letter of 3 November 1979 constitutes a contemporaneous objection by HCC to such withholdings. NIOC has not

submitted any evidence to show that it provided HCC with the necessary documentation for HCC to receive an offset for these improper deductions from the Social Security Organization, or to confirm that it has, itself, remitted these amounts to the Social Security Organization.

44. Therefore, the Tribunal awards HCC the sum of Rls. 10,949,748 on this part of the claim.

d. Outstanding Escalation Invoices

45. HCC claims the sum of U.S.$1,498,887.70 (less 5.5% contractor's tax) in respect of escalation invoices submitted to NIOC pursuant to Clause 48 of the Particular Conditions (as amended) and allegedly unpaid. In particular, HCC contends that NIOC has failed to pay the sum of U.S.$253,396.25 in respect of materials escalation invoices, U.S.$465,042.05 in respect of civil works escalation invoices and U.S.$780,449.40 in respect of mechanical works escalation invoices.

i) Materials Escalation Invoices

46. HCC maintains that NIOC has failed to pay two invoices for materials escalation Nos. 78-007 and 78-041, contrary to the provisions of Clause 48.b.1 of the Particular Conditions as amended. Invoice No. 78-007 is for pipe and wrapping materials valued at U.S.$154,813.18 and U.S.$54,318.52, respectively, and was issued on 18 January 1978. Invoice No. 78-041 relates to the supply of valves, totalling U.S.$44,264.55, and is dated 29 May 1978. In support of its contentions HCC has submitted copies of the invoices, together with copies of bills of lading, sheets of calculation, and invoices and packing lists.

47. NIOC concedes that some payment is due to HCC for materials escalation but calculates the amount as

U.S.$98,298.36, being U.S.$77,291.81 for pipe and wrapping materials and U.S.$21,006.55 for the valves. In support of this contention NIOC submits an affidavit from Mr. Beigdali, NIOC's Escalation Controller ("the Beigdali affidavit"), in which the calculations on which NIOC relies are described in detail.

48. Clause 48.1 of the Particular Conditions, as amended, contains an agreed formula for the calculation of materials price adjustments. The Parties disagree as to the method and formula of calculation to be applied. HCC asserts that its calculations are made in accordance with a circular dated 23 October 1977, issued by NIOC, which states that it is intended to "clarify the discrepancies which exist between the Tender/Contract documents and the addendum No. 1 to contract." NIOC contends that the difference in the calculations arises from HCC's alleged failure to apply "the invested adjustment method." In the Beigdali affidavit NIOC contends that HCC has disregarded the time of shipment, used incorrect invoices and made errors in transferring information when preparing its calculations. Mr. Beigdali also asserts that HCC has applied an incorrect escalation formula in its calculations.

49. Contained in the documents submitted with the Beigdali affidavit is a letter from HCC to NIOC dated 21 April 1979, attached to which is a summary entitled "Cost Adjustment Clause 48 Invoices/Payments-Summary." The letter states in relevant part:

> Over the last few weeks we have reviewed with N.I.O.C. staff H.C.C. invoices, N.I.O.C. calculations and payments already made for Variation in Costs, Clause [48] of the Conditions of Contract. For your ease of reference we attach to this letter the details and breakdowns agreed.
>
> From this you will observe that N.I.O.C. currently owes H.C.C. the following: -
>
> (i) Materials Adjustment $119,001.96

The summary shows that this sum is made up as follows:

1.1	Line Pipe		
	Certified to date	$25,090.97	
1.2	Valves, etc.		
	Certified [sic] to date	39,851.23	
1.3	Wrapping Materials	54,059.76	$119,001.96
	Less paid to date		- 0 -
	BALANCE DUE H.C.C.		$119,001.96

50. NIOC's only comment on this letter is a statement from Mr. Beigdali, as follows:

> In this case, if we should rely on this letter, a plausible conclusion may be drawn in comparison with the figures acceptable by the company [NIOC].

The Tribunal concludes that NIOC has accepted the letter and summary by having submitted them in evidence. HCC has not made any comment on this exhibit, nor has it submitted the letter and summary in evidence itself, although both are signed, or initialled, by Mr. White, who had returned to Iran in March 1979.

51. The Tribunal finds this letter and summary to be a reliable and contemporaneous summary of HCC's position in April 1979, which is accepted by NIOC. The element for wrapping materials is nearly identical, and the agreed figure for valves etc. varies by less than U.S.$5,000. The major discrepancy is the figure for line pipe, for which HCC claims U.S.$154,813.18, but for which only U.S.$25,090.97 is shown on the summary. There is no reference in the covering letter to indicate that there were any claims not certified at the time or not included in the summary. Both invoices

on which HCC bases its claim are dated prior to the letter and summary and there is no reason why the sums referred to in those invoices would not have been included if still due. The Tribunal therefore awards HCC the sum of U.S.$119,001.96, as evidenced by the summary. No deduction for contractor's tax is required, as this element relates to supply of materials under Part B.

ii) Civil Works Escalation Invoices

52. HCC also asserts that, contrary to the provisions of Clause 48.2.1. of the Particular Conditions as amended NIOC has failed to pay two invoices for civil works escalation costs, Nos. 79-003 and 79-004, both dated 16 August 1979, and totalling Rls. 19,458,822 and Rls. 12,233,794, respectively. Invoice No. 79-003 reflects adjustments for April, August and October 1977, whereas Invoice No. 79-004 relates to cost increases in January and February 1978. HCC asserts that both invoices have been prepared in accordance with the formula set out in the Esfahan-Rey Contract. The invoices and supporting documents have been submitted in evidence by HCC.

53. Again, NIOC acknowledges that some payment is due to HCC, but asserts that the total amount payable by NIOC for civil works escalation during the life of the Esfahan-Rey Contract was Rls. 188,383,012.[4] In the Beigdali affidavit

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[4]This amount is substantially higher than that claimed by HCC. The Tribunal assumes that part payment has been made to HCC, but is unable to calculate the amount that NIOC acknowledges as still payable.

it is contended that HCC has used an incorrect formula in calculating these sums, of $E = PO(\frac{CW1}{CWO} - 1)$ instead of

$E = PO(\frac{CW1}{CW0} - 1.05)^5$.

54. The Tribunal notes that the April 1979 letter and summary also refer to civil works escalation, the summary stating:

> 2.1 Civil Works
>
> | | | |
> |---|---|---|
> | Total certified to February 1977 | Rls. | 189,651,726 |
> | plus March to October 1977 | | 11,250,821 |
> | | | 200,902,547 |
> | less NIOC deduction calculation | | 20,008,290 |
> | | Rls. | 180,894,257 |

Despite the fact that both the invoices on which payment is now claimed were sent to NIOC subsequent to the April 1979 summary, neither one of the invoices, nor the two covering letters, refers to that summary or attempts to explain the discrepancy, even though all are signed by Mr. White, Contracts Administrator, and despite the fact that the serial numbers of the letters are only a few numbers apart. Indeed, the cover letter to Invoice No. 79-003 refers to a previous submission of these calculations in December 1977, stating:

> Please note that we had submitted by letter reference ER 784 dated 12th December 1977 these calculations based on last index published by the Plan and Budget Organization .... N.I.O.C., however, failed to pay in accordance with these rules. We therefore respectfully request you disregard our ER 784 dated 12th December 1977, and consider this submission as being the document for checking and payment of this long over-due account.

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[5] The formulae are explained in full in Addendum 1 to the Esfahan-Rey Contract.

55. The Tribunal concludes that, with regard to Invoice No. 79-003, the April 1979 summary provides a more reliable and accurate reflection of the amount outstanding for civil works for the period covered by said invoice than the invoice itself. Although the invoice is dated subsequent to the summary, its reliability is cast into doubt by the fact that no attempt is made to refer to, or reconcile, the discrepancies between the two, even though prepared by the same person, and even though the serial numbers of the two covering letters are only a few numbers apart. The Tribunal therefore accepts the figure of Rls. 11,250,821, as shown on the summary, as being the sum due to HCC in respect of Invoice No. 79-003.

56. HCC's second invoice for civil works escalation, No. 79-004, covers work performed in January and February 1978, which is not included in the April 1979 summary. As noted in paragraph 53, supra, NIOC contends that HCC has used an incorrect formula in preparing its calculations. However, it is clear from the calculations prepared by HCC, which have been submitted in evidence by both Parties, that HCC did, in fact, use the correct (CW1 - 1.05) formula. Indeed, this is acknowledged by NIOC in the Beigdali affidavit at page 3, where Mr. Beigdali states "for the purpose of confirming ... the contractor's calculations for ... January and February 1978, were carried out in accordance with the formula." NIOC has not disputed that work was done in these two months. The Tribunal therefore awards HCC the sum of Rls. 12,233,794 in respect of that invoice.

57. Thus the total due to HCC for civil work escalation is Rls. 23,484,615, as per the April 1979 summary and Invoice No. 79-004, less 5.5% contractor's tax, to give a net figure of Rls. 22,192,961.

iii) Mechanical Works Escalation Invoices

58. Finally, in this section of the claim, HCC asserts that NIOC has failed to pay two Invoices Nos. 77-098 and 78-050, for mechanical works escalation in the sums of Rls. 45,056,024, and U.S.$70,882.69 plus Rls. 3,252,641, respectively.

59. HCC has submitted in evidence a copy of Invoice No. 77-098, dated 12 December 1977, which covers the months of April, July and August 1977, together with a copy of the covering letter to Invoice No. 78-050, dated 22 July 1978, which states that it refers to escalation for the months of September and October 1977. Invoice No. 78-050 itself has not been submitted in evidence. In addition, HCC has submitted a number of documents in support of its calculation of the amounts due, and asserts that these calculations are made in accordance with the formula set out in Clause 48.2.2. of the Particular Conditions, as amended.

60. NIOC challenges HCC's calculation and disputes the amount claimed. In the Beigdali affidavit it is asserted that "the adjustment price approved by NIOC for this section amounts to 320,716,245 rials. The reason for discrepancy is the fact that the contractor applied incorrect indicators (the amount of difference is 40,753,500 rials)." Beigdali also asserts that because HCC's statements were prepared on the basis of Gregorian calendar months, and the relevant price indices used in the calculation thereof are based on Iranian calendar months, adjustments are required to correlate the two.

61. Once again, the Tribunal finds that the April 1979 summary includes an element for mechanical works escalation,

as follows:

2.2 Mechanical Works	[Rls.]
Total certified [sic] to August 1977	328,253,543
plus Sept to Oct 1977	8,123,019
	336,376,562

The Tribunal notes that the claimed value of Invoice No. 78-050, when converted to rials at the Tender rate of exchange (U.S.$1 = Rls. 68.15), is equal to Rls. 8,083,296, i.e., slightly less than that indicated in the April 1979 summary. The Tribunal determines that although HCC has not produced this invoice the related correspondence does give an accurate reflection of the amounts due for September and October 1977, and, therefore, awards HCC the amounts of U.S.$70,882.69 plus Rls. 3,252,641, as reflected in the covering letter.

62. The amount of Rls. 45,056,024 claimed for the period covered by Invoice No. 77-098, i.e., April, July and August 1977, is more difficult to correlate with the April 1979 summary. The summary lists only a value certified for the mechanical work for the entire period of the contract to August 1977, together with a lump sum paid by NIOC in respect of both civil and mechanical works. It does not list the monthly value of mechanical work, nor does it apportion the lump sum payment between civil and mechanical works. To calculate the sum attributable to mechanical works, it is necessary to make certain additional calculations. The summary shows lump sum total payments by NIOC to HCC of Rls. 497,412,963 for both civil and mechanical works, to which must be added a "NIOC deduction" as listed in the summary, of Rls. 20,008,290, to give a total "credit" to NIOC for amounts paid of Rls. 517,421,253. Of this payment, Rls. 189,651,726 is allocated to civil works to February 1977 (Section 2.1 of the April 1979

summary)[6] to give a balance allocated to mechanical works of Rls. 327,769,527. The April 1979 summary shows a total of Rls. 328,253,543 certified as due to August 1977. By deducting the amount of the payment allocated for mechanical works as calculated above, a balance due to HCC of Rls. 484,016 is arrived at for this period.

63. As stated in paragraph 51, supra, the Tribunal has determined that the April 1979 summary reflects a contemporaneous statement of HCC's position at that time. As the summary was prepared more than a year after Invoice No. 77-098, the Tribunal awards HCC only the sum of Rls. 484,016, as calculated from the summary, in respect of the claim under this invoice.

64. Therefore, the Tribunal awards HCC the total of U.S.$70,882.69 plus Rls. 3,736,657 (Rls. 3,252,641 plus Rls. 484,016), less 5.5% contractor's tax, i.e., U.S.$66,984.14 plus Rls. 3,531,141, in respect of mechanical works escalation costs.

65. The total awarded to HCC in respect of its claims under all categories of escalation invoices is, therefore, U.S.$185,986.10 plus Rls. 25,724,102.

e. Exchange Invoices

66. HCC seeks payment of the sum of U.S.$1,096,889.70 in respect of exchange invoices totalling U.S.$2,138,912.61 submitted to NIOC pursuant to Clause 19.24 of the Instructions to Tenderers (Section II of the Esfahan-Rey Contract) as a result of fluctuations in the rial/dollar

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[6]The Rls. 11,250,821 for March to October 1977 is not included in this item as payment of this amount is awarded separately and offsetting here would give rise to a double credit to HCC. Alternatively, the same sum would have to be added to the amount "credited" to NIOC.

exchange rate to be applied to the 60% portion of each payment to be paid in U.S. Dollars during the life of the project. HCC also claims payment of U.S.$434.48 under Payment Certificate No. 20, for which NIOC has not been invoiced. HCC acknowledges receipt of a total of U.S.$1,042,457.39 from NIOC, but contends that the balance of U.S.$1,096,887.70 remains unpaid. HCC has submitted in evidence the relevant invoices, calculation sheets and Payment Certificates, which were delivered regularly to NIOC during the life of the Esfahan-Rey Contract.

67. NIOC admits that it owes the sum of U.S.$84,149.41 to HCC in this respect and accounts for the difference on two grounds. The first is that, as the contract price is denominated in rials, any payments made in rials are not subject to any fluctuation in exchange rates. NIOC alleges that U.S.$137,326.76 of HCC's claim, being two "adjustment payments" (i.e., escalation payments), of Rls. 161,290,794 and Rls. 261,750,923 and the "C20 payment" of Rls. 853,354, relates to such rial payments. NIOC also contends, in a further affidavit from Mr. Beigdali, that HCC includes in its calculation the sum of U.S.$36,990.17 which, allegedly, is later credited as paid, and that the changes in the exchange rate arose from delays resulting from the events of the Revolution, from which it is relieved of any liability by virtue of force majeure.

68. NIOC's more fundamental objection relates to a difference in interpretation of Clause 19.24 of the Instructions to Tenderers, which provides: "Should there be any change in exchange rate with regards to the rates at the Tender date more than one percent, then appropriate (±) adjustment will be made to contract payments. (Ref. Min. August 13, Para. 55)."

69. HCC has prepared its invoices and bases its claim on the assumption that the "appropriate (±) adjustment" refers to the entire fluctuation of the official Bank Markazi rate

from the Tender rate in all cases where that total fluctuation exceeds 1%. By contrast, NIOC contends that the contract language only permits HCC to claim the amount of the adjustment in excess of 1%, thus significantly reducing the amount due. NIOC has submitted in evidence the Minutes of Meeting referred to in Clause 19.24, which merely repeat the phrase in identical language, together with requests for payment of the adjustment from other contractors which, it is contended, show that NIOC's interpretation was the one generally applied. These documents do indicate that at least two other contractors interpreted the provision in the same way as NIOC, as shown by a letter from Snamprogetti-Saipem to NIOC dated 19 November 1977, and a letter dated 17 February 1976 from M.K. Neda to NIOC.

70. With respect to NIOC's initial contentions, the Tribunal notes that the first two amounts referred to as having been paid wholly in rials relate to Escalation Payments Nos. 1 and 2, which are evidenced by Payment Certificates Nos. 235 and 224, submitted in evidence by HCC, and the third to Payment Certificate No. 20C. These documents confirm that these sums were fully paid in rials. Clause 48 of the Particular Conditions (as amended) states: "Payment shall be made in accordance with the same percentage of foreign currency as was included in the original price format for Part 'B'." In the absence of any evidence to indicate that HCC agreed to receive payment wholly in rials, NIOC's assertion that the sum of U.S.$137,326.76 should be excluded from this part of the claim is rejected.

71. The Tribunal also rejects NIOC's contention that U.S.$36,990.17 has been paid but not credited by HCC. The Claimant's summary of exchange invoices contains a mathematical error, in that the total amount credited as paid reflects the gross figure authorized by NIOC, whereas the first payment was subject to a deduction of 5.5%, which was added to, and included in, the next payment. The amounts shown in the column marked "Amount Paid" reflect the

amounts actually received by HCC, i.e., U.S.$1,042,457.39. Thus the Claimant's summary correctly represents the amount still to be paid on these invoices. The Tribunal further rejects as unsupported NIOC's contention that it is relieved of any liability as a result of force majeure. NIOC has provided no evidence that it was prevented from performing its obligations in any way.

72. The Tribunal notes that, in a letter of 30 July 1979, in which HCC reminded NIOC that payment of the last two of these invoices totalling U.S.$160,262.41 had not been received, it is stated: "Previous invoices have been paid and we would respectfully request payment of these invoices to finalize the matter." Such a phrase at first appears to indicate that only the two invoices referred to in that letter were still outstanding at that time. However, at no time during these proceedings has NIOC contended that it has paid all the invoices except these two and, instead, has gone to great lengths to supply the Tribunal with other reasons as to why these sums are not due. Furthermore, even the amount conceded by NIOC does not tally with the amounts shown on its calculations as due on the two invoices which are referred to in that letter. The Tribunal must therefore examine the letter in context to establish its true meaning. The letter of 30 July 1979 was sent by Mr. White of HCC, not to the Project Manager, Mr. Mirabolfathi, to whom HCC had regularly submitted its earlier invoices, but to the new Head of Contracts, Mr. Talezadeh. It is true that the final invoice submitted by HCC, Invoice No. 78-066 dated 21 March 1979, was also addressed to Mr. Talezadeh as Project Manager, but given the frequent changes of personnel at this time, the Tribunal finds it reasonable to interpret the letter as attempting to indicate a previous course of conduct, rather than being an admission by HCC that no further payment was due. Another indication that the Parties themselves did not view the letter as an admission is that the letter indicates that it was copied to Mr. Zad. The major part of NIOC's defense to this part of the claim

is based on Mr. Zad's own affidavits and calculations and the Tribunal finds it difficult to believe that Mr. Zad would not have raised this point in NIOC's defense if he had understood it to be an admission of payment by HCC at the time it was sent. The Tribunal infers from this silence that both Parties acknowledge that the previous invoices were, in fact, only partly paid.

73. With regard to the dispute as to the proper application of Clause 19.24, the Tribunal notes that both Parties' interpretations of the relevant phrase seem reasonable. There is nothing in this Clause or elsewhere in the Esfahan-Rey Contract to indicate the Parties' intentions. NIOC has introduced no evidence to indicate that this issue was ever discussed directly with HCC or to show that it objected to HCC's invoices at the time of presentation, other than by failing to make payment of the full amount. It appears that NIOC made three payments to HCC in October 1976 and April and May of 1977 in respect of these invoices, none of which relates directly to the amounts as invoiced. No explanation was given of the deductions and later invoices simply went unpaid. Although it is surprising that HCC did not make reference to the unpaid balance in its subsequent invoices or object to the reduced payments, such omissions do not negate the presumption that the full amounts of the invoices are still payable. In the practice of this Tribunal, it has repeatedly been held that in the absence of contemporaneous objections or disputes invoices or payment documents presented during the course of the contract are presumed to be correct. (See DIC of Delaware, Inc. and Tehran Redevelopment Corporation, Award No. 176-255-3 (26 April 1985), reprinted in 8 Iran-U.S. C.T.R. 144; R. J. Reynolds Tobacco Co. and The Islamic Republic of Iran, Award No. 145-35-3 (6 August 1984), reprinted in 7 Iran-U.S. C.T.R. 181.) NIOC may not now rely on the interpretation of the contract language discussed above, which it did not even raise with HCC at the time. Thus, the Tribunal finds that NIOC has failed to rebut the presumption that the amounts

invoiced are properly due and payable. The Tribunal also finds that HCC has failed to establish to its satisfaction that the sum of U.S.$434.48, which was not invoiced to NIOC at the time, is properly due and payable, and so is denied that amount. Therefore, the Tribunal awards HCC the sum of U.S.$1,096,889.70, less U.S.$434.48 which was not invoiced at the time, to give an award of U.S.$1,096,455.22, less contractor's tax of 5.5%, to arrive at a net award of U.S.1,036,150.18.

f. Variation Order Invoices

74. HCC states that in May 1977 NIOC requested HCC's assistance in operating the Esfahan-Rey pipeline in the opposite direction to that for which it was originally designed. This required modifications to the pipelines, by-pass and other associated work, which was carried out by HCC under Variation Orders Nos. 2 and 3, and paid for by NIOC under Payment Certificate No. 21C.

75. HCC alleges that in connection with this work NIOC also required HCC to maintain its camp in Mey-Meh for an additional period to accommodate NIOC engineers and seconded personnel, and to supply additional equipment and materials, some of which were to be returned to HCC and some to be retained as permanent fixtures, and that NIOC has failed to pay three Variation Order invoices, totalling U.S.$455,781 (U.S.$482,308.25 less contractor's tax). The first invoice, No. 77-095 A, dated 9 December 1977, for Rls. 23,206,000, relates to maintenance of the camp in "Mey-Meh" to accommodate NIOC's engineers and personnel. HCC has also submitted a second (unnumbered) invoice, dated 13 January 1978, in the sum of Rls. 1,981,000, for the maintenance of the camp through 14 December 1977. A third invoice, No. 78-006, also dated 13 January 1978, for Rls. 1,136,500, relates to materials supplied to NIOC at NIOC's request. HCC also claims the value of items supplied by it but to be returned to HCC on completion of the project. HCC contends

that certain of these items were never returned to it and claims the sum of U.S.$96,050 in respect thereof. HCC's total claim is therefore Rls. 25,187,000 in respect of the camp and Rls. 1,136,500 plus U.S.$96,050 for materials.

76. As further evidence of its claim, HCC submitted two letters from NIOC, dated 18 May 1977 and 22 August 1977, respectively, both of which request HCC to proceed with the work and guarantee payment at the contractual rates. Also in evidence is a letter from NIOC dated 6 November 1977 asking HCC to inform it of the costs of maintaining the Mey-Meh camp and HCC's response advising NIOC of the daily rate of U.S.$2,000. With regard to the claim for materials supplied, HCC submits a letter dated 6 September 1977 with an attachment showing the value of the items supplied, together with the covering letter to Invoice No. 78-006 and an attached list of the items supplied, verified by Moody.

77. NIOC denies that it owes the amounts claimed by HCC. In the Zad affidavit it is asserted that HCC agreed to reduce its charges for labor and equipment by Rls. 25,187,000, the same amount now claimed in respect of the camp expenses. Attached to the Zad affidavit is a copy of Change Order No. 3, dated 21 February 1978, and a summary of the related work and invoices issued thereunder. Change Order No. 3, which is stamped as received by HCC, states that HCC's claim was for Rls. 36,866,986 and contains the recital: "Following a deduction agreed upon this was reduced effectively to Rls. 11,679,986."

78. Mr. Zad also asserts, in a second affidavit, that NIOC only owes HCC the sum of Rls. 5,744,000 for materials supplied and that the U.S.$16,676.45 reflected in Invoice No. 78-006 (which is expressed in rials) has already been paid by incorporation in Change Order No. 3. In support of its materials valuation, NIOC submits an unsigned and undated list entitled "Hcc Materail [sic] Claimed 'Left on the lines'," valuing those items at Rls. 5,744,000.

79. The Tribunal finds that Change Order No. 3 accurately reflects an agreement between the Parties to reduce the amount paid to HCC by the amount now claimed in respect of camp maintenance. As the two invoices relied upon by HCC are both specifically listed in the summary attached to Change Order No. 3, and were included in the original calculation thereof, the Tribunal dismisses the claim in respect of the camp expenses.

80. The Tribunal also finds that Invoice No. 78-006 was included in Change Order No. 3. Although it is not referred to by number in the summary to the Change Order, there is a specific reference to its covering letter ER 795, dated 13 January 1978, and the amount of Rls. 1,136,500 is accepted as part of the reduced amount paid under Change Order No. 3 and so this portion of the claim is also dismissed.

81. With regard to the items allegedly not returned, the Tribunal notes that NIOC has admitted that these items are worth at least Rls. 5,744,000. The Tribunal also notes that the lists of items provided by the Parties are identical, with the exception that only two of five pressure gauges said to have been supplied are included on the NIOC list. NIOC's letter of 22 August 1977 indicates that HCC will be reimbursed for these items "at cost plus 25%." As HCC's valuation of the items is based on its letter of 6 September 1977, the Tribunal accepts such letter as contemporaneous evidence of that "cost plus" value, which was not disputed by NIOC at the time. Given that the list of materials verified by Moody indicates that five such pressure gauges were supplied and NIOC has not submitted any evidence of return of them, the Tribunal awards HCC the full amount claimed in respect of these items. The Tribunal therefore awards HCC the sum of U.S.$96,050 under the Variation Order Invoices. As this amount relates to the supply of materials under Part B of the Esfahan-Rey Contract, no deduction for contractor's tax is necessary.

g. Release Of Retention Monies

82. HCC seeks the release of U.S.$138,814.19 in retention monies withheld from progress payments and allegedly not released by NIOC on issue of the Completion and Final Certificates. HCC asserts that NIOC withheld a total of Rls. 492,929,925 from its payments, but has released only Rls. 483,469,738, leaving a balance of Rls. 9,460,187, equivalent to U.S.$138,814.19.

83. In support of its contentions HCC submits Payment Certificates Nos. 7A, 21C and 1B, which show the individual withholdings for each part of the Esfahan-Rey Contract, and Payment Certificate No. 8993, evidencing the amount released by NIOC.

84. NIOC admits that it withheld the amount now claimed by HCC, but asserts that it was entitled to do so as a consequence of HCC's failure to pay contributions and submit clearance certificates from the Social Insurance and Workers Training Organizations, as required by Clause 20.12 of the Particular Conditions.

85. The contractual provisions as to release of the retention monies are set out in Clauses 108.1.3, 108.2.4 and 108.3.3. None of these makes production of a clearance certificate from the Social Insurance Organization a condition precedent to payment, but clearly states that the retention "shall" be released on satisfaction of the contractual conditions. It is not disputed that the requirements of Clause 108 have been met. The obligation to produce these certificates is imposed by Clauses 20.12 and 115 of the Particular Conditions, both of which state "Final payment shall not be made to [HCC]" before such certificates are produced.

86. The Tribunal notes that it is not disputed that HCC has performed the work and is entitled to receive payment.

Equally it is not contended that HCC has, in fact, applied for, or obtained, the required certificates, although, as discussed in paragraph 42, supra, HCC contends that it has paid the appropriate contributions.

87. The Tribunal finds that HCC's entitlement to these monies accrued on 1 September 1979, the date of the Final Certificate. Although the Final Certificate also referred to the need to produce a clearance certificate, this is a requirement relating to the procedure to effect final payment, and does not affect HCC's entitlement to that sum. Although HCC retained a presence in Iran at this time performing other contracts and could have taken steps to apply for such a clearance certificate after 1 September 1979, it is acknowledged that the situation in Iran after 4 November 1979 to 19 January 1981 was such that due to the consequences of the seizure of the American Embassy in Tehran and the severing of relations between the two countries, it was unlikely that an American company would receive the necessary cooperation from public bodies to obtain a clearance certificate. Under these circumstances, which were beyond the control of HCC, failure to obtain such a certificate cannot be considered wrongful or a bar to payment of such sum. (See Gould Marketing, Inc. and Ministry of Defence, Award No. 136-49/50-2 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 272.) HCC was therefore released from the requirement to obtain such certificates as of 4 November 1979. Furthermore, HCC has evidenced to the satisfaction of the Tribunal that it paid Social Security contributions during the life of the Esfahan-Rey Contract (see paragraph 42, supra) and thus has attempted to satisfy its underlying obligations to the Social Security Organization. Therefore, the Tribunal finds that HCC is entitled to receive payment of the balance of the contract price for work properly performed. HCC has claimed release of the gross amount of the monies withheld by NIOC. Clause 115 of the Particular Conditions, however, authorized NIOC to withhold the 5.5% contractor's tax from "all payments

made to the Contractor." When NIOC released the first portion of the retention monies to HCC under Payment Certificate No. 8993, it deducted contractor's tax from the amount paid. Therefore, the Tribunal awards HCC the net sum of Rls. 8,939,877, being Rls. 9,460,187 less 5.5% contractor's tax.

h. Supplied Materials Letter Of Credit

88. Finally, HCC seeks the sum of U.S.$207,696.41, allegedly owing under the letter of credit opened by NIOC to secure payment to HCC of 80% of the cost of materials supplied under Part B of the Esfahan-Rey Contract. HCC alleges that the letter of credit was opened in the total amount of U.S.$35,033,625.36, but that only U.S.$34,825,928.95 has been drawn down under its terms. HCC contends that the balance of U.S.$207,696.41 should be released to it as part of the agreed consideration for the work performed. In support of this contention HCC submits a schedule of payments received under the letter of credit. The letter of credit is not itself in evidence.

89. NIOC objects to this part of the claim, arguing that HCC would be unjustly enriched by any such award. NIOC asserts that, pursuant to Clause 108.2.1 of the Particular Conditions, HCC could draw on the letter of credit by presenting the relevant shipping documents. The fact that the letter of credit has not been fully amortized indicates only that HCC was able to complete its obligations under Part B at a lower total cost than first anticipated, i.e., that it did not ship materials to the full value of the letter of credit.

90. The Tribunal notes that draw-down under the letter of credit was entirely within the control of HCC. The fact that the full amount has not been released indicates only that HCC has not shipped material to the full value of the letter of credit. This may be for one of two reasons:

either there are still materials to be shipped or HCC has been able to supply the entire quantity required at a total cost of less than that originally anticipated.

91. The Tribunal finds there to be an implication in the language of Clause 108.2 of the Particular Conditions that the lump sum contract price was to be adjusted in accordance with the value of the materials actually supplied. Such an implication is supported by the obvious fact that the final costs of materials could not be known at the time of the Tender. Clause 48.1. of the Particular Conditions (as amended) provides an elaborate mechanism for the adjustment of the price of the materials and equipment imported under Part B in the event of increase in the actual cost in the country of origin. Indeed, such an adjustment forms part of HCC's claim (see paragraphs 46-51, supra). Therefore, it also seems reasonable to infer that the Part B lump sum contract price may also be adjusted in favor of NIOC in the event that the actual costs are less than originally estimated. There is no mechanism within Clause 108 of the Particular Conditions, or, as far as the Tribunal is aware, in the letter of credit itself, under which any balance remaining may be released. The bank itself may only make payment against presentation of shipping documents and the Tribunal must therefore dismiss this part of the claim.

i. NIOC Counterclaims

i) Defect In The Cathodic Protection System

92. NIOC has raised a counterclaim for Rls. 10,000,000 for the cost of alleged redesign and installation relating to the cathodic protection system supplied and installed by HCC under the Esfahan-Rey Contract. HCC had initially designed the system with one diesel engine per protection station. Prior to the issue of the Final Certificate, NIOC informed HCC that a secondary backup engine would also be required.

NIOC installed a second unit at each station but alleges in the Zad affidavit that once the second engine was installed, there was insufficient space to maintain the units and so the compartments had to be enlarged by NIOC at an estimated cost of Rls. 10,000,000.

93. NIOC bases its claim for compensation on the fact that the Esfahan-Rey Contract was a turnkey project and upon Clause 7 of the General Conditions, which states: "The Contractor shall be responsible for any discrepancies, errors or omissions in the drawings and other particulars supplied by him, whether such drawings and particulars have been approved by the Engineer or not...." NIOC asserts that the failure to provide for two engines was itself a breach of international standards and therefore it is entitled to compensation for the added costs incurred in order to enlarge the stations so as to fully accomodate two units. In support of its position NIOC has submitted, inter alia, an internal memorandum dated 18 July 1979 in which the figure of Rls. 10,000,000 is requested for the work, an opinion from NIOC's Legal Affairs Department dated 6 February 1980 concluding that HCC should bear the "costs of correcting and removing the defects," and a letter to HCC dated 1 May 1980 advising it that the sum of Rls. 10,000,000 would be deducted from the final payment. This is the letter referred to in point 3 of the Final Certificate.

94. HCC acknowledges that this issue was a matter of contention between the Parties but asserts that the system was properly designed and relies on the issue of Completion Certificate No. 2 on 20 September 1977, relating to the cathodic protection system, to evidence NIOC's satisfaction with the system at that time.

95. The Tribunal notes that although there is no reference to this dispute in Completion Certificate No. 2, it is included as an outstanding item under the Final Certificate issued on 1 September 1979, in which it is stated: "Both

Parties agreed to take [this] item ... to arbitration." However, the dispute was not submitted to arbitration nor was it resolved in any other way. Furthermore, the Attachment to Completion Certificate No. 2 refers only to the "C.P. generator units." Under the terms of the Esfahan-Rey Contract, HCC was responsible for the design of the cathodic protection system, as well as its installation. Although Section VIII/ii of the Contract Specifications thereof sets out specific testing requirements for the cathodic protection system, the overall design of the system is left to the Contractor, who is required to employ "an approved cathodic protection consultant" in the preparation of the design. As indicated by NIOC, Clause 7 of the General Conditions makes HCC liable for any defect or omission in design, whether or not the drawings are approved by NIOC's representatives. Clause 32 of the General Conditions, entitled "Taking over," states in sub-clause 1 that "the issue of a taking-over certificate shall not operate as an admission that the Works have been completed in every respect." Clause 33.2 of the General Conditions, entitled "Defects," provides "the Contractor shall be responsible for making good with all possible speed any defects arising from defective design ... during the Period of Maintenance." Clause 33.7 states: "Save as in this clause [clause 33] expressed the Contractor shall be under no liability in respect of the said defects after the Works have been taken over."

96. The Tribunal has not been advised of the date on which this issue first arose, but there is nothing in the record to establish that it was prior to the issue of Completion Certificate No. 2, the relevant taking-over certificate. In addition, Clause 18.1 of the Pipeline Construction Specifications (Section VIII of the Contract) provides for the cathodic protection system to be surveyed "just prior to the termination of the ... Remedy of Defects Period ... to verify the adequacy of the installed cathodic protection system." If, for the purpose of this argument, it is

assumed that HCC's design was below required international standards, the Tribunal therefore concludes that the issue of Completion Certificate No. 2 would not, on its own, be sufficient to release HCC from liability to recompense NIOC for the costs of correcting any such defect or omission in the cathodic protection system arising during the one year Maintenance Period.

97. The Tribunal must therefore consider whether NIOC has established, to its satisfaction, the existence of the alleged defect, the time at which such defect or omission arose and the costs of repair. The Tribunal notes that neither Party has submitted any evidence of international or other generally accepted standards on this issue. Clause 22 of the General Conditions requires all work to be carried out "to the satisfaction of the Engineer." The Tribunal finds that NIOC has established that it was not satisfied with the system as finally installed. HCC has introduced no evidence to indicate that NIOC's requirement of two units per station was unreasonable. It seems probable to the Tribunal that the space allocated in the design to one unit may not be sufficient to allow proper access to two such units. It also seems credible to the Tribunal that such a problem may become apparent only when the system is actually put into operation i.e., during the one year Maintenance Period, so as to constitute a "design defect" within the provisions of Clauses 7 and 33.2 of the General Conditions. In the absence of any data on which to base an alternative finding, the Tribunal concludes that HCC is liable for the costs of altering the system. The Tribunal notes that the figure of Rls. 10,000,000 is specifically mentioned in the Final Certificate issued in September 1979 and that NIOC again advised HCC of the estimated costs in May 1980. As HCC raised no objection to the quantum of that estimate, and in the absence of any other indication as to actual cost, the Tribunal awards NIOC the sum of Rls. 10,000,000.

ii) Capacity Test

98. NIOC claims the sum of Rls. 10,412,800[7] as the cost of testing the Esfahan-Rey pipelines. As the refineries which the pipeline was to serve were not "on stream" at the time HCC completed work on the project, it was agreed that NIOC would conduct the necessary tests later, at HCC's expense. This is reflected in the Final Certificate, which states "agreed sum will be deducted from amounts due H.C.C." NIOC has submitted an estimate, prepared in October 1986, of the costs of conducting the tests over a 30 day period, together with a breakdown of labor and materials costs.

99. HCC acknowledges that the testing was to be conducted at its expense, but asserts that the Parties agreed in November 1979, shortly after issue of the Final Certificate, that the cost of this item would be Rls. 1,384,092, as allegedly evidenced by a letter from HCC to NIOC, dated 4 November 1979.

100. The issue before the Tribunal is, therefore, to determine whether the Parties reached an agreement on this sum, and if not, whether NIOC has established the quantum of its claim.

101. The letter of 4 November 1979 is crucial to this issue. It states, in relevant part:

> Many factors have delayed completion of pump stations and still prevent execution of the design test. Consequently N.I.O.C. have advised H.C.C. that due to a desire to avoid N.I.O.C. having to pay to H.C.C. the high costs of contractor's bank bonds, fees and services and in order for N.I.O.C./H.C.C. to finalise its contractual affairs H.C.C.'s obligation to witness the tests will be waived. This results in saving of labor and supervision to H.C.C.

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[7] Originally claimed as Rls. 79,834,666.

> We would estimate the cost of this saving at N.I.O.C. Contract Unit rates to be: -
> ...
> =Rls. 1,384,092.

The Tribunal notes that this letter refers to cost savings, and not to the costs of actually conducting the tests, and, in any event, does not evidence any "agreement" by NIOC. However, the Tribunal finds the NIOC memorandum similarly unconvincing, as it is merely an estimate of the possible costs, prepared years after the testing should have been carried out; there is nothing to indicate when, or indeed whether, the tests have yet been conducted. In the absence of any other evidence as to the amount of the "agreed sum," the Tribunal awards NIOC the sum of Rls. 1,384,092[8] on this count.

iii) Defects At Ghom Pressure Reducing Station

102. NIOC's third counterclaim is in the sum of Rls. 5,873,356 for damages allegedly incurred as a result of defects in the part of the system known as the Ghom Pressure Reducing Station. NIOC contends that the co-ordinates of the pipelines were not properly aligned with the station, so that, according to the Zad affidavit, the station inlet pipeline, which was being constructed by two Italian companies, Snamprogetti and Saipem, had to be modified, thus incurring additional expense for NIOC. NIOC asserts that a meeting was held between all the interested parties on 5 February 1980, and that HCC agreed that the Italian contractors would perform the necessary work at HCC's expense. NIOC contends that the work was performed as agreed, but that HCC failed to pay the relevant invoice when

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[8]This is equivalent to U.S.$20,309, i.e., the gross amount credited by HCC when calculating its total claim under the Esfahan-Rey Contract.

submitted and that the invoice has been settled by NIOC. NIOC therefore claims reimbursement of this sum.

103. In support of its claim NIOC has submitted a copy of the handwritten minutes of the meeting held on 5 February 1980, which appear to have been initialled by HCC's representative at the meeting, Mr. Ahmad Badar. The minutes state:

> Saipem will carry out the work in co-ordination with Houston Contracting Co. and invoice any additional work through NIOC to Houston.

NIOC has submitted a letter from HCC dated 1 February 1980 introducing Mr. Badar as its representative for the purpose of this meeting. NIOC also produces a letter dated 17 February 1981 whereby NIOC forwarded the invoice issued to it by Snamprogetti-Saipem to HCC, asking HCC to "arrange for the payment of this invoice ... and inform us accordingly." Finally, NIOC has introduced an internal communication which states that: "Letter ... dated 20 Aug. 1984 concerning ... payment of expenses incurred for work performed at Qom Pressure Reducing Station by Snamprogetti Contract No. CC-760 was discussed at the ... Meeting of the Board of Directors of NIOC and payment of rials 5,873,356 to Snam progetti [sic] was approved."

104. HCC relies on the fact that there is no mention of such a defect in the Final Certificate for the work, which was issued some five months earlier and asserts that the minutes of the meeting do not constitute evidence of a subsequent agreement by it, since they are not signed by a representative of HCC. Furthermore, HCC contends that NIOC has not established that it has actually paid this amount to Snamprogetti.

105. The Tribunal determines, firstly, that the minutes of the meeting evidence an agreement by HCC with NIOC to bear the costs of any additional work required in this respect. HCC's letter introducing Mr. Badar does not purport to limit

his authority in any way, nor does HCC produce any evidence of any objection to those minutes of meeting in February 1980 or at the time it received the Snamprogetti invoice from NIOC.

106. The Tribunal must then consider whether this claim belonged to NIOC or to Snamprogetti as of 19 January 1981.

107. The Tribunal considers that as a basic principle HCC is required to compensate NIOC for any expenses it incurred as a result of HCC's failure to align the pipeline as agreed. The invoice from Snamprogetti is evidence of the quantum of the claim and is addressed to NIOC, not to HCC, requesting NIOC to authorize payment, thus indicating that Snamprogetti looked to NIOC for payment and did not consider itself to have a direct right of recovery against HCC. The Tribunal therefore determines that this claim is properly to be considered as a counterclaim for damages by NIOC in the amount evidenced by the Snamprogetti invoice, rather than a third party claim on behalf of Snamprogetti for payment of that invoice. The obligation arose in February 1980 and the work was completed by March 1980. Consequently, the fact that NIOC may only have paid the sum in question to Snamprogetti at some time after August 1984 does not affect HCC's underlying obligation and the merits of the claim. The Tribunal therefore awards NIOC the sum of Rls. 5,873,356.

iv) Payment Of Customs Duties

108. NIOC alleges that the sum of Rls. 206,315,440 is payable by HCC in respect of equipment imported duty-free which remains in Iran. NIOC contends that, pursuant to Clause 116 of the Particular Conditions, HCC was required either to export such materials and plant or to pay all applicable customs duties and taxes, and that the amount claimed represents the duties and charges now payable as a result of HCC's failure to comply with such requirements.

109. The Tribunal dismisses this counterclaim. The Esfahan-Rey Contract gave HCC the option either to export the equipment or to pay the duties. Any obligation to pay customs duties therefore arises not from the Esfahan-Rey Contract itself, but by operation of law. In addition, NIOC has failed to evidence this claim satisfactorily, relying solely on its own calculations. NIOC is not the entity responsible for collection of customs duties, nor has it alleged that it has paid these amounts, or that it is entitled under the Esfahan-Rey Contract to claim such sums from HCC.

v) Social Security Contributions

110. NIOC counterclaims for the sum of Rls. 514,901,471, being contributions and penalties allegedly payable by HCC to the Social Security Organization, pursuant to Clause 20.12 of the Particular Conditions of Contract. NIOC asserts that, as the Esfahan-Rey Contract was expressly stated to be subject to Iranian laws and regulations, an obligation to pay Iranian Social Security premia arises from the Esfahan-Rey Contract itself. NIOC further asserts that it "will be held responsible under ... the Social Security Act to defray the Social Security Organization dues," and submits in evidence details of its calculations and letters from the Social Security Organization.

111. HCC denies liability for these payments, asserting, inter alia, that the claim for Social Security premia is outside the jurisdiction of the Tribunal as not arising from the "same contract, transaction or occurrence," that the Social Security Organization is not a party to these proceedings, and that this claim was not outstanding as of 19 January 1981.

112. The Tribunal notes that the Esfahan-Rey Contract provides, in Clause 17.1 of the General Conditions, that HCC will indemnify NIOC for any penalty or liability "of every

kind" arising out of a breach by HCC of local law and regulations. NIOC has not submitted any evidence to indicate that it was required to pay the amount now claimed to the Social Security Organization prior to 19 January 1981 or, indeed, at any time thereafter. Although NIOC has submitted a separate brief in connection with HCC's alleged dues, the only documentary evidence produced in support of its assertions are two letters from the Social Security Organization dated 5 October 1981. In view of the foregoing, and without prejudice to the issue of the Tribunal's jurisdiction, this counterclaim is dismissed.

vi) Unpaid Taxes

113. NIOC also counterclaims for Rls. 650,277,235 in respect of taxes allegedly owed by HCC pursuant to the Esfahan-Rey Contract. NIOC bases its right to bring such a claim on Clause 123 of the Particular Conditions which provides that the Esfahan-Rey Contract would be governed by and construed in accordance with the laws of Iran. NIOC has submitted details of the calculation of the sum claimed in a separate submission, together with copies of tax assessments issued by the Ministry of Economic Affairs and Finance which indicate that at least part of this claim in respect of the tax years 1976-7 and 1978-9 was outstanding as of 19 January 1981.

114. The Tribunal notes that NIGC has filed a claim for unpaid taxes in the same amount and based upon the same calculations, which refers to NIOC's submission Document No. 146. The Tribunal therefore concludes that the two counterclaims have been amalgamated and need only be addressed once.

115. The Tribunal has consistently held that it has no jurisdiction over counterclaims relating to allegedly unpaid taxes, when the obligation to pay such taxes does not arise out of the contract, transaction or occurrence that

constitutes the subject matter of the claim in the same proceedings. (See International Technical Products Corp. and Islamic Republic of Iran, Award No. 196-302-3 (28 October 1985), reprinted in 9 Iran-U.S. C.T.R. 206; General Dynamics Telephone Systems Center and Islamic Republic of Iran, Award No. 192-285-2 (4 October 1985), reprinted in 9 Iran-U.S. C.T.R. 153; Questech, Inc. and Ministry of National Defence, Award No. 191-59-1 (25 September 1985), reprinted in 9 Iran-U.S. C.T.R. 107; Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298; T.C.S.B., Inc. and Iran, Award No. 114-140-2 (16 March 1984), reprinted in 5 Iran-U.S. C.T.R. 160.) The three Chambers fully concurred on this finding. The Tribunal does not see any reason to depart from these precedents in the instant case.

116. The two States Parties to the Algiers Accords deliberately refrained from giving jurisdiction to the Tribunal over claims of one of them against nationals of the other (see Case A/2, Decision No. DEC 1-A2-FT (26 January 1982), reprinted in 1 Iran-U.S. C.T.R. 101.) This exclusion obviously extends to claims arising out of unpaid taxes. The only exception to this negative rule relates to counterclaims. In order to be admissible such counterclaims, however, have to meet the conditions set forth in the Claims Settlement Declaration, namely to arise out "of the same contract, transaction or occurrence that constitutes the subject matter" of the claim of the national who initiated the proceedings (Article II, paragraph 1).

117. The obligation to pay taxes finds its source in the domestic law of the State concerned. In the case of income taxes, it arises out of the earning of revenues by a person subject to the law. The fact that these revenues are earned as the result of the performance of a contract is immaterial: it does not change the legal nature of the obligation, which remains statutory and not contractual, and creates no legal link between such an obligation and the

contract which allowed the revenue to be earned. It cannot be said, therefore, that the obligation to pay taxes "arises out of" this contract and, accordingly, the conditions set forth by the Claims Settlement Declaration for the admissibility of a counterclaim for allegedly unpaid taxes are not fulfilled. The same is true if reference is made to the "transaction" to which the contract relates since the obligation to pay taxes exists independently of the dealings between the parties to a transaction. The fact that such parties include the amounts to be paid as taxes among the costs to be taken into consideration for the calculations of the price of the contract does not suffice to change the legal situation: as with all the other costs, such as the cost of the items to be delivered or labor costs, the taxes to be paid do not constitute a legal obligation of one party to the contract vis-à-vis the other.

118. For the same reasons, a counterclaim relating to allegedly unpaid taxes can not be accepted on the basis of the theory of unjust enrichment. Such theory does not provide a separate basis of jurisdiction under the Claims Settlement Declaration. Furthermore, the fact that the Tribunal has no jurisdiction over the counterclaim does not deprive the Iranian authorities of access to any of the existing legal recourses to enforce their tax laws. Finally, the Tribunal is usually not provided with evidence sufficient to allow it to decide upon such issues and, even if evidence is furnished, the Tribunal is not equipped to evaluate its persuasiveness in order to determine the amount due or even the very existence of the alleged debt. Since it is not in a position to assess the existence or quantum of this debt, it is equally not in a position to offset it against the amounts awarded to a claimant.

119. A provision in the contract to the effect that Iranian law will be the law of the contract or that a foreign party will be subject to Iranian laws, including tax laws, does not change the preceding conclusions: such laws would apply

to the revenues earned by the foreign party whatever the provisions of the contract and even if the latter did not include any provision of this kind.

120. On the other hand, the situation is quite different if the contract includes provisions which create specific obligations, which do not exist in the law, of one party towards the other, in relation to the burden of the taxes to be paid, or provisions which set forth conditions for payment of amounts earned under the contract in relation to the payment of taxes. Examples of such provisions are those, very frequently encountered, that a certain percentage (usually 5.5%) of the amounts due will be withheld by the buyer and directly paid by it to the Ministry of Economic Affairs and Finance, or that the buyer will reimburse the seller the amount of the taxes paid by it, either as a general rule, or if there is an increase in the rate of these taxes after the execution of the contract. Like all other contractual obligations, such provisions must be enforced by the Tribunal and may be the subject matter of counterclaims. The counterclaim in this case is not based upon a provision of this kind and, accordingly, is dismissed.

vii) Communications Expenses

121. NIOC asserts a counterclaim for Rls. 1,794,200 allegedly owed by HCC to the Ministry of Post, Telegraph and Telephone ("Ministry") for the use of wireless communication sets during its performance of the Esfahan-Rey Contract. As evidence NIOC has submitted a letter sent from the Ministry at some time after November 1983 requesting that the item be included in the counterclaims against HCC.

122. The Tribunal dismisses this counterclaim for lack of jurisdiction. NIOC does not assert that it has paid the amount in question and is clearly asserting this claim on

behalf of the Ministry, which is not a party to these proceedings.

viii) Services Rendered By Bina Company

123. NIOC has also filed a counterclaim in the sum of Rls. 606,786 allegedly owed by HCC to Bina Company, a sub-contractor on the Esfahan-Rey project. NIOC has submitted in evidence a copy of a judgment in favor of Bell Engineering from Chamber Two of the Public Court of Tehran for this amount, together with a letter from Bina Company, dated 2 September 1984, in which it asks that, as successor to Bell Engineering, this sum be included in the arbitral proceedings against HCC.

124. This counterclaim must also be dismissed for lack of jurisdiction. Bina Company is not a party to these proceedings and NIOC has shown no basis on which to assert this item of claim on its own behalf.

ix) Letters Of Guarantee

125. NIOC's final counterclaim is in the sum of Rls. 483,469,738 in respect of two performance guarantees opened pursuant to the Esfahan-Rey Contract. The two guarantees, Nos. 9/108 and 8/356, were issued by Bank Tejarat (formerly Iranians Bank) against stand-by letters of credit from First City National Bank of Houston ("FCNBH"). Guarantee No. 8/356 is dated 14 March 1978 and is in the sum of Rls. 241,734,869 (5% of the contract price after the downpayment). It states that it is provided in respect of NIOC agreeing to release to HCC the 5% retention to be made pursuant to Clause 108 of the Particular Conditions, i.e., on issue of the Completion Certificates. Guarantee No. 9/108 is dated 8 April 1978 and is similar in most respects save that it is to secure the 5% Social Insurance and Worker's Training contributions and is stated to expire one week later than Guarantee No. 8/356.

126. NIOC contends that it has made a demand to Bank Tejarat for payment under these guarantees, and that Bank Tejarat requested payment from FCNBH on 22 November 1980 but that FCNBH refused to make payment under its standby letters of credit. NIOC contends that this refusal was in violation of the Esfahan-Rey Contract and that, pursuant to the Tribunal's decision in Case No. A-16 Bank Tejarat's claim may be considered by this Chamber.

127. In support of its arguments NIOC has submitted the two guarantees at issue, a copy of the telex text of FCNBH's standby letter of credit No. SC-4941, dated 6 April 1978, a letter from NIOC dated 26 August 1980 to Bank Tejarat referring to a previous letter apparently requesting payment under guarantee No. 9/108 and a number of other items of correspondence relating to the guarantees. NIOC has also filed, as an exhibit to one of its submissions, a counterclaim purporting to join Bank Tejarat as a Counter-claimant. NIOC contends that HCC would be unjustly enriched if the value of these letters of guarantee is not released.

128. HCC argues that such claim should be dismissed for lack of jurisdiction, as not arising out of the same contract, transaction or occurrence as HCC's claims, citing International Technical Products Corp. and Government of the Islamic Republic of Iran, Partial Award No. 186-302-3 (August 19, 1985), reprinted in 9 Iran-U.S. C.T.R. 206. HCC further objects that Bank Tejarat is not a party to these proceedings and that this counterclaim is untimely raised by NIOC.

129. The Tribunal finds that as the Final Certificate issued by NIOC on 1 September 1979 specifically provided for the release of guarantee No. 8/356, no claim can now arise under that guarantee and the counterclaim relating thereto is dismissed on the merits, without requiring the Tribunal to address the question of jurisdiction.

130. Guarantee No. 9/108 was valid until all obligations and duties under the Esfahan-Rey Contract had been fulfilled and HCC had produced W.S.I.O. and W.T. clearance certificates, and was payable "as soon as written notification is received." The obligations arising under this guarantee are, therefore, not automatically discharged by a finding that HCC properly performed its obligations under the Esfahan-Rey Contract. The stated expiry date was originally 28 September 1978. NIOC has submitted evidence of its extension to 5 March 1979, but not beyond. Bank Tejarat was authorized to draw on the standby letter of credit issued by FCNBH if confirmation of an extension was not received by two days prior to the expiration date of guarantee No. 9/108. NIOC demanded payment under this guarantee by letter dated on 26 August 1980, but it appears that Bank Tejarat only requested reimbursement from FCNBH by telex dated 23 November 1980. No evidence has been submitted to confirm whether or not Bank Tejarat has paid the value of the guarantee to NIOC.

131. As a result the Tribunal concludes that it must dismiss the counterclaim under this guarantee also. NIOC's primary remedy under the guarantee is to demand payment from Bank Tejarat, which it has done. If payment was in fact made prior to 19 January 1981, then NIOC's claim is extinguished and the right to demand payment passes to Bank Tejarat. Bank Tejarat has failed to satisfy the necessary burden of proof that it has incurred this obligation by making payment to NIOC and its claim is therefore dismissed on the merits, again without need to address the issue of jurisdiction. If, as seems more likely, no payment has in fact been made, the claim is outside the jurisdiction of this Tribunal, because NIOC's claim lies against Bank Tejarat and is therefore outside the terms of the Claims Settlement Declaration. For these reasons, the counterclaim for payment of guarantee No. 9/108 is also dismissed.

j. Summary

132. The Tribunal has therefore found that HCC is entitled to receive the following sums under the Esfahan-Rey Contract:

i) Rls. 5,758,466 payable under Payment Certificate No. 21C; plus
ii) Rls. 10,949,748 reimbursement of deductions improperly made; plus
iii) U.S.$185,986.10 plus Rls. 25,724,102 payment due under the escalation invoices; plus
iv) U.S.$1,036,150.18 payment due in respect of the exchange rate invoices; plus
v) U.S.$96,050 for payment for work performed under the Variation Orders; plus
vi) Rls. 8,939,877 release of retention monies.

133. The Tribunal has also found that NIOC is entitled to receive the following amounts:

i) Rls. 10,000,000 for the costs of remedying defects in the cathodic protection system; plus
ii) Rls. 1,384,092 for the costs of conducting the capacity test; plus
iii) Rls. 5,873,356 for the costs of corrective work at the Ghom Pressure Reducing Station.

134. The Esfahan-Rey Contract provided for HCC to receive 60% of all progress payments in U.S. Dollars at the "Bank Markazi selling rate of exchange at the date of payments." The Tribunal finds it appropriate to use the same rate for conversion of the 40% to be paid to HCC in rials. In addition, HCC was entitled to receive an adjustment payment in the event of certain exchange rate variations during the life of the Esfahan-Rey Contract. (See paragraphs 66-73, supra.) The Tribunal therefore determines that all amounts expressed in Iranian Rials are to be converted into U.S.

Dollars at the Bank Markazi average rate for the month in which payment was due, provided that, should that rate vary by more than 1% from the rate of exchange as at the Tender date, i.e., U.S.$1 = Rls. 68.15, then, pursuant to Clause 19.24 of the Instructions to Tenderers and the Tribunal's decision as to the proper interpretation thereof (see paragraph 73, supra), the appropriate rate of exchange shall be fixed at U.S.$1 = Rls. 68.15.

135. On examination, the Tribunal finds that in all cases except two the applicable Bank Markazi average rate of exchange was U.S.$1 = Rls. 70.475. The exceptions are the sum of Rls. 1,655,550 due to HCC under Payment Certificate No. 15C, for which the relevant rate was U.S.$1 = Rls. 70.625, and the Rls. 5,873,356 due to NIOC for the corrective work at the Ghom Pressure Reducing Station, for which the relevant rate was U.S.$1 = Rls. 75.419. All of these rates vary from the rate as at the Tender date by more than 1%. The Tribunal therefore determines that the appropriate rate of exchange to be applied to all amounts awarded to both HCC and NIOC under the Esfahan-Rey Contract is that as of the Tender date, i.e., U.S.$1 = Rls. 68.15.

136. The Tribunal therefore awards HCC the sum of U.S.$1,318,186.28, plus Rls. 51,372,193 converted at the above rate, to give a figure of U.S.$753,810.61, to reach a total award to HCC of U.S.$2,071,996.89 in respect of its claims under the Esfahan-Rey Contract. As the credit allowed by HCC to NIOC (see paragraph 34, supra) is reflected in the amount awarded to NIOC under the counterclaim (see paragraph 101, supra), no further deduction is required.

137. The Tribunal also awards NIOC the sum of Rls. 17,257,448, converted at the rate of U.S.$1 = Rls. 68.15, to reach a total award to NIOC of U.S.$253,227.41 in respect of the counterclaims under the Esfahan-Rey Contract.

2. The Claims And Counterclaims Under The Gach Saran Contract

a. Factual Background

138. In 1977, HCC entered into Contract No. 3-73-276-01-338 with Oil Service Company of Iran ("OSCO"), the Gach Saran Contract, effective 14 June 1977, for the construction of gas pipelines and related facilities for the Gach Saran Associated Gas Injection Project ("the Project"). HCC's obligations included the construction of the pipelines and related civil and mechanical works, testing and commissioning, and the installation of a cathodic protection system, as described in the scope of work (Section 10 of the Gach Saran Contract). The Gach Saran Contract was for a lump sum price of U.S.$8,874,500 plus Rls. 417,120,000.

139. Pursuant to Clause 1.9 of the Form of Agreement Foster Wheeler (Process Plants) Ltd. ("Foster Wheeler") was appointed construction manager of the Project on behalf of OSCO, and it was primarily Foster Wheeler staff who dealt with HCC during the performance of the Project. Foster Wheeler and OSCO were responsible for provision of all materials and supplies, unless specifically agreed otherwise. The Project was to be completed by 14 July 1978, followed by a 12-month maintenance period prior to final acceptance, pursuant to Clause 1.8 of the Form of Agreement and Clause 34 of the General Conditions.

140. As with the Esfahan-Rey Contract, HCC was required to submit a monthly progress report to Foster Wheeler reflecting the amount of work performed, together with a Progress Payment Certificate for approval, pursuant to Clause 41 of the General Conditions. After approval by Foster Wheeler, OSCO was required by Clause 41.2.a of the General Conditions to pay the amount certified within 30 days, less a retention of 5% for Social Security payments, 0.2% for Workers Training contributions and 5.5% contractor's tax. Although the

Gach Saran Contract is, itself, silent as to the currency of the payments to be made to HCC, it is well documented in the tender correspondence, as well as in a letter from HCC to OSCO dated 12 June 1977, that the Parties agreed that all payments would be made 60% in U.S. Dollars and 40% in Iranian Rials, at a fixed exchange rate of U.S.$1 = Rls. 70.5.

141. Clause 39 of the General Conditions provided that Foster Wheeler could expand or modify the original scope of the work by issuing Variation Orders and adjusting the contract price accordingly. Clause 40 of the General Conditions provided for additional work to be paid for at the rates specified in the Gach Saran Contract, or if no rate was specified, at a rate to be agreed by HCC and Foster Wheeler before commencing the work. The amount of work so performed was to be included for payment in the regular Progress Payment Certificate. Variation Orders which cumulatively increased the contract price by U.S.$250,000, or multiples thereof, required formal amendment to the Gach Saran Contract before the work was performed, in accordance with Clause 42.1 and 42.2 of the General Conditions. Provision was also made for cost adjustments to reflect labor and materials pricing increases, to be calculated as a percentage of the amount due for work performed, as determined by a formula set out in Section 4.5 of the Gach Saran Contract.

142. The procedure on completion of the work varied somewhat from the procedure provided for in other HCC contracts, and is set out in Clauses 32-36 of the General Conditions. Clause 32 of the General Conditions provides for the issue of a "Taking Over Certificate" by Foster Wheeler on completion and testing of the works. The 12-month maintenance period was deemed to commence on the date of issue of that certificate, but prior to expiry of that period HCC could apply to Foster Wheeler for a "Completion Certificate," pursuant to Clause 33 of the General Conditions, by showing

that Taking Over Certificates had been issued for all parts of the work, and that the work site (as defined in the Gach Saran Contract) had been properly cleared. On satisfactory completion of the maintenance period Foster Wheeler was required by Clause 35 of the General Conditions to issue a "Maintenance Certificate." The "Final Certificate" would only be issued when HCC had received both a Completion Certificate and a Maintenance Certificate and, pursuant to Clauses 17 (3) and 36 of the General Conditions, had either exported its plant and any surplus materials from Iran or obtained customs clearance for such items.

143. Clause 41 of the General Conditions provides, however, for HCC to receive final payment upon issue of the Completion Certificate, i.e., before expiry of the maintenance period, upon production of clearance certificates evidencing payment of Social Security and Workers Training contributions and evidence that all of its equipment had been exported or had obtained customs clearance, as described above. Provided all these conditions were met, HCC could submit an invoice for the amount of the retentions and OSCO was required to make payment within 30 days.

144. The Gach Saran Contract also included a force majeure provision, Clause 64 of the General Conditions, pursuant to which HCC could request an extension of time if required as a result of any such event, together with detailed provisions for termination by OSCO, with or without cause, and for termination by HCC on certain grounds, as specified in Clause 54 of the General Conditions. These grounds included OSCO's failure, without good cause, to make payments due to HCC within 14 days of a written notice of demand.

145. HCC commenced work on the Project in July 1977. By letter dated 27 September 1978 HCC notified Foster Wheeler of its concern over the disruption to its work caused by civil disturbances and the imposition of martial law. In its reply dated 7 October 1978 Foster Wheeler drew HCC's

attention to the force majeure clause contained in the Gach Saran Contract. A further exchange of correspondence took place between HCC and Foster Wheeler, wherein HCC expressed its concern over the difficulties it was encountering in maintaining proper and safe working conditions and asserted that it was being denied access to the wellhead sites. On 12 December 1978 HCC wrote again to Foster Wheeler informing it of the difficulties it was encountering in obtaining materials and supplies and in maintaining a secure working environment and requested Foster Wheeler to delete certain works from the scope of the Gach Saran Contract and to hold in abeyance extra works that Foster Wheeler was contemplating giving to HCC.

146. As HCC had not received any reply to this letter, on 28 December 1978, it gave notice to OSCO of the suspension of its operations on the Gach Saran Contract, due to force majeure. This letter reads as follows:

> We are gravely concerned over the abnormal working environment in Iran. Escalations in riots, killings, threats of violence and civil disorder threaten the safety of our Iranian, Third Country and U.S. personnel in Iran.
>
> We are also experiencing shortages in supplies, particularly fuel. These shortages substantially interfere with construction of the above referenced project.
>
> Accordingly, we are temporarily suspending construction activities on this project. We intend to resume construction when we can obtain necessary supplies and our people can work in safety.
>
> Please make arrangements for the security and guarding of the works and the construction plant. We will cooperate with your security program, but anticipate our personnel being compelled to leave the country on short notice if the situation deteriorates further. Messrs. H. Eichstaedt and W. Fox of our company have been instructed to coordinate with you to implement the necessary security program.
>
> We request an extension of the completion date of our contract due to the abnormal working

> environment which has resulted in shortages of supplies and constitutes a critical threat to the safety of our personnel. We will request a meeting with you in the near future to discuss these problems and the necessary extension.

147. On 13 January 1979 Foster Wheeler replied to HCC's letter of 12 December 1978, expressing its concern about HCC's "sudden departure" from the site on 4 January 1979 and rejecting HCC's request to delete certain work from the scope of the contract. This letter also states that "in the event of your Company's failure to complete the Contract Works ... we shall deem it necessary to foreclose on your Performance Bond ... on the grounds of your abandonment of the Contract." Despite this, Progress Payment Certificate No. 16, which was first approved on 6 December 1978, for payment of approximately U.S.$5,000,000 was reconfirmed for payment by NIOC on 29 January 1979.

148. On 20 March 1979 HCC acknowledged its recent receipt of this letter, making reference to the fact that it was apparently written in ignorance of HCC's letter dated 28 December 1978 and requesting a meeting with Foster Wheeler. HCC continued by stating:

> With the work 98.5% complete and the remainder made impossible due to lack of materials, we are of the opinion the contract should be accepted at its current stage.

HCC did not receive any response to this letter from Foster Wheeler. Despite attempts made by HCC to contact Foster Wheeler, no contact was established until HCC sent a telex directly to OSCO in August 1979 advising OSCO that it was awaiting instructions in regard to a meeting to resolve the "outstanding items of this contract." OSCO responded just a few days later, on 29 August 1979, setting up a meeting in Tehran on 3 September 1979.

149. Meetings were held on 3 and 24 September 1979 at which OSCO requested HCC to complete the work under the Gach Saran

Contract. However, on 1 December 1979 HCC advised OSCO by telex that it was "terminating the contract pursuant to Clause 54 (1) (a) of the contract." As its reasons for termination, HCC cited the continuing unrest in Iran and seizure of the American Embassy, inability to recruit expatriate staff for work in Iran and the "long overdue" balance owed to HCC of U.S.$3,023,000 in respect of approved but only partially paid invoices and unpaid escalation costs of approximately U.S.$200,000.

150. OSCO's only response to this was by telex dated 25 December 1979, in which it rejected HCC's notice of termination and advised HCC that OSCO considered HCC to have abandoned the site in December 1978 as per Clause 50A [sic] and to have failed to fulfill its contractual obligations. NIOC has submitted in evidence a handwritten internal memorandum dated 3 March 1979 from Foster Wheeler in Abadan, which concludes "[Foster Wheeler] must not recommend that [Payment 16] be processed in view of abandonment of site by Houston."

151. HCC alleges that despite the fact that it adequately performed all its obligations under the Gach Saran Contract until its rightful termination on 1 December 1979, OSCO failed to make full payments for work performed, namely: (1) U.S.$3,023,000 in outstanding progress payments; (2) U.S.$3,949,710[9] in cost adjustments; and (3) U.S.$12,662,353 (net) in respect of work performed. HCC also claims the release of U.S.$1,700,229 in retention monies on termination of the Gach Saran Contract.

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[9]Reduced from U.S.$4,003,026.

b. Termination Of The Gach Saran Contract

152. In order to establish the rights and obligations of the Parties, the Tribunal must first consider the issue of whether or not HCC was entitled to suspend and terminate the Gach Saran Contract.

153. NIOC argues, on OSCO's behalf, that HCC abandoned the site in December 1978, thus breaching the Gach Saran Contract and that therefore it is not entitled to invoke Clause 54 of the General Conditions as a ground for termination. In an affidavit from Mr. Naghashpour, OSCO's Head of Contract Services for the Project, NIOC alleges that OSCO attempted to convince HCC to remobilize and finish the Project and that, after the meetings held in September 1979, HCC had agreed to complete the Project. To support its contentions NIOC relies on a telex dated 24 September 1979 addressed to HCC in which OSCO confirmed that a meeting was to be held between the Parties and which states that HCC was requested "to complete the outstanding work."

154. By way of denial of this allegation, HCC relies on its communications to Foster Wheeler (see paragraphs 145-146, supra) from September through December 1978 to evidence the existence of conditions of force majeure. HCC contends that it duly terminated the Gach Saran Contract, pursuant to Clause 54 of the General Conditions, for non-payment by OSCO of amounts due and relies on its telex of 1 December 1979 in this respect.

155. It is clear that force majeure conditions existed in Iran at the time HCC suspended the performance of the Gach Saran Contract. The Tribunal has consistently recognized that United States contractors were justified in stopping work and leaving Iran in late 1978. (See, e.g., Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298.) HCC first informed

Foster Wheeler of its concern as to local conditions in September 1978 and it was Foster Wheeler that raised the issue of possible force majeure. HCC has submitted other documents for the period between September 1978 and its notice of suspension on 28 December 1978, all of which evidence its continuing concern, and it is clear that the matters referred to in the letter of suspension were real and substantial and previously known to Foster Wheeler. The working environment in Iran at this time made continuation of the Project impractical and these conditions were clearly beyond the control of either Party and could not have been foreseen or prevented by them.

156. It is much harder to determine whether the events of force majeure continued unabated up to the date of HCC's telex of termination in December 1979. NIOC has contended that HCC abandoned the Project in January 1979 and then refused to remobilize, relying upon Foster Wheeler's letter of 13 January 1979. The Tribunal finds this letter to be unpersuasive. It appears that the letter was written without knowledge of HCC's letter of suspension, which is not surprising when it is considered that HCC's letter was addressed to OSCO's Tehran office, whereas Foster Wheeler's letter was prepared and sent from its office in Khorramshahr. Equally, the Foster Wheeler memorandum of 3 March 1979 was probably also written without knowledge of HCC's letter, and does not in any way evidence an intention not to return to the site.

157. The Tribunal finds that the record evidences a series of meetings and correspondence which demonstrate that HCC was willing to resume work on the Gach Saran Project, but that, in practice, it was unable to do so prior to 4 November 1979. In its telex of termination, HCC refers to shortages of materials and NIOC's asserted intention to review the contractual arrangements between the Parties, both of which could be interpreted as indicating that reasonable conditions for resumption of the work did not

exist at that time. After that date, further performance by HCC was rendered impossible as a consequence of the seizure of the American Embassy in Tehran.

158. From the evidence on record, the Tribunal concludes that HCC continued to attempt to contact Foster Wheeler throughout 1979 and that the failure to arrange a meeting to discuss resumption of the work arose out of difficulties caused by Foster Wheeler's own departure from Iran and OSCO's resulting inability to co-ordinate negotiations, rather than from any abandonment by HCC.

159. Pursuant to that determination, the Tribunal finds that HCC was entitled to invoke Clause 54 of the General Conditions so as to terminate the Gach Saran Contract for non-payment in December 1979. Payment Certificate No. 16 had been approved for payment of approximately U.S.$5,000,000 in January 1979, but only U.S.$1,442,000 had been paid. HCC's telex of 1 December 1979 refers to "repeated verbal and written demands" for payment. The Tribunal is not fully satisfied, however, that HCC complied with the actual requirements of Clause 54 of the General Conditions by giving 14 days notice of termination to OSCO, but it is accepted by the Tribunal that the HCC telex of 1 December 1979 constituted such notice and that HCC was entitled to terminate the Gach Saran Contract 14 days from OSCO's receipt thereof, OSCO having failed to show good cause for non-payment. NIOC has not specifically stated when the telex was received, but the copy submitted in evidence by HCC shows at the end "How Rcvd?" and the response "it is OK." The Tribunal therefore concludes that HCC properly terminated the Gach Saran Contract with effect from 15 December 1979 and that, pursuant to the provisions of Clauses 54[10] and 52 of the General Conditions, OSCO

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[10] As amended by Special Condition 8.15.

became liable to reimburse HCC for all chargeable costs incurred up to that date, together with demobilization expenses and an amount to be agreed representing "reasonable profit."

160. The Tribunal must, therefore, consider first, what sums were due and payable to HCC as of 15 December 1979 and second, the amount to be awarded. HCC originally claimed for payment of the balance of Payment Certificate No. 16, plus an amount outstanding for extra work performed pursuant to Foster Wheeler's or OSCO's request, plus cost adjustments calculated but not paid. During the Hearing, however, it was accepted by both Parties that the sum reflected in Payment Certificate No. 16 was to be an "on account" payment to be offset against the claims for extra work. Accordingly, the claim for payment of the balance of Payment Certificate No. 16 as a progress payment is dismissed. The Tribunal will therefore need to consider each of the 59 claims for extra work individually, so as to assess HCC's ultimate entitlement to the balance due under Payment Certificate No. 16 and to any additional sums. As the issue of the application of the cost adjustment provisions to such extra work is also in dispute, the Tribunal will address that question first.

c. Costs Adjustments

161. HCC claims a total of U.S.$3,949,710 in respect of costs adjustments allegedly unpaid by NIOC on Payment Certificates Nos. 13, 14, 15 and 16 and on amounts due for approved Variation Orders and claims for extra work. In the White affidavit HCC states that the last cost adjustment index provided to it by OSCO covered the period to 6 August 1978, and that Bank Markazi ceased to publish the relevant indices thereafter. The last quoted cost adjustment factor, calculated pursuant to Section 4 of the Gach Saran Contract, was 12.34608%. HCC asserts that this was the appropriate factor to be applied to Payment Certificate No. 13, which

was issued on 12 August 1978. However, OSCO only authorized increased costs of U.S.$46,752 plus Rls. 2,197,376, which HCC claims to be a cost adjustment factor of only 11.20%.

162. Payment Certificates Nos. 14 and 15 were issued on 23 October 1978 and 4 December 1978 respectively. Section 4.5.3 of the Gach Saran Contract provides:

> If in any case the appropriate index is not available at the time when the Company is calculating the above adjustment, the adjustment shall be calculated on the basis of the latest available index.

HCC therefore contends that the cost adjustment factor of 12.34608% should also have been applied to these two Payment Certificates, but that OSCO failed to do so. HCC has submitted in evidence a schedule showing the amount of each Payment Certificate, HCC's calculation of the cost adjustment factor and the amounts actually paid by OSCO. The amount claimed as underpaid in respect of Payment Certificates Nos. 13, 14 and 15 is U.S.$67,120.[11] HCC also claims the sum of U.S.$1,044,096 in respect of a similar cost adjustment on Variation Order No. 26 for blasted rock, dated 31 May 1978, on which no cost adjustment was included, and for a cost adjustment on Payment Certificate No. 16. Given the subsequent acknowledgement that Payment Certificate No. 16 was to be an "on account" payment in respect of extra work, as discussed in paragraph 160, supra, the question of cost adjustment in respect of that payment and the portion of this claim which relates to payment for additional work to be determined by this Tribunal is dealt with in relation to cost adjustments on the amount awarded for extra work as a whole (see paragraph 274, infra).

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[11] HCC acknowledges a total cost adjustment payment by NIOC of U.S.$119,785 against Payment Certificate No. 15, which has been offset against the total of Payment (Footnote Continued)

163. Finally, HCC contends that, as the cost adjustment formula was included in the Gach Saran Contract so as to compensate for increases in inflation, and given that inflation in Iran increased rapidly after August 1978, it would have been only equitable for OSCO to pay HCC a "reasonable amount," i.e., higher than the 12.34608% factor, when Bank Markazi ceased to publish the relevant index. Section 4.5.3 of the Gach Saran Contract provides for adjustment of previous calculations when the appropriate index becomes available once more. HCC therefore requests the Tribunal to award it an additional sum of U.S.$41,915, assuming for these purposes a steady rate of inflation equal to that recorded over the life of the Gach Saran Contract.

164. For its part, NIOC refers to HCC's telex of 1 December 1979, which refers to outstanding escalation costs of approximately U.S.$200,000, and contends that not only is no money due to HCC for cost adjustments but that HCC has already been overpaid by U.S.$77,903 for such adjustments, which sum should be repaid to NIOC. In support of its argument NIOC submits the affidavit of Mr. Shahrestani of NIOC's Finance Department ("the Shahrestani affidavit"), in which it is asserted that HCC miscalculated the adjustments, both by using incorrect and unconfirmed indices and by assuming that the cost adjustment provisions in the Gach Saran Contract were applicable to sums paid for Variation Orders under the Payment Certificates, as well as for continuing progress work. In particular, NIOC argues that no cost adjustment should be paid in respect of the blasted rock payment, asserting that this work, which is accepted to have been outside the original scope of the Gach Saran Contract, was performed pursuant to a separate contract between HCC and OSCO, rather than under a Variation Order to the Gach Saran Contract.

(Footnote Continued)
Certificates Nos. 13-15. The amount stated is the net balance.

165. This part of the claim raises a number of issues to be resolved, both as to the contractual application of Section 4 of the Gach Saran Contract and as to HCC's claim for "reasonable" additional compensation.

166. Section 4.5.1 of the Gach Saran Contract states: "On receipt of each progress payment invoice the Company shall adjust the sum shown therein ... in the manner set out below in order to take into account ... any changes in the relevant labour, equipment and materials costs." There is nothing in this clause or elsewhere in the section to indicate that payments made in respect of Variation Orders were to be excluded from its provisions. On the contrary, Section 4 of the Gach Saran Contract, entitled "Schedule of Rates," specifically states in paragraph 4.0: "The following rates shall have no further or other application to the Contract than the purpose of valuing variations to, additions to, or deductions from, the Works ordered by the Engineer pursuant to Clause 39 of Section 9." (Emphasis added.) The Tribunal thus concludes that work performed at the scheduled rates under Variation Orders was entitled to the benefit of this cost adjustment provision, unless specifically agreed otherwise.

167. The Tribunal dismisses NIOC's argument that the blasted rock work was performed under a separate contract. There is no evidence to support this contention and the signed and approved Variation Order, which is itself in evidence, submitted by NIOC, specifically states that it was work performed "as per item 4.1.1.20 in the schedule of rates." The Tribunal therefore concludes that a cost adjustment is payable on the Variation Order for blasted rock works, and awards HCC the sum of U.S.$1,044,096 in respect thereof.

168. With respect to the actual mathematical factor to be applied to the cost adjustments under Payment Certificates Nos. 13, 14 and 15, the Tribunal finds the language of Section 4.5.3 of the Gach Saran Contract to be clear and

unambiguous. In the absence of any required index, the latest available index was to be used. HCC has not supplied details of how it calculated the factor of 12.34608% but the Tribunal notes that, in the sheets of calculations submitted by NIOC as exhibits to the Shahrestani affidavit, NIOC has set out its calculations in full, from which it appears that NIOC has, in fact, used the factor quoted by HCC but has applied it to different totals. The Tribunal is unable to establish how NIOC has arrived at the reduced totals to which it applies the cost adjustments factor, except to note that the calculation sheets refer to certain Variation Orders as being "not subject to escalation." HCC itself has admitted that certain items of additional work are not subject to cost adjustment and, in its Rebuttal, has reduced this part of its claim accordingly in respect of the extra work performed but not yet paid. Although not specifically stated as such, these reductions admitted by HCC are all in respect of items of materials supply.

169. NIOC contends that cost adjustments are not payable in respect of Variation Orders Nos. 1-4, 6, 8, 9, 13, 17, 19, 22, 26, 33 and 38. All of these Variation Orders were included in Payment Certificate No. 14 and most of them relate to materials supply. However, the language of Section 4.5.1. of the Gach Saran Contract explicitly states that the cost adjustment formula applies to "labour, equipment and materials costs" (emphasis added). As HCC has not reduced its claim in respect of these past Variation Orders, the Tribunal must apply the provisions of Section 4.5.1. and therefore determines that HCC is entitled to receive the amounts claimed under Payment Certificate No. 14.

170. NIOC has not raised any other specific argument in respect of the amounts claimed under these Payment Certificates. Although HCC has not explained the figure of U.S.$200,000 referred to in its telex of 1 December 1979, the Tribunal notes that the telex continues: "An invoice for

the total sums due [HCC] on the subject project is being prepared and will be submitted in the near future." The Tribunal therefore awards HCC the full amount of U.S.$67,120 claimed in respect of Payment Certificates Nos. 13, 14 and 15.

171. It has been argued in the Shahrestani affidavit that, should any payment be due to HCC for cost adjustments, Section 4.5.3 of the Gach Saran Contract operates to render unnecessary any award of interest thereon. As discussed above, Section 4.5.3 relates to calculation of the appropriate cost adjustment when the relevant index is not available, and provides for adjustment of the calculation when the index becomes available, concluding: "No interest will be paid on any sum which is so delayed." It is evident that this does not affect any right to interest that may arise from non-payment of the cost adjustment and thus NIOC's argument on this point is rejected.

172. The Tribunal rejects HCC's contention that it should apply a higher costs adjustment factor to compensate HCC for increased inflation costs in Iran. As noted in paragraph 168, supra, the contractual language is clear and unambiguous. In the absence of any new indices published by Bank Markazi and of any reliable evidence as to inflation, there is no basis upon which the Tribunal could make such an adjustment. The Tribunal therefore awards HCC a total of U.S.$1,111,216, (being U.S.$1,044,096 plus U.S.$67,120) less 5.5% contractor's tax to arrive at a net figure of U.S.$1,050,099.12 in respect of unpaid cost adjustments under Payment Certificates Nos. 13-15 and Variation Order No. 26.

173. The Tribunal must now address the issue of the requirement to withhold 5.02% of each progress payment to secure Social Security and Workers Training contributions pursuant to Clause 41 (2)(a) of the General Conditions. Such withholdings were to be refunded on termination of the

Gach Saran Contract upon production of certain certificates from the relevant Iranian authorities. However, such amounts, even if withheld, still represent payment for work performed. As the Tribunal has found that the Gach Saran Contract was properly terminated by HCC as at 15 December 1979, HCC is entitled to receive payment for such work in full, pursuant to Clause 52 of the General Conditions. Therefore, the Tribunal finds that the specific provisions of Clause 52 of the General Conditions as to termination override those contained in Clause 41(2)(a), such that the Tribunal finds it unnecessary to now apply any such withholding pursuant to Clause 41(2)(a) to the amount of its award.

d. Claims In Respect Of Extra Work

174. HCC has raised a further 59 claims in respect of work performed by it and for which it claims payment under the Variation Order provisions of the Gach Saran Contract, valued at U.S.$18,399,315. HCC alleges that all these claims remain unpaid. As discussed in paragraph 160 supra, the Tribunal finds it necessary to examine all of these claims separately, so as to establish the balance due after consideration of the U.S.$5,000,000 "on account" payment reflected in Payment Certificate No. 16.

175. The Tribunal notes that these claims fall into three separate categories: those accepted by NIOC, those to which NIOC's only defense is an assertion that they are inadequately evidenced and those to which a substantive defense has been raised.

176. Of the 59 claims, the following 10 items have been conceded as payable in full by NIOC:

HCC. Item No.	Description	Value in Rls.
34	additional transitioning/ modification of isometrics	2,505,630[12]
37	alteration of GS-86 wellhead	451,040
54	fabrication of gate posts at wellhead	2,624,800
72	moveback to install 24" anchor flanges	183,820
84	costs of explosive disposal/ guarding	681,600
85	fabrication of fence posts for manifold fencing	3,251,510
87	pup piece replacement at M-41	231,415
88	lubrication of sliding anchor plates	2,351,750
93	fabrication of manifold gates	863,030
94	modification work GS-17	774,960
	Total Rls.	13,919,555

177. These concessions are based on the statements made on NIOC's behalf by Mr. Peter Becker, Project Director for the Gach Saran Contract for Foster Wheeler to December 1977, both at the Hearing and in his affidavit. NIOC has also attempted, in its Rebuttal Brief (to which Mr. Becker's affidavit is an exhibit), to deny liability for certain of these items, by relying on the affidavit of Mr. Hassan Amir Jani, a member of NIOC's construction department ("the Amir Jani affidavit"). However, the Tribunal notes that most of the discrepancies in NIOC's calculations relate to the relevant rates to be used, rather than to specific issues of liability. The Tribunal finds that NIOC is bound by the statements made by Mr. Becker. The Tribunal therefore credits HCC with the sum of Rls. 13,919,555, equivalent to U.S.$197,440.50 at the agreed rate, in respect of these 10 items. Mr. Becker also makes partial concessions in respect

[12]The Claimant has made a typographical error in its summary of this claim and claims a total of Rls. 2,535,630. The lower figure included in the listing is as evidenced by the Claimant's timesheets and as conceded by NIOC.

of three other claims, items 28, 41 and 56, which are dealt with in paragraphs 197-199, 206-208 and 218-219 respectively.

178. Second, NIOC asserts that numerous of the claims are insufficiently evidenced. In particular, NIOC points to timesheets submitted by HCC which are not signed by any Foster Wheeler or OSCO representative, documents which are illegible or which do not relate directly to the items claimed, and generally to a lack of evidence of authorization or agreement to incur such costs.

179. The Tribunal has scrutinized each of the claims and its supporting evidence with care. The Tribunal finds certain of the documents submitted to show crucial deficiencies, e.g., some appear incomplete or do not bear necessary signatures or authorizations. As a result, the Tribunal is not satisfied that HCC has carried the burden of proof in respect of the following 19 items:

HCC. Item No.	Description	Value in Rls.
9	restringing of pipe	424,540
23	extra work on water supply	5,204,890
40	dewatering with compressed air	44,218,935
58	additional work on manifolds	43,511,610
59	additional expense due to PU2 road closure	24,761,266
69	revision of manifold mechanical drawings	5,218,465
73	purchase of insulation sheet	30,000
74	additional work on bridges	10,082,860
75	purchase of paint for CP marker posts	112,200
76	additional concrete backfill	2,457,820
77	supply of miscellaneous materials	175,000
78	supply of precast tiles	3,000,000
81	modification works at GS 32	613,930
82	modification works at LPCS-2	589,030
83	additional painting	5,539,505
86	removal of installed control valves	5,896,830
90	retest at wellhead GS-17	137,790
92	drainage trenches at manifolds	2,874,685
95	removal of 24" b.v. at M31	186,230

The Tribunal therefore cannot award HCC any sums in respect of the above listed items.

180. The Tribunal must now examine the individual merits of the remaining 30 claims under this heading. In all cases, the item is referred to by the number assigned to it by HCC in its Summary of Valuation of Extra Works. Before proceeding to that analysis, the Tribunal must first address the argument raised by NIOC that, pursuant to Clause 42 of the General Conditions of the Gach Saran Contract, a formal contract amendment was required prior to HCC commencing work on these items. Clause 42 of the General Conditions states that a formal contract amendment is required prior to commencing work on all Variations which, cumulatively, increase the contract price by more than U.S.$250,000. NIOC has submitted evidence which shows that, prior to the issue of Payment Certificate No. 16, some 40 Variation Orders had been issued and paid. Although these amounted to over Rls. 823,183,974 (approximately U.S.$11,676,368 at the contractual rate), only two amendments had been concluded to the Gach Saran Contract, covering Variation Orders Nos. 1-26. It is evident to the Tribunal that Variation Orders Nos. 27-40 had also been approved and paid, without first obtaining a formal amendment. In addition, both the amendments that were issued were executed after the work in question had actually been performed and paid. The Tribunal therefore concludes that the contractual provisions of Clause 42 of the General Conditions were not observed by the Parties in practice and, given this past conduct, it would be inequitable to allow those provisions to be accepted as a bar to payment of the remaining claims for extra work.

181. Item 3 - Delays due to lack of pipe/explosives. HCC claims the sum of U.S.$2,656,581 for costs arising from delays allegedly caused by OSCO's and Foster Wheeler's failure to deliver pipe and explosives in a timely fashion during August and September 1977. HCC contends that it was obliged to place crews and equipment on standby, thus

incurring additional costs. In support of the claim HCC submits daily worksheets signed and initialled by Foster Wheeler for the affected crews and a substantial quantity of letters and telexes, reflecting the urgency for such materials to be delivered.

182. In its defense NIOC relies upon the Amir Jani and Becker affidavits, in which the claim is challenged for three principal reasons: first, the timesheets show that the crew was paid for overtime on a seven-day week when supposedly standing idle; second, that none of the timesheets was signed by Foster Wheeler; and third, that HCC has apparently claimed for "the down time of ALL equipment, and hence the operators and drivers, whether or not such equipment was in use for the construction actually achieved...." At the Hearing HCC explained that in order to maintain its workforce in Iran, it was required to pay laborers for a full seven day week, plus overtime, irrespective of the work actually performed.

183. On review of the evidence presented, the Tribunal concludes that HCC has established that Foster Wheeler and OSCO were delayed in supplying necessary materials to HCC. The documents submitted evidence that HCC repeatedly advised Foster Wheeler of the situation and that it was being required to place its crews on standby and incur additional costs. The Tribunal also notes that Section 4.3 of the Gach Saran Contract, entitled: "Schedule of Rates for Constructional Plant" specifically provides for attendance and operating crew to be charged for separately under the rates set out in Section 4.2. The Tribunal thus rejects this argument by NIOC.

184. The Tribunal notes also the provisions of Clause 8.8.3 of the Special Conditions and Clause 43 (1) of the General Conditions, which may be applicable to such item of claim and which have been referred to in the Amir Jani affidavit. Clause 8.8.3 states: "The Company will not accept any claims

from the Contractor arising out of delays in the delivery of Company supplied materials unless the Contractor shows that he has explored every possibility of adjusting his Programme of Work to minimize or eliminate extra costs...." The Tribunal concludes that this provision places an additional burden of proof on HCC in respect of any such claims, not only to evidence the basis and quantum of its claims, but to satisfy the Tribunal that it has "explored every possibility of adjusting his Programme of Work." However, neither Party has addressed this issue in detail in its pleadings before this Tribunal. The Tribunal concludes that the Respondent has waived the requirements of this clause. Clause 43(1) of the General Conditions provides:

> Within one month after any additional expense is incurred which is not covered by Clause 39 hereof [Variation Orders], the Contractor shall send ... a written statement ... of all claims for any additional charges ... no charges will be considered in respect of any expense which has not been included ....

The Tribunal notes that in August 1977 HCC advised Foster Wheeler by telex GST-031 that its crew was on standby, stating "we will be seeking reimbursement of all cost such as standby construction program delays ... incurred as a result of the non-availibility of pipe." Although it is not readily apparent from the record exactly when HCC first submitted its claim to NIOC, Foster Wheeler wrote to HCC on 8 October 1978 and in its letter entitled: "Standby and Extension of Time Costs," stated: "[Foster Wheeler] has sought, and been granted, permission by the Client to negotiate nett cost rates with [HCC] for both the agreed stated periods." The Tribunal thus finds that NIOC has admitted its obligation to pay HCC and has waived any right of objection it may have had even if the claim, in fact, was not presented to it within the one month period.

185. The Tribunal finds convincing most of the documentation submitted by HCC in support of the quantum of the claim.

The timesheets list the hours for each laborer and indicate delay in supply of materials as the reason for the standby, and are all signed or initialled by Foster Wheeler staff. The Tribunal is, however, not convinced as to the claim for payments made to laborers for a number of hours in excess of those for which the labor was actually on standby. While this may have been a necessary factor for HCC to retain its workforce (and this has not been proven by HCC), it is not a basis for full reimbursement from NIOC. Equally, signature by Foster Wheeler is clearly for the record of work performed and not, as alternatively provided for on the time sheets, for payment. Given that Clause 8.8.3 of the Special Conditions provides that the Contractor must endeavor to "minimise or eliminate extra costs" as a result of delay in delivery of Company supplied materials (see paragraph 184, supra), the Tribunal will consider only the portion of the claim which reflects the normal 10 hours working day and deducts the sum of Rls. 17,994,320, equal to U.S.$255,238.58, from the claim. The deduction is calculated by taking the figure shown on each timesheet for extension beyond normal hours and multiplying this by the relevant number of days covered by the timesheet.

186. The Tribunal also deems it appropriate to reduce the claim by the amount of Rls. 115,585,016, being the amount claimed by HCC in respect of "Interruption of Working Programme." These expenses, which relate to management, warehouse and administrative costs, are not evidenced by any supporting documents or calculations and the Tribunal is not convinced that they reflect additional expenses that would otherwise not have been incurred. The Tribunal therefore awards HCC the sum of U.S.$761,838.65.

187. Item 7 - Standby of civil crews. HCC claims the sum of U.S.$956,958.26 for delays and standby costs allegedly incurred by its civil work crew as a result of Foster Wheeler's and OSCO's failures and delays in supplying materials over an eight month period. Again HCC supports its

claim with signed timesheets and correspondence between it and Foster Wheeler, advising Foster Wheeler of the situation.

188. In the Becker affidavit NIOC challenges HCC's calculations, pointing out that HCC has claimed for 31 days standby in November 1977 and has used a monthly multiplier of 11, not 8, in respect of the general overheads for the civil crew. Other objections as to the form and adequacy of the evidence are also raised.

189. As with the claim relating to item 3 (see paragraph 184, supra), the Tribunal finds that this claim is not barred by virtue of Clause 43(1) of the General Conditions. The purpose of that Clause is to establish a procedure whereby NIOC is advised promptly of any additional claims outside the original contract price which it may be required to bear. It has not been shown that NIOC insisted upon compliance with this requirement during the life of the Gach Saran Contract. The Tribunal therefore holds that the intent of this clause shall have been satisfied wherever HCC notified Foster Wheeler or NIOC of a potential claim within one month of it arising, even if the claim itself was not quantified until later. In this case, HCC notified Foster Wheeler as early as September 1977 that its crews were on standby due to NIOC's delay and thus incurring additional charges. Although it is not shown exactly when HCC first quantified its claim, it is evident from the record that all Parties knew of those events and thus the Tribunal finds the intent of Clause 43(1) to have been satisfied.

190. The Tribunal concludes that HCC has properly evidenced the basis of this claim, but it accepts the specific criticisms as to the calculation of the amount due referred to above and reduces the claim as follows: (1) by one day to 30 days for November 1977; (2) by Rls. 8,310,000 for use of the incorrect multiplier; and (3) to a maximum of ten hours

labor cost per day. The Tribunal therefore calculates the claim to be:

September	- labor	21 x 214,500	Rls.	4,504,500
	- equipment			2,889,600
October	- labor	31 x 214,500		6,649,500
	- equipment			4,265,600
November	- labor	30 x 187,350		5,620,500
	- equipment			2,352,000
December	- labor	31 x 21,250		658,750
	- equipment			235,598
January	- labor	11 x 87,800		965,800
		5 x 318,500		1,592,500
		6 x 101,950		611,700
	- equipment			241,998
				387,996
				132,000
Overheads		8 x 2,770,000		22,160,000
			Rls.	53,268,042

However, the Tribunal is not satisfied as to the sufficiency of the evidence concerning the claim for general overheads for an eight month period. No evidence is provided in respect of these costs other than a brief listing. The Tribunal therefore allows the claim only in the amount of Rls. 31,108,042, equal to U.S.$441,248.82 at the contractual rate of exchange.

191. Item 8 - Standby of mechanical crews. This claim is asserted by HCC for U.S.$1,308,766.79 for delays and standby costs allegedly incurred from OSCO's and Foster Wheeler's failure to deliver supplies in timely manner. The claim is divided into seven sections: (1) standby costs from 10 September to 31 October 1977; (2) standby costs for erection equipment; (3) extended costs for prefabrication equipment; (4) inefficient working of prefabrication crew; (5) extension costs for site services; (6) extension costs for camp maintenance; and (7) extension costs for other site services. The claim is supported by signed timesheets and

correspondence to Foster Wheeler, in which HCC continuously advised it of the situation.

192. NIOC submits no substantive defense but contends, in the Becker affidavit, that there are numerous errors in calculation, that the timesheets are not signed, that the claims are unsupported by the documents submitted and that HCC has not provided the basis for its calculations.

193. The documents submitted by HCC clearly establish that all Parties were aware of the existence of a delay due to lack of materials from 10 September to 31 October 1977. The Tribunal finds this part of the claim to be sufficiently evidenced both as to the amount of the claim and notification to NIOC of the claim no later than November 1977. However, there is no signed authorization for the standby costs of the erection equipment and no contemporaneous evidence quantifying the claims for extended costs of the erection equipment, extended costs and inefficiency of the prefabrication crew or the additional camp costs or site services. Therefore, the Tribunal awards HCC only the sum of Rls. 20,954,820 for September and October 1977, as evidenced by HCC under this part of the claim, less Rls. 3,532,750 deduction for labor costs in excess of ten hours per day, to give a net figure of U.S.$247,121.56.

194. Item 11 - Padding of pipe. The next claim is in the sum of U.S.$396,043.99, being the costs claimed for padding the pipe in rocky areas. HCC contends that, in addition to the rock blasting work performed under Variation Order No. 26 (see paragraph 162, supra), it was requested to provide padding for the pipe and that it has not been paid for this additional item. In evidence are the relevant worksheets, indicating that this work was actually performed, and several letters from HCC requesting payment.

195. NIOC does not deny that the work was performed but asserts that payment for the padding was included in the

overall price agreed pursuant to Variation Order No. 26. In particular, NIOC relies on a letter from Foster Wheeler to HCC dated 22 November 1978 submitted in evidence by HCC, in which it is stated that the sum agreed under Variation Order No. 26 "was inclusive of all items associated with the encountering of rock and this includes sand padding."

196. The Tribunal notes that a dispute on this point thus arose in November 1978. HCC has failed to introduce any evidence to confirm that padding was not included in the sum agreed under Variation Order No. 26, and, thus, the Tribunal concludes that HCC has failed to support its claim and dismisses this item.

197. Item 28 - Extra works on water supply phase II. HCC claims U.S.$127,712.64 in standby costs allegedly incurred between 7 and 19 February 1978 and in May 1978 as a result of OSCO's and Foster Wheeler's failure to deliver pipe, together with a claim for payment for certain work relating to the water lines and pumps and modification of piping. HCC submits in evidence the relevant timesheets and correspondence with Foster Wheeler.

198. It is conceded in the Becker affidavit that Foster Wheeler authorized much of the additional work and that payment of Rls. 2,892,320 (U.S.$41,026) is due in respect of backwelding work, electrical rewiring, replacement of flanges, connection work, purchase of valves and a one day standby on 26 May 1978. The balance of the claim consists of (1) Rls. 3,791,421 standby costs 7 to 19 February 1978; (2) Rls. 150,000 standby in May 1978; (3) Rls. 950,000 additional work; (4) Rls. 450,000 additional work on storage tank; (5) Rls. 650,000 piping modifications; and (6) Rls. 120,000 manufacturing costs. NIOC challenges the rest of the claim on the grounds of insufficient evidence.

199. The Tribunal finds that HCC has adequately evidenced the existence of a delay in February 1978 and additional

work in May and June 1978 and that NIOC was notified of these matters. However, with the exception of the signed timesheets which document the claim for standby costs in February and for one of the crews in May 1978, and the electrical, backwelding, connection and replacement work conceded by NIOC, HCC has only submitted estimates for the additional work to be performed and no evidence of actual costs or expenses incurred. Therefore, the two claims for additional work, and the claims for modification to piping and manufacture are rejected. The Tribunal notes that, again, the timesheets submitted by HCC indicate that the crew was paid for hours in excess of those actually on standby and the Tribunal reduces the claim accordingly. The amount of Rls. 150,000 also is disallowed for standby of the erection crew on 23 May 1978 as there is no supporting time sheet. Based on the figures reflected in the signed timesheets submitted by HCC, the Tribunal therefore calculates that HCC is entitled to receive the sum of Rls. 3,165,666, equal to U.S.$44,903.06, in respect of standby costs, plus the U.S.$41,026 conceded by NIOC and awards HCC the total of U.S.$85,929.06.

200. Item 5 - Unloading explosives. HCC claims the sum of U.S.$4,365.39 for costs of unloading explosives supplied by OSCO for the rock blasting work. HCC submits in evidence a timesheet evidencing the unloading and a letter to Foster Wheeler dated 29 November 1977 requesting payment.

201. NIOC does not deny that HCC performed this work but contends that the lump sum price agreed in Variation Order No. 26 covered the costs of unloading the explosives and therefore no further payment is due.

202. As with the claim for padding (see paragraphs 194-196, supra), the onus is on HCC to establish to the satisfaction of the Tribunal that this work was not included in the payment under Variation Order No. 26. HCC has failed to

introduce any evidence on this point, and the Tribunal must therefore dismiss this claim.

203. Item 22 - Modification of isometrics. HCC contends that U.S.$2,244.33 (Rls. 158,225) is due to it for extra work performed in connection with the modification and fabrication by HCC of isometrics, as a result of revisions to the contract drawings. HCC submits, as evidence of its contention, copies of the relevant timesheets and a letter to Foster Wheeler dated 5 February 1978 requesting payment.

204. In the Becker affidavit it is stated that Foster Wheeler declined to issue a Variation Order at the time and that some of the items claimed, e.g., oxygen and acetylene, are "consumables" which were already included in the contract rate for this work.

205. The Tribunal accepts HCC's claim for the actual work performed as a result of the changed drawings, but deducts the sum of Rls. 7,965, equal to U.S.$112.98, for materials and awards HCC the sum of U.S.$2,131.35.

206. Item 41 - Installation of pups at manifolds. This claim is asserted for U.S.$49,580.64 for the installation of pup pieces to facilitate testing, due to the absence of certain well end valves. HCC submits in evidence the relevant timesheets and correspondence with Foster Wheeler, including a letter dated 9 May 1978 instructing HCC to do this work.

207. NIOC argues that the evidence submitted by HCC is illegible and that, as the Gach Saran Contract provided for payment for a certain number of valves, it should receive a credit for each valve for which a pup piece was used instead.

208. The Tribunal dismisses NIOC's defense as unfounded. HCC has established that it was requested to perform this

work and the Tribunal cannot agree with NIOC that the timesheets submitted are illegible. The Tribunal therefore awards HCC the full amount of this claim.

209. Item 42 - Standby for welders/moveback time. The next item claimed by HCC is U.S.$435,591.76 (Rls. 30,709,219) for delay and standby costs incurred from January to May 1978, allegedly as a result of delays in the delivery of pipe by Foster Wheeler. HCC relies upon the signed timesheets and copies of correspondence with Foster Wheeler to evidence its claim.

210. In its defense, NIOC asserts that the timesheets were signed by someone acting without authority to do so, and objects that they were all signed at the same time, rather than contemporaneously. In the Becker affidavit NIOC also objects to the inclusion of a 5-day public holiday period in the calculation.

211. The Tribunal finds that HCC has adequately evidenced the existence of a delay, and shown that NIOC was aware of this and had been notified as early as February 1978 that additional costs were being incurred. The Tribunal also accepts as reasonable the evidence given at the Hearing that claims for delay are generally resolved together on completion of a project, rather than dealing with each one as it arises. The Tribunal dismisses, as inconclusive, NIOC's argument that the timesheets are in some way less reliable because they were all signed on the one day or that the Foster Wheeler representative was acting beyond his authority. The Tribunal therefore awards HCC the sum claimed, less the amount calculated in respect of labor payments for hours in excess of the normal 10 hour day. Based on the time sheets submitted, the Tribunal calculates the excess amount of the claim to be Rls. 2,745,840 and therefore awards HCC the sum of Rls. 27,963,379, equal to U.S.$396,643.67 at the contractual rate.

212. Item 48 - Extra works on c.p. system. HCC claims the costs of additional work on the installation of the cathodic protection system totalling U.S.$43,083.46 (Rls. 3,037,384) and submits in evidence the relevant timesheets and correspondence from Foster Wheeler, including a letter dated 12 July 1978 instructing HCC to perform the work.

213. NIOC counters this claim by alleging that as HCC failed to complete the entire cathodic protection system, parts of the pipeline have been damaged and thus HCC should not receive any additional payment. In the Amir Jani affidavit this work is valued at only Rls. 600,000 (U.S.$8,510.64).

214. The Tribunal rejects these arguments and finds that HCC has evidenced its claims to the full amount at issue, less the value of one timesheet for 9-12 June 1978, which is unsigned, in respect of trench excavation. The Tribunal therefore awards HCC the sum of Rls. 3,037,384, less Rls. 952,044, converted at the agreed exchange rate, to give a figure of U.S.$29,579.29.

215. Item 55 - Standby of wellhead fencing crews. HCC asserts that it is due the sum of U.S.$81,493.62 in respect of standby costs incurred in May and June 1978, due to the alleged absence of wellhead fencing materials. HCC submits in evidence the relevant timesheets and correspondence between it and Foster Wheeler.

216. NIOC denies that any delays occurred. It refers to the correspondence submitted by HCC, which indicates that a contemporaneous dispute had arisen between the Parties on this issue and questions HCC's failure to submit this claim during the term of the Gach Saran Contract.

217. The Tribunal concurs with NIOC's contention that a contemporaneous dispute arose as to whether HCC had been subjected to delay. It is HCC's burden to establish such delay and the Tribunal finds that it has failed to do so

satisfactorily. The Tribunal therefore dismisses this particular item of claim.

218. Item 56 - Extension of time. HCC claims the sum of U.S.$5,375,133.19 for associated costs from 24 May 1978 incurred to completion as a result of late receipt of materials and submits in evidence correspondence, completion programs and lists of staff and equipment. The sum of U.S.$292,378 is conceded in respect of this claim in the Becker affidavit, as being reasonable reimbursement for the extension of time.

219. On examining the documents submitted, the Tribunal finds that HCC has not satisfied the burden of proof and therefore awards HCC only the sum of U.S.$292,378 conceded.

220. Item 57 - Additional civil/mechanical work on manifolds. HCC claims the sum of U.S.$3,040,406.54 for additional work allegedly incurred as a result of an increase in the civil and mechanical works required on the manifolds. HCC submits a four-page handwritten memorandum entitled "Civil Remeasurement of Section 2 Manifolds" which, it claims, evidences Foster Wheeler's agreement to a revaluation of the civil works by an additional U.S.$2,515,000. In respect of the mechanical works, HCC has estimated the value of the additional mechanical and instrumentation work at U.S.$2,004,897.68, added it to the revised civil work valuation of U.S.$3,367,176.52, and deducted from this sum the amount of U.S.$2,491,507.66 allocated to mechanical works, as per Section 2 of the Gach Saran Contract.

221. NIOC challenges HCC's assertion that Foster Wheeler agreed to the civil work revaluation and objects to the inclusion of estimated amounts, with no explanatory calculations. Further NIOC contends that Foster Wheeler did not authorize the work and denies that it was, in fact, ever performed.

222. At the Hearing the Tribunal was informed that the memorandum relating to the civil readjustments was written by Foster Wheeler staff.

223. Although HCC's evidence on this point was unrebutted, the Tribunal is not satisfied that HCC has fully discharged its burden of proof in respect of this sizeable claim and the performance of the civil works so as to establish an agreed variation for which it is entitled to payment. Therefore, the Tribunal dismisses the part of the claim relating to the civil works.

224. As regards the mechanical works, the Tribunal finds that HCC has failed to adequately document the estimates provided and therefore rejects the balance of this claim.

225. Item 60 - Relocate 4" line. This claim is for U.S.$2,418.44 in respect of costs allegedly incurred as a result of the rerouting of pipeline already laid to permit a new entrance. HCC submits in evidence the relevant timesheet, together with a letter dated 11 July 1978 to Foster Wheeler requesting payment.

226. NIOC contends that HCC has not evidenced Foster Wheeler's request for this work and asserts that the worksheets were not signed by an authorized representative.

227. The Tribunal notes that the letter of 11 July 1978 clearly indicated that a claim for extra costs would arise. In the absence of evidence of any contemporaneous objection thereto and given that the signed timesheet evidences that the work was, in fact, performed, the Tribunal awards HCC this claim.

228. Item 61 - Repairing pipe damage. HCC claims the sum of U.S.$9,994.33 for work performed to repair damage to the pipeline caused by other contractors. In evidence are the signed timesheets and letters requesting payment.

229. NIOC contests both the right to payment and the valuation on the basis that Clause 4 of the Schedule of Rates permitted OSCO to decide "at its option" how the work should be valued. In the Becker affidavit it is also noted that under Clause 4.3 of Section 4 of the Gach Saran Contract equipment costs for repair work should be valued at only two-thirds of the normal rate.

230. The Tribunal finds that HCC performed the work in question. Although Clause 4.0 of Section 4 permits OSCO to decide how the work is to be valued, the Tribunal finds it reasonable to require OSCO to act expeditiously if it wishes to rely on such a valuation. In view of the lack of any evidence of an alternative valuation by OSCO at the time, the Tribunal awards HCC the amount claimed, less one-third of the compensation claimed for equipment costs, in accordance with Clause 4.3 of Section 4 of the Gach Saran Contract to reach a total of U.S.$8,333.33

231. Item 62 - Additional expenses due to change in work permit system and delays in obtaining permits. HCC claims U.S.$398,539.48 for costs allegedly incurred as a result of Foster Wheeler's failure to obtain the necessary work permits in a timely fashion. HCC submits in evidence minutes of a meeting dated 27 June 1978, in which it is recorded that Foster Wheeler agreed to accept responsibility for obtaining all necessary permits. HCC supports its claim with timesheets indicating the time lost and a series of letters and minutes of meetings evidencing both the delays and Foster Wheeler's acknowledgement that HCC should be compensated therefor.

232. NIOC's only defenses to this claim are that HCC never submitted any claim for such delay, that the timesheets are not signed by OSCO representatives, and that the Foster Wheeler representative who signed them was not authorized to do so.

233. The Tribunal determines from the evidence before it that HCC has evidenced the existence of a claim of which Foster Wheeler and, therefore, NIOC, was aware by August 1978. The Tribunal notes that the claims for civil work shutdowns from 27 June to 12 July 1978 and September to November 1978, which form the bulk of the claim, are not supported by signed timesheets and are therefore dismissed. The amount awarded in respect of the balance of the claim is further reduced in respect of equipment use for 11 July for which there are no worksheets and is adjusted where necessary to take into account claims in excess of ten hours per day and equipment claims at the full rate, rather than the agreed 2/3 standby rate. The Tribunal therefore awards HCC the sum of Rls. 6,698,634 in respect of this claim, equal to U.S.$95,016.09 at the contractual exchange rate, calculated as follows:

	Labor	Equipment
27-12 July (Civil)	-	-
2-6 July (Test)	-	-
7 July (Civil)	101,450	7,200
7 July (Civil)	106,700	7,200
8 July (Civil)	42,680	2,400
8 July (Civil)	42,680	2,400
11 July (Civil)	91,150	7,200
11 July (Civil)	13,300	-
11 July (Civil)	101,900	-
12 July (Civil)	18,890	1,200
13 July (Civil)	63,960	28,400
13-16 July (Civil)	432,360	242,200
13-17 July (Civil)	950,400	279,200
14-17 July (Civil)	575,400	224,067
16 July (Testing)	36,720	92,067
16 Aug (Civil)	122,400	16,267
15-16 Aug (Civil)	125,700	54,400
17 Aug (Civil)	37,880	11,200
20-22 Aug (Testing)	92,300	206,000
22-28 Aug (Civil)	104,000	19,600
22-28 Aug (Civil)	104,750	54,400
Nov-Dec (Mechanical)	1,716,480	562,133
Sept-Nov (Civil)	-	-
	4,881,100	1,817,534

Total Rls. 6,698,634 = U.S.$95,016.09.

234. Item 64 - Delay due to close down of materials yard. This claim is submitted in the sum of U.S.$2,447.52 for costs incurred as a result of the closure of Foster Wheeler's Gach Saran materials yard, and HCC's resulting inability to obtain necessary materials. HCC has submitted in evidence a timesheet reflecting the relevant shut down time and a letter to Foster Wheeler dated 18 September 1978 advising it of the problem.

235. NIOC's only comment to this claim is that the timesheets are unsigned and the claim is therefore unsubstantiated.

236. The Tribunal notes that the timesheet does bear a signature, plus the notation "ok for payment." The timesheet therefore raises a presumption that these costs were incurred and accepted and that payment is due.

237. In the absence of any response or objection to HCC's letter of 15 September 1978, the Tribunal awards HCC the full value of this item of claim.

238. Item 65 - Shut down at GS 80. This claim is for U.S.$2,372.34 for shut down costs allegedly incurred in September 1978 while awaiting a design decision from Foster Wheeler. HCC contends that Foster Wheeler required it not to proceed until the decision was made, and submits in evidence timesheets for various employees who were placed on standby as a result thereof.

239. NIOC asserts that HCC has failed to evidence its claim in that the timesheet is not signed by Foster Wheeler and, in the Becker affidavit, objects that the claim was not timely submitted.

240. On looking at the timesheet, the Tribunal finds it to be signed in the space "Approved by Client" and states that it reflects "Job stop verber [?] FW Eng dept." The Tribunal

finds the timesheet to be prima facie evidence of the amount of the claim. Given that the timesheet is signed by Foster Wheeler and specifically refers to instructions issued by Foster Wheeler, the Tribunal finds it established that Foster Wheeler was aware of the stoppage. However, there is nothing to indicate that either Foster Wheeler or NIOC has been notified of a potential claim so as to satisfy the requirements of Clause 43(1) of the General Conditions, and the claim is therefore dismissed.

241. Item 66 - Failure of valve at LPCS-2. HCC's next claim is for U.S.$14,615.60 for work performed after a 24 inch valve failed on test. HCC asserts that Foster Wheeler requested it to interrupt the test, remove the valve and repressure and recommence the test. HCC submits in evidence the relevant timesheet.

242. NIOC contends that HCC has failed to properly evidence this item of the claim.

243. The timesheet submitted by HCC is, as in many other claims, signed in the space allocated for authorization by the client and recites that the work was "due to faulty valve which had to be removed."

244. The Tribunal therefore awards HCC the full amount claimed of U.S.$14,615.60.

245. Item 67 - Additional testing costs. HCC asserts a claim for U.S.$302,659.57 for additional costs allegedly incurred as a result of it having to conduct testing in two phases. HCC contends that it had planned to test the manifold and wellhead work at the same time as the pipeline, but that due to Foster Wheeler's delays in delivering materials this was not possible. HCC submits in evidence the relevant timesheets relating to the extra work and a letter dated 27 September 1978 to Foster Wheeler, advising it of

the problem and notifying it that HCC would be claiming the additional costs.

246. NIOC argues that not all of the necessary testing was performed, and that such testing as was done was not properly performed and that, therefore, no money is due to HCC.

247. The Tribunal finds that the timesheets and letter to Foster Wheeler raise a presumption that the work was performed and that payment is due. In the absence of any other argument from NIOC, the Tribunal awards HCC the amount claimed.

248. Item 68 - Moveback to manifolds and related work. This claim is for U.S.$132,976.60 for the removal of temporary pup pieces and additional costs of installation of materials delivered behind schedule by Foster Wheeler. HCC submits in evidence the relevant timesheets to document the work actually performed, together with notes from a meeting on 17 September 1978 in which Foster Wheeler is reported to have stated: "Any move back to install late delivered fittings could be paid for under the schedule of rates contained in Section 4 of the Contract Documents."

249. NIOC argues that the Gach Saran Contract gave the Engineer the prerogative of valuing work at either day-work or specific rates and that HCC has abused this prerogative. NIOC denies that there is any basis upon which to award HCC this sum.

250. As noted previously, if NIOC wishes to rely on its contractual prerogative to value work performed under the Gach Saran Contract it must do so promptly and advise HCC accordingly. Based on the evidence before it, the Tribunal finds that HCC has satisfied the burden of proof to evidence its claim and is thus entitled to receive the sum claimed for this work.

251. Item 70 - Installation of burn-off pits. HCC asserts a claim for U.S.$363,308.30 for the installation of burn-off pits and blow-down stacks, which HCC contends were requested following inspection of the pipeline by OSCO and Foster Wheeler. HCC submits in evidence the relevant timesheets.

252. NIOC contends that no proof of the claim has been submitted as the timesheets are not signed by an authorized representative.

253. Although the time sheets submitted by HCC are signed on behalf of the client and thus evidence that the work was performed, the Tribunal is not satisfied in this instance that HCC has established that the work was performed at Foster Wheeler's request or that it was extra work not already provided for in the contract price or specifications. The Tribunal therefore dismisses this claim.

254. Item 71 - Relocation of flare lines at GS20. This claim is in the sum of U.S.$13,627.80 for relocation of flare lines, allegedly at Foster Wheeler's request. HCC submits only the relevant timesheet in support of its claim and NIOC contends that the timesheet does not constitute sufficient evidence of the claim.

255. Again, the Tribunal is not satisfied that HCC has established that the work was performed at Foster Wheeler's request or that it was extra work not already provided for in the contract price or specifications. The Tribunal therefore dismisses this claim.

256. Item 79 - Installation of crossing at M-21. HCC contends that it is due the sum of U.S.$37,865.89 for the installation of concrete crossings and associated work. HCC submits in evidence the timesheets for the work performed and notes from a meeting with Foster Wheeler dated 2 October 1978.

257. Again, NIOC contends that the claim is not sufficiently evidenced.

258. On review of the evidence, the Tribunal agrees that HCC has not fully evidenced its claim to this payment. The notes of the meeting with Foster Wheeler do not indicate that this was extra work and the claim is therefore dismissed.

259. Item 80 - Installation of burn-pits. The next claim is asserted for U.S.$133,816.88 for installation of burn-pits as allegedly requested by OSCO and Foster Wheeler following inspection. Again, the only evidence submitted is the appropriate timesheet, which NIOC contends to be insufficient evidence.

260. The Tribunal is, again, not satisfied that HCC has established that the work was performed at Foster Wheeler's request or that it was extra work not already provided for in the contract price or specifications. The Tribunal therefore dismisses this claim.

261. Item 89 - Collection, modification and repair of palings. This claim is for U.S.$38,948.72 for work performed by HCC to overcome an alleged shortage of fencing materials for the Project. HCC has submitted in evidence the relevant timesheets and notes of a meeting dated 17 October 1978 documenting the shortage.

262. NIOC protests the lack of evidence in respect of this claim. However, given that the Gach Saran Contract provided for OSCO and Foster Wheeler to be responsible for all materials supplies, the Tribunal concludes, on balance, that the evidence submitted by HCC in support of this claim is adequate and convincing and awards HCC the sum of U.S.$38,948.72, as claimed.

263. Item 91 - Installation of redesigned c.p. system. HCC asserts a claim for U.S.$31,723.33 for costs incurred by it in the installation of a redesigned cathodic protection system. In evidence is a letter from Foster Wheeler dated 24 October 1978 advising HCC of the decision and stating: "All additional works incurred will be measured and evaluated by the rates in schedule 4 of the conditions of contract." HCC has also submitted in evidence the relevant timesheets and calculations.

264. The Tribunal finds this claim to be satisfactorily proven. There is a clear indication that HCC was to receive additional payment at the contract rates. In the absence of any substantive defense by NIOC, the Tribunal awards HCC the sum as claimed.

265. Item 96 - Standby for instrument fitter. HCC claims the sum of U.S.$9,417.30 for standby costs of an expatriate instrument fitter from 28 October to 24 November 1978, allegedly due to lack of materials. HCC submits in evidence the timesheets, which NIOC contends are insufficient to evidence the claim.

266. The Tribunal notes that the timesheets specifically refer to the fact that this crew member was on standby due to missing materials and are signed by Foster Wheeler. However, there is nothing to indicate that either Foster Wheeler or NIOC were notified of a potential claim and this part of the claim is therefore dismissed.

267. Item 97 - Revision to wellhead drawings. HCC claims the sum of U.S.$28,381.42 for work performed pursuant to revisions to the wellhead drawings. HCC relies for evidence on a letter from Foster Wheeler dated 18 June 1978 which refers to the fact that the drawings have been revised and instructed HCC to "modify the piping in accordance with the above drawing."

268. HCC has submitted the relevant timesheets as evidence of the calculation of its claim.

269. The Tribunal finds this claim to be adequately documented, showing both Foster Wheeler's instruction and the quantification of the claim. The Tribunal therefore awards HCC the sum of U.S.$28,381.42.

270. Item 49 - Supply of c.p. materials. HCC's final claim for extra work is for U.S.$1,713.48 for the supply and delivery costs for various materials allegedly provided by HCC for the cathodic protection system. HCC submits in evidence an HCC purchase order with the notation "charge to F. Wheeler," in the amount of Rls. 39,000, together with a timesheet for delivery of lime, for which HCC claims Rls. 9,150, and a summary showing the various other components of the claim.

271. NIOC contends that work on the cathodic protection system was never finished and that HCC's failure has caused damage to the pipeline, and denies that any payment is due to HCC.

272. The Tribunal does not accept that the purchase order constitutes sufficient evidence of the claim in respect of the items shown thereon and that part of the claim is therefore rejected, together with Rls. 72,650 for the items documented only on the summary. Equally, the Tribunal finds no evidence that the lime was delivered at Foster Wheeler's request and therefore the Tribunal also dismisses this final part of the claim.

273. To summarize, the Tribunal has accepted as valid or partly conceded, 19 of the disputed claims for extra work, totalling U.S.$2,963,971.66. When added to the amount for items fully conceded by NIOC, a total of U.S.$3,161,412.16 is arrived at for extra work.

274. The Tribunal must now consider to what extent a cost adjustment factor should be applied to these sums. As stated in paragraph 166, supra, the Tribunal has determined that cost adjustments are applicable to work performed under Variation Orders at the contractual rates unless specifically agreed otherwise. Variation Orders should have been issued by OSCO for all of the extra works awarded above, other than those conceded by HCC in its Rebuttal as not being subject to adjustment, namely item 84, for Rls. 681,600, equal to U.S.$9,668. As the remainder of the amounts awarded are all based on the contractual schedule of rates, the Tribunal considers it appropriate to apply the last cost adjustment factor of 12.34608% to those amounts i.e., U.S.$3,151,744.16 (being U.S.$3,161,412.16 minus U.S.$9,668) to reach a total of U.S.$3,550,529.02 (being U.S.$3,151,744.16 x 112.34608% plus U.S.$9,668).

275. The Tribunal must now address the issue of deductions and retentions for contractor's tax and Social Security payments. Contractor's tax of 5.5% must be deducted from the adjusted figure to give a net figure of U.S.$3,355,249.92. The Tribunal finds it unnecessary to apply any further withholding for the reasons discussed in paragraph 173, supra.

276. It is not contested by the Parties that of the U.S.$5,000,000 payment reflected in Payment Certificate No. 16 HCC has received only U.S.$1,442,000. The Tribunal therefore awards HCC the sum of U.S.$1,913,249.92 (U.S.$3,355,249.92 less U.S.$1,442,000 already received) in respect of extra work performed but not paid.

e. Release Of Retention Monies

277. HCC claims the release to it of U.S.$1,700,229 in retention monies withheld by OSCO during the term of the Gach Saran Contract, which were to be released to HCC on

issue of the Completion Certificate pursuant to Clause 41 (2) (b) of the General Conditions. HCC contends that as a result of its termination of the Gach Saran Contract, pursuant to Clause 54 of the General Conditions, it is excused from completing the remainder of the work thereunder and that such termination also excuses it from compliance with any contractual conditions precedent to repayment. In addition, HCC asserts that it has made all required payments to the Social Insurance Organization and the Apprenticeship Fund.

278. NIOC objects to release of the retention monies on the grounds that not only has HCC not produced the Social Insurance and Apprenticeship Fund certificates referred to in Clause 41 (2) (b) of the General Conditions, but that OSCO has never issued either a Completion or a Final Certificate in respect of the Project, and HCC has not submitted evidence of clearance of the work site or re-export of equipment. Furthermore, NIOC contends that the amount withheld was only U.S.$1,440,232.

279. The Tribunal does not consider either of these positions to be correct. As HCC terminated the Gach Saran Contract under Clause 54 of the General Conditions, the requirements of Clauses 36 and 41 of the General Conditions, which relate to the actions to be taken on completion of the Project, are no longer applicable. Instead, the Tribunal determines that the appropriate legal and contractual basis on which to consider HCC's claim is under Clause 52 of the General Conditions of the Gach Saran Contract, to which specific reference is made in Clause 54 of the General Conditions. Subclause 52 (3) provides "the Company shall pay to the Contractor an amount to be agreed by the parties hereto representing the Contractor's reasonable profit on the Works performed." The contractual language does not specifically refer to the release of retention monies but

provides an alternative method of terminating the Parties' obligations. In view of the fact that the Parties were unable to reach such agreement, the Tribunal must determine the amount now due to HCC. There are, of course, several approaches which the Tribunal could adopt to determine the amount now due. However, in the absence of any guidance from the Parties the Tribunal concludes that the most reasonable approach is for it to determine the percentage of work actually performed by HCC up to the date of termination, to calculate the relevant proportion of the contract price therefor and then adjust the amounts actually received by HCC accordingly.

280. The issue of the percentage of work actually performed is disputed by the Parties. HCC asserts that at least 95.78% of the work had been completed as of 20 September 1978 and that, by the time HCC left the site, this had increased to 98.5%. In support of these contentions, HCC relies upon a monthly site progress report, dated 20 September 1978, certified as correct by Foster Wheeler, and its correspondence with Foster Wheeler and OSCO after suspension for force majeure. NIOC, however, asserts in the Shahrestani affidavit that the percentage of work completed was only 78%.

281. The Tribunal finds the evidence submitted by HCC to be persuasive, and in particular, the certified progress report showing completion of 95.78% in mid-September 1978. Given the conditions prevailing in Iran at that time, and the intervening events of force majeure, it seems unlikely that HCC would have been able to complete much more of the work prior to its departure on 4 January 1979. Payment Certificate No. 15 evidences that HCC actually received payment for 98.5% of the work originally contemplated under the Gach Saran Contract. It is not disputed that HCC had performed 100% of the work required under Variation Order No. 26 (blasting rock) but that only a portion of the additional work contemplated had been performed. Assuming

that the portion for which HCC received payment is the same as the portion actually performed, and absent any contrary indication, the Tribunal is able to calculate the percentage of additional work performed as 30.61% (U.S.$1,931,194 plus Rls. 90,766,140 expressed as a percentage of U.S.$6,308,892 plus Rls. 296,518,092. Therefore, the average percentage completion of the Project is calculated to be 78.6509% (being the total work performed expressed as a percentage of the total contract price) and so the Tribunal finds the provisions of Clause 52 to be satisfied if HCC receives at least 78.6509% of the total consideration that it would have received under the Gach Saran Contract, had the Project been completed in the normal manner.

282. If HCC had been able to complete the Gach Saran Contract, and fulfill all its conditions as to payment, it would have received the lump sum contract price of U.S.$8,874,500 plus Rls. 417,120,000, plus the increase shown on Payment Certificate No. 15, to arrive at a total of U.S.$15,183,392, plus Rls. 713,638,092. To this must be added the gross value of Variation Order No. 26 (which is not included in Payment Certificate No. 15) i.e., U.S.$8,457,711 and the gross amount of increased costs shown on Payment Certificate No. 15, being U.S.$877,994 plus Rls. 40,404,771, as follows:

		U.S.$	Rls.
Increased contract price		15,183,392	713,638,092
Variation Order No. 26		8,457,711	-
Increased costs		877,994	40,404,771
		24,519,097	754,042,863
		10,695,643	converted to U.S. Dollars
Total contract value	=	35,214,740	
Net contract value	=	33,277,930	
78.6509%	=	26,173,392	net entitlement

283. Payment Certificate No. 15 evidences that HCC has received net payments of U.S.$10,314,659 plus Rls. 484,036,462. HCC has also received payment under Variation Order No. 26 in the amount of U.S.$4,531,642 plus Rls. 212,987,153, as shown on Payment Certificate No. 3. Thus HCC has received actual payments of U.S.$14,846,301 (U.S.$10,314,659 plus U.S.$4,531,642) and Rls. 697,023,615 (Rls. 484,036,462 plus Rls. 212,987,153) to arrive at a total sum received by HCC of U.S.$24,733,160.

284. Part of HCC's claim relates to the amount withheld under Payment Certificate No. 16. As only the net amount of that "on account" payment is offset against the sum awarded for extra work (see paragraph 172, supra), it need not also be considered here. The Tribunal therefore awards HCC the balance of the net entitlement i.e., U.S.$1,440,232 (being U.S.$26,173,392 minus U.S.$24,733,160).

f. NIOC's Counterclaims

i) Percentage Of Work Performed

285. NIOC has raised a counterclaim for U.S.$9,890,722 for alleged overpayments to HCC in respect of the amount of work actually performed and including repayment of the U.S.$1,442,000 paid to HCC in respect of Payment Certificate No. 16.

286. In view of the Tribunal's decisions on the merits of HCC's claims relating to the Gach Saran Contract, the issues on which this counterclaim is based have already been addressed and the counterclaim is dismissed.

ii) Cost Adjustments

287. NIOC counterclaims for the sum of U.S.$77,903 for alleged overpayments of cost adjustments during the life of the Gach Saran Contract. NIOC asserts that the cost

adjustment provision in Section 4.5.1. of the Gach Saran Contract was improperly applied to the payments made pursuant to Variation Orders nos. 1, 2, 3, 4, 6, 8, 9, 13, 17, 19, 22, 26, 33 and 38 and that HCC was overpaid as a result of errors in Foster Wheeler's calculations. NIOC has submitted in evidence Variation Orders Nos. 1-40 and supporting documentation.

288. HCC contends that NIOC's calculations are incorrect in that they are based on NIOC's view that only 78% of the Project had been completed.

289. The Tribunal has already determined that payments made pursuant to Variation Orders were subject to cost adjustments in all cases where the extra work was valued at the rates set out in Section 4 of the Gach Saran Contract (see paragraph 166, supra). The Tribunal has reviewed each of the 14 Variation Orders referred to by NIOC and determines that, of those 14, only Variation Orders Nos. 1, 6, 8, 17 and 22 (which relate to the provision of the Project campsite and radiographic services) are for items which were not valued at the rates set forth in Section 4 of the Gach Saran Contract. The remaining nine therefore were properly included in the cost adjustment calculations.

290. With regard to the five Variation Orders referred to above and the claim for overpayment as a result of mathematical errors in the calculations, the Tribunal notes that all of these Variation Orders were paid to HCC after certification by both OSCO and Foster Wheeler of the amounts to be paid, including the calculation of the cost adjustments. It is difficult for the Tribunal to determine, from the evidence before it, whether the amounts of these Variation Orders were included when calculating the cost adjustments or whether, as is suggested by some of the calculation sheets submitted by NIOC, these amounts were, in fact, excluded from the calculation at that time. In view of NIOC's failure to establish whether or not all of these

adjustments were actually paid to HCC, together with OSCO's contemporaneous approval of those payments, the Tribunal dismisses this part of the counterclaim for lack of proof.

iii) Performance Guarantee

291. NIOC has filed a counterclaim in the sum of Rls. 104,331,200 arising out of the alleged failure by Seaboard Surety Company ("Seaboard") to make payment to NIOC under a performance guarantee provided by HCC in June 1977 to secure its proper performance of the Gach Saran Contract. NIOC asserts that on 7 March 1983 it demanded payment of the entire amount of the guarantee, i.e., 10% of the contract price, but that Seaboard refused to make payment thereunder. In support of its contentions NIOC refers the Tribunal to the text of the letter of guarantee, which forms part of the contract documents, and which states that payment will be made on demand, when accompanied by "your simple written notice stating that [HCC] has failed in the due and good performance of the Contract without your being required to produce any evidence of the correctness of your statement." NIOC has also submitted in evidence its telex sent in March 1983 and Seaboard's response.

292. HCC contends that this counterclaim is outside the jurisdiction of the Tribunal, on the basis that the underlying obligation to make payment does not arise from the Gach Saran Contract but from the letter of credit itself, and is therefore not part of the same "contract, transaction or occurrence" as required by the Claims Settlement Declaration. HCC also argues that even if the Tribunal were to determine that it has jurisdiction, NIOC had no basis on which to demand payment, as HCC had completed its obligations under the Gach Saran Contract.

293. The Tribunal dismisses this counterclaim for lack of jurisdiction, as it was not outstanding as at 19 January 1981. NIOC acknowledges that it did not demand payment

until March 1983. Even if it had the right to demand payment prior to that date, no claim could arise until the demand was made and the counterclaim therefore falls outside the jurisdiction of the Tribunal, pursuant to Article II, paragraph 1, of the Claims Settlement Declaration. In addition, the Tribunal has found in this Award, in paragraph 159, supra, that HCC was entitled to terminate the Gach Saran Contract and it follows that no claim for payment can properly be made by NIOC.

iv) Payment Of Salaries To Guards

294. NIOC's fourth counterclaim is for reimbursement of the sum of U.S.$81,685, allegedly paid by NIOC to HCC's representative, Jamshid Natan, in order to pay outstanding salaries to the guards protecting HCC's camp at the Gach Saran site. NIOC asserts that in early 1980 Natan presented to it a letter from HCC authorizing him to act on HCC's behalf in Iran, and requested that NIOC advance this money, so as to permit him to pay these salaries, in view of the financial difficulties HCC was experiencing in Iran at that time. In support of its contention NIOC has submitted the letter of authorization from HCC, together with an exchange of telex correspondence with HCC, in which HCC specifically authorized the payment, and the relevant signed payment authorizations and certificates.

295. HCC asserts in its defense that the payment appears to have been made after 19 January 1981 and is therefore excluded on the grounds of jurisdiction. As to the merits, HCC states: "Surely, HCC should not reimburse NIOC for the cost of guards hired to safeguard equipment that eventually was taken over by NIOC and the Iranian Government."

296. The Tribunal notes that the documents submitted by NIOC do show that Rls. 2,975,000 of this counterclaim were paid to Natan in November 1981 and therefore any claim related thereto is outside the jurisdiction of the Tribunal.

However, the documents evidencing payment of a separate sum of Rls. 2,475,000 were clearly prepared in April 1980 and are thus within the jurisdiction of the Tribunal. The Tribunal does not accept HCC's defense as to the merits. The expenses were validly incurred by OSCO with HCC's knowledge and authorization and the Tribunal therefore awards NIOC the sum of Rls. 2,475,000, equivalent to U.S.$35,106.38 at the agreed rate of exchange.

v) Pipe Corrosion

297. NIOC's next counterclaim is for an unspecified sum in respect of corrosion damage which allegedly occurred as a result of HCC's failure, on departure from the site, to drain the pipeline of water after testing. NIOC contends that this has caused substantial corrosion and has shortened the effective life of the pipeline and asks the Tribunal to appoint an expert to determine the extent of the damage.

298. The Tribunal must dismiss this counterclaim for lack of proof. The burden of proof rests on NIOC. If it wished to appoint an expert, it could do so and submit his report in evidence. NIOC has not submitted any evidence as to HCC's responsibility for causing such alleged damage, nor is there any basis upon which the Tribunal could quantify any such damage if it were found to have occurred.

vi) Damage To Roads And Agricultural Lands

299. NIOC claims the sum of U.S.$100,709 in respect of damage to road endings at the well sites, allegedly arising from HCC's use of heavy machinery. NIOC claims that HCC was required to repair such damage, pursuant to Clause 29 (5) of the General Conditions of the Gach Saran Contract, which Clause also provides: "Should the Contractor fail to repair immediately the Company shall execute any repairs and charge the Contractor accordingly."

300. NIOC also contends that HCC has caused damage to certain agricultural land where it stored pipe. NIOC claims an unspecified sum in respect of both allegations, inviting the Tribunal to appoint an expert to assess and quantify the supposed damage.

301. The Tribunal dismisses these counterclaims. NIOC has failed to evidence the existence of any damage to its property or any loss incurred by it in connection therewith.

vii) Return Of Surplus Materials

302. NIOC's next counterclaim relates to the alleged failure of HCC to return to it surplus materials supplied by OSCO, valued at U.S.$115,077, plus U.S.$42,554 for explosives supplied by OSCO. Section 13.2.2. of the Gach Saran Contract provides for all surplus materials to be returned to OSCO on completion of the Project. NIOC contends that HCC failed to return any materials when it left the site in January 1979 and alleges that materials consisting of 20,000 bags of cement, valued at U.S.$70,922, 800 bag ribbons, valued at U.S.$1,600, and steel valued at U.S.$42,555 have been destroyed as a result of HCC's failure in safekeeping. In addition, NIOC contends that OSCO provided HCC with explosives, not all of which were used and the balance of which were not returned. In support of its contentions, NIOC relies upon the Naghashpour and Amir Jani affidavits.

303. Again, the Tribunal must dismiss this counterclaim for lack of evidence. Other than its recital of the goods referred to above, NIOC has not evidenced supply of the materials on which the claim is based, and the Tribunal finds that NIOC has not discharged its burden of proof.

viii) Cost Of Failure And Delay In Recommencement Of Work

304. NIOC asserts that HCC by its "unwarranted abandonment of the site and refusal to resume works despite repeated requests, ... brought about conditions in which resumption of works requires reconstruction or repetition of works already completed, and cost 11,000,000 rials, equivalent to U.S.$156,030." NIOC contends that HCC is required to reimburse NIOC for such sum, pursuant to Clause 43 (2) of the General Conditions, which provides:

> The Company shall forward to the Contractor details of all costs it has incurred and which it can properly show result from the default or negligence of the Contractor ... and the Contractor shall on demand pay to the Company such costs.

305. Given the Tribunal's decision on the merits of termination of the Gach Saran Contract (see paragraph 159, supra), this counterclaim is dismissed. In addition, NIOC has failed to evidence that it incurred any such costs as a result of HCC's delay or negligence or that it required payment of same from HCC.

ix) Use Of Wireless Equipment

306. NIOC claims the sum of U.S.$30,414[13] allegedly due from HCC to the Ministry of Post, Telegraph and Telephone for the use of telecommunication facilities during performance of the Project. In support of this claim NIOC states that it has submitted a copy of the invoice for the rial equivalent of this amount.[14]

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[13] Originally claimed as U.S.$30,480.

[14] This exhibit was not found.

307. The Tribunal dismisses this counterclaim as being outside its jurisdiction. NIOC is asserting a claim on behalf of a third party which is not a respondent in these proceedings.

x) Payment For OSCO Services Rendered

308. NIOC has submitted to the Tribunal a computerized list of services supposedly rendered by OSCO to HCC during the term of the Gach Saran Contract, in the sum of U.S.$11,923, which NIOC contends HCC has failed to pay.

309. HCC does not deny that OSCO performed services for it but contends that the documents submitted by NIOC are illegible and do not evidence when or whether such services were, in fact, rendered.

310. The Tribunal finds that NIOC has failed to evidence its claim fully. Although it is conceivable that amounts may be due to OSCO from HCC in this respect, the Tribunal is unable to determine what these amounts would be. Furthermore, the Tribunal notes that the documents submitted all bear the statement "The following amounts have been booked to your account," thus raising the possibility that the sums in question have already been deducted from monies paid by OSCO. The Tribunal therefore dismisses this counterclaim.

xi) Costs Of U.S. Law Suit

311. NIOC's next counterclaim is for an unspecified amount in respect of its expenses incurred in connection with legal actions brought by HCC in the U.S. federal courts. NIOC contends that HCC should, in good faith, have withdrawn such actions upon its application to this Tribunal, rather than merely suspending the proceedings, and that NIOC has incurred costs in defending same.

312. The Tribunal dismisses this counterclaim for lack of evidence, without having to address the merits.

xii) Taxes And Social Security Premia

313. NIOC's final counterclaims are in respect of allegedly unpaid Social Security premia of Rls. 306,366,030, plus an unspecified amount for unpaid taxes. NIOC refers the Tribunal to the fact that the Gach Saran Contract provided, in Clause 41 of the General Conditions, for deduction of 5% of each payment for Social Security contributions, to be released on production of a clearance certificate from the Social Security Organization. NIOC has also submitted separate memoranda relating to the liability for and calculation of the amounts claimed.

314. On review of this evidence, the Tribunal notes that the only piece of evidence relating to the claim for Social Security payment is dated 29 May 1986, and refers to a "declaration of liability ... dated 1st December 1984." The Tribunal dismisses these counterclaims for the same reasons as those elaborated in respect of the Esfahan-Rey Contract.

g. Summary

315. The Tribunal has therefore found that HCC is entitled to receive the following sums under the Gach Saran Contract:

i) U.S.$1,050,099.12 for unpaid cost adjustments;
plus
ii) U.S.$1,913,249.92 payment for extra work and work performed under the Variation Orders;
plus
iii) U.S.$1,440,232 payment due on termination of the Gach Saran Contract.

The Tribunal has also found that NIOC is entitled to receive the sum of U.S.$35,106.38 in respect of its counterclaims under the Gach Saran Contract.

B. The Claims And Counterclaims Involving NIGC

1. The Claims Under The Ramin Contract

a. Factual Background

316. In early 1978 NIGC requested a quotation from HCC for the construction of a natural gas pipeline from Ahwaz to the Ramin Power Station ("the Ramin Pipeline"). HCC submitted its lump sum proposal of U.S.$4,950,000 on 27 April 1978, which NIGC accepted by a "Letter of Intent" dated 30 April 1978. HCC and NIGC entered into Contract No. 302/2317 ("the Ramin Contract"), effective 30 April 1978, for the construction of the pipeline, together with civil, mechanical and electrical works at Ahwaz Compressor Station No. 5 and at Ramin Electrical Power Station and full testing and commissioning thereof. "INTEB - Industrial and Engineering Consultants" ("INTEB") was appointed by NIGC as construction manager to supervise the project and review invoices.

317. Pursuant to Clause 1.1 of Section 6 and Clause 19 of the Special Conditions HCC was required to supply all of the materials required for the project, except for the pipe itself and coating and wrapping materials. The pipeline was to be completed by 30 September 1978, with a 12-month maintenance period prior to final acceptance, pursuant to Clause 1.5.5 of Section 6.

318. Under the terms of the Ramin Contract, all imported materials were to be paid for in U.S. Dollars and local procurements in Iranian Rials. The construction element of the lump sum contract price was payable 60 percent in U.S.

Dollars and 40 percent in Iranian Rials, at a fixed exchange rate of 70.475 rials to the dollar. Clause 39 (a) of the General Conditions of the Ramin Contract provided for a 25 percent advance payment to HCC, after which monthly progress payments would be made, based on invoices submitted by HCC indicating the amount of work performed in that month. The Engineer was required to issue a Payment Certificate for the authorized value of the work performed within 30 days of presentation of the HCC invoice, and NIGC was then required to make payment within a further 30 days of issue of the Payment Certificate.

319. Under Clauses 9.1.C of the Special Conditions and Clauses 39 and 40 of the General Conditions, each Payment Certificate was subject to a 10 percent withholding as retention monies to be held against completion, a 25 percent withholding to amortize the advance payment to HCC and a further 5.5 percent (after retention) for the Iranian contractor's tax. The Ramin Contract also provided for the retention monies to be released to HCC in two equal instalments, the first to be paid on issue of a Certificate of Completion, pursuant to Clause 34(2) of the General Conditions, and the second upon issue of the Final Certificate at the end of the 12-month warranty period.

320. It was further provided in Clause 42 of the General Conditions that NIGC could expand or modify the original scope of the work by issuing variation orders and adjusting the contract price accordingly. In practice, the review and certification of variation orders was carried out by INTEB.

321. HCC commenced work on the project in May 1978. The work was completed and tested on 30 September 1978, except for a few minor items which remained to be performed. In December 1978 HCC suspended work on all projects, including the Ramin Pipeline, due to the civil unrest in Iran. In March 1979 HCC resumed work on the project, which was completed in September 1979. HCC repeatedly requested NIGC

to issue the necessary Completion Certificate under Clause 34(2), but the project was not formally inspected until July 1980, when NIGC representatives noted: "No defects were observed and the 30" pipeline was handed over to N.I.G.C." Following this inspection, NIGC issued a "Certificate for Completion of Work" dated 4 September 1980 which recorded acceptance of the work and satisfactory completion of the 12-month warranty period. The certificate, which is in evidence before the Tribunal, states "payment of 50% retention money for maintenance is approved" and: "The payment of the rest of the performance bond for maintenance and clearance of remainder of accounts is approved."

322. HCC contends that, although it performed all its contractual obligations under the Ramin Contract, NIGC failed to make certain payments required thereunder or made improper deductions from such payments and seeks from NIGC an amount of U.S.$635,071, subsequently increased to U.S.$1,024,838, comprising: (1) U.S.$116,944 (net) payment of the final progress payment; (2) U.S.$489,780 release of retention monies; (3) U.S.$366,373 (net) for unpaid variation order invoices; (4) U.S.$25,718 reimbursement of contractor's tax improperly levied on imports; and (5) U.S.$26,023 reimbursement of custom duties and related charges.

b. Unpaid Progress Payment

323. HCC seeks payment of the net amount of U.S.$116,944, (i.e., U.S.$123,750 less contractor's tax) as the balance of the final progress payment, which allegedly was approved for payment but is still outstanding. HCC asserts that, in conformity with the terms of the Ramin Contract, NIGC issued Variation Orders Nos. 1,2 and 3, which modified the scope of the work and increased the original contract price by U.S.$71,548, from U.S.$4,950,000 to U.S.$5,021,548, as reflected in Payment Certificate No. 6, and that NIGC has only paid U.S.$4,897,798 of the original contract price.

Therefore a balance of U.S.$123,750 remains outstanding. A copy of Payment Certificate No. 6, signed by NIGC authorities on 9 August 1980, is submitted in evidence by HCC.

324. NIGC does not deny that it has withheld payment under Payment Certificate No. 6. It states that, pursuant to the Iranian Social Insurance Law, payment of this amount was conditioned upon presentation by HCC of a clearance certificate from the Social Security Organization, which HCC has not submitted and, therefore, NIGC is entitled to withhold payment. In support of this contention NIGC relies on Clause 9.1 of the Special Conditions, which permits NIGC to deduct monies for Social Security contributions from the monthly payments to HCC, and on Clause 58 of the General Conditions, which provides that the contractor shall abide by local laws and regulations of Iran.

325. Pursuant to Clause 9.1 of the Special Conditions of the Ramin Contract NIGC was required to make payment on Payment Certificates within 30 days of issue, subject to deductions pursuant to Clause 39 of the General Conditions, and deductions for tax and social security. The Tribunal therefore concludes that, as this payment was in the nature of a progress payment, rather than a final payment, NIGC was entitled to withhold these funds from the progress payment, but that the sum of U.S.$123,750 must therefore be added to the amount claimed by HCC in respect of its claim for release of retention monies. (See paragraphs 326-329, infra.)

c. Release Of Retention Monies

326. HCC seeks an amount of U.S.$489,780 by way of release of retention monies allegedly wrongfully withheld by NIGC upon issue of the Completion Certificate in September 1980. HCC asserts that, pursuant to Clause 39 of the General Conditions, half of the 10% retention monies withheld by NIGC under the terms of the Ramin Contract should have been

released to HCC on certification of physical completion of the pipeline, which is asserted to be no later than 30 September 1978, and the second half upon issue of the Final Certificate. As NIGC issued a combined Completion and Final Certificate on 4 September 1980, HCC contends that the funds should have been released to it at that time, but that, in fact, NIGC still retains these monies. HCC's initial claim for release of retention monies was in the amount of U.S.$70,371, on the basis that, of the total U.S.$489,780 held in retention monies, NIGC had already made gross payments of Rls. 17,697,158 (U.S.$251,112.56) to HCC and Rls. 11,871,144 (U.S.$168,444.75) to the Social Insurance Organization. In subsequent submissions, however, HCC does not concede any such credit, requiring NIGC to produce evidence of actual payment of these amounts, failing which, HCC maintains its claim for release of the retention monies in full.

327. NIGC relies on this initial acknowledgement of receipt by HCC as an admission that it has already released or otherwise credited HCC with this amount, and has produced in evidence an internal document confirming the amount said to have been paid to HCC and correspondence with the Social Security Organization evidencing payment of Rls. 11,212,390 on behalf of HCC. As regards the balance of U.S.$70,371, NIGC acknowledges that this sum is due but again asserts that payment is conditional upon production by HCC of proof of payment to, and a clearance certificate from, the Social Security Organization.

328. As a preliminary point, the Tribunal notes that HCC initially acknowledged that partial payment had been made by NIGC and it has not brought additional evidence thereafter to establish the validity of its claim for the full amount of U.S.$489,780. Given that, under Article 24 (1) of the Tribunal Rules each party has the burden of proving the facts relied upon by it, the Tribunal determines that HCC's

claim for retention monies must be considered only in the amount of U.S.$70,371.

329. Pursuant to Clause 39 of the General Conditions, the retention monies were to be released to HCC in two equal installments. As recited above (see paragraph 321, supra), a combined Completion Certificate and Final Certificate was issued by NIGC on 4 September 1980. Therefore, HCC's entitlement to the release of the retention monies accrued as at this date. Clause 13 (2) of the General Conditions states: "Final payment shall not be made to the Contractor before a Certificate of clearance from the W.I.S.O is produced." As noted with regard to the Esfahan-Rey Contract (see paragraph 87, supra), the Tribunal finds that compliance with such a requirement was waived after 4 November 1979. The Tribunal has evidence before it that indicates that most, if not all, of HCC's obligation to pay Social Security contributions in connection with the Ramin Contract was satisfied by direct payment by NIGC to the Social Security Organization (see paragraph 327, supra) and HCC's claim has been reduced partly as a result of such payments. Therefore, NIGC's argument that payment should not be made for this reason is without substance. The Tribunal notes that the documentation submitted by NIGC to evidence payment to HCC of part of this retention shows a deduction for contractor's tax. The Tribunal therefore awards HCC the sum of U.S.$70,371 in respect of the retention monies withheld, plus the sum of U.S.$123,750 withheld from the final progress payment, as discussed in paragraph 325, supra, less contractor's tax of 5.5%, to give a total of U.S.$183,444.35.

d. Outstanding Variation Orders

330. HCC seeks a total amount of U.S.$366,373, i.e., U.S.$387,696 less contractor's tax, in Variation Order invoices made up as follows: (1) U.S.$124,740 for special

cleaning of NIGC supplied pipe; (2) U.S.$60,437 for works at block valve; (3) U.S.$61,578 for the supply and installation of a special metering system at Compressor Station No. 5; (4) U.S.$41,860 for the installation of a burn pit at Ramin Power Station; (5) U.S.$7,797 for the furnishing and installation of a slug catcher connection at the Ramin Power Station; (6) U.S.$14,541 for providing accommodation and vehicles for several engineers; (7) U.S.$17,148 for the supply of tee pieces and reducers not in the original drawings; (8) U.S.$45,406 for additional concrete work at Ramin Power Station; and (9) U.S.$14,189 for the replacement of a power cable at Compressor Station No. 5.

331. In support of its claim for payment under these Variation Orders, HCC has submitted to the Tribunal contemporaneous invoices and correspondence to show acceptance by NIGC or INTEB, its representative, of each item, respectively, as follows:

(1) Contract amendment No. 7, Section 7, Clause 3.2.2, which provides: "The mechanical cleaning operation ... shall be considered to be additional to the Scope of the Works and the cost ... shall be reimbursed to the Contractor";

(2) Letter from INTEB, dated 12 June 1978, acknowledging that the work "will be paid for at rates to be mutually agreed";

(3) Letter from INTEB, dated 12 June 1978, authorizing purchase of the equipment, to be paid for "as an extra item at rates to be mutually agreed";

(4) HCC letter and invoice, dated 14 December 1978, referring to an acknowledgement by INTEB, dated 2 August 1978, that the work was outside the original scope of the Ramin Contract;

(5) HCC letter and invoice, dated 19 December 1978, referring to a request from INTEB, dated 24 June 1978, to supply the item;

(6) HCC letter and invoice, dated 6 December 1978, referring to INTEB letter, dated 9 July 1978;

(7) HCC letter and invoice, dated 19 December 1978, referring to Amendment No. 6 to the Ramin Contract;

(8) HCC letter and invoice, dated 19 December 1978, requesting the issue of a Variation Order for the additional concrete works, referring to an exclusion in paragraph 5, attachment II of the Letter of Intent dated 27 April 1978; and

(9) HCC letter, dated 19 February 1980, requesting payment for additional work "Per Mr. Khalili's [NIGC Head of Project] call to Mr. White."

332. NIGC raises only two defenses as to the specific details of the claims: first, that the accommodation and transport reflected in the claim in (6) was provided at INTEB's request for its own employees and the resulting charges are therefore attributable to INTEB, not NIGC, and that the Agreement between NIGC and INTEB provided for INTEB to bear such costs; and second, that the need to supply the pieces reflected in the claim in (7) arose from HCC's failure to comply with NIGC's technical standards. HCC denies both of these specific allegations and asserts that the Variation Orders are properly attributable to NIGC and should be paid.

333. As a general defense, NIGC contends that it has only approved payments for Variation Orders in a total of U.S.$264,684 and that its determination of the value of such work is binding by virtue of Clause 10 of the Special Conditions of Contract, whereby the final contract price is to be determined by the Engineer, with the approval of NIGC.

334. NIGC then asserts that, as certain contractual obligations as to the method of approving and recording Variation Orders have not been observed, no money is payable to HCC but that despite this it has already paid HCC

U.S.$212,821.43 for the work and that it withheld the balance so as to ensure compliance with HCC's Social Insurance obligations. As evidence of such payments, NIGC has submitted two internal communications showing that payment of Rls. 15,000,000 to HCC was approved by it.

335. The Tribunal notes that HCC has submitted evidence that NIGC or INTEB requested the work performed and that HCC invoiced NIGC at the time for the amounts as claimed. NIGC has not submitted any evidence to suggest that it objected to these invoices when they were issued, nor has it supplied any details of when and how it reached its alternative valuation of U.S.$264,684 (which it thereby admits to be due and owing).

336. NIGC asserts that this valuation is evidenced by Contract Payment Certificate No. 8 Final dated 24 June 1981 which was submitted in evidence only in NIGC's contested late filing in March 1987. The certificate covers a period from an unspecified date in 1980 to the date of issue and certifies payment due, in respect of Change Order No. 2, of Rls. 18,653,591, less a deduction of advance payments allegedly made of Rls. 15,000,000, to arrive at a balance due of Rls. 3,653,591. Although this clearly documents valuation by NIGC of certain additional work performed by HCC, there is nothing in the certificate which would allow the Tribunal to determine whether it relates to the additional work which forms the basis of HCC's claim. Change Order No. 2 is not in evidence before the Tribunal even though it would undoubtedly clarify the issue. The Tribunal also takes note of the fact that the certificate was issued in mid-1981, whereas the work was performed by HCC (with only one exception) during 1978. As discussed with respect to the Gach Saran Contract (see paragraph 230, supra), the Tribunal determines that NIGC may rely on the provisions of Clause 10 of the Special Conditions only if it can show that it acted properly and expeditiously in

preparing its valuation. The Tribunal finds that NIGC has failed to do so.

337. Similar considerations apply to Clause 15 of the Special Conditions and Clause 68 of the General Conditions, which are also relevant. Clause 15 of the Special Conditions provides for the price of any variation of the work to be "ascertained by negotiation between the Engineer and the Contractor" and concludes: "In case an agreement is not reached the Engineer's price will be used." Clause 68 of the General Conditions, which also relates to valuation of variations, states: "In case agreement is not reached the rates proposed by the Engineer will be final." As with the provisions of Clause 10 of the Special Conditions, in order to rely on these clauses, NIGC must be able to indicate that negotiations as to the price were entered into at the relevant time and that HCC was notified of the Engineer's final valuation. NIGC has failed to do so. In view of the lack of any contemporaneous objection to HCC's invoices, the Tribunal finds HCC's claim to be properly asserted in the higher amount of U.S.$387,696.

338. The Tribunal also determines that payments such as that disputed under (6) are specifically provided for in Clauses 11.2 and 11.4 of the Special Conditions of the Ramin Contract. It is irrelevant to this claim whether NIGC is in fact entitled to recover such funds from INTEB. NIGC has also failed to show that the additional work reflected in (7) was due to HCC's default. NIGC is, therefore, liable for both these claims. The Tribunal also finds that NIGC is estopped from relying on the contract formalities to defend this claim, as it clearly authorized a part payment, thereby waiving such conditions.

339. The final question for the Tribunal to determine is whether the amount requested should be reduced by the sum of U.S.$212,821.43, which NIGC claims to have already paid to, or on behalf of, HCC. NIGC has submitted a number of

handwritten internal payment orders, together with Contract Payment Certificate No. 8, which confirm that payment of such an amount was authorized by NIGC in 1981. However, the Tribunal has seen no evidence that these funds were ever paid to HCC or that such payments related to the work in question. HCC, in turn, denies receipt of any payment. Therefore, the Tribunal must conclude that this amount was not actually paid.

340. As discussed in paragraph 329, supra, the Tribunal determines that the requirement under Clause 13 (2) of the General Conditions to obtain a clearance certificate from the Social Security Organization prior to receiving final payment is waived and that final payment may be made to HCC. NIGC has acknowledged that this claim is in the nature of a final payment and the Tribunal therefore finds the net amount of U.S.$366,373 to be payable, after deduction of contractor's tax.

e. Reimbursement Of Contractor's Tax

341. HCC asserts that it imported materials to Iran for the Ramin Contract with a total value of U.S.$467,603, as is evidenced by a letter of 18 December 1978 to NIGC, with an attached list of the items and their value. HCC alleges that, despite specific provisions in both Clause 70 of the General Conditions and Clause 17 of the Special Conditions of Contract exempting HCC from payment of contractors' tax on such imports, NIGC improperly deducted the 5.5% tax from its payments to HCC for these items, to a total of U.S.$25,718.

342. NIGC does not deny withholding this sum or the basis on which it is calculated. It argues, however, that these amounts were paid to the Ministry of Economic Affairs and Finance on behalf of HCC and that "the return of the said amount is conditional upon the submission of documents necessary for final settlement of tax liabilities and

subject to the issuance by the Ministry of tax clearence [sic] certificate."

343. The Tribunal notes that NIGC does not contest the fact that this sum was withheld, nor does the Ramin Contract provide for a withholding conditioned upon the issue of such a tax certificate. Clause 17 of the Special Conditions provides:

> The Contractor shall be exempted from the payment of the Contractors tax related to the CIF cost of materials which he imports to Iran in the name of [NIGC].

Thus, NIGC was clearly in error in deducting this amount from its payments to HCC, and the Tribunal awards HCC the amount of U.S.$25,718.

f. Reimbursement Of Customs Duties

344. HCC asserts that NIGC has failed to reimburse the sum of Rls. 1,833,979, equivalent to U.S.$26,023, incurred by HCC for customs duties, commercial taxes, registration fees and port charges in connection with the importation of materials and equipment for the Ramin pipeline. HCC contends that, pursuant to the Commercial Terms (Attachment IV) of its Letter of Intent, all such imported items are "to be free of duties, commercial tax, registration fee and port and customs charges." In support of its claim HCC has submitted a letter dated 16 December 1978 to NIGC, enclosing its invoice of the same date and a breakdown of the charges.

345. By way of defense, NIGC states:

> N.I.G.C. made a timely investigation into the issue and reached the conclusion that the customs duties claimed by Claimant were in no way related to N.I.G.C. and, therefore, not payable.

NIGC also asserts that this equipment was imported into Iran tax-free for the NIOC Gach Saran Contract.

346. The Tribunal notes the absence of any evidence in support of NIGC's allegation that the equipment for which the reimbursement is claimed was provided for the Gach Saran Contract, and therefore, rejects such argument as unfounded.

347. The Tribunal also notes that the letter dated 16 December 1978 from HCC to NIGC states that reimbursement is requested: "In accordance with Amendment No. 5 to the Contract and with reference to Clause 26.6 of the Special Conditions of Contract." That Clause provides:

> [HCC] shall be responsible for the payment of all applicable charges such as but not limited to order registration fees, bank charges, porterage, port dues and every other expense whatsoever which will be necessary for the provision of the imported materials and equipment .... However [NIGC] will obtain exemption from customs duties and commercial tax only or will be responsible for the payment of customs duties and commercial tax.

Clause 12 of the General Conditions provides that "the provisions of the General Conditions and Conditions of Particular Application [Special Conditions] shall prevail over those of any other documents forming part of the Contract." Therefore, the provisions of Clause 26.6 of the Special Conditions prevail over those recited in HCC's Commercial Terms annexed to its Letter of Intent. Amendment No. 5 to the Ramin Contract is not in evidence before the Tribunal. In view of the lack of any direct evidence that Clause 26.6 of the Special Condition has been amended, this claim is subject to its specific terms, and HCC is therefore entitled to reimbursement only of customs duties and commercial tax incurred and not of any other charges.

348. The attachment to HCC's letter of 16 December 1978 provides a breakdown of various types of charges incurred by HCC, totalling Rls. 1,358,503. Accordingly to the letter, the balance is comprised of "other cash and indirect costs, overhead, taxes and profit, equivalent to 35%." The entries

shown on the attachment for customs duties and commercial tax total Rls. 302,894 and Rls. 239,451, respectively.

349. In the absence of any contradictory evidence, the Tribunal therefore awards HCC the sum of Rls. 542,345, equal to U.S.$7,695.56 at the contractual rate, in respect of this item of claim.

g. Summary

350. The Tribunal has therefore found that HCC is entitled to receive the following sums under the Ramin Contract:

i) U.S.$183,444.35 release of retention monies withheld during the term of the Ramin Contract; plus
ii) U.S.$366,373 for payments for work performed under the Variation Orders; plus
iii) U.S.$25,718 reimbursement of contractor's tax wrongfully deducted; plus
iv) U.S.$7,695.56 reimbursement of customs duties.

The Tribunal thus awards HCC the net sum of U.S.$583,230.91, under the Ramin Contract.

2. The Claims And Counterclaims Under The Tehran Spur Contract

a. Factual Background

351. On 12 September 1978 NIGC issued a Letter of Intent, and entered into a further contract with HCC, for the removal and replacement of two separate segments of pipe, totalling 52 kilometers, on the Ghom to Tehran spur of an existing 30 inch natural gas transmission pipeline and to build a temporary 16 inch above-grade bypass pipeline, so that the gas service to Tehran would not be interrupted while the 30 inch line was being replaced. This agreement is identified as No. 302/6029 or the "Tehran Spur Contract."

352. The Tehran Spur Contract was for a lump sum of Rls. 650,000,000, payable 40% in Iranian Rials and 60% in U.S. Dollars converted at the official Bank Markazi rate pursuant to Clause 9.5 of the Special Conditions. Clause 19 of the Special Conditions provided for an advance payment to HCC of Rls. 130,000,000. Clauses 9 of the Special Conditions and 39 of the General Conditions provided for the balance of the contract price to be paid in monthly installments, based on statements submitted by HCC to the Engineer, Mr. A. Samiee of NIGC Engineering Projects, indicating the amount of work performed in that month. NIGC was required to make payment within 30 days of presentation to it of the Engineer's Interim Payment Certificate, which itself was required to be presented within 30 days of receipt of the monthly statement from HCC.

353. Clause 9 of the Special Conditions, entitled "Certification and Payment," also provides for withholdings from each interim payment, and in particular, a 25% retention to amortize the advance payment pursuant to Clause 19 of the Special Conditions, a retention of 5% for Social Security Organization contributions and deduction of taxes. The language of Clause 39 (3) of the General Conditions refers to "a 10 (ten) percent retention and deduction of taxes," but, in practice, NIGC withheld 10 percent of the payments pending completion of the work, plus taxes.

354. Clauses 41 and 42 of the General Conditions permitted the Engineer to vary the scope of the work by means of a Variation Order and to determine any variation in the contract price as a result thereof. Clause 41 (2) of the General Conditions provides that if the Contractor confirms in writing a verbal variation from the Engineer, such confirmation from the contractor shall be deemed to be a formal order from the Engineer, unless subsequently contradicted by the Engineer in writing.

355. As noted above, the Letter of Intent for the Tehran Spur Contract was issued on 12 September 1978. Due to the civil unrest in Iran, no formal contract documents were signed at that time and HCC suspended work on the Tehran Spur Contract for reasons of force majeure in late 1978, along with its other projects. When HCC was able to recommence performance in October 1979, working conditions in Iran had changed considerably, giving rise to higher labor and materials costs in particular. HCC and NIGC agreed to an increase in the contract price and revisions of the work schedule. The increase in price was not agreed as a fixed sum, but was reflected in a letter from NIGC to HCC, dated 11 October 1979, which forms part of the Tehran Spur Contract, and which states in relevant part:

> 1... Company undertakes to make representation (has already done so) to "Plan and Budget Organization" to obtain their directives for Contractors compensation in relation with above mentioned changes.
>
> 2. Based upon the directive to be issued by Plan and Budget Organization instructing us to what extent, and in what manner you are to be compensated for the aforementioned extra costs we undertake to immediately commence negotiation with your duly authorised representative so as to determine fair and reasonable compensation for the extra costs you have incurred. As soon as the amount of compensation has been agreed between us we undertake to credit same to you, with bank (s) nominated by yourselves.
>
> This letter shall be considered an integral part of the contract and shall take precedence over any condition to the contrary contained therein.

HCC had already advised NIGC by letter dated 14 September 1979, prior to recommencing work, that HCC required the contract price to be increased to Rls. 798,740,000.

356. HCC recommenced work on the Tehran Spur Project, which, after another interruption of work from November 1979 to February 1980, was duly completed and handed over to NIGC. NIGC subsequently issued Revised Job Instruction No. 2,

dated 12 October 1980, authorizing an increase in the contract price of only Rls. 36,732,150, to a total of Rls. 711,399,651. Two combined Temporary and Final Completion Certificates for both pipelines (16 inch and 30 inch) were issued by NIGC on 3 February 1981 (14/11/59 Iranian Calendar).

357. HCC contends that, although it performed all its obligations under the Tehran Spur Contract, NIGC failed to make certain payments required under the contract, or made improper deductions therefrom. HCC seeks from NIGC an amount of U.S.$9,058,853, comprising: (1) U.S.$515,394 in unpaid progress payments; (2) U.S.$7,588,921 for variation orders and sundry claims; and (3) U.S.$954,538 release of retention monies.

358. Before proceeding to the merits of the claims, the Tribunal notes that the Tehran Spur Contract did not specify a fixed exchange rate to be used by the Parties, but provided for conversion at the "official Bank Markazi Rate" (see paragraph 352, supra). It appears from the documents before the Tribunal that, in practice, the Parties adopted a rate of U.S.$1 = Rls. 70.5 in relation to this contract, and that the Claimant has based its calculations upon that rate. In the absence of any objection to the use of such rate, the Tribunal also adopts that rate for the purpose of all exchanges required in connection with the Tehran Spur Contract.

b. Unpaid Progress Payments

359. HCC alleges that, after authorizing two increases in the contract price to a total of Rls. 711,399,650, as evidenced by Payment Certificate No. 11, dated 14 October 1980, NIGC has made gross payments of only Rls. 672,949,568 and has failed to pay the balance of Rls. 38,450,082, less contractor's tax, which HCC claims is equivalent to U.S.$515,395 at the rate of U.S.$1 = Rls. 70.5.

360. It is not disputed by NIGC that the contract price was increased to Rls. 711,399,650 but NIGC contends that it was entitled to withhold the balance of the increased contract price until production of a clearance certificate from the Social Security Organization. NIGC relies upon the affidavits of Mr. Assadollah Alirezaee Dizicheh, Project Engineer, (the "Alirezaee affidavit"), and of Mr. Kayhan Afshar Oroomieh, Project Head, ("Afshar affidavit"). Clauses 9.4 of the Special Conditions and 39(3) of the General Conditions entitle NIGC to withhold 5% of the amounts due under the Payment Certificates. It is further asserted that NIGC "accepted to dispense with the deduction of the 5% from the progress reports" to help HCC, which was facing financial difficulties. The Alirezaee affidavit continues by stating that at the time Payment Certificate No. 11 was settled, HCC had completed 94.59% of the project and that NIGC decided to withhold the remaining 5.41% of the total contract payment until "the settlement clearance of Social Insurance is presented by the Contractor," in accordance with Clause 9.4 of the Special Conditions.

361. The Afshar affidavit also asserts that HCC cannot claim full and final payment until the issuance of the Final Certificate and that no such certificate has, in fact, been issued. NIGC submits in evidence a letter to HCC, dated 22 November 1981, which refers to HCC's alleged failure to export an item of equipment imported into Iran for the project and states: "Therefore, in connection with determination of the situation of the above machine, the completion certificate may not at present be issued."

362. The Tribunal notes that Payment Certificate No. 11 has been signed by NIGC representatives and that it evidences both the increase in contract price and the amounts paid. The Tribunal further notes that Clause 9.4 of the Special Conditions expressly authorizes the withholding of 5% of each interim payment until production of a clearance certificate from the Social Insurance Organization. HCC has

submitted no evidence to indicate that it has ever obtained such a clearance certificate or produced it to NIGC. However, Payment Certificate No. 11 indicates that only 94.59% of the work was completed at this time. It is not disputed that the progress payment reflected in Payment Certificate No. 11 was paid to HCC and that the amount in dispute under the claim is 5.4% of the contract price i.e., the value of the remainder of the work not covered by this Payment Certificate. Other than the combined Temporary and Final Completion Certificates, no payment certificate was issued for the balance of this work. The Tribunal, therefore, determines that NIGC was entitled to withhold such payment at least until such time as a further Payment Certificate or the Completion Certificates were issued and that this part of the claim is properly to be considered as a claim for the payment of the balance of the contract price rather than for unpaid progress payments. Therefore, the amount of this claim is added to the amount considered at paragraphs 364-375, infra.

363. As the Tribunal's decision as to the release of retention monies and the right to withhold Social Security contributions affects the net amount to be awarded under HCC's claims for payment under Variation Orders and other sundry claims, the Tribunal will first consider the issue of completion of the work and release of retention monies and then proceed to an examination of the claims for additional work.

c. Release Of Retention Monies

364. HCC seeks the release of U.S.$954,538 in retention monies (being 10 percent of all Payment Certificates paid by NIGC), allegedly wrongfully withheld by NIGC after completion of the work and expiry of the maintenance period. To this must be added the sum of Rls. 38,450,082, pursuant to the Tribunal's determination in paragraph 362, supra.

365. NIGC acknowledges that it has withheld this amount from payments to HCC, but contends that, in accordance with Clause 9.4 of the Special Conditions, these funds cannot be released until HCC has fulfilled all its obligations under the Tehran Spur Contract and a Final Completion Certificate has been issued.

366. The claims relating to the release of the retention monies fall into three separate categories. Clause 9.3 of the Special Conditions provides that all of the retention monies held with respect to the temporary 16 inch pipeline (stated in Appendix D to be 24.04%) were to be released upon completion of the 30 inch pipeline. Clause 39.4 of the General Conditions further provides that NIGC shall release one half of the retention monies for the 30 inch pipeline (37.98%) upon issue of the Certificate of Completion. Under Clause 39.5 of the General Conditions, NIGC was required to release the balance of the retention monies at the expiry of the 12 month period of maintenance, which period was to commence on the date of issue of the Certificate of Completion, subject only to confirmation by the Engineer that all the contractor's obligations had been fulfilled.

367. The Parties disagree as to whether a Final Completion Certificate was, in fact, issued. HCC argues that two combined Temporary and Final Completion Certificates were issued in January 1981 and has submitted these documents to the Tribunal. The certificates recite that the work was completed in two phases, on 7 April and 7 October 1980, respectively. NIGC denies that a Final Completion Certificate has been issued, relying upon its letter of 22 November 1981, in which it advised HCC that, although the one year maintenance period had expired on 15 October 1981, no completion certificate could be issued until HCC exported or otherwise disposed of a shot-blasting and priming machine alleged to have been imported into Iran for use on the Tehran Spur project. NIGC also contends that it is entitled to withhold these funds in satisfaction of various debts,

amounting to Rls. 119,784,291, allegedly due to NIGC from HCC for material supplies and services.

368. The issues to be decided by the Tribunal are to determine whether the contractual conditions precedent to the release of these funds have been fulfilled and, if so, whether NIGC is entitled to continue to withhold the monies to satisfy HCC's alleged debts.

369. As the whole of the retention monies relating to the 16 inch pipeline were to be released on completion of the 30 inch pipeline, it is necessary to examine closely the contractual provisions governing such completion. Clause 9.3 of the Special Conditions provides:

> With reference to sub-paragraph (b) above the retention monies held by the Company in respect of the temporary 16" diameter bye pass lines shall be released, in full, to the Contractor upon completion of the 30" diameter pipeline.

The date of completion of the Works is defined in Clause 1 (1) (q) of the General Conditions as being "the date upon which the Engineer certifies in writing the completion of the Works." It is evident from the documents before the Tribunal that, in accordance with the above definition, HCC's right to release of the retention monies for the 16 inch pipeline accrued as at the date of the Completion Certificates prepared by the Project Engineer, Mr. Alirezaee. These Certificates both state that they were prepared on 8 Bahman 1359 in the Iranian calendar. The corresponding date in the Gregorian calendar is 28 January 1981. Both Certificates also bear a later date of 14 Bahman 1359 (3 February 1981) as the date of signature by NIGC Head of Projects, Mr. Gholamali Kashkooli.

370. The claim for release of one half of the retention monies for the 30 inch pipeline also accrues on the issue of such Certificates, which include the Engineer's certification that "payment of 50% of the repair deposit is without

objection." The final 50% was only to be released after expiry of the 12 months maintenance period. Pursuant to Clause 1 (1) (s) and 39 (5) of the General Conditions, this was to be 12 months from the latest date specified in the Certificates of Completion, i.e., from 7 October 1980.

371. The Tribunal notes that it is established that the work on the Tehran Spur project was fully completed as of 7 October 1980 and therefore HCC was entitled at that time, to receive 100% of the contract price, subject only to the contractual provisions as to release of retentions actually withheld, and that, had the Completion Certificates been issued in timely fashion, HCC would have received the funds relating to the 16 inch pipeline and one half of the funds for the 30 inch pipeline shortly thereafter, and certainly prior to the effective date of the Claims Settlement Declaration.

372. The Tribunal finds that NIGC should not benefit from its own delay in issuing the Completion Certificates, when it acknowledges that the work was satisfactorily performed. The Tribunal therefore awards HCC the balance of the contract price due for the remaining 5.41% of the work, together with the release of the full amount of the retention monies for the 16 inch pipeline and one-half of the monies for the 30 inch pipeline, i.e., 62.02% of the 10% withholding. These payments are not subject to the requirement to produce a Social Security Organization clearance certificate as that requirement relates only to the 5% withholding NIGC was entitled to make from progress payments pursuant to Clause 9.2.c of the Special Conditions, and the Tribunal has determined that neither of these sums are of such a nature.

373. In view of the Tribunal's finding that HCC's claim for payment of unpaid progress payments relates to payment of the balance of the contract price and release of retentions (see paragraph 362, supra) the Tribunal must now calculate

the sum due to HCC. Based on the increases reflected in Payment Certificates Nos. 8 and 11, dated 11 August and 14 October 1980, and Revised Job Instruction No. 2, dated 12 October 1980, the Tribunal finds there to have been two separate increases to the original contract price as follows:

Original contract price	- Rls.	650,000,000
Payment Certificate No. 11	- Rls.	24,667,500
Revised job inst. No. 2	- Rls.	36,732,150
Revised contract price	- Rls.	711,399,650

Payment Certificate No. 11 also evidences that HCC has received gross payments of Rls. 672,949,658. HCC is therefore entitled first to receive the amount claimed in respect of the balance of the contract price i.e., Rls. 38,449,992 (being Rls. 711,399,650 less Rls. 672,949,658), less 5.5% contractor's tax to arrive at a net figure of Rls. 36,335,242. As this amount represents payment for work actually performed, the Tribunal does not find it necessary to apply a 10% retention pursuant to Clause 39(3) of the General Conditions, as such retention is intended to provide security for proper performance, which condition the Tribunal finds to have been satisfied. Second, HCC is entitled to release of 62.02% of the actual amount withheld. That withholding is 10% of the gross payment of Rls. 672,949,658, i.e., Rls. 67,294,966, and thus HCC is entitled to the release of Rls. 41,736,338 (Rls. 67,294,966 x 62.02%), less contractor's tax, to give a net figure of Rls. 39,440,839, plus the Rls. 36,335,242 referred to above, to reach a total of Rls. 75,776,081.

374. The Tribunal therefore awards HCC the sum of U.S.$1,074,838.03 in respect of these claims. The claim for release of the balance of the retention monies, payable no earlier than 7 October 1981, is dismissed for lack of jurisdiction, as not being outstanding at 19 January 1981.

375. The Tribunal also rejects NIGC's contention that the retention monies should not be released because of debts allegedly incurred by HCC in connection with the Tehran Spur Contract. These alleged debts form part of NIGC's counter-claim, which is discussed below, and are dealt with therein.

d. Variation Orders And Sundry Claims

376. HCC claims the sum of U.S.$7,588,921 after deduction of 5.5% contractor's tax, for some 14 allegedly unpaid Variation Orders and sundry claims arising out of performance of the Tehran Spur Contract. Had HCC been paid for this work during the time of the Tehran Spur Contract, NIGC would have been entitled to make withholdings from such payments, pursuant to Clause 9.2.c of the Special Conditions. However, it is not disputed that NIGC itself did not apply this provision to the progress payments it made and so the Tribunal deems it unnecessary to now apply such a withholding to any amounts awarded under this section. Five of the claims in question arise from Variation Orders and these are considered first.

i) Provision Of Vehicles And Accommodation.

377. HCC claims the sum of Rls. 5,354,000, equivalent to U.S.$75,943 (less contractor's tax), as reimbursable expenses under Clauses 10.2 and 10.4 of the Special Conditions for provision of accommodation and transport to NIGC employees in the year to end of Esfand 1357, allegedly at NIGC's request. In support of its claim, HCC relies upon a letter to NIGC dated 31 March 1980 with a summary listing the names and relevant details of the number of days on which the claim is based. The amounts claimed for accommodation and vehicles are calculated in accordance with the rates set out in Appendix C to the Tehran Spur Contract, and there is an additional charge of Rls. 405,000, being the use of car radio systems for 270 days at Rls. 1,500 per day.

378. NIGC concedes that Rls. 2,860,900 is outstanding on this claim, but alleges that part of the balance claimed is for expenses incurred by Safinco Technical Inspection ("Safinco"), NIGC's inspection consultants for the project and that the number of days on which HCC bases its claim is incorrect. In support of its position, NIGC submits a letter from HCC to Safinco, dated 15 February 1981, in which HCC states that it has "collected its dues from Safinco with amount of 138,000 rials and nothing is due it from Safinco" and an internal NIGC memorandum dated 31 December 1980. This document refers to a balance due to HCC of Rls. 2,885,400 and acknowledges the use of vehicles by Safinco. NIGC also introduces two letters from HCC dated 15 September 1980 and 4 October 1980, which, it alleges, evidence the reduction of the number of days on which the claim is based.

379. The Tribunal notes that the rates set forth in Appendix C to the Tehran Spur Contract do not include Rls. 1500 per day for use of a car radio system, but provide for a daily rate of Rls. 4,900 per day "including all related costs." Clause 10.4 of the Special Conditions provides that the vehicles shall "be equipped and in a condition acceptable to the Engineer." In view of the lack of any additional evidence to support the additional charge for the radio, the Tribunal finds that the claim for transport is admissible only in the amount of Rls. 4,900 per day. HCC's claim is therefore reduced to Rls. 4,949,000.

380. The Tribunal does not accept NIGC's argument that it is not liable for expenses incurred by Safinco staff. The Tehran Spur Contract specifically refers in Clause 10.2 and 10.4 of the Special Conditions for HCC to be reimbursed for the provision of such services for "the Engineer's staff." The Tribunal finds that the letter of 15 February 1981 does not confirm or in any way indicate that the expenses incurred by Safinco are the same as those for which NIGC was responsible under the Tehran Spur Contract and which form the basis of this claim. The Tribunal also rejects NIGC's

argument that the number of days on which the claim is calculated has been reduced. The letters submitted in evidence by NIGC from HCC refer to services supplied in 1358, whereas the claim is based upon services supplied in 1357.

381. In the absence of any contemporaneous objection by NIGC to the March billing from HCC or of any specific evidence to contradict the details therein, the Tribunal awards HCC the amount of Rls. 4,949,000, less 5.5% contractor's tax, to give a net sum of U.S.$66,337.66.

ii) Supply Of Inhibitor

382. HCC claims U.S.$12,300 for the cost incurred in supplying NIGC with an inhibitor product (a water additive) used in the bypass pipeline. As evidence of its claim, HCC submits a letter dated 16 August 1980 requesting payment of this item.

383. NIGC denies liability for this claim, alleging that Article 4.1.2 of the Technical Specifications, set forth in Volume II of the Tehran Spur Contract, stipulates that HCC shall supply such inhibitors and therefore it does not constitute additional work. NIGC relies on the Afshar and Alirezaee affidavits in support of this contention.

384. The Tribunal agrees that the technical specifications contemplate the supply by HCC of inhibitor products in connection with the testing of the pipeline. Therefore this item cannot be issued as a variation or addition. The Tribunal consequently dismisses this part of the claim.

iii) Replacement Of Existing Pipe At Cased And River Crossings

385. HCC asserts a claim of U.S.$2,411,348 (less contractor's tax), equal to Rls. 170,000,000, for work performed in replacing pipe at various cased road, rail and river crossings. In support of its claim HCC submits a letter to NIGC dated 15 November 1979, quoting this price for the work and a copy of a NIGC internal memorandum, dated 14 February 1980, estimating the cost of this work at Rls. 95,000,000, which was communicated to HCC. HCC responded in April 1980, stating that it could not carry out the work at this price. In addition, HCC submits a letter from NIGC, dated 30 July 1980, asking HCC to "arrange for immediate necessary action's [sic] for Gharachi river crossing."

386. NIGC does not deny that the work has been performed but estimates HCC's costs at only Rls. 45,560,000. It further states that it never accepted HCC's initial quotation of Rls. 170,000,000 and that it is not bound by its original offer of Rls. 95,000,000, as this estimate was not approved by the appropriate authorities within NIGC. NIGC also refers the Tribunal to Clause 14 of the Special Conditions, which states that the cost of any variation shall be negotiated between the Engineer and the contractor, and that, failing agreement, the Engineer's price will be used.

387. The Tribunal notes that neither Party has submitted evidence to indicate the content of the discussions referred to in NIGC's letter of 30 July 1980. The Tehran Spur Contract specifically provides for the Engineer's price to be used in the absence of any agreement. The Engineer is stated in Clause 5 of the Special Conditions to be the Head of NIGC's Engineering Projects Division. The figure of Rls. 95,000,000 therefore constitutes the Engineer's price to be used in this case. The Tribunal notes that HCC objected to this estimate prior to actual performance of the work. However, there is nothing in the contractual language upon

which the Tribunal may base an alternative valuation and, therefore, the Tribunal awards HCC the sum of Rls. 95,000,000, equal to U.S.$1,347,517.73. After deduction of contractor's tax, the net amount of the award is U.S.$1,273,404.25.

iv) Additional Cased Crossings At KP 102, 108 And 111

388. HCC claims U.S.$425,532 (less contractor's tax), i.e., Rls. 30,000,000, in expenses incurred for the installation of cased pipeline road crossings. To evidence this item of the claim HCC submits a letter dated 31 March 1980, requesting payment of the amount now claimed.

389. NIGC concedes that the work was performed but argues that the amount owed is only Rls. 2,400,000. To support its allegation NIGC submits a letter dated 26 February 1980, in which it ordered HCC to proceed, noting that the cost was being considered and "will later be notified to you," together with an internal memorandum dated 29 July 1980 which purports to estimate the value of the work at Rls. 2,400,000.

390. Although the memorandum submitted by NIGC indicates that NIGC prepared an internal cost estimate in May 1980, there is nothing to indicate that it protested the amount claimed on receipt of HCC's letter or that it at any time advised HCC of its own lower estimate. HCC's letter therefore stands as the sole item of contemporaneous evidence between the Parties of the value of the work which was performed. The Tribunal finds it surprising that NIGC did not respond in any way to HCC's request for payment of such a large sum, especially as no breakdown or details of the sum was provided. The Tribunal notes that although Clause 42 (5) of the General Conditions permits the Engineer to fix a rate for such work if necessary, such a rate, even if adequately evidenced, may still be the basis of a

subsequent dispute between the Parties, and subject to review by a competent authority such as this Tribunal. As has been stated in respect of the Ramin Contract (see paragraph 336, supra), NIGC may only rely on the language of Clause 14 of the Special Conditions if it does so by raising the issue with HCC expeditiously. The Tribunal finds that NIGC has failed to evidence that a price was established by the Engineer for this work so as to prevail over the amount claimed by HCC and therefore awards HCC the sum of Rls. 30,000,000, equivalent to U.S.$402,127.66 after deduction of contractor's tax.

v) Extra Work At Pipe Termination At Rey City Gate

391. HCC asserts a claim in the amount of U.S.$40,426 (Rls. 2,850,000) less contractor's tax for additional work at Rey City Gate. HCC alleges that NIGC requested HCC to tie in the pipeline 60 meters inside the boundary fence whereas Clause 1.3.14 of Section 5 of the Scope of Works states that the pipeline should commence "outside of fenced areas at KM-O and Rey City Gate." HCC submits in evidence a letter dated 3 April 1980, requesting payment of the amount now claimed.

392. NIGC contends that the additional work actually comprised 75 meters of additional pipeline, rather than the 60 meters claimed by HCC, but that HCC actually commenced its work 25 meters away from the gate. NIGC therefore deducts the costs of these 25 meters from the additional work. NIGC provides two valuations of the remaining 50 meters of work, one of Rls. 1,027,000 (U.S.$14,567.38) and one of Rls. 700,000 (U.S.$9,929.08), without supporting calculations.

393. NIGC does not dispute that 50 meters of work was performed nor that payment for such extra work is now due. HCC has not provided the Tribunal with any evidence of NIGC's request to perform 60 meters of work. In the absence

of any contemporaneous objection by NIGC to HCC's invoice and taking into consideration the tardiness of and contradictions within NIGC's own valuations, the Tribunal awards HCC 5/6ths of the amount claimed, i.e., U.S.$33,688.33, less contractor's tax, to reach a total of U.S.$31,835.47.

vi) Padding Of Pipe

394. HCC claims U.S.$407,801 (less contractor's tax) as reimbursement of expenses incurred for padding the bottom of the pipeline over its entire length. HCC alleges that Clause 1.3.3 of the Scope of Work provides that HCC was to provide padding only "where necessary in rocky areas" and contends that NIGC subsequently requested that the entire length of the pipeline be padded. HCC submits by way of evidence a copy of the covering letter to its invoice to NIGC dated 3 April 1980.

395. NIGC denies liability for this amount, alleging that padding work was contemplated by the terms of the Tehran Spur Contract and therefore is not chargeable as extra work. NIGC also denies that it ordered HCC to pad the entire length of the pipeline. In evidence is a letter from NIGC to HCC, dated 31 May 1980, which draws HCC's attention to Clause 1.3.3. of Section 5, pursuant to which padding is the contractor's responsibility, and in which the claim for payment is rejected.

396. HCC has not submitted any evidence of NIGC's alleged variation of the contract requirements. Clause 41 (2) of the General Conditions provides that a verbal order from the Engineer shall be considered as a variation only if confirmed in writing by the contractor and not subsequently contradicted in writing. NIGC's letter of 31 May 1980 undoubtedly constitutes such a contradiction. The Tribunal therefore dismisses this claim.

vii) Standby Costs At KP0 And KP90

397. HCC claims the sum of U.S.$366,996 (less contractor's tax) for the costs resulting from delays in the work at KP0, allegedly caused by NIGC in late 1979, and U.S.$645,678[15] (less contractor's tax) for similar delays to the work at KP90, also allegedly caused by NIGC. Pursuant to Clause 8 of the Special Conditions, NIGC was required to de-gas the relevant sections of the existing 30 inch pipeline and hand it over to HCC after completion and commissioning of the 16 inch bypass line. HCC alleges that NIGC delayed the handing-over in respect of both sections, thus causing HCC labor and equipment to be placed on standby. In support of these claims, HCC has produced a letter dated 30 November 1979 showing the breakdown of costs for a 13-day delay at KP0, totalling Rls. 25,873,250, and a letter dated 13 February 1980, showing the costs for a one month delay at KP90, totalling Rls. 45,520,300. HCC also asserts that its crew and equipment were placed on standby due to NIGC's default at other times not evidenced by these letters and claims the sum of U.S.$173,759 in respect thereof.

398. NIGC denies any liability for any delay that might have occurred in the hand-over of the pipe at KP0, arguing that HCC has failed to supply valid evidence of its claim, and that the calculations in HCC's letters are baseless. In its defense, NIGC submits a letter to HCC dated 29 May 1980 in which it advised HCC that its request for extra payment could not be granted under the terms of the Tehran Spur Contract, and referred to a previous letter of 30 December 1978, which is not in evidence.

399. With respect to the claim for standby costs at KP90, NIGC concedes that Rls. 1,271,226 is due to HCC. NIGC

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[15] Reduced from U.S.$1,186,433.

relies upon Clause 14 of the Special Conditions to support its contention that NIGC's determination of the value of the work is definitive.

400. The Tribunal notes that NIGC did raise an objection to one or both of these claims in May 1980. The reference to a previous letter of December 1978 is unclear, as HCC did not submit these claims until late 1979 although, of course, it did start on the project in 1978; but as that letter is not in evidence, the Tribunal cannot draw any conclusions from it. HCC has not directed the Tribunal to any particular provision of the Tehran Spur Contract, upon which its claim for extra payment is based, nor has either Party addressed the provisions of Clause 28 of the General Conditions "Contractor's access to the site." This clause provides in sub-clause b) that, if the contractor is delayed due to the company's failure to give possession, "the time for the Completion of the Works shall be extended accordingly but no additional payment shall be made for this reason."

401. The Tribunal finds the situation envisaged by this clause to be sufficiently similar to that now in dispute to be applicable by analogy. Therefore, in the absence of any specific clause in the Tehran Spur Contract providing for payment for such costs, and given that the Tehran Spur Contract was for a lump sum price, the Tribunal holds that HCC is not entitled to financial compensation for any such delay, save for the sum of Rls. 1,271,226 ($18,031.57) specifically admitted by NIGC. The Tribunal therefore awards HCC this sum, less contractor's tax of 5.5%, giving the net figure of U.S.$17,039.84.

viii) Standby Due To Pipe Delivery Delays

402. HCC asserts a separate claim for U.S.$765,034 (less contractor's tax) for standby costs arising from NIGC's alleged failure to deliver pipe timely. HCC contends that

NIGC failed to supply 16 inch pipe for the work between September and December 1978, thus interrupting HCC's performance and causing shutdowns. HCC relies upon Clause 17.1 of the Special Conditions as the basis for this claim, in which it is stated: "If the Company supplied pipe is not supplied such that the Contractor can work continously [sic] and the time for completion is extended, the additional cost of such extension shall be borne by the Company." To evidence the amount of its claim, HCC submits its letter and invoice of 20 December 1978, with attachments. The amount claimed comprises Rls. 17,298,890 shut-down costs and 30 days "Standby of camp and idle time of equipment (15 Dec. 1978 to 13 January 1978 [sic])," amounting to Rls. 36,636,000. HCC's covering letter refers to this second item as being "part of the time extension" and also gives NIGC notice that additional costs will be incurred during the extended work period.

403. NIGC denies that it caused any delay in the delivery of the necessary pipe, and asserts that, even if such delay did occur, HCC should have foreseen such a possibility and made provision for such, prior to the delayed execution of the contract documents in late 1979. NIGC contends that the list of "Sundry items" in Clause 1.4 of Section 5 of the Tehran Spur Contract is an exhaustive list of additional items agreed on during negotiations in 1979 and that HCC is assumed to have accepted any other changes in circumstances of which it was, in fact, aware, prior to signing of the contract documents. NIGC also relies upon Clause 18 (4) of the General Conditions, which specifically precludes any financial or other claim, outside of extension of the contract term in such circumstances.

404. The Tribunal does not accept the arguments put forward by NIGC. There is nothing in Section 5, Clause 1.4, to indicate that this is an exhaustive list of such items, nor has NIGC supplied any other evidence to support this assertion. As regards the application of Clause 18 (4) of the

General Conditions, the Tribunal finds that, in accordance with Clause 12 of the General Conditions and paragraph 2 of the Agreement itself, Special Conditions prevail over General Conditions and, therefore, HCC is entitled to receive compensation in accordance with Clause 17.1 of the Special Conditions.

405. However, HCC is entitled under that clause to receive compensation for the additional cost of any extension of the time for completion (emphasis added), not necessarily for all standby costs. As with the delays with respect to the hand-over of the pipelines, there is no specific provision in the Tehran Spur Contract for HCC to receive compensation for such costs. The time schedule agreed in September 1979 provided for completion at the end of February 1980 (Contract Appendix B). HCC has not supplied the Tribunal with any evidence to link the extended completion dates (April and October 1980) with this particular cause of delay, other than the letter of 20 December 1978. This letter refers to a need to extend the completion schedule for various stages of the project, but the amounts claimed are for the direct costs of shutdown in September, October and November 1978, together with an estimated 30 days future standby, which is said to be "part of the time extension" and which forms two-thirds of the value of the claim. It is not explained how HCC was able to forsee the length of the standby at the time of writing. Although the letter gives details of the daily rate upon which the claim is calculated, it does not form any basis upon which to conclude that the contract period was extended by 30 days due to the late delivery of pipe. Indeed the letter states "when the situation clarifies, we will submit a revised Work Programme." No such revised Work Programme or other evidence that NIGC's failure to timely supply pipe constituted the basis for extension of the time for completion by thirty days or any other length of time has been presented to the Tribunal.

406. The Tribunal finds that HCC has failed to prove to the satisfaction of the Tribunal that the costs claimed relate to the additional cost of an extension of time for completion, as provided in Clause 17.1 of the Special Conditions of the Tehran Spur Contract, rather than to standby costs. Therefore, this claim is dismissed.

ix) Costs Incurred To Cut And Reweld Due To Pipe Shortage

407. HCC asserts a claim for U.S.$1,045,915 (less contractor's tax) for costs allegedly incurred pursuant to a request from NIGC that HCC cut and reweld approximately 350 bad joints in the pipe. HCC submits in evidence two letters, dated 17 January 1980 and 3 April 1980, advising NIGC that reimbursement of the extra costs involved will be claimed and providing a breakdown of the actual costs.

408. NIGC does not dispute that this work was carried out at its request but asserts in its pleadings filed in 1987 that HCC is only entitled to receive Rls. 965,760 ($13,698.72) in respect thereof, pursuant to the rates set out in Appendix C to the Tehran Spur Contract.

409. Clause 41 (1) (e) of the General Conditions provides that the Engineer may require HCC to carry out "additional work of any kind necessary for the Completion of the Works and ... the value (if any) of all such variations shall be taken into account in ascertaining the amount of the Contract Price." Clause 42 of the General Conditions provides for such work to be valued "at the rates set out in the Contract if, in the opinion of the Engineer, the same shall be applicable." The Tribunal notes that most of the activities for which compensation is claimed are not specified in Appendix C, and the absence of any contemporaneous objection or alternative valuation by NIGC or the Engineer fails to rebut the presumption that the amounts as evidenced are correct. One particular item of work is included in

Appendix C, this being the rate of Rls. 2,640 per end to cut and bevel 30 inch pipe. Although HCC has used this rate as a basis for its calculations, it has imposed a 500% surcharge for performing this operation by hand, rather than by machine. HCC has supplied no evidence to indicate that the hand work was necessary to the operation or was done at NIGC's specific request. The Tribunal therefore awards HCC the sum of Rls. 73,737,024, less the two surcharges imposed for hand work totalling Rls. 6,784,800, and less contractor's tax at 5.5%, to give a total of Rls. 63,269,852, equal to U.S.$897,444.70.

x) Pipe Failures At KP7.7 And KP9

410. HCC asserts two claims for costs arising from pipe failures in the sums of U.S.$34,885 and U.S.$138,384 (less contractor's tax in both cases). HCC contends that the pipe burst which occurred at KP7.7 was due to a "latent defect" in the pipe, which was supplied by NIGC, and that the burst at KP9 occurred when a split in the pipe wall opened under pressure. HCC claims that both of these occurrences are NIGC's responsibility pursuant to Clause 4.5 of the Special Conditions. In support of its claims HCC submits a letter to NIGC dated 30 November 1979 with a breakdown of costs for the burst at KP7.7, and letters of 21 August and 14 October 1980 relating to the burst at KP9. No breakdown of costs has been provided for this part of the claim.

411. NIGC denies any liability in respect of the burst at KP7.7, arguing that Clause 18 (3) of the General Conditions applies, whereby HCC assumes the risk of loss or damage to the pipe upon acceptance at the time of delivery, and therefore, the risk of damage had passed to HCC prior to this incident. To evidence this NIGC submits letters to HCC dated 29 May 1980, 23 October 1980 and 13 November 1980, rejecting the claim on the basis that NIGC had been unable to inspect the pipe or obtain sufficient detail of the

serial number so as to pursue a claim against the manufacturer.

412. With regard to the burst at KP9, NIGC does not deny liability but contends that, in its estimation, only Rls. 2,951,355 is payable, and that such estimate is binding on HCC, pursuant to the provisions of Clause 14 of the Special Conditions.

413. Clause 4.5 of the Special Conditions makes specific reference to latent defects in the pipe supplied by NIGC. Not only does it state that "all risks for consequence and repair of such [latent] defects shall be N.I.G.C.'s responsibility" but it also states "the Company shall accept any costs not covered by the insurance provided by the Policy." The title page to the Special Conditions states that such conditions will prevail over the General Conditions and, therefore, the Tribunal must apply Clause 4.5 of the Special Conditions in preference to the conflicting provisions of Clause 18 (3) of the General Conditions, so that NIGC is required to bear all costs arising from defective pipe, unless those defects are covered by insurance. Although the Tribunal initially finds some merit in NIGC's argument that it should be able to inspect the pipe to confirm that the defect was, indeed, latent, this is countermanded by the fact that the first recorded request for such inspection is dated 29 May 1980, whereas the incident occurred on 30 September 1979, eight months previous. Therefore, and in the absence of any evidence from NIGC to indicate that this incident was due to any cause other than a latent defect in the pipe provided, and of any alternative valuation of this work, the Tribunal awards HCC the amount claimed in respect of the burst at KP7.7.

414. With respect to the burst at KP9, NIGC has conceded responsibility but has challenged the quantum of the claim. The Tribunal finds that, having accepted responsibility for the damage, NIGC may only rely on Clause 14 of the Special

Conditions if it responds with its valuation in timely fashion. The Tribunal has not been informed when, or on what basis, the NIGC valuation was made, nor has any contemporaneous objection to HCC's invoice been evidenced. NIGC has therefore failed to establish that a price for this work was fixed by the Engineer and notified to HCC, which is thus entitled to receive payment in full.

415. For the foregoing reasons, the Tribunal awards HCC the sum of U.S.$173,269, less contractor's tax, i.e., U.S.$163,739.20 net in respect of these two claims.

xi) Bridge Pier Work

416. A claim for U.S.$60,284 (less contractor's tax) is brought by HCC for extra expenses allegedly incurred as a result of the need to avoid interference with concrete bridge supports under a road along the pipeline route. In support of the claim HCC submits a letter dated 1 December 1979 requesting payment of this additional sum.

417. NIGC contends that it is not liable for any additional costs so incurred, as HCC was aware of the existence of such supports at the time of signing the contract documents in October 1979 and that all items which required additional expenditure were listed in Clause 1.4 of Section 5 of the revised agreement. NIGC submits a letter to HCC dated 23 October 1980 which outlines its position and rejects HCC's claim, together with additional correspondence between the Parties from September 1978 to July 1980.

418. It is apparent from that correspondence that HCC first became aware of a potential problem in August 1978 and asked NIGC to prevent the construction from proceeding. HCC was in communication with NIGC until 26 November 1978, advising it of the interference and of the need to continue operations by hand, at considerable extra expense. The first written notification to NIGC that extra costs would be

incurred was given on 29 September 1978, more than a year before the contract documents were actually signed. The issue is therefore to determine what effect, if any, the subsequent execution of the formal contract documents had upon the Parties' positions.

419. Clause 6 of the General Conditions and the Construction Specifications make it clear that the contractor is deemed to have inspected and have complete knowledge of all matters affecting execution of the works and to have no claim for extra payment as a result thereof. Clause 6 (3) of the General Conditions provides for the Contractor to make a claim for additional work, if obstructions or conditions are encountered "during the execution of the Works" which "could not have been reasonably foreseen by an experienced contractor," provided written notice is given to the Engineer immediately. NIGC has submitted in evidence a series of correspondence with HCC to show that HCC was aware of the existence of the bridge footings at the time it signed the Tehran Spur Contract in October 1979.

420. It is evident from this correspondence that HCC first advised NIGC of a potential problem on 22 August 1978, i.e., after submission of its Tender but before the Letter of Intent was issued for the Project. It is equally clear that NIGC approved the continuation of the interfering work in October 1978, after HCC had commenced work on the project, and that HCC objected immediately to the granting of such approval. NIGC's letter of 16 October 1978 states, in relevant part:

> We advise that the installation ... is being carried out with prior approval of NIGC. The permission was granted, as a result of approval ... [that it] will not interfere with the performance of future possible maintenance work on subject pipeline.

421. The Tribunal finds that the continuation or cessation of the intervening work was entirely within the control of

NIGC, and that HCC raised repeated objections to NIGC at the time. The Tribunal also finds that, for the purposes of Clause 6 of the General Conditions, the effective date of Theran Spur Contract pursuant to paragraph 3 of the Letter of Intent is 12th October 1978, i.e., 30 days from the date of issue of the Letter of Intent. As noted above, HCC first became aware that NIGC had approved the intervening work on receipt of NIGC's letter of 16 October 1978, and thus the dispute may be deemed to have arisen between the Parties as at 18 October 1978, being the date on which HCC objected to the granting of permission and formally notified NIGC that additional costs would be incurred. Although it would have been prudent of HCC to refer to this, and any other disputed matter, when the contract documents were actually signed in late 1979, the Tribunal finds nothing to support NIGC's argument that Clause 1.4 of Section 5 was intended to be an exclusive list of items requiring alteration. The Tribunal therefore determines that this claim was not waived by subsequent execution of the contract documents. NIGC has not contested the amount of the claim and so the Tribunal awards HCC the full amount thereof, less 5.5.% contractor's tax in the sum of U.S.$56,968.38.

xii) Additional Insurance Premia

422. HCC's next claim is for reimbursement of insurance premia in excess of those allowed for in the Tehran Spur Contract, in the sum of U.S.$26,496 (less contractor's tax). Clause 4.1 of the Special Conditions states, in relevant part:

> The Contract Price includes a provisional sum of Rials 85,000 per kilometer to cover the cost of insurances required under the General Conditions of Contract. The actual cost of insurance premiums paid by the Contractor shall be reimbursed to the Contractor upon production of receipted invoices.

Paragraph 6 of the General Notes and Clarifications provides:

> The Contractor has stated in his Tender it includes a provisional sum of Rials 85,000/per kilometer ... since the Project has not been described in sufficient detail to obtain formal insurance quotations. When the project is better defined, insurance quotations can be obtained and the above figure will then be adjusted upwards or downward as necessary.

HCC therefore contends that NIGC is responsible for any amounts in excess of Rls. 85,000 x 52 (= Rls. 4,420,000) as the project was for 52 kilometers of pipeline. HCC asserts that it has paid a total of Rls. 6,288,000 in insurance premia, as evidenced in a letter of 27 September 1979, so that it is entitled to receive reimbursement of the balance of Rls. 1,868,000.

423. NIGC contends that the contract payment applies not to 52 kilometers, but to 104 kilometers of pipeline, being 52 kilometers of 30 inch pipeline and 52 kilometers of 16 inch pipeline, and, therefore, HCC is responsible for insurance premia up to Rls. 8,840,000, not Rls. 4,420,000. NIGC evidences this contention by way of an inter-office memorandum dated 26 July 1980 from which it is apparent that HCC was already aware of NIGC's objection.

424. The Tribunal notes that either interpretation of the phrase "per kilometer" is reasonable. The phrase was originally used in HCC's Tender, which, although obviously relevant, is not in evidence before the Tribunal. HCC has also not produced in evidence the receipted invoices required by Clause 4.1 of the Special Conditions. The Tribunal finds that HCC has failed to provide adequate evidence of its entitlement to this amount and therefore dismisses this claim.

xiii) Increased Costs Due To Program Delay

425. HCC asserts a claim for increased costs in the sum of U.S.$1,588,764 (less contractor's tax), which it alleges is due to it as "fair and reasonable compensation" pursuant to NIGC's letter of 11 October 1979, which forms part of the contract documentation. HCC asserts that it recommenced work on the project, subject to NIGC agreeing to revise the contract price in order to compensate HCC for its additional and unforeseeable expenses incurred as a result of the events in Iran. HCC has submitted in evidence a letter of 14 September 1979 to NIGC, requiring an increased price of Rls. 798,740,000, together with NIGC's subsequent letter of 11 October 1979, which states that, after obtaining approval from the Plan and Budget Organization ("PBO"), "we undertake to immediately commence negotiation with your duly authorised representative so as to determine fair and reasonable compensation for the extra costs you have incurred." HCC's requested contract price amounts to an increase of 22 percent, a factor evidenced by newspaper clippings, submitted by HCC, as corresponding to the inflation rates then current in Iran.

426. It is not disputed that on 12 October 1980 NIGC agreed to a price increase of Rls. 36,732,150, being Rls. 112,007,850 less than requested by HCC, and that this amount was received by HCC in early 1981. HCC contends that this does not constitute "fair and reasonable compensation" and is insufficient to cover costs actually incurred, and so claims the balance of its original request, i.e., Rls. 112,007,850 from NIGC.

427. NIGC contends that the 6 percent increase approved by it was reasonable and adequate compensation. NIGC rejects the newspaper clippings as a viable basis for amendment of the contract price and asserts that it has paid the required increase to HCC.

428. The question before the Tribunal is, therefore, to determine whether the amount granted by NIGC was, in fact, "fair and reasonable compensation" and if not, what such compensation should be. HCC has not provided the Tribunal with any evidence of increased costs against which the Tribunal could weigh the relevant assertions. HCC cannot automatically rely on the figure quoted in its letter of 14 September 1979, as this is superseded by the specific term incorporated in the contract documents, requiring the Parties to negotiate a fair and reasonable compensation. Equally, NIGC can not rely solely on its own evaluation when it has committed itself to future negotiations.

429. It is not disputed by the Parties that some increase in the contract price was warranted. In the absence of any reliable guidelines as to how to reach a fair and reasonable sum, the Tribunal, at its own discretion, awards HCC one half of the amount claimed, that is Rls. 56,003,925, less contractor's tax at 5.5 percent to give a net figure of U.S.$750,690.91.

xiv) Reimbursement Of Contractor's Tax

430. HCC claims reimbursement of the sum of U.S.$11,439, allegedly improperly deducted by NIGC from payment certificates in respect of materials imported into Iran for the project. Clause 16 of the Special Conditions provides that HCC shall be exempted from payment of contractor's tax on the c.i.f cost of materials so imported. As evidence of the amount of the claim HCC submits a letter dated 29 September 1979, in which it states that the total value of materials imported to that date amounts to U.S.$208,053. The letter refers NIGC to the detailed information on HCC's "Requests to Import," which were in NIGC's possession, and which was summarized on attachments to the letter.

431. NIGC does not dispute that these monies have been withheld, but contends that they have been paid over to the

Ministry of Economic Affairs and Finance, under Iranian tax law, so that the claims will be considered when HCC submits a tax declaration.

432. As with the Ramin Contract (see paragraphs 344-349, supra) HCC is exempted from payment of contractor's tax by the Tehran Spur Contract and is, therefore, entitled to reimbursement of any such amount withheld by NIOC. As NIGC has not contested the amount of the claim, the Tribunal awards HCC the sum of U.S.$11,439.

e. NIGC Counterclaims

i) Court Judgments

433. NIGC has raised two counterclaims relating to judgments issued against HCC by the Tehran Public Court, in favor of a number of former employees of HCC, in the sums of Rls. 10,272,505 and Rls. 2,166,429, respectively. In support of its claim NIGC submits copies of memoranda and Execution Orders from the Court evidencing these judgments.

434. The Tribunal dismisses these two counterclaims for lack of jurisdiction, as NIGC is asserting the claims on behalf of third parties who do not fall within the definition of "IRAN" pursuant to the Claims Settlement Declaration.

ii) Goods Supplied

435. NIGC's next counterclaim is for Rls. 12,244,506 arising from HCC's alleged failure to pay for goods and services supplied to it by NIGC under the Tehran Spur Contract. These are the same debts as are referred to in paragraph 375, supra. In support of the claim NIGC submits an internal memorandum dated 11 August 1980, in which a number of items of equipment are listed, but no valuation given; an internal memorandum dated 12 November 1980, showing the value of Rls. 10,696,506 for coating materials said to have

been supplied to HCC; and two memoranda, dated 22 October and 6 November 1980, evidencing the costs of radiographic services allegedly performed for HCC from July to October 1980, in the sum of Rls. 1,548,000.

436. HCC denies any liability for such claims, stating that the basis for the counterclaims is unclear and that, to the extent they are based on NIGC's claims for the costs of completion of the work, there is no evidence that HCC should have borne such costs under the Tehran Spur Contract.

437. Clause 17.5 of the Special Conditions provides for the Contractor to supply all materials other than those specified in the contract documents as being Company supplied materials. Clause 20 of the Special Conditions requires HCC to provide all radiographic equipment and services. Therefore, a presumption arises that such matters were HCC's responsibility under the Tehran Spur Contract. HCC does not deny that it received these goods and services. It thus has a primary obligation to pay for them. Therefore, the Tribunal must determine whether the internal communications submitted by NIGC are sufficient to evidence the counterclaim.

438. The Tribunal finds that the documents relating to the supply of materials are only estimates, calculated at the current market prices, and do not constitute sufficient evidence of the claim. With regard to the documents relating to radiographic services, the Tribunal finds these documents, on balance, to be sufficient and contemporaneous evidence of the amount of the claim and therefore awards NIGC the sum of Rls. 1,548,000, equivalent to U.S.$21,957.45.

iii) Bank Guarantee No. 9/235

439. NIGC has filed a counterclaim for payment of Rls. 65,000,000 under guarantee No. 9/235, opened by HCC to secure its proper performance, on the basis that HCC has failed "to perform its contractual obligations in a satisfactory manner." In support of this counterclaim, NIGC has submitted a document from Bank Tejarat, the issuing bank (formerly Iranians Bank), stating that the guarantee has been properly extended at NIGC's request and that Bank Tejarat is still responsible for payment thereunder.

440. The Tribunal notes that, as with the counterclaim raised by NIOC in relation to the Esfahan-Rey Contract, this counterclaim is asserted on behalf of both Bank Tejarat and NIGC. This basis of this counterclaim is contradicted by the language of the Completion Certificate issued by NIGC's Project Engineer, which states: "Cancellation of the performance guarantee No. 9/235 relating to this contract ... is without objection." In view of this statement and the findings by the Tribunal that HCC was not in breach of its obligations under the Tehran Spur Contract, no proper demand for payment could be made and the counterclaim is dismissed on the merits, without the Tribunal having to address the issue of jurisdiction.

iv) Damages For Delay

441. NIGC's fourth counterclaim is for the sum of Rls. 45,000,000,000 for damages claimed to have been incurred by NIGC and IRAN as a result of HCC's alleged delay in the implementation of the Tehran Spur Contract. NIGC contends that HCC's expatriate staff left Iran in November 1979 "without informing NIGC, thus causing the virtual stoppage of the project operations." NIGC claims that the project was thereby delayed for some 5-6 months, until HCC resumed work in February 1980 with Jamshid Natan as local manager, and that, in order to supply its customers, NIGC was required to

purchase gas oil equal to 60% of the capacity of the pipeline at the price of Rls. 25 per liter, amounting to Rls. 300 million per day for 5 months.

442. HCC requests that this counterclaim be dismissed for lack of evidence and further asserts that Clause 60 of the General Conditions of the Tehran Spur Contract (Force Majeure) releases it from any responsibility for any delays occasioned by the revolution, and that, in any event, this is a claim for consequential damages, liability for which is specifically excluded by Clause 4.4 of the Special Conditions, which provides: "The Contractor shall not be held liable for any indirect and/or consequential losses."

443. The Tribunal dismisses this counterclaim. HCC is not liable for damages arising out of the force majeure conditions surrounding the revolution and the seizure of the U.S. Embassy in November 1979. The express language of the Completion Certificates states that the work was delayed "due to legitimate reasons," which wording constitutes an admission by NIGC that such delay was not due to HCC's default. Furthermore, even if the project were delayed, which has not been proven by NIGC, HCC was specifically exempted from liability for such losses by Clause 4.4 of the Special Conditions.

v) Return Of Payments On Account

444. NIGC claims the return of Rls. 105,000,000, being "on account" payments allegedly made to HCC. In support of this claim NIGC has submitted internal correspondence authorizing three separate advance payments to HCC totalling Rls. 95,000,000 in March, July and December 1980, a letter from HCC dated 15 January 1981 in which "advance payments" of Rls. 95,000,000 are acknowledged by HCC, an internal memorandum dated 5 February 1981, recommending payment of a further Rls. 10,000,000 and a handwritten payment order dated 20 February 1981, authorizing payment of that sum less

5.5% tax. HCC contends that it has fulfilled its contractual obligations to NIGC and that, therefore, NIGC is not entitled to any refund. HCC also asserts that it has already offset Rls. 40,000,000 gross advance payments made in 1981 against its claim for increased costs due to delay (see paragraph 426, supra).

445. The Tribunal notes that the advance payments of Rls. 50,000,000 and Rls. 15,000,000, approved for payment to HCC in March and July 1980, were made prior to the issue of Payment Certificate No. 11, which evidences "Total Payments To Date" in the sum of Rls. 672,949,568 and "Previous Payments" of Rls. 638,217,418. NIGC has not presented any evidence to suggest that these advance payments were not included in the totals shown on Payment Certificate No. 11. As the Tribunal has found that HCC was entitled to receive payment of the full amount shown on Payment Certificate No. 11, the claims as to Rls. 65,000,000 is dismissed on the merits. As noted in paragraph 444, supra, HCC has acknowledged receipt of two payments totalling Rls. 40,000,000 in early 1981. It appears to the Tribunal that one payment of Rls. 30,000,000 was for the balance of the increase authorized by Payment Certificate No. 11 and reflected in the "Total Payments to Date" figure therein. HCC has already offset this amount against its claim for increased costs due to delay. Given the Tribunal's finding as to the merits of HCC's claim (see paragraph 429, supra), this part of the claim is also dismissed. There remains the question of the final payment of Rls. 10,000,000 authorized in February 1981. This cannot be the balance of the increase reflected in Payment Certificate No. 11, as the certificate itself states that "Rls. 10,000,000 has been paid as advance ..., which amount is to be deducted from the present payment." However, as NIGC asserts that the sum was paid in or after February 1981, it is evident that no claim for its return can have been outstanding as of 19 January 1981 and therefore this final part of NIGC's counterclaim is dismissed for lack of jurisdiction.

vi) Social Insurance Premia

446. NIGC asserts a counterclaim in the sum of Rls. 55,286,408 for unpaid social insurance premia. NIGC has submitted a separate supplemental brief concerning calculation of the claim for social security dues. However, as with the counterclaims for social security dues raised by NIOC in respect of the Esfahan-Rey and Gach Saran Contracts, the only documents submitted by NIGC in support of its calculations are two letters from the Social Security Organization, dated 25 January 1982 and 7 February 1982, respectively. This counterclaim is therefore dismissed for the reasons set forth with respect to the Esfahan-Rey Contract in paragraph 112, supra.

vii) Failure To Redeliver Pipe

447. NIGC claims that HCC acted in breach of contract by failing to deliver to NIGC the existing 30 inch pipe removed as part of the project and, similarly, by not returning to it the 16 inch pipe used on a temporary basis until the main line was once more on-stream. Clauses 1.4.5 and 1.2.13 of the Scope of Work required HCC to return such pipe to the NIGC pipe yard for disposal by NIGC. NIGC submits no evidence of this alleged failure and, consequently, the counterclaim is dismissed for lack of proof.

viii) Insurance Premia Due To Sherkat Sahami Bimeh Iran

448. NIGC's final counterclaim is for Rls. 4,368,000 insurance premia allegedly unpaid in respect of policy No. 57/12228/21. The claim is evidenced by a letter dated 18 September 1982 from the insurance company. This counterclaim is dismissed for lack of jurisdiction, as NIGC is asserting the claim on behalf of the insurance company, which is not party to these proceedings.

ix) Unpaid Taxes

449. As discussed in paragraph 114, supra, NIGC and NIOC have amalgamated their claims in respect of unpaid income taxes and this counterclaim is therefore rejected for the reasons set out therein.

f. Summary

450. The Tribunal has therefore found that HCC is entitled to receive the following sums under the Tehran Spur Contract:

i) U.S.$3,671,027.07 for payments for work performed under Variation Orders and sundry claims; plus
ii) U.S.$1,074,838.03 for the balance of the contract price and release of retention monies.

451. The Tribunal has also found that NIGC is entitled to receive the sum of Rls. 1,548,000, which at the contractually agreed rate is equivalent to U.S.$21,957.45, for payment for radiographic services supplied to HCC.

C. The Expropriation Claim

1. Factual Background And Contentions

452. HCC's final claim was asserted initially in the amount of U.S.$7,297,720 for the alleged expropriation by IRAN of HCC's equipment and inventory. The claim was subsequently increased to U.S.$7,407,920, plus an element for freight costs, which was limited at the Hearing to U.S.$91,000, making a total of U.S.$7,498,920.

453. HCC states that, in order to fulfill its obligations under the various contracts, it imported into Iran, and otherwise acquired, substantial amounts of specialized

construction equipment and supplies. At the beginning of 1979 most of the equipment used on the Esfahan-Rey, Gach Saran and Ramin Contracts was stored in HCC's main warehouse and equipment yard at Ahwaz. The equipment still being used for the Tehran Spur Contract was based at a separate facility at Ali Abad.

454. All four contracts provide that title to equipment imported into Iran for the purpose of performing the work would vest in NIOC or NIGC, as appropriate, upon delivery to the site and that, in principle, such title would re-vest in HCC upon completion of the project, subject to certain conditions which vary from contract to contract. None of the Parties has alleged that this provision was intended to have, or in fact did have, any effect upon HCC's ultimate ownership of the imported equipment, and it is clear to the Tribunal that HCC remained the owner of the equipment for the purposes of this claim. Equally, it is clear to the Tribunal that Clause 16 (2) of the General Conditions of the Gach Saran Contract required HCC to take action to re-export the equipment or to sell it and pay customs duties before title would pass.

455. HCC states that in May 1979 armed guards and members of the Ahwaz Revolutionary Committee took control of the Ahwaz facility and confiscated the equipment, allegedly acting pursuant to a document signed by the Governor of Ahwaz, authorizing the taking of HCC's equipment "for development work" in the area. This document is not in evidence before the Tribunal. HCC informed NIGC of these events in correspondence over the period 13 July to 1 December 1979. However, there was no immediate contemporaneous objection by HCC, even though, according to the rebuttal affidavit of Mr. J.W. Gully, HCC's Equipment Manager at the time, the local expatriate Equipment Superintendent, Mr. Tinker, was placed

under house arrest for approximately five days as part of these events[16].

456. Although the Committee guards controlled all access to the yard, HCC was still able to remove equipment not required by the Committee from Ahwaz. HCC began to export as much equipment as possible, transferring items to the Ali Abad facility for use on the Tehran Spur Contract and then transferring them to a port for shipping. HCC asserts that it was able to export approximately half of its equipment from Iran in this manner, but that after November 1979 the Ahwaz Revolutionary Committee refused to permit any further transfers from Ahwaz for shipment abroad, as did the Revolutionary Committee at Ali Abad. HCC representatives continued to apply to NIOC for permission to export the equipment, but allegedly received no response.

457. As a result of these events HCC contends that the equipment, much of which is said to be usable only in connection with the construction or maintenance of pipelines, was retained by and used for the benefit of Iranian governmental entities. In particular, HCC contends that the activities of the local Revolutionary Committees in asserting control over the storage yards and, therefore, over the equipment, constituted Iranian governmental action, pursuant to the Tribunal's decision in William L. Pereira Associates and Islamic Republic of Iran, Award No. 116-1-3 (19 March 1984), reprinted in 5 Iran-U.S. C.T.R. 198.

458. HCC therefore claims that compensation for such taking is payable, both under international law and under the Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, signed 15

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[16]Both the Gully affidavit and that of Mr. N. Esphahanian, a Senior Vice-President of HCC (see paragraph 458, infra) state that these events occurred in March 1979.

August 1955, entered into force 16 June 1957, 234 U.N.T.S. 92, T.I.A.S. No. 3853, 8 U.S.T. 900 ("Treaty of Amity"), equivalent to the fair market value of the equipment remaining in Iran, in the sum of U.S.$7,498,920. HCC's calculation of the value of the equipment is based on an appraisal by its Senior Vice President in 1980, Mr. N. Esphahanian, which is derived from internal accounting records, personal knowledge and published information. This evaluation is supported by further affidavits from Mr. Gully and from Mr. T.W. Carpenter, an independent appraiser and auctioneer.

459. In its pleadings IRAN denies that the expropriation claim is attributable to it, stating that no evidence has been brought to substantiate the alleged taking or that IRAN, or any subdivision or entity controlled by IRAN, has in any way, utilized HCC's facilities and stocks.

460. NIOC and NIGC also both deny any liability for the alleged taking. NIOC asserts that it has never interfered with any equipment belonging to HCC, nor has it made use of any such equipment. NIGC states that none of HCC's equipment is in its custody, that there has been no interference with such equipment by either NIGC or IRAN and that HCC was, in fact, authorized to export any equipment no longer needed for the projects. Both NIOC and NIGC conclude that any equipment which remained in Iran was intentionally abandoned as being worth less than the transportation costs involved in re-export. NIOC has raised a counterclaim in the sum of Rls. 206,315,440 for customs duties allegedly payable on the equipment which remained Iran.

461. In its defense of this claim, NIOC relies upon the Zad affidavit, together with affidavits from Mr. Mahmood Ghodratipour, Head of Construction and Transportation Machineries Affairs for NIGC ("the Ghodratipour affidavit"), and from Mr. Jamshid Natan, HCC's Senior Vice President for Iranian Affairs in 1980-81 ("the Natan affidavit"). In the

Zad affidavit it is argued that HCC was provided "maximum assistance for shipment of the said remaining equipment." In support of this argument NIOC has submitted copies of letters from it to various Customs Departments, dated between 20 December 1978 and 9 February 1980, requesting release of some of the equipment, together with HCC's own "Request for Export and Export Proforma Invoices" ("RFEs") dated 21 July 1979 and various bills of lading. HCC contends that the bills of lading submitted by NIOC relate to the items it was able to export and asserts: "None of the items on Exhibit 37 [the Claimant's list of expropriated assets] are reflected in the export documents offered by Respondents." The Zad affidavit also refers to, and relies upon, an internal telex from HCC's Project Manager, Mr. Eichstaedt, dated 19 October 1979, listing equipment HCC wished to export and identifying items which, in Mr. Eichstaedt's words, were "so disassembled or cannibalized that it is not practical to ship." These items are all included in the list of allegedly expropriated equipment submitted by HCC. NIOC contends that this telex indicates that HCC intentionally left those items in Iran, so as not to incur freight and shipping costs in excess of the value thereof, a proposition supported in the Natan affidavit.

462. Finally, the Ghodratipour affidavit challenges the Claimant's valuation of the equipment, offering an alternative valuation of U.S.$1,108,143, based on the supposed depreciated book value of the equipment, which Ghodratipour asserts to be the appropriate method to use to determine its real and genuine value.

2. The Tribunal's Decision

463. As the issue of the measure and calculation of compensation to be awarded in a claim for expropriation is dependent upon a factual finding that a compensable taking did

occur, the Tribunal will first examine the facts in question.

a. The Taking By The Ahwaz Revolutionary Committee

464. The Claimant's fundamental basis for the allegation of a taking is the assumption of control over the Ahwaz storage yard by the local Revolutionary Committee in May 1979. As noted above, the "document" purportedly signed by the Governor of Ahwaz, authorizing this act, is not in evidence. Nor is there any evidence on the record of any contemporaneous objection from HCC. Instead, the record indicates, and the Claimant acknowledges, that it was, in fact, able to export numerous items of equipment from Iran after that date. It is equally acknowledged by all Parties that certain items remained in Iran.

465. The Tribunal finds, on the evidence before it, that HCC was prevented from having full access to certain items of its equipment at the Ahwaz yard, as is shown by its subsequent correspondence to NIOC (see paragraph 455, supra), and that such interference was due to the actions of the Ahwaz Revolutionary Committee. Pursuant to the Tribunal's decision in Pereira, IRAN must be deemed responsible for the actions of the Revolutionary Committee. However, the Tribunal must consider not only the question of responsibility for the actions, but whether such actions constituted a compensable taking under international law.

466. The Tribunal finds that, with respect to items seized by the Revolutionary Committee for IRAN's use, a compensable taking occurred. It also determines that this taking did not extend to all the equipment at the Ahwaz yard, as shown by Mr. Eichstaedt's telex of 19 October 1979 (see paragraph 461, supra). The Tribunal is therefore faced with two problems: to identify and place a value upon those items of equipment which were so expropriated and to determine

whether subsequent events resulting in the failure to re-export other equipment also constituted a taking.

b. The Failure To Re-export

467. HCC alleges that after November 1979 the Revolutionary Committees at both Ahwaz and Ali Abad prevented further shipments or removal of equipment. As noted in paragraph 454, supra, HCC was required under the Gach Saran Contract to take steps to re-export or sell equipment imported thereunder. Even if such action was not specifically required by the other contracts, HCC is still required to show that it took all reasonable steps to export the equipment, so as to satisfy the burden of proof to show that the losses suffered by it were incurred as a result of the acts or omissions of IRAN and not by HCC's own failure to act.

468. HCC asserts that the status quo at both Ahwaz and Ali Abad changed after November 1979. In order to establish such a claim it therefore needs to evidence to the Tribunal the events which occurred to effect such change. However, the Claimant has supplied little direct evidence of any change of circumstances in or after November 1979. HCC states that it was prevented from exporting its equipment but provides no direct evidence of any frustrated attempts to export the remainder of the equipment. Although Mr. Esphahanian asserts in his affidavit that HCC continued to apply for permission to export the equipment after November 1979 but that the Ahwaz Committee rejected these applications, there is no evidence of attempts to remove equipment from the Ahwaz yard that were prevented by the Revolutionary Guards, nor of the applications being refused. Likewise, there is no evidence of export permits being granted for some items of equipment but not for others, nor, even, of any contemporaneous objection by HCC. The letter of 1 December 1979, by which HCC suspended performance for reasons of force majeure, states: "Our warehouse facility in

Ahwaz, including our equipment, spare parts and supplies at that location, has been siezed [sic] ..." However, there is no evidence in the record of any particular action or event to which this "seizure" can be linked, other than the taking in May 1979. Indeed, HCC's letter written one week earlier, states specifically: "In mid May 1979 the Ahwaz Local Government unilaterally ex propriated ..." thus confirming that HCC is still relying upon the events of May 1979 as the source of the interference.

469. HCC has submitted in evidence a copy of the minutes of a meeting held on 26/27 January 1980, i.e., after the date on which HCC had temporarily suspended performance of the Tehran Spur Contract for reasons of force majeure, which states, in connection with items at Ali Abad:

> J.N. has already received export approval. Problem is to remove from Aliabad.

and then:

> Prospects of return of H.C.C. equipment working with Khomiteh or for return of Ahwaz base are poor. Accordingly, J.N. is authorized to offer ... provided H.C.C. can remove: -
>
> (i) Items not being used by Khomiteh.
> (ii) Pipeline supplies and equipment.
> (iii) Spares in H.C.C. warehouse.

No evidence is provided to show which items had already received export approval, but which HCC was not, in fact, permitted to remove from Ali Abad for shipment. These minutes certainly suggest that most, if not all, of the equipment remaining at Ahwaz was no longer under HCC's control, even if not actively being used by the Revolutionary Committee. The Tribunal appreciates the difficulty to the Claimant of proving a negative, for example, that required approvals were not granted. However, the burden of proof to establish the alleged taking or interference with property rights rests with HCC, and the

Tribunal finds insufficient evidence in the record upon which to determine that HCC took all steps necessary to export the remainder of its equipment, but was prevented from so doing by the acts of IRAN or that HCC has established that the situation altered substantially in November 1979 so as to constitute a separate act of taking. Having found that the taking in May 1979 extended to only part of the equipment, the Tribunal must now attempt to identify and value such items.

c. Valuation Of The Equipment

470. HCC has not provided any precise information as to which items of equipment were actually used by the Revolutionary Committee. The letters submitted by HCC, complaining to NIGC of the taking in May 1979, refer, in July 1979, to "a large amount of Houston equipment," on 24 and 30 November 1979 to "a considerable, but unknown, amount of our Ahwaz construction equipment," and "our entire warehouse facility in Ahwaz including some essential pieces of equipment." However, the implication that most, if not all, of HCC's equipment as listed in Document 117, Exhibit 35 (later exhibited a second time by HCC and referred to as Exhibit 37) was taken in May 1979, or that HCC was unable to identify which items were taken, is contradicted by the detailed RFEs subsequently prepared by HCC in July 1979 and by the undisputed fact that HCC was able to export a substantial part of its equipment after May 1979. It is acknowledged that Mr. White travelled to Iran on several occassions in 1979 and that other HCC staff remained until November 1979. It seems reasonable to the Tribunal that, prior to November 1979, HCC would have been able to identify the equipment actually taken and being used by the Revolutionary Committee. Whilst the Tribunal is satisfied that Exhibit 35 is an accurate reflection of HCC's equipment which remained in Iran in November 1979, it is unable to identify from that document, or any others before it, those items which were, in fact, expropriated by the Ahwaz

Revolutionary Committee when it first assumed control over the Ahwaz yard in May 1979 and those which remained under HCC's control, at least until November 1979.

471. For the reasons discussed in the preceding paragraph, the Tribunal finds it impossible to identify from the record items of equipment at Ahwaz in respect of which a taking in May 1979 has been established, and therefore, the Tribunal is unable to award any compensation for such items. The claim for expropriation of the balance of the items is rejected.

IV. INTEREST AND COSTS

A. Interest

472. The Claimant seeks interest on all amounts awarded by the Tribunal pursuant to the decision in Sylvania Technical Systems, Inc. and The Government of The Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298. NIOC and NIGC have also requested an award of interest at a rate to be determined by the Tribunal. In the absence of any contractual provisions for payment of interest, the Tribunal finds it proper to fix the interest rate at 10 percent, pursuant to the principles and guidelines established by the Tribunal in McCollough and Company, Inc. and Ministry of Post, Telegraph and Telephone, Award No. 225-89-3 (22 April 1986), reprinted in 11 Iran-U.S. C.T.R. 3. Due to the multiplicity of individual claims, the Tribunal determines that the interest payable to HCC is to be calculated from the date of completion or termination of each contract, up to and including the date of instruction by the Escrow Agent to the Depositary Bank to make payment to HCC, as follows:

1. The Esfahan-Rey Contract

473. a) On the amounts due to HCC under the Esfahan-Rey Contract in respect of unpaid or partially paid Payment Certificates, escalation, exchange adjustment and Variation Order invoices, i.e., U.S.$1,940,817.48, interest shall run from 29 June 1977, being the date of issue of Completion Certificate No. 1;

b) on the amount of the claim for release of retention monies, i.e., U.S.$131,179.41, interest shall run from 4 November 1979, being the date upon which the Claimant became entitled to release of the funds;

c) on the amount due to NIOC in respect of the counterclaim relating to testing, i.e., U.S.$20,309.49, interest shall run from 4 December 1979, being 30 days from the date upon which HCC acknowledged the saving to NIOC;

d) the amount due to NIOC in respect of the counterclaim relating to the Ghom Pressure Reducing Station, i.e., U.S.$86,182.77, interest shall run from 19 March 1981, being 30 days after the date upon which payment was requested;

e) on the amount due to NIOC under the Esfahan-Rey Contract in respect of the counterclaim relating to the cathodic protection system, i.e., U.S.$146,735.14, interest shall run from 31 May 1980, being 30 days from the date upon which the amount due was notified to HCC.

2. The Gach Saran Contract

474. a) On all amounts due to HCC under the Gach Saran Contract interest shall run from 15 December 1979, being the effective date of termination;

b) on the amount due to NIOC under the Gach Saran Contract in respect of the counterclaim for payment of salaries to guards, i.e., U.S.$35,106.38, interest shall run from 26 April 1980, being the date on which the expenses were incurred.

3. The Ramin Contract

475. a) On the amounts due under the Ramin Contract in respect of the claims for Variation Orders and reimbursements, i.e., U.S.$399,786.56, interest shall run from 30 September 1979, being the date of completion of the work;
b) on the amount of the claim for release of retention monies, i.e., U.S.$183,444.35, interest shall run from 4 September 1980, being the date of issue of the Final Certificate.

4. The Tehran Spur Contract

476. a) On the amounts due under the Tehran Spur Contract in respect of the claims for Variation Orders and extra work i.e., U.S.$3,671,027.07, interest shall run from 7 October 1980, being the date as of which the work was certified as completed;
b) on the amount awarded in respect of the claim for release of retention monies, i.e., U.S.$1,074,838.03, interest shall run from 7 December 1980, being sixty days after the work was completed;
c) on the amount due to NIGC under the Tehran Spur Contract in respect of the counterclaim for radiographic services, i.e., U.S.$21,957.45, interest shall run from 6 December 1980, being thirty days after the amount was to be deducted from HCC's account.

B. Currency Of Payment

477. All amounts awarded by the Tribunal under these contracts which are expressed in Iranian Rials have already been converted to U.S. Dollars at the appropriate agreed rate in the main text of this Award and require no further consideration.

C. Costs

478. The Claimant and the Respondents also seek an award of costs. The Claimant has submitted evidence to show that it has incurred costs (other than legal fees) of U.S.$140,451.80 in connection with these proceedings, together with an element of U.S.$6,800 in respect of legal fees incurred as a direct result of the two-day postponement of the Hearing (see paragraph 7, supra). The Claimant also requests that "a reasonable counsel fee ... be assessed by the Tribunal" to recompense it for legal fees.

479. The Tribunal awards the Claimant U.S.$46,800 costs of arbitration.

V. AWARD

480. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a) The Respondent NATIONAL IRANIAN OIL COMPANY is obligated to pay to HOUSTON CONTRACTING COMPANY:

1. the sum of One million nine hundred forty thousand eight hundred seventeen United States Dollars and Forty-eight Cents (U.S.$1,940,817.48), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 29 June 1977 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

2. the sum of One hundred thirty-one thousand one hundred seventy-nine United States Dollars and Forty-one Cents (U.S.$131,179.41), plus simple

interest due at the rate of ten percent (10%) per annum (365-day basis) from 4 November 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

3. the sum of Four million four hundred three thousand five hundred eighty-one United States Dollars and Four Cents (U.S.$4,403,581.04), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 15 December 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; and

4. the sum of Twenty-three thousand four hundred United States Dollars (U.S.$23,400) as one half of the awarded costs of arbitration.

All other claims of HOUSTON CONTRACTING COMPANY against NATIONAL IRANIAN OIL COMPANY are dismissed.

b) The Respondent NATIONAL IRANIAN GAS COMPANY is obligated to pay to HOUSTON CONTRACTING COMPANY:

1. the sum of Three hundred ninety-nine thousand seven hundred eighty-six United States Dollars and Fifty-six Cents (U.S.$399,786.56), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 30 September 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

2. the sum of One hundred eighty-three thousand four hundred forty-four United States Dollars and Thirty-five Cents (U.S.$183,444.35), plus simple interest due at the rate of ten percent (10%) per

annum (365-day basis) from 4 September 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment act of the Security Account;

3. the sum of Three million six hundred seventy-one thousand twenty-seven United States Dollars and Seven Cents (U.S.$3,671,027.07), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 7 October 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

4. the sum of One million seventy-four thousand eight hundred thirty-eight United States Dollars and Three Cents (U.S.$1,074,838.03), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 7 December 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; and

5. the sum of Twenty-three thousand four hundred United States Dollars (U.S.$23,400) as one half of the awarded costs of arbitration.

All other claims of HOUSTON CONTRACTING COMPANY against NATIONAL IRANIAN GAS COMPANY are dismissed.

c) The Counterrespondent HOUSTON CONTRACTING COMPANY is obligated to pay to NATIONAL IRANIAN OIL COMPANY:

1. the sum of Twenty thousand three hundred and nine United States Dollars and Forty-nine Cents (U.S.$20,309.49), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 4 December 1979 up to and including

the date on which the Escrow Agent instructs the Depositary Bank to make payment to HOUSTON CONTRACTING COMPANY out of the Security Account;

2. the sum of Eighty-six thousand one hundred eighty-two United States Dollars and Seventy-seven Cents (U.S.$86,182.77), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 19 March 1981 up to and including the date on which the Escrow Agent instructs the Depositary Bank to make payment to HOUSTON CONTRACTING COMPANY out of the Security Account;

3. the sum of One hundred forty-six thousand seven hundred thirty-five United States Dollars and Fourteen Cents (U.S.$146,735.14), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 31 May 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to make payment to HOUSTON CONTRACTING COMPANY out of the Security Account; and

4. the sum of Thirty-five thousand one hundred six United States Dollars and Thirty-eight Cents (U.S.$35,106.38), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 26 April 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to make payment to HOUSTON CONTRACTING COMPANY out of the Security Account.

All other counterclaims of NATIONAL IRANIAN OIL COMPANY are dismissed.

d) The Counterrespondent HOUSTON CONTRACTING COMPANY is obligated to pay to NATIONAL IRANIAN GAS COMPANY the sum of Twenty-one thousand nine hundred fifty-seven

United States Dollars and Forty-five Cents (U.S.$21,957.45), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 6 December 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to make payment to HOUSTON CONTRACTING COMPANY out of the Security Account.

All other counterclaims of NATIONAL IRANIAN GAS COMPANY are dismissed.

e) The Escrow Agent is requested to calculate the amounts due under this Award and to instruct the Depositary Bank to make payment out of the Security Account of the net amount due to HOUSTON CONTRACTING COMPANY after offset of the amounts due to NATIONAL IRANIAN OIL COMPANY and NATIONAL IRANIAN GAS COMPANY.

f) All of the above obligations of the Respondents shall be satisfied by payment to HOUSTON CONTRACTING COMPANY out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

g) The claim of HOUSTON CONTRACTING COMPANY against THE ISLAMIC REPUBLIC OF IRAN is dismissed.

h) The Claimant, HOUSTON CONTRACTING COMPANY, is hereby released from any and all obligations which may or have already arisen out of any guarantees, letters of credit or other similar documents provided by the Claimant to secure its performance under the contracts which form the subject of this Award.

i) This Award is submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated, The Hague
22 July 1988

Michel Virally
Chairman
Chamber Three

In the Name of God

Charles N. Brower
Concurring and
Dissenting Opinion

Parviz Ansari Moin
Concurring in part
Dissenting in part
See Separate Opinion