I CLAIMS T

39-396

دیوان داوری دعاوی ایران - ایالات متحده

396

ORIGINAL DOCUMENTS IN SAFE

Case No. 39 Date of filing: 6 Sep 89

** AWARD - Type of Award _____

- Date of Award _____

_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____

_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: Second Supp Statement of Mr Khalilian

- Date _____

20 pages in English _____ pages in Farsi

R/12

In the Name of God

CASE NO. 39
CHAMBER TWO
AWARD NO. 425-39-2

PHILLIPS PETROLEUM COMPANY IRAN,
Claimant,

and

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

Second Supplemental Statement of Seyed Khalil Khalilian

Introduction

1. I believe it is indeed unseemly of an arbitrator to attempt to rebut, particularly unjustifiably, another arbitrator's statements made in the discharge of his responsibilities as a Tribunal Member. I think I had a clear obligation to explain in sufficient detail why I did not sign the English version of the so-called "Majority Award" filed with the Tribunal on 30 June 1989. This is the requirement under the Tribunal Rules, Article 32(4) providing, inter alia, that where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature. As the "Majority" failed

to state my reasons for not signing the Award, I felt it necessary to file my initial statement together with the "Majority Award", and then supplemented it on 18 July 1989.

2. Mr. Aldrich's Supplemental Statement, unlike mine, does not serve to fulfill any of his obligations as a Tribunal Member. As he admits himself, the "Majority Award", most naturally, and his Concurring Opinion adequately express his views. Mr. Aldrich in fact does not leave it to imagination that the purpose of his Supplemental Statement is to respond, or, put it more precisely, rebut my comments. I believe it is more accurate to call Mr. Aldrich's Supplemental Statement a "rebuttal" rather than a "response" because of its timing and the goal it appears to pursue. If Mr. Aldrich was truly of the view that he was under an obligation of any sort to respond to my statements without any hidden motivation, he would definitely not procrastinate until as late as 30 August 1989. It is not obviously a pure coincidence that Mr. Aldrich's Supplemental Statement emerges, as a bolt from the blue, at a time when the Appointing Authority is about to decide the challenge to Mr. Briner.

3. Mr. Aldrich's Supplemental Statement purports "to set the record straight". But this is the one thing it definitely does not do. And the present response is exactly needed to help the record <u>remain</u> straight. Though admittedly tempted, Mr. Aldrich has chosen, on balance, to be in silent on a large number of issues including the confirmation by his and Mr. Briner's legal assistants of the fact that the secret memorandum has actually been used as the basis for reaching the compensation figure of $65 million as well as Mr. Briner's resort to a number of inaccuracies in an effort to hide the realities at the signing ceremony. He has even found it totally impractical to deny my other statements. Far from serving to set the record straight, Mr. Aldrich's Supplemental Statement distorts the facts, as

it contains a large number of inaccuracies, out-of-context citations and unbelievable scenarios.

4. However, Mr. Aldrich's Supplemental Statement -- inaccurate, incredible and misleading as it is -- includes several interesting admissions and revelations. He, for example, admits that the application of the DCF formula for the calculation of the compensation was solely his idea. To this effect, Mr. Aldrich reveals that it was not until a very late stage of the so-called deliberative proceeding -- long after Mr. Briner had put forth the DCF methodology as the most meaningful and equitable means of calculating the recovery -- that Mr. Briner happened to show an interest in finding out what that formula meant after all, or, in the words of Mr. Aldrich, he "expressed curiosity as to the mechanics of the DCF formula" in the course of an informal conversation with Mr. Aldrich and his legal assistant. See p. 3, para. 4.

A. My exclusion from deliberations

5. I believe my exclusion from deliberations and unjustifiability of the Award are two inter-related phenomena. Mr. Aldrich's explanations to which I referred in para. 4 supra makes clear that the adoption of DCF methodology was solely his idea, and that Mr. Briner, the Chamber Chairman -- whom Mr. Aldrich repeatedly addresses only as the "President" and nothing else -- had agreed to use it without even knowing its "mechanics". Mr. Aldrich himself unequivocably admits that the "Award" and his Concurring Opinion closely follow one of the notes he circulated for comment during deliberations. Id. para. 7. Those notes were later completed, as far as the computation of the final figure of compensation was concerned, on the basis of Mr. Aldrich's secret memorandum. That being the case, there was indeed no place for me in deliberations on substantial issues. Mr. Aldrich is right in stating that deliberations began in February, but

he is definitely wrong in suggesting that they were ever completed or that I ever participated in any deliberations on the alleged adjustments to the Claimant's figure.[1]

6. I was never confided into the deliberations on the alleged adjustments to the Claimant's figures. I believe this assertion can be easily verified by the review of the record of the exchanged written notes, and oral discussions which, according to Mr. Aldrich, took place among us. The minutes of the deliberations conducted with my participation should reflect such deliberations if there were any, but they do not since there were none. If by deliberations Mr. Aldrich means his and Mr. Briner's "informal conversation" on the case at which one of Mr. Aldrich's legal assistants also happened to be present (para. 4 of his Supplemental Statement), I cannot naturally be expected to be aware of any such private communications. I can hardly imagine how there could be meaningful deliberations at all on the entirely irrational and incongruous basis suggested by Mr. Aldrich. He states that as certain inappropriate amounts have been subtracted from the different elements of valuation (oil available for recovery, the prices...), there was no need to substitute a different discount rate for risks in the Claimant's DCF formula. Here there is a conspicuous confusion of facts (elements of valuation) and the risk factor (discount rate).

7. The absence of any deliberations in the proper sense of the word can be inferred from the arbitrary and unreasoned

---

[1] With the limited time that I was allowed, I found it possible only to review Mr. Aldrich's analysis of oil reserves, which was merely one of the four elements of valuation. I was not even given sufficient time to fully comment upon that analysis either. Indeed, my limited comments on that analysis were never discussed, nor fully responded to.

nature of the "Award". A brief examination of the "Award" would demonstrate that it lacks any sensible basis. As explained in detail in Annex 6 to my Statement of 30 June 1989, there can be no valid correction or adjustment of a DCF formula unless it is consistently and proportionately revised in whole in respect of all its components including price, costs, production forecasts and, above all, the risk element. To take an example, the quantity of oil given by the Claimant has been reduced in the Award to somewhere in the range of 280-290 million barrels. Even if this value had any justification, which it does not, there could be no way of cutting down the claim by any proportionate degree, as the effect of such reduction would not be uniform over the 20 years in question. The same reasoning holds true of the price forecast, for the price changes are not uniform either. The most important factor concerns the risks. Here, the "Award" simply states, without more, that they "would have reduced the value of the Claimant's JSA interest very substantially.". See Award, para. 155.

8. Of the four elements of valuation (oil quantity, oil price, production cost, and discount rate), the projection of oil reserves was undoubtedly the most difficult one, as it involved many uncertainties and technicalities which were largely outside the expertise of the Tribunal Members. This did not, however, deter Mr. Briner and Mr. Aldrich from making a haphazard assessment of the oil quantities in specific, abeit fictitous, terms. Thus, in paragraph 124 of the "Award," they estimated the oil reserves at 280-290 million barrels, and were confident that this estimate was reasonable, despite the fact that the 10-k forms filed by Phillips itself with the United States Securities and Exchange Commission (the "SEC") contradicted that assumption, and proved that their estimation was grossly overstated, see paragraphs 24-26 infra for more discussion of the SEC Report. Likewise, Mr. Briner and Mr. Aldrich were very specific on the second most complex element of the formula

for valuation, viz. the projection of oil price. Here, again, they took up upon themselves to resolve this extremely specialized subject and somehow came up in favour of the Chase Econometrics Projection which was the basis for their calculations. See paragraphs 127 to 131 of the Award. They have dealt with the Estimate of Production Costs, another complicated issue, in a similar arbitrary manner, and have managed to come up, in paragraph 134 of the Award, with specific measurements to their own satisfaction.

9. But paradoxically, when it comes to the most straightforward, yet crucial element of the valuation, i.e., the issue of the discount rate, Mr. Aldrich suggests that:

> "Put simply, the valuation technique followed in the Award, although based on the DCF method, eliminated the need to substitute a different discount rate in the DCF formula and thereby made unnecessary any deliberation of the amount of such a rate."

Thus, Mr. Aldrich admits that this element was never deliberated at all despite the fact that paragraphs 113 and 155 of the Award puts it in very clear terms that the Claimant had used:

> "A very low discount rate (four and one-half percent)..." and "The Tribunal has concluded... that the risks that would have been perceived in 1979 would have reduced the value of the Claimant's JSA interests very substantially."

I am really at a total loss to understand how the so-called valuation technique adopted by Mr. Briner and Mr. Aldrich adjusted the substantial understatement in the discount rate used by the Claimant, given particularly the fact that, as admitted by Mr. Aldrich, their valuation technique was "based on DCF" and used the Claimant's figure arrived at by the application of this method. See paragraphs 154 and 155 of the Award.

10. The fact of the matter is that not only the discount rate, but none of the other valuation elements as reflected in the so-called Award were deliberated with my participation either in writing or orally. The record clearly shows that, though the "Award" purports to have used the DCF formula to arrive at the final compensation figure, it cannot be justified on that, or any other basis. Mr. Briner has, in effect, been led by Mr. Aldrich to adopt a formula (DCF) the mechanics of which was unknown to him. The amount of compensation to be awarded to the Claimant too has been decided between Messrs. Briner and Aldrich on the basis of the latter's secret memorandum containing an egregious error.

11. When Mr. Briner's Draft Award based on that memorandum was distributed on 22 June 1989, there was no question of further deliberations. At that time I had been invited to make myself available at a signing ceremony on 29 June 1989 to provide the third signature required to award an unjustified colossal amount to Phillips. At the signing ceremony, Mr. Briner refused to accept the result of correcting the mistake, as it would reduce the intended amount of the Award ($65 million doubled by an equivalent amount of interest) by more than a half. Mr. Briner only agreed to reduce that amount by $10 million with regard to no legal basis at all. It was then crystal clear to me that they were not being faithful even to their own DCF formula, or any other legal premises, but that they were resolute not to pay the Claimant less than a certain amount. This was particularly evident, because neither Mr. Briner nor Mr. Aldrich could justify either the figure of $65 million or $55 million, on which they were both in complete accord, with reference to any legal foundations.

12. Before moving on to the next point, I should also briefly point out that I cannot understand how the comparison, by Mr. Aldrich, of the remedy sought with the amount

awarded by the Tribunal would justify the approach adopted by Mr. Aldrich or Mr. Briner in handling the Case. If a claim is grossly inflated, it does not mean the Tribunal should, for instance, still award one-third of the claim. Indeed, the SEC Reports (discussed below) indicate that the Claimant in this Case had inflated its estimate of oil reserves by as much as four time.

B. Secret Memorandum

13. Mr. Aldrich denies that the memorandum provided by him or his legal assistant was the basis of the amount awarded. The scenario he has presented in support of such denial is simply grotesque and amusing! He asserts that Mr. Briner, in an informal conversation at which one of his legal assistants was present, happens to express curiosity as to the mechanics of the DCF formula. Then his legal assistant on his own initiative (meaning without Mr. Aldrich's instructions or probably even without his knowledge) prepares a number of hypothetical calculations to explore how the DCF formula worked. And, as Mr. Aldrich understands (signifying that he is not sure), his legal assistant uses several discount rates and other assumptions for the sole purpose of exercise. Mr. Aldrich claims that once his legal assistant begins to show his hypothetical calculations to him, he tells him it is unnecessary to examine them, but adds that he has no objection to his showing the calculations to Mr. Briner who, according to Mr. Aldrich's reading of the Award, reaches the conclusion that the calculations were irrelevant to the method of valuation used by the Tribunal.

14. Mr. Aldrich's assertion is disproved, in the first place, by the contents of the secret memorandum patently lacking any hypothetical or educational nature. The figures used in that memorandum are exactly those in issue in Case No. 39; and, apart from bare figures, there are no definitions or descriptions provided for teaching purposes. A

glance at the secret memorandum would serve to demonstrate that the computations made in that document are not intelligible to someone who is interested in learning about the mechanics of DCF out of curiosity. Moreover, for educational purposes, it would suffice to make the calculations for only one year and not, as in the secret memorandum, for the full 20-year period covered by the "Award".

15. Further, having regard to Mr. Briner's persisted refusal of the Respondent's request for the appointment of an expert, he should have been fully versed in the mechanics of DCF by then. Particularly so, because the Parties had extensively discussed the DCF methodology under various hypotheses at the Hearing. Now, in view of Mr. Aldrich's explanations, it transpires that Mr. Briner had, in fact, no objection to the appointment of an expert because of the technical nature of the issues involved, but his refusal to grant the Respondents' request as such was due to the fact that he thought he already had such an expert, Mr. Aldrich's legal assistant at his disposal.

16. Besides, Mr. Aldrich's extraordinary attempt to distance himself from the preparation as well as the submission of the memorandum to Mr. Briner reveals the disingenuousness of his position. How could he possibly realize what his legal assistant was going to show him, and thus avoid seeing it, when he began to show him the calculations? If there was no question about the irrelevancy of the computations, why should his legal assistant have tried to show them to him? If the calculations were totally hypothetical, why should his legal assistant have made an unsuccessful attempt to show them to him? Did his legal assistant not know that the one who had expressed curiosity as to the mechanics of the DCF formula was Mr. Briner, and not Mr. Aldrich? Did Mr. Aldrich not find out, at least later, what the memorandum contained and whether it was actually provided to Mr. Briner or not? If the answer is no, the question is why was

he not curious to learn what that memorandum contained after all? If the answer is yes, then the question is why he does not dispense with the phrase "I understand", which expresses uncertainty, when addressing those points? And finally, if the calculations were of a purely hypothetical nature, as Mr. Aldrich alleges, why should one have to read the Award to realize that Mr. Briner has reached the conclusion that the calculations were irrelevant?

17. Mr. Aldrich asserts that I have incorrectly concluded that the secret memorandum was the basis of the amount awarded. No. I have not. There are a large number of reasons for that conclusion as the development of the events reveals. Once I happened to have access to the memorandum - I will describe how this came about in the following paragraphs - and the error was noticed, I asked my legal assistant to go through the calculations with Mr. Briner's legal assistant to have him realize the mistake. My legal assistant explained his recalculations to Mr. Briner's legal assistant who compared them against his own copy of the secret memorandum and computations which I had received through the xerox room, and was shocked by the sheer size of the mistake.[2] Mr. Briner's legal assistant then discussed the error with Mr. Aldrich's legal assistant. At the time, there was no question at all that the computations in the memorandum had actually been used as the basis to arrive at the compensation figure of $65 million previously inserted in the final version of the Draft Award.

18. Upon the discovery of the mistake, Mr. Briner's legal assistant immediately informs him about it by phone while he was in Geneva. At the time, far from denying the relevance

---

[2] It is worth recalling that Mr. Briner had claimed that he had returned that copy to Mr. Aldrich's legal assistant because he had felt that it was not relevant.

of the computations in the memorandum to the intended figure of $65 million, he reportedly confirms that "we must do something about it." He then flies to the Hague forthwith and stays long hours, until very late at night, at the Tribunal going over the calculations in the memorandum together with his legal assistant. Mr. Briner agrees to convene a meeting the first thing in the morning at 8.30 on 29 June 1989 to discuss the error, while according to the former schedule there was to be solely a signing ceremony at 12.00. Mr. Briner postpones the meeting twice apparently in order to decide what position to take. At the meeting, Mr. Briner makes a number of contradictory denials and admissions about the receipt and use of the memorandum and then suddenly reduces the figure of $65 million by $10 million and angrily stresses that that is his final offer. Mr. Briner and Mr. Aldrich fail to justify those amounts on any basis at all. There cannot indeed be so much ado about nothing.

19. The next point I should like to discuss is my statement to the effect that I happened to come into possession of the secret memorandum "from a source which I do not feel obliged to disclose." This wording, by which I simply meant to say that it was needless to explain how I received the memorandum, appears to have stirred suspicion in Mr. Aldrich's mind, and has given rise to speculation and another imaginary scenario, this time about the disappearance of the computations and secret memorandum from his legal assistant's office, of which a gentleman of Mr. Aldrich's standing should not have been capable. The source I referred to, contrary to Mr. Aldrich's speculations, was entirely an innocent one as follows: Mr. Khan, in charge of the Tribunal's Xerox room, repeatedly informed my office on Friday 23 June 1989 and Monday 26 June 1989, that a file containing a copy of my memorandum written on 23 June to Mr. Briner was lying around in that room. My secretary collects the papers Mr. Khan pointed to as mine. When I received the file, I

noticed that under my memorandum of 23 June 1989 were a number of other papers, which papers were the memorandum containing the secret calculations. Then, the rest of the story followed.

20. Mr. Aldrich is definitely wrong in asserting that there has been nothing improper about the memorandum in question. The Tribunal's arbitrating panels, either of three or nine, like any other arbitral tribunals, have a carefully balanced number of the party-appointed and third country arbitrators. The discussion of the important issues affecting the arbitrating parties rights should not take place between a third country arbitrator and a party appointed arbitrator. This is why the Tribunal Rules, like any other code of arbitral procedures, requires that such discussions be conducted with all the panel members participating in an orderly process called deliberations. Mr. Briner himself does not deny that an issue should be discussed in the presence of all arbitrators before the party appointed arbitrators may address memoranda to the presiding arbitrator. See Mr. Briner's letter of 14 July 1989 to me.

21. What is particularly improper about the memorandum and rightly qualifies it as a secret one is that neither Mr. Aldrich nor Mr. Briner provided a copy of it to me. Mr. Aldrich's defence is solely aimed at showing, though unjustifiably, that he was not required to send a copy of his memorandum to me. But, he does not deny that at least Mr. Briner should have done so. I am not aware of any practice within the Tribunal allowing a Chamber Chairman to receive a deliberative memorandum from a government appointed arbitrator without sending a copy to the other concerned arbitrator. I do not believe that such a practice exists at any other decent arbitral tribunal. Nor is that, contrary to Mr. Aldrich's assertion, a permissible procedure of the International Court of Justice (ICJ). According to ICJ rules of procedures, when a judge distributes a written note

on the deliberated issues, he has to distribute it to other judges as well. See Resolution concerning the Internal Judicial Practice of the Court (Rules of Court, Article 19), adopted on 12 April 1976, Article 4(ii). Indeed, some time after my appointment as a member of the Tribunal, Mr. Briner particularly pointed out to me that any notes or comments that I was addressing to him had to be distributed not only to the other member but also to their respective Legal Assistants.

C. The Chase Econometrics Forecast was not relied on or introduced in evidence by the Respondents

22. In paragraphs 8 and 9 of his Supplemental Statement, Mr. Aldrich quotes the Respondent's statements out of their proper context, and thereby suggests that it was the Respondents, not Mr. Briner or himself who pointed out that Chase forecasts[3] in Case No. 55 could be used in Case No. 39. The Respondent's statements read in context are solely made to show the speculative and unreliable nature of the DCF methodology. The statement quoted in paragraph 8 is taken from section 3 of Iranian Oil Operating Company's Study regarding (the) Production and Cost Forecasts of the Claimant. In Doc. No. 269, Section 3, Respondent provides an overview of the technical basis of Phillips' claim and in para. 3-3 states that the price forecast used by Phillips is in contrast with Claimant's own conduct where it had used a constant price in its 1975 report and then makes the quoted comparison. That is in no way an implication of acceptability of the said forecast or its introduction into the case.

---

[3] Chase Econometrics forecast in question is in fact that of Morgan Stanley's since it has been used by the latter in Case No. 55 after extensive alterations. In other (Footnote Continued)

23. Insofar as Dr. Stevens' testimony is concerned, I have already discussed the context in which the reference was made. See para. 10 Annex 4 to my Statement of 30 June 1989. He was only demonstrating that DCF can not form the basis of a legal valuation. He used different scenarios to prove this point. In so doing, he referred to several price forecasts including that of Chase. He plainly criticized that forecast and stated his reservations about it. See Doc. No. 348. It cannot, therefore, be said, as Mr. Aldrich does, that Dr. Stevens relied on the said forecast in Case 39. It follows, thus, that Messrs. Briner and Aldrich use of the Chase Econometrics forecast in Case No. 39 was definitely inappropriate. The impropriety of such an action is particularly highlighted by the fact that the Tribunal, Chamber 3, had already rejected the Chase Econometrics forecast. See Partial Award No. 310-56-3, Para. 237.

D. The SEC Report

24. In paragraph 10 of his Supplemental Statement, Mr. Aldrich justifies the disregard of a 1979 annual report (10-k), which is a forecast far below that adopted in the Award, on two grounds. First because it was filed with the Tribunal late. Second, because it contains a caveat which renders it uncertain, particularly so since, according to Mr. Aldrich, the figure was given for the year 1979 and was not repeated in the 1980 report. In the first place, Mr. Aldrich fails to show that it is an established practice of the Tribunal to reject the late-filed documents. The Tribunal definitely would not have refused to give effect to that piece of evidence under normal circumstances for the simple reason that it was the Claimant's own document and

---

(Footnote Continued)
words, the so-called Chase forecast used by Mr. Briner is not a genuine one. Rather, it is Morgan Stanley's adjusted version of that forecast for Case 55.

needed no verification. Moreover, the document was, as admitted by Mr. Aldrich himself, of public record and the Tribunal could easily take judicial notice of it. See my Supplemental Statement of 18 July 1989, Para. 18.

25. In paragraph 10 of his Supplemental Statement, Mr. Aldrich quotes the following caveat from 10-k form:

> "The SEC views the Summary of Oil and Gas Producing Activities prepared on the basis of Reserve Recognition Accounting (Summary) as a document under development and recognizes that there are numerous conceptual and implementation issues with respect to [Reserve Recognition Accounting] that must be resolved." Emphasis added

Resorting to this caveat, Mr. Aldrich tends to suggest that the figure [of oil reserves] in the 10-k form is uncertain. It is, however, quite obvious that the caveat quoted by Mr. Aldrich relates to the concept of "Reserve Recognition Accounting", which is a new system of accounting in oil industry based on DCF (compared to conventional system of historical cost accounting). The caveat simply gives a warning that the concept of accounting based on DCF is still under development. This does not mean that the estimate in the SEC form of Phillips' entitlement to Iranian oil reserves (i.e. the 15 million barrels) has been arrived at by oil engineers under the accounting concept to which the caveat relates. In other words, the estimate of the oil reserves are made independently of the concept with which the accountants are concerned. If, Mr. Aldrich is going to use this caveat as an indication of the unreliability of all the contents of the 10-k form, in that case he should realize that the same caveat also applies to "the Award" in Case 39, which is also based on the same concept of accounting as that used in the SEC Report, i.e. DCF. Indeed, paragraph 150 of "the Award" puts it in very explicit terms that the projections on which "the Award" is based "would have seemed particularly uncertain in 1979." Emphasis added.

26. Further, Mr. Aldrich's comment, especially the citation given in support of the unreliability of SEC Report is misleading. He quotes the part stating that there are numerous conceptual and implementation issues to be resolved, but chooses to ignore the next paragraph which explains that the said report has been prepared on the same assumption as that on which the "Award" is based, viz. DCF. That paragraph reads as follows:

> "RRA [i.e. Reserve Recognition Accounting, which is the equivalent of DCF in oil accounting] is premised on the concept that earnings and losses should be recognized at the time reserves are discovered or revised, and as economic conditions changes."

That Report, therefore, is bound to disregard any future changes in economic conditions later than 1979 i.e. after the date the Report was prepared. This is exactly the theory of a reasonable buyer's estimations in late 1979 as adopted in the Award. It should also be pointed out that the Claimant had never alleged that there had been any occurrence since 1979 dramatically changing the situation in its favour. Indeed, subsequent developments, including the sharp drop in oil prices were unfavourable to the Claimant's position and the "majority" declined to take them into account on the grounds that they could not have been anticipated at the date of taking, i.e. 1979. See paragraph 126 of the Award.

27. In paragraph 10 of his Supplemental Statement, Mr. Aldrich considers that the reserve figure in the 1979 SEC Report (i.e. the 15 million barrels) is of an obscure nature because, he suggests, that figure does not reappear in the SEC Report for the following year, i.e. 1980. The fact that the 1979 SEC Report has not appeared in 1980 is quite natural and does not diminish the validity of the Report. The reason is that Phillips has written off Iranian crude

reserve in 1979. In this regard, I invite Mr. Aldrich's attention to page (s-37) of the SEC Report running:

> "Previous reserves estimates and production forecast were revised during 1979 to exclude Iranian crude reserve / 15 million barrels..." Emphasis added.

Thus, from December 1979 onwards, even the name of Phillips Petroleum Iran is deleted from the list of Phillips' subsidiaries. Mr. Aldrich should not therefore expect the reserves which, as indicated on page (s-27) of the SEC Report, were deleted in 1979 "due to internal strife" in Iran to reappear again in 1980!

E. The Range of Valuation

27. Mr. Aldrich's discussion of the range of valuations appears to be lacking any basis. The secret computation exchanged between Mr. Briner and Mr. Aldrich had produced two projected recovery figures of $79 million and $89 million, to which certain adjustments referred to in paragraph 156 of the Award had to be made for past debts owing between the Parties. These adjustments involved a credit to the Claimant for oil in storage at the end of 1978 plus production through the date of taking, and a credit to Respondent for $8.8 million in taxes due by the Claimant for 1978. Deducting these adjustments for past debts from the projected recoveries of $79 million to $89 million, produces a range of $75 million to $85 million. It is noteworthy that in a memorandum dated 16 June 1989, Mr. Aldrich indicated that the compensation amount of $65 million inserted in the final version of the Draft Award had been understated by as much as $10 million to $15 million. He, nevertheless, agreed with the figure of $65 million in order to form a majority.

28. Put another way, at that stage he still believed that the amount of the compensation should have been fixed at an

amount between $75 million and $80 million, which, as explained above, corresponds with the range arrived at through the secret computations, from which Mr. Aldrich is now trying to distance himself. It is astonishing that after the event and in view of the discovery of the mistake in the secret computations, Mr. Aldrich is now suggesting that he had previously agreed with Mr. Briner upon a range of $55 million to $70 million, of which I had never heard before. This is undoubtedly another futile attempt to muddle up the issue in order to detach the Award from the secret computations which were found to be erroneous.

29. As stated in my Supplemental Statement of 18 July 1989, Mr. Briner, at the signing ceremony, refused to correct the intended amount of the Award despite the discovery of a large error in the secret memorandum; as to do so would have substantially reduced the amount to be awarded to the claimant. But, Mr. Briner, as a compromise solution, cut down the figure of $65 million by $10 million. In an effort to justify Mr. Briner's incomprehensible action, Mr. Aldrich asserts that Mr. Briner agreed on the low end of a justifiable range of $55 million to $70 million, and that he (Mr. Aldrich) joined "to form a majority". Id. Para. 11. This statement is simply false. First, no such range can be inferred from the Award, as Mr. Aldrich tends to suggest. A range of this kind is, however, envisaged in the secret memorandum where two different discount rates of 12% and 15% had been used. Second, Mr. Aldrich had already agreed with Mr. Briner on a higher figure of $65 million previously inserted in the final version of the Draft Award distributed on 22 June 1989. Indeed, in his memorandum of 16 June 1989, Mr. Aldrich stated as follows:

> "I would prefer to award U.S.$10 to 15 million more compensation than the Chairman... Nevertheless... I concur with his proposed compensation amount [$65 million]..."

This being the case, all there was left to do later, as stated in the memorandum of 22 June to me, was to sign the Draft Award at the signing ceremony to be held on 29 June 1989, without changing the $65 million to $55 million as no such change was anymore necessary to form a majority.

F. The Innuendos Concerning efforts to delay the Award

30. The accusation of my delaying the Award is not only incorrect, but it is, in my view, unethical. Charges of this kind are commonplace tactics used routinely by some attorneys against their opponents. I believe it is unbecoming of an arbitrator to resort to such strategies to hide plain facts. The truth is that I have gone to great length to cooperate with the Tribunal to resolve the Case. I had to devote substantial amount of time to this Case, as I had not attended the Hearing of this Case and I had, therefore, no awareness of the pending issues.

31. Interestingly, Mr. Aldrich has divined as to when my sixty-one page comments circulated on 27 June 1989 was actually ready and, more than that, as to when I intended to distribute them. Through amazing clairvoyance, he states that my comments were ready long before it was circulated in the hope that it could be distributed "in the autumn" (not earlier or later). Such speculation can by no means be rationalized. There was no reason for me to delay the Award and thus bestow upon the winning Party the benefit of an extremely high interest rate of 10% to the detriment of the other Party. This kind of speculation, which is obviously contrary to fact, is indeed typical product of the imagination that has generated an unfounded Award of $110 million including interest in favour of Phillips. It also exemplifies his course of conduct in Case No. 39, and the type of mentality that led him to conveniently ignore the Tribunal Rules concerning deliberations, as did Mr. Briner.

32. A further instance of such unacceptable conduct is Mr. Aldrich's admission that he and Mr. Briner did read my comments, but they decided, on their own, without my participation or knowledge, that it contained nothing warranting the change of the conclusions he and Mr. Briner had reached. Para. 12. The veracity of Mr. Aldrich's assertion is flatly contradicted by Mr. Briner. He, in his Separate Statement of 14 July 1989 (p.7), referring to my comments, states:

> "In the fifty-six pages of remarks submitted on 27 June 1989 which is also annexed to Mr. Khalilian's Statement a number of interesting points are raised. It is only regrettable (that I did not submit them earlier)." Emphasis added.

This clearly indicates that Mr. Briner disregarded my deliberative papers in the same way that he disregarded the SEC Reports under the pretext of late filing. In order to cover up this inappropriate conduct, Mr. Aldrich is, however, introducing another twist to the whole episode of the deliberation process in Case No. 39.

The Hague,
15 Shahrivar 1368/6 September 1989

Seyed Khalil Khalilian