

ORIGINAL DOCUMENTS IN SAFECase No. 494Date of filing: 23 Jan '90

\*\* AWARD - Type of Award Final  
- Date of Award 23 Jan '90  
55 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: \_\_\_\_\_  
\_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi



CASE NO. 494

CHAMBER THREE

AWARD NO. 464-494-3

INTERNATIONAL SYSTEMS &  
CONTROLS CORPORATION,  
Claimant,

and

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

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان دآوری دعاوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	23 JAN 1990
	تاریخ ۱۳۶۸ / ۱۱ / ۲

AWARDAppearances:

## For the Claimant:

Mr. Thomas V. Lankford, Jr.,  
Mr. Steven M. Johnson,  
Mr. Jerome Owens,  
Counsel;  
Mr. Herman M. Frietsch,  
Mr. Julian Y. Barrolaza,  
Witnesses.

## For the Respondents:

Mr. Mohammad K. Eshragh,  
Agent of the Government of the  
Islamic Republic of Iran;  
Dr. Nematollah Mokhtari,  
Legal Advisor to the Agent;  
Mr. H. Piran,  
Assistant to the Agent;  
Dr. Jahanbakhsh Arfa Zanganeh,  
Mr. Gh. Mohtadi,  
Mr. Ghassem Nekoonazar,

Mr. Nasser Tavanaie Pour,  
Representatives of National  
Iranian Gas Company.

Also present:

Mr. Timothy E. Ramish,  
Agent of the Government of the  
United States of America;  
Mr. Michael F. Raboin,  
Deputy Agent of the Government  
of the United States of  
America.

T A B L E O F C O N T E N T S

	<u>Paragraph</u>
I. INTRODUCTION AND PROCEDURAL HISTORY .....	1
II. PRELIMINARY ISSUES	
A. Post-Hearing Submission .....	9
B. Jurisdiction .....	10
1. The Claimant's Nationality .....	10
2. The Respondents' Nationality .....	15
3. The Forum Selection Clause And The Subject Matter Of The Claim .....	17
III. THE CLAIM	
A. Factual Background .....	20
B. The Claimant's Contentions .....	55
C. The Respondents' Contentions	
1. NIGC's Contentions .....	66
2. IRAN's Contentions .....	77
D. Rebuttal .....	78
E. The Merits .....	84
1. Distribution Of Proceeds From The Sale Of Equipment .....	85

Paragraph

2.	The Failure To Implement LNG Projects ..	89
	(a) The Scope Of The Repayment Agree- ment .....	90
	(b) NIGC's Legal Obligations And The Understandings Of The Parties .....	92
	(c) The Good Faith Obligation .....	108
F.	The Expropriation Claim .....	116
IV.	COUNTERCLAIMS .....	118
V.	INTEREST AND COSTS .....	120
VI.	AWARD .....	125

I. INTRODUCTION AND PROCEDURAL HISTORY

1. The Claimant, INTERNATIONAL SYSTEMS & CONTROLS CORPORATION ("ISC"), entered into a joint venture with other participants to develop Iranian natural gas reserves for export. The present claim arises out of the alleged failure to repay loans in the principal amount of U.S.\$1,924,362.92<sup>1</sup> pursuant to an agreement entered into between ISC and NATIONAL IRANIAN GAS COMPANY ("NIGC") to finance such development (the "Repayment Agreement").

2. On 18 January 1982 ISC filed a Statement of Claim and Request for Expedited Hearing naming NIGC, NATIONAL IRANIAN OIL COMPANY ("NIOC") and THE ISLAMIC REPUBLIC OF IRAN ("IRAN") as Respondents.

3. The Claimant filed a separate "Motion For Expedited Hearing" on 6 April 1982. No decision to expedite the proceedings was made.

4. NIGC filed a Response to the Statement of Claim and Counterclaim on 23 August 1982 on behalf of itself and the Ministry of Petroleum. IRAN filed a Statement of Defence on 27 August 1982, as did Kangan Liquefied Natural Gas Company ("Kalingas"), an Iranian joint venture company. Kalingas is not a named defendant in this Case. NIOC has not participated in the proceedings.

5. On 18 October 1982 the Claimant filed a Reply to NIGC's counterclaim to which NIGC responded on 22 January 1986.

6. On 30 June 1986 the Claimant filed its Prehearing Memorial. The Respondents IRAN and NIGC filed their Memorials on 2 December 1986. Rebuttal Memorials were filed by

---

<sup>1</sup>Plus contractual interest. See infra para. 44.

the Claimant on 1 April 1987, by NIGC on 4 May 1987 and by IRAN on 13 May 1987.

7. A Hearing was held on 8 September 1987.

8. Subsequent to the Hearing the Claimant filed on 17 September 1987 a document purporting to be a listing by First National Bank of Chicago of its Prime Rate for the period from 15 December 1947 to 14 September 1987. On 18 September 1987 IRAN objected to this submission. By Order dated 13 October 1987, the Tribunal determined that it would consider this issue in the present Award.

## II. PRELIMINARY ISSUES

### A. Post-Hearing Submission

9. The Tribunal determines that the material contained in the Claimant's post-Hearing submission relates solely to the issue of the rate at which contractual interest is to accrue under the Repayment Agreement. Although some of this information was undoubtedly available to the Claimant prior to the Hearing, the contractual obligation to pay interest on the principal sum is ongoing requiring continual updating. The Claimant's submission does not affect the merits of the claim. Furthermore, the Respondents have been aware of the definition of how such rate of interest was to be calculated since before the filing of the Statement of Claim. Their position is not prejudiced by the filing of arithmetical calculations employing published rates readily available to the Respondents. The Tribunal therefore accepts the filing of this document.

### B. Jurisdiction

#### 1. The Claimant's Nationality

10. ISC 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. ISC states that 43% of its shares are owned by five individuals, each of whom is a United States citizen, and that a further 38% of its shares are held by another eighteen shareholders each of whom is believed to be a United States citizen or United States corporation. The Claimant acknowledges that on 15 April 1985 it transferred all of its right, title and interest in this claim to Geogas, Inc. ("Geogas"), which is also alleged to be a United States corporation.

11. As evidence of its United States nationality, ISC submits a copy of a certificate of incorporation and good standing dated 11 June 1986 from the Secretary of State of Delaware, a certificate of incorporation and good standing for Deferred Credit Corporation ("DCC"), one of ISC's major shareholders, also dated 11 June 1986, together with two sworn affidavits of Patricia D. Fowler, Corporate Secretary of ISC, which refer to and attach proxy statements for annual general meetings held in 1977 and 1982. ISC also submits United States birth certificates for three individual shareholders of DCC, who allegedly own 61% of the stock thereof.

12. The Respondents initially objected that ISC had not produced sufficient evidence of its United States nationality and subsequently contended that ISC's transfer of its rights and interests to Geogas precludes the possibility of ISC continuing to pursue the claim. Both NIGC and IRAN have requested production of the transfer agreement between ISC and Geogas.

13. The Tribunal previously has held that ISC is a United States national in accordance with Article VII, paragraph 1, of the Claims Settlement Declaration. See International Systems & Controls Corporation and Industrial Development



and Renovation Organization of Iran et al., Award No. 256-439-2, pp. 17-18 (26 Sept. 1986), reprinted in 12 Iran-U.S. C.T.R. 239, 251. The Respondents present no basis for the Tribunal to reconsider its past determination. Accordingly, the Tribunal finds the Claimant to be a United States national for the purpose of jurisdiction.

14. The Tribunal also has disposed of the issue of the transfer of interest to Geogas by virtue of its Order dated 24 December 1986, in which it states "that the . . . assignment occurred after 19 January 1981 and therefore has no bearing on the Claimant's locus standi, according to Article VII, paragraph 2, of the Claims Settlement Declaration."

## 2. The Respondents' Nationality

15. The Respondents do not dispute that they fall within the definition of "Iran" contained in Article VII, paragraph 3, of the Claims Settlement Declaration. However, they argue that Kalingas is a private company and that ISC has raised the claim on behalf of Kalingas without authorization or, in the alternative, that ISC's claim is against Kalingas and cannot be entertained by the Tribunal because it is a claim by one private company against another.

16. The Tribunal notes that the agreements upon which this claim is based were entered into by ISC with NIGC and not with Kalingas. See infra paras. 43-44. Therefore, the Tribunal finds that it has jurisdiction over the named Respondents NIGC, NIOC and IRAN and need not address the issue of the status of Kalingas, which is not a named party to these proceedings.

## 3. The Forum Selection Clause And The Subject Matter Of The Claim

17. NIGC argues that this claim arises not solely under the Repayment Agreement but also under an earlier agreement

dated 19 October 1972 between all the participants in the Kalingas venture. This agreement, known as the "Participation Agreement," provides for arbitration of disputes in Tehran and for Iranian law to prevail. The arbitration clause in the Participation Agreement is incorporated into the Repayment Agreement by Article 11 thereof, which states: "The arbitration provisions of Article 19 of the Participation Agreement shall apply to this Agreement." NIGC argues that this provision places the dispute outside the jurisdiction of the Tribunal, pursuant to Article II, paragraph 1, of the Claims Settlement Declaration. It further argues that Article 19 of the Participation Agreement provides that a dispute may be referred to arbitration only by a majority of the parties thereto and thus arbitration may not be commenced by ISC acting alone.

18. The Claimant contends that the arbitration provision in the Participation Agreement does not give sole jurisdiction to the Iranian courts and therefore does not place the dispute outside the Tribunal's jurisdiction. ISC also dismisses NIGC's other jurisdictional arguments as being "not relevant."

19. The Tribunal has held on several occasions that arbitration provisions such as those contained in the Participation Agreement (and therefore also in the Repayment Agreement) do not constitute a bar to the Tribunal's jurisdiction. See, e.g., Dresser Industries, Inc. and Islamic Republic of Iran et al., Award No. ITL 9-466-FT (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 280. Furthermore, the Claimant's claim arises out of the Repayment Agreement, to which only ISC and NIGC are parties, and not out of the multiple party Participation Agreement. Thus the provision as to a majority application is irrelevant. In the absence of any other objections, the Tribunal concludes that it has jurisdiction over all aspects of this claim, insofar as it is found to have arisen prior to 19 January 1981. See infra

paras. 114-15. The issue of jurisdiction over the counter-claims asserted by NIGC is examined in Section IV infra.

### III. THE CLAIM

#### A. Factual Background

20. In 1971 and 1972, ISC developed and presented to IRAN, through one of its subsidiary companies, a plan for the exploration and development of offshore natural gas reserves in the Persian Gulf and for the establishment of an onshore facility to manufacture and export liquefied natural gas ("LNG"). The plan provided for (1) joint exploration of the Khuff formation in the Persian Gulf to determine whether natural gas was present in sufficient quantities to justify construction of LNG facilities and (2) the formation of a joint stock company to construct the LNG facility and subsequently transport and market the LNG product.

21. In March 1972, NIGC accepted the plan and entered into a letter of agreement with ISC. ISC assembled a group of non-Iranian participants to assist with various aspects of the project. These included Halfdan Ditlev-Simonsen & Company ("Halfdan") and Fred Olsen & Company, both Norwegian ship-building concerns, and Nissho-Iwai Company, Ltd. ("Nissho"), a Japanese company which was to market LNG in Japan. These four participants entered into the Participation Agreement with NIGC on 19 October 1972, which formally created the Kalingas venture and provided for the establishment of Kalingas as a joint stock company.<sup>2</sup> NIGC was identified as the "First Party" to the Participation Agreement, holding 50% of the shares in Kalingas. The remaining 50% was divided between ISC and the other non-Iranian

---

<sup>2</sup>Kalingas was established as an Iranian company in 1974.

participants, collectively referred to as the "Second Party."

22. As the project evolved, other Second Party participants were included, namely Chicago Bridge & Iron Company ("CBI"), Enserch Service Company of Iran ("Enserch") and Crinavis Sistemas Navales y Criogenicos, S.A. ("Crinavis"), each of which assumed part of ISC's original shareholding of 27.5% of Kalingas. In 1975, Nissho was replaced by a consortium of Japanese companies known as the Japan Kalingas Company, Ltd. ("JKC").

23. Pursuant to the terms of the Participation Agreement, a further agreement was signed on 22 February 1973 between the original parties to the Participation Agreement to provide financing for the project (the "Credit Agreement").

24. The Participation and Credit Agreements constituted the basis of the project and contain the original understandings of the parties. The Participation Agreement provides that Kalingas was to be responsible for the design, construction and operation of a natural gas liquefaction plant and related facilities. Kalingas also was to arrange for the sale and export of between four to seven million metric tons of LNG per year. The Second Party was required to arrange "all the financing required for the implementation of the Project, amounting to approximately \$652,000,000 U.S. dollars including without limitation, First and Second Party's contribution to the share capital of the Joint Company." Such financing was to be "on terms and conditions acceptable to both Parties." The Participation Agreement specifically provided that any loans or credits made to Kalingas were to be collateralized by "take or pay LNG Sales and Purchase Contracts and such other collateral as may be mutually agreed; it being understood that guarantee shall not be required of the Parties."

25. Pursuant to Article 2 of the Participation Agreement, NIGC was responsible for all activities relating to the exploration, drilling and operation of wells in addition to the sale of natural gas to Kalingas. The Second Party, however, was responsible for providing the necessary financing for "the confirmation and development of gas reserves, including without limitation, the drilling of wells." Repayment of these advances was stated to be "subject to the discovery and confirmation of sufficient gas reserves to meet the requirements of the Project and permit the obtaining of loans for the Project."

26. The Second Party's financing obligations were further clarified in the Credit Agreement, pursuant to which the Second Party was to advance funds for up to three confirmation wells. The program was divided into two phases, with progress up to and including drilling of the first confirmation well designated as "Phase One," and the drilling of not more than two additional confirmation wells designated as "Phase Two." Each member of the Second Party could withdraw at the end of Phase One if they so wished. NIGC was under no obligation to repay any amount advanced under the Credit Agreement "unless the Program confirms that sufficient gas reserves are present . . . to meet the requirements of the Project and to permit the obtaining of permanent financing for the Project as indicated in the Participation Agreement."

27. NIGC commenced its confirmation well drilling program ("CWD") in August 1973. The information presented to the Tribunal indicates that it was a great success. According to a report prepared for Kalingas in May 1976, the area explored, known as the Pars Field, represented the largest natural gas field outside the Soviet Union with reserves far in excess of the needs of the Kalingas project. On 10 July 1976, Mr. T. Mossadeghi, then Managing Director of NIGC, wrote to the individual members of the Second Party, advising them that "beyond any doubt, . . . the requirements of

Kalingas Company to Natural Gas under the Participation Agreement can be met out of the natural gas producible from Pars Structure."

28. Although an enormous success, the CWD had proved much more expensive for the Second Party than originally envisaged, largely due to inflation. NIGC wanted to proceed immediately with development well drilling ("DWD"). Initially, the Second Party members were reluctant to advance further funds due to the increased costs but after negotiations a further agreement, the "Loan Agreement," was signed on 19 October 1976, providing that all new advances would be "made on the same terms as the loans made to Kalingas pursuant to [the Credit Agreement] for financing development (production) wells."

29. Because of the vast size of the Pars Field NIOC was able to commence drilling operations independently of the Kalingas project. In early 1977, NIGC indicated to the Second Party that NIOC was willing to assume responsibility for NIGC's development drilling program. On 10 May 1977, with the full consent of the Second Party, NIOC took control of all NIGC drilling operations and equipment. As of that date, the Second Party was relieved of any further obligation to fund the DWD program and was able to devote its attention to finding long-term financing for the Kalingas LNG project.

30. As originally conceived, the success of the LNG project was dependent upon arranging 100% project financing secured by long-term "take or pay" LNG sales contracts. This proved difficult to do. In a January 1977 report prepared by the financial advisors to Kalingas, Bankers Trust International Limited and Lloyds Bank International Limited, all parties to the Participation Agreement were advised that long-term financing and LNG purchase contracts would not be easy to arrange, as Kalingas did not own the natural gas to be produced from the Pars Field but merely had a right to

purchase such gas. The financial advisors noted that each shareholder would be required to contribute to the equity capital of the venture and that, as host country, Iran would be required to provide certain political risk assurances to prospective purchasers, including the assumption of debt service obligations in the event that LNG deliveries were interrupted. The financial advisors also pointed out that to their knowledge, no LNG project had ever been financed using take or pay contracts.

31. Despite this report NIGC stated at a shareholders' meeting held on 15-16 February 1977 that it "was not prepared to agree to a change in the basic documents" and that, of the options proposed by the financial report, the two alternatives requiring Iranian government guarantee of the required export credit financing were not acceptable to NIGC. Mr. Mossadeghi, who was by this time Chairman of NIGC, contended that

if at the end of April, 1977, the Second Party did not have a viable solution for the continuation of the project then he saw no alternative but to serve a notice on each Second Party Shareholder to the effect that there are genuine grounds and causes for the termination of the Participation Agreement.

Mr. Mossadeghi stressed the April 1977 deadline several times during the meeting and concluded that "the Kalingas project could be abandoned, but could not be delayed."

32. By Spring 1977, the Second Party participants had begun to develop two separate projects for Kalingas. Crinavis had developed a plan to construct a floating sea-based liquefaction facility which would require only 10% equity financing by the Second Party. JKC was developing a plan for a land-based facility which was formally submitted in June 1977. Shortly before the expiry of the time referred to by Mr. Mossadeghi in the February shareholders' meeting, the Second Party notified NIGC by letter dated 29 April 1977

that "the Kalingas Project has reached the point where the Second Party Shareholders can inform you that it forms a basis on which funds could be committed by the Second Party Shareholders and a Project Release Date of December 31, 1977, be achieved." The Crinavis proposal was accepted in principle at a Kalingas Board meeting held on 30 April and 1 May 1977, with the JKC proposal to be implemented concurrently. An internal document submitted by ISC at the time indicates that the JKC project might involve stock buy-out possibilities and concludes: "This is clearly the beginning of [JKC's] move to make this a 100% Japan project." Both projects needed to be ready for implementation by 1 September 1977 in order to achieve the desired commitment dates.

33. The JKC formal proposal was distributed to the other members of the Second Party at a board meeting held on 25 June 1977. The introduction to the proposal states: "This proposal contemplates that the other Second Party shareholders will not elect to participate." It also was indicated at this meeting that the 1 September deadline could be met only if NIGC could negotiate the feed gas price with NIOC well in advance of that date. NIGC's representative at that meeting, Dr. Abusaidi, confirmed that NIGC was expediting negotiations with NIOC on this point. On 29 August 1977, NIOC issued a guarantee to NIGC to deliver natural gas to NIGC or Kalingas for a twenty-year period commencing 1 January 1982 at the rate of 1.4 billion standard cubic feet per day. No pricing was fixed in this letter.

34. On 31 August 1977, JKC presented a proposal to NIGC for the financing of construction of the JKC land-based facility at a total cost of U.S.\$764 million. The proposal provided for 50% of the financing to be provided by Japan by way of an export credit that would require guarantee by the Iranian government. The remaining 50% was to be provided by the members of the Second Party.



35. Subsequently various negotiations were conducted between the Second Party participants, culminating with a shareholders' meeting on 23 October 1977 in Tehran. The minutes of this meeting indicate that a "Memorandum of Understanding" (which is not in evidence) had been reached on 22 October 1977 between the Second Party members. As summarized in the minutes, the Memorandum of Understanding recognized that several projects were possible within the structure of Kalingas and that not all Second Party members would wish to continue to participate in each project. It therefore provided for each shareholder to determine whether or not it wished to continue to participate in the Kalingas project and for any withdrawing member to recover its prior advances from sales from "any or all LNG Projects." It also provided that the non-participating parties would agree to waive their rights and forgo all claims in projects in which they did not participate, other than the right of repayment of advances. The minutes of the meeting of 23 October 1977 record that:

The Chairman [Mr. Mossadeghi] stated that his concept was NIGC is committed to the repayment of advances made by the Second Party only within the framework of the Participation Agreement, and as long as this repayment could be derived from sale of LNG.

Dr. Abusaidi emphasized that those Second Party Members who do not participate in LNG Projects within the framework of the Participation Agreement should transfer their shares to NIGC at nominal value.

The Chairman then stated that unless a LNG Project was initiated within the framework of Participation Agreement and within six months from now, NIGC would not have an obligation to repay the funds paid by the Second Party under Participation Agreement.

#### Future of the Company

The Chairman stated that today he was going to give a notice to each of the Second Party Shareholders stating that the Participation Agreement should be terminated within six months from the date of the service of the said notice of the

Second Party Shareholders unless Second Party Shareholders initiate a firm LNG Project within the said six month deadline.

36. Consequently, on 24 October 1977, Mr. Mossadeghi notified the Second Party participants as follows:

A review of the . . . provisions of the [Participation] Agreement clearly indicates, in the light of what has transpired since the signing of the Agreement, instances where the Second Party to the Agreement has been in breach of Contract. Furthermore, in spite of frequent extensions of repeated time limits for the realization of the Project, the Second Party is not yet in a position to present a feasible project and to assume the liabilities required from each of the shareholders of Kalingas for the implementation of any such Projects.

In view of the reasons briefly outlined above which establish breach of Contract on the part of Second Party, we regret to have to give you hereby six months notice from the date hereof to terminate the Contract, as provided for in Article 13 (2) of the Agreement.

37. JKC, in particular, objected and advised NIGC that it did not accept the notice of termination. In its response dated 26 November 1977 NIGC pointed out that the Second Party participants were jointly responsible to NIGC for the fulfilment of the obligations under the Participation Agreement. NIGC concluded by stating:

We do recognize, however, your approach and efforts to implement the proposed land-based LNG project, outside the scope of activities and independent from other members of Second Party, but since this project has not yet reached the stage of realization, it is difficult for us to make any judgement thereon at this juncture. It is, however, our expectation that you would take appropriate measures to realize this project as scheduled and in any case not later than the expiry date of the said Notice.

38. On 26 December 1977 JKC wrote to the other Second Party participants with its latest financing proposals for the land-based facility, based on the proposal submitted to NIGC

in August. This proposal required each shareholder to provide a pro rata share of 20% of the total investment cost as equity and for the remaining 80% to be financed by loans. Of this 80%, one half would be financed by export credits from Japan, to be guaranteed by the Iranian government, and the rest by direct loans pro rata from the Second Party participants. The proposal recognized that some of the Second Party shareholders would not wish to participate and stated that such shareholders would receive repayment of existing advances "in such manner as would be finally agreed upon between NIGC and members of Second Party." JKC gave each Second Party member thirty days in which to notify JKC that it wanted to participate in the JKC project as outlined. ISC did not respond.

39. Meanwhile, work on the Crinavis proposal was proceeding and on 1 March 1978 Crinavis submitted a joint proposal with General Electric Corporation to NIGC for the floating facility at a total cost of U.S.\$732 million. Of this amount, Crinavis intended to arrange debt financing for 90%, which would require guarantee only from NIGC and not from the government of Iran, with counter-guarantees to NIGC from other individual shareholders. The proposal was subject to acceptance and execution of an unrestricted contract by 30 April 1978.

40. On 13 March 1978, JKC submitted to NIGC a revised "Joint Implementation Schedule" for the JKC project. Inter alia, this envisaged that negotiation of financing would be completed by mid-June 1978, with a formal commitment and signature of the loan agreements in October 1978. The next day, Mr. Mossadeghi wrote on behalf of NIGC to JKC accepting the revised implementation schedule for the JKC project. This letter is pivotal to the understanding of later developments and reads as follows:

This will acknowledge receipt of the attached revised schedule dated March 13, 1978 for our joint realization of the Japanese land-based LNG

Project. NIGC accepts this schedule for implementation of the Japanese Project.

NIGC's acceptance of this schedule assumes that a letter satisfactory to NIGC confirming the intent of JKC to implement the Project will be received prior to the expiration of the notice in our letter of October 24, 1977.

NIGC further agrees that it would not take any action to invoke the provisions of Article 13 of the Participation Agreement in respect of JKC provided that the land-based LNG Project now being negotiated is duly implemented in accordance with the attached schedule.

NIGC further states that, as and when the Second Party shareholders which will not participate in the Japanese Project are no longer shareholders in Kalingas, NIGC will take such action as may be required to supplement or amend the Participation Agreement to reflect the foregoing.

We would appreciate if you would indicate your acceptance of the foregoing and we look forward to joint implementation of the Japanese Project with you.

JKC responded on 15 April 1978, acknowledging NIGC's letter and stating:

As your partner in this Project, we wish to confirm the following to you:

1. JKC will participate in the Project up to 47.5%. We understand CBI will be a 2.5% participant and NIGC will participate for the remaining 50%.
2. . . .
3. The entire financing of the total investment cost of the Project less the equity and CBI's direct loan portion will be provided by Japan as will be mutually agreed.

41. By this stage, most of the Second Party participants had decided not to participate in the JKC project. A CBI internal memorandum dated 13 March 1978 refers to the initialling of repayment and accession agreements with NIGC relating to the balance of its holding in Kalingas and indicates that both Enserch and Halfdan were in the process

of preparing similar documents. This memorandum recites that the repayment agreement reached between CBI and NIGC provided for repayment of advances in proportion to the production from all LNG projects utilizing the Pars Field, and not just from Kalingas. Based on the estimated output presented in the JKC proposal, CBI calculated that, even if the JKC project was the only one to proceed, it could still recover 70% of its advances.

42. ISC had decided not to participate in the JKC project. Although there is no correspondence between ISC and NIGC during this period in the record, an internal ISC memorandum dated 17 April 1978 indicates that ISC had agreed to assign all of its shares to NIGC. In part, this memorandum provides:

All members of the Second Party will have the same repayment agreement. Information obtained from [CBI] indicates that all parties are positive on the project going ahead so as to assure repayment of the advances. Further representations have been received from NIGC indicating that any other LNG project in which the feedstock is from the Pars Field would be credited against the loan repayment formula.

43. Consequently, on 23 April 1978, one day before expiration of the six-month notice of breach and termination of the Participation Agreement, ISC assigned all of its remaining shares in Kalingas to NIGC. All parties to the Participation Agreement, including NIGC, consented to such assignment in an Accession Agreement of the same date. Article 2 of the Accession Agreement confirms that ISC shall have no further rights, duties or obligations under the Participation and Credit Agreements or as a shareholder in Kalingas, except as specifically provided in the Repayment Agreement. The Accession Agreement also provides in Article 3:

The Parties hereto hereby release ISC from any and all claims, demands, actions, or causes of action, relating to, arising, and/or resulting from the

Participation Agreement and the Credit Agreement and ISC hereby releases the other parties hereto from any and all claims, demands, or causes of action, relating to, arising, and/or resulting from the Participation Agreement or the Credit Agreement or from the participation of any of the parties or their successors in any project utilizing natural gas which Kalingas has the rights to purchase and utilize for the manufacture of liquefied Natural Gas. ISC declares that they have no liability financially or otherwise to any party, or company, or person natural or juridical as a shareholder of Kalingas. Provided however, that ISC retains the right to pursue any claims or causes of action arising out of any of said agreements insofar as they relate to the [Repayment] Agreement between ISC and NIGC . . . .

44. Simultaneously, ISC and NIGC executed the Repayment Agreement, the preamble to which recites that "the Parties desire to provide for repayment to [ISC] of certain amounts advanced by [ISC] for the Kalingas Project." The Repayment Agreement records the total principal sum advanced by ISC to be U.S.\$1,992,811.67 as of 31 January 1978, and provides in Article 5 thereof for interest

at the rate per annum of one percent (1%) above the prime lending rate of The First National Bank of Chicago (namely, the prime lending rate of said bank applicable to 90-day commercial loans to substantial and responsible corporate borrowers) from time to time in effect and changing simultaneously with each change in such prime rate.

Interest accrued on the loan to 31 December 1977 was calculated at U.S.\$105,863.31.

45. The Repayment Agreement provides for repayment by two means. First, it was acknowledged that surplus funds might become available from the monies provided to finance the NIGC drilling program after final payment and sale of the remaining equipment, and that "NIGC will immediately and directly disburse to [ISC] its pro rata share of surplus funds . . . ." Second, the Repayment Agreement provides in Article 4 that:

The portion of the Loan Amount plus the portion of the total interest accrued on the Loan Amount to be paid to [ISC] under this Agreement shall be that percentage of the total Loan Amount plus total interest equal to percentage that the level of annual production of LNG, expressed in metric tons, which has been achieved during the term of repayment, is to four (4) million metric tons; provided, however, that in no event shall such percentage exceed one hundred percent (100%).

Article 6 provides in part:

The amount to be paid to [ISC] . . . shall be . . . payable solely out of the proceeds of the sale of natural gas by NIGC to Kalingas less the intrinsic value and production cost of such natural gas. It is the intent of NIGC to sell gas to Kalingas at a price sufficient to provide proceeds which . . . will provide funds for the repayment due to [ISC], over a period of ten (10) years. The determined amount of annual repayment shall be that amount which results in equal annual payments over the remaining years of the ten year (10) term of repayment and is sufficient, together with previous repayment, to repay the amounts due [ISC] within ten (10) years from the date of first production of natural gas from the Pars Field utilized for the manufacture of LNG in quantities and for proportion set forth in paragraph 4 hereof.

46. ISC and NIGC also provided that the arbitration provisions of the Participation Agreement would apply to the Repayment Agreement (see supra para. 17) and concluded: "Except as otherwise stated herein, this Agreement supercedes, in its entirety, the Credit Agreement insofar as it pertains to [ISC]."

47. On 26 April 1978, a memorandum was distributed within CBI summarizing the restructuring of Kalingas that had taken place. The memorandum indicates that ISC, Enserch and Halfdan each had terminated its interest in Kalingas and that Crinavis intended to terminate its interest subject to Spanish government approval and the completion of an escrow arrangement. Consequently, only JKC and CBI were expected to continue as Second Party participants in Kalingas.

Additionally, each shareholder, whether continuing or noncontinuing, was reported to have entered into a repayment agreement with NIGC similar to that entered into by ISC.

48. On 2 July 1978, Kalingas wrote to NIGC concerning payment for materials and assets handed over to NIOC on assumption of the DWD program, outlining the share due to each Kalingas participant. ISC's total share of the amount due was calculated to be U.S.\$172,302.23. The letter states:

The "Repayment Agreements" between NIGC and the various participants makes provisions for the immediate distribution of funds received from the sale of inventory of equipment remaining from the drilling program.

. . .  
A cash distribution of the above amounts can be made to all participants when payment is received from NIOC for the value of these materials and assets.

49. Negotiations continued between NIGC and JKC and also between NIGC and Crinavis. Crinavis was still proceeding with its plans for a floating facility, to be known as Kalingas No. 2, even though the time limit in its original proposal had expired. Crinavis still retained its shares in Kalingas, and was prepared to assign them to NIGC only if Crinavis was permitted to form another joint venture company to implement its own proposal. One other project, proposed by a Norwegian consortium and known as the MRV project, was also under consideration.

50. In December 1978, a draft Shareholders' Agreement was drawn up for the land-based JKC project. This was to amend the Participation Agreement, which would continue in effect for the balance of its original twenty-year term. The draft, which was never signed, required Iranian government approval and provided in Article 2.2 that "NIGC's share of . . . loans and/or credits shall in consultation with and subject to approval by [NIGC] be arranged by JKC from Japan,



provided that NIGC shall obtain the guarantee of the Government of Iran for 100% of NIGC's share of such loans and/or credits." Although no specific reasons have been given for the failure to sign this agreement, it appears that NIGC and JKC were unable to persuade Crinavis to release its shares in Kalingas. This, in turn, delayed completion of the financing arrangements because, in order to obtain the necessary financing from the Japanese EXIM Bank, Kalingas was required to be restructured to be owned jointly and equally by JKC and NIGC.

51. Although the LNG Sales, Natural Gas Sales, Construction and Engineering Contracts for the JKC Project had been signed in June 1978, no further progress was made on either of the Kalingas projects due to the political and social turmoil in Iran in the early part of 1979. On 29 September 1979, some six months after the Islamic Revolution and the establishment of the new government, NIGC and JKC met again to discuss the project. NIGC was represented at the meeting by Mr. Etemad, a newly appointed director in charge of planning. ISC was not represented at this meeting, as it was no longer a shareholder in Kalingas, but it has produced in evidence a letter dated 29 November 1979 from JKC to its co-shareholder, CBI, in which it is stated that Mr. Etemad outlined IRAN's policy to be as follows:

- a) First of all, natural resources should be reserved for the benefit of the nation.
- b) Secondly, the price of natural gas, when it is decided to be sold, should be equivalent to the international price of crude oil. Namely, the price of natural gas to be delivered to Kalingas should be equivalent to the FOB price of crude oil at the delivery point. Otherwise, NIGC will lose the justification toward the government for proceeding with this project.
- c) After review of the Kalingas agreements, NIGC still has to maintain that the Second Party has not performed its obligations under the Participation Agreement in respect of the financing arrangement (no equity contribution and no guarantee

on financing) and marketing arrangement (4-7 million tons).

Consequently, the new Chairman of NIGC, Mr. Morshed, wrote to JKC on 6 November 1979, referring to the meeting held on 29 September 1979 and stated:

A review of the Project submitted by J.K.C. indicates that the proposed financing of the Project is not in conformity with the provisions of the Participation Agreement outlined herein-above which establishes breach of contract. We, therefore, regret to have to give you hereby six months notice from Sept. 29, 1979 to terminate the contract as provided for in Article 13 (2) of the Agreement.

JKC objected to this notice on 22 November 1979, pointing out that NIGC had been aware since 1977 that the JKC proposal required both equity contribution and government guarantees and that, although NIGC had raised objections to various issues, it had never objected to these two basic concepts. NIGC responded on 23 January 1980, maintaining its position under the notice and stating:

[Y]ou are well aware that in the absence of authorized and effective amendment(s) to or alteration(s) in the Participation Agreements, with respect to the questions at issue the provisions of the Participation Agreement remain intact and constitutes the sole basis of the relations between the parties and of their respective rights and obligations.

52. On 5 May 1980 NIGC wrote to JKC again, confirming that the Participation Agreement was declared terminated "as of March 23, 1980." However, on 10 September 1980, NIGC purported to revoke its six-month notice of 6 November 1979 (long after it had expired) and gave JKC, Crinavis and CBI a further six-month notice from the date thereof. Once again, JKC objected to NIGC's notice of termination, stating that:

There was no objection by NIGC to [JKC's] confirmation [of 15 April 1978] and based on the above . . . NIGC, JKC and CBI jointly proceeded to the

implementation stage of this Project including the financing scheme, which, from the beginning of our presentation of the Land-based LNG Project, had been premised on the equity contribution by all the shareholders of Kalingas and on the guarantee of the Iranian government for the NIGC's portion of the debt service.

53. Finally, on 22 April 1981, NIGC telexed JKC and the other shareholders, as follows:

[Please] be advised that our position and stand as to the termination of the Participation Agreement . . . remains unchanged . . . . Furthermore, since no action has been taken on the part of Second Party to remedy their breach during six-month period set forth under para 2 of Article 13 of the Participation Agreement, we therefore declare the Participation Agreement terminated as from March 11, 1981.

NIGC also called an Extraordinary General Meeting to discuss the liquidation of Kalingas. JKC responded by a lengthy telex on 11 May 1981 stating that it was unable to accept the notice of termination, explaining its reasons and confirming its continued interest in the implementation of the Kalingas project. JKC's telex concluded:

In view of the surrounding circumstances in Iran, however, we would like to propose you to keep this project as it is for the time being until both parties will be able to commence discussions for the re-establishment of the project on a viable basis under a normal business climate.

54. The Kalingas project never was implemented. While legal action has been taken by NIGC in Iran to dissolve Kalingas, an application for liquidation, dissolution and winding-up was rejected by the lower courts based on the requirement in the Participation Agreement that the remaining shareholders must settle any dispute by arbitration. This decision was confirmed by the Iranian Supreme Court. Of the original principal amount of U.S.\$1,992,811.67 due to ISC only the sum of U.S.\$68,448.75, representing sums for

engineering costs and fees previously paid to one of ISC's subsidiaries, has been paid.<sup>3</sup>

B. The Claimant's Contentions

55. The Claimant seeks to recover the net principal sum of U.S.\$1,924,362.92 advanced by ISC for the Kalingas project ("the Loan Amount"), to which it is allegedly entitled under the Repayment Agreement, together with continuing contractual interest.<sup>4</sup> The Claimant asserts that NIGC breached the Repayment Agreement in two material respects by failing to perform in good faith its express and implied contractual duties.

56. The Claimant asserts that NIGC first materially breached the Repayment Agreement in July 1978, by failing to distribute proceeds from the sale of drilling equipment and supplies to NIOC. The Claimant relies upon the letter of 2 July 1978 from Kalingas to NIGC (see supra para. 48) to evidence the agreement between NIGC and NIOC to pay for this equipment and the amount of ISC's share. The Claimant states: "Prior to the revolution, NIGC directors never once objected to the amounts involved nor did they ever deny that the sums should be paid." ISC contends that, despite continual assurances, it has not received any of its share of these proceeds and that this failure constitutes a bad faith breach and repudiation of the Repayment Agreement as early as July 1978. The Claimant contends that the Repayment Agreement does not make any such payment contingent upon implementation of an LNG project and concludes:

---

<sup>3</sup>As evidenced by a telex from ISC to NIGC dated 26 June 1978.

<sup>4</sup>As at 31 December 1986, interest was calculated by the Claimant at U.S.\$2,449,524.59.

Evidence that the July, 1978 breach and repudiation were in bad faith has been confirmed, first, by the fact that NIGC subsequently received its pro rata share of proceeds from NIOC whereas Second Party participants received nothing, and second, by the new Iranian Government's refusal to acknowledge their obligations under Section 2 of the Repayment Agreement. The combination of non-performance and repudiation entitles Claimant to recover the full amount claimed.

57. The Claimant's second allegation of material breach is founded upon the Respondents' "unilateral and unjustified decision to abandon LNG projects." The Claimant argues that by making repayment contingent upon LNG production and sales, the Respondents assumed an implied duty to use their best efforts to implement LNG projects. The Claimant asserts that, "where a party's duty to perform is subject to a condition precedent, that party has made an implied promise to use his best efforts to perform the condition in good faith." Citing various authorities, including Article 237 of the Iranian Civil Code, the Claimant concludes that, where a party promises to make payment out of a designated source of future funds, "the party has an obligation to use his best efforts to ensure that the funds will exist."

58. In addition to an obligation implied by law, the Claimant also argues that the Respondents' good faith and best efforts obligation arises from the circumstances surrounding the execution of the Repayment Agreement. The Claimant asserts that by early 1977, all of the participants, including NIGC, were aware that the Kalingas project could not proceed without revision and that NIGC accepted the revised JKC project one month before entering into the Repayment Agreement with ISC. The Claimant argues that NIGC's letter of 14 March 1978 indicates NIGC's commitment to the JKC project. The Claimant further alleges that ISC exchanged its equity position in Kalingas on the strength of representations by NIGC that it intended to proceed with the Kalingas venture, as evidenced by NIGC's letter of 14 March 1978 (see supra para. 40), and based on the understanding

that proceeds from any future LNG project using natural gas from the Pars Field would be used to repay the loans.

59. The Claimant relies on various contemporaneous documents to show that each of the Second Party members believed that repayment was assured "in light of NIGC's acceptance of the Japanese LNG plant and representations that NIGC would pursue at least two other pending LNG projects." See supra paras. 49-50. Both Mr. Barrolaza and Mr. Frietsch, the witnesses produced by the Claimant, testified at the Hearing and in their affidavits that they believed NIGC had an obligation to pursue LNG projects diligently and would do so in good faith. Mr. Barrolaza also testified that NIGC accepted the JKC proposal in March 1978 and that all of the withdrawing Second Party participants relied upon that acceptance when entering into the Accession and Repayment Agreements.

60. The Claimant also asserts that the terms of the Repayment Agreement itself reflect the contemporaneous understandings, as the examples contained in that document reflect precisely the minimum amount of LNG to be produced by the revised JKC project. The Claimant concludes:

Repayment of the Loan Agreement was made contingent on LNG production because NIGC had agreed to implement LNG projects and because NIGC had accepted the JKC project and was actively pursuing others. Consequently, the duty of good faith obligated Respondents to use their best efforts to implement LNG projects and thereby repay the Loan Amount.

61. Consequently, the Claimant contends that it has a right to full and immediate repayment of the Loan Amount as a result of the Respondents' alleged breach of their obligations as demonstrated by NIGC's purported refusal to proceed not only with the revised JKC project, but also with any other LNG project.

62. The Claimant contends that IRAN's declaration in September 1979 that it had reserved the gas in the Pars Field for its own purposes (see supra para. 51) constituted a unilateral declaration which "terminated negotiations, ended foreign participation in the project, and destroyed the prospect of an operating LNG facility." The Claimant argues that: "In denying its repayment obligations, NIGC seeks to benefit from its own unilateral actions which, in effect, have nullified one method of repayment on which the parties had relied." The Claimant thus concludes that: "The effect of any development of the Pars Field without repaying [the sums advanced] is the unjust enrichment of NIGC, NIOC and IRAN."

63. In particular, the Claimant asserts that "a failure, without legal excuse, to perform in good faith any implied or express contractual duty constitutes a breach of contract for which the breaching party is liable in damages" and that where a party unjustly prevents the fulfilment of a condition precedent to performance, that party also commits a breach of the alleged underlying duty, and that by interfering with its performance, the condition precedent is eliminated and the full debt becomes payable immediately. In support of this argument, the Claimant cites the Tribunal's decisions in CMI International, Inc. and Ministry of Roads and Transportation et al., Award No. 99-245-2 (27 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 263 and Time, Incorporated and The Islamic Republic of Iran et al., Award No. 139-166-2 (22 June 1984), reprinted in 7 Iran-U.S. C.T.R. 8.

64. The Claimant asserts that the evidence submitted indicates that, until the end of 1978, the "Respondents were participating in the revised LNG project and were, in good faith, exercising their best efforts to implement LNG projects" but that execution of the revised Shareholders' Agreement and implementation of the LNG projects were delayed due to the events of the Iranian revolution and other internal disruptions. The Claimant also asserts that

Mr. Mossadeghi informed both JKC and CBI that all necessary governmental approvals had been obtained informally and that formal approval would not be an obstacle. The Claimant contends the Respondents' bad faith is evidenced by IRAN's declaration in September 1979 that it had reserved the gas in the Pars Field for its own purposes. The Respondents' refusal to proceed with the project is therefore seen as an "uncompromising and unreasonable decision to revoke their prior acceptance of the project [which] prevented implementation of the LNG project." The reasons given by NIGC at the time (see supra paras. 51-53) are dismissed by ISC, which states:

When Kalingas was restructured in April, 1978, NIGC agreed with JKC's revised approach to project financing and assured ISC that the Japanese LNG project would be implemented in accordance with these arrangements. Until new NIGC directors were appointed after the revolution, NIGC never once objected to the revised financing arrangements.

65. The Claimant sums up its arguments by stating:

The plain facts demonstrate, however, that Respondents unilaterally and inexcusably abandoned the revised project and other LNG projects and thereby frustrated the only condition to repayment - revenues to NIGC from sales of natural gas to LNG projects. Because Respondents improperly frustrated the source of repayment, in violation of the duty of good faith and best efforts, they have materially breached the Repayment Agreement.

C. The Respondents' Contentions

1. NIGC's Contentions

66. NIGC agrees that the Repayment Agreement is conditioned, but argues that any repayment was payable only from profits generated by the Kalingas project and not from any other project. In support of its argument, it relies on Article 6 of the Repayment Agreement, which states: "The amount to be paid to Lender . . . shall be . . . payable



solely out of the proceeds of the sale of natural gas by NIGC to Kalingas." NIGC contends that the formula contained in the Repayment Agreement linking the percentage of the repayment to the production level of LNG implies that NIGC had no obligation to pay any amount if no proceeds became available from the sale of natural gas to Kalingas. 'Therefore, NIGC contends its obligations were limited to the Kalingas project. NIGC argues that, because the Kalingas project was never implemented and proceeds never became available, the obligation to repay has not arisen. Relying on Article 4 of the Repayment Agreement, it alleges:

[ISC was] quite aware that in the event that the Project was never fully implemented, and that the manufactured LNG was never exported, then they would not have been entitled to receive any compensation for the funds already spent on confirmation and development drilling.

67. NIGC thus concludes that as performance of the Kalingas project has been frustrated, payment under the Repayment Agreement is deferred and not due. NIGC asserts that ISC bore the risk of non-implementation of the project, stating:

In the event that the Project was never implemented, [ISC] could only hold the remaining entities comprising Second Party responsible for compensating any loss or damages that the withdrawing parties may think they are entitled to. For the simple reason that again the Second Party would have been the Party responsible for non-implementation of the total Project.

NIGC asserts that the Crinavis and MRV proposals were completely independent of the Kalingas project and therefore had no impact upon the conditional payment obligation under the Repayment Agreement. NIGC also asserts that even if the Repayment Agreement did contemplate payment from non-Kalingas projects, none had obtained technical approval and therefore they had not progressed to a stage at which they could be considered to have been abandoned by NIGC. Rather, NIGC contends that these projects did not proceed for other reasons, none of which is attributable to NIGC.

68. In particular, NIGC links the failure to implement the Kalingas project to the Second Party members' failure to arrange satisfactory financing in accordance with the terms of the Participation Agreement. NIGC contends that the Second Party was in breach of Article 7 of the Participation Agreement and that:

So long as the Clause 7 of the Participation Agreement which was the guideline for all actions was not implemented and the substance thereof was disregarded, any steps and efforts that may have been taken by JKC, CBI and others in promotion of JKC project could not have been acceptable to NIGC prior or after the Revolution.

69. NIGC challenges ISC's interpretation of the understandings between the Parties at the time the Repayment Agreement was executed and denies that the Repayment Agreement was executed by ISC only in the belief that NIGC had accepted the JKC proposal. Instead, NIGC contends that the Repayment Agreement was executed at ISC's request and that it was "the self interest of members of the Second Party with weaker financial standing that led to its conclusion." In particular, NIGC contends that the understanding between the Parties was that its obligations under the Repayment Agreement would not arise unless the Second Party met its obligations under the Participation Agreement. NIGC asserts that the Participation Agreement and the Repayment Agreement are so closely interrelated that unless the Participation Agreement was implemented "the likelihood of repayment and fulfillment of the Repayment Agreement did not arise."

70. NIGC asserts that it was committed only to perform the Participation Agreement as originally executed and that it was not authorized to agree to any amendment without the consent of its shareholders in general meeting. Consequently, NIGC maintains that the Second Parties willingly accepted, and remained bound by, the risks of providing financing under the Participation Agreement.

71. NIGC contends that various Second Party members implicitly acknowledged their inability to perform their obligations by asking to withdraw from the project and that NIGC only moved to terminate the Participation Agreement in October 1977 as a result of the Second Party members voting against the provision of finance for the next stage of the Kalingas project at the shareholders' meeting held in Tokyo in February 1977.

72. Regarding ISC's allegation that NIGC reversed its position on the JKC project, NIGC denies that it ever agreed to the financing proposals for the revised JKC project and states that ISC has submitted no corroborative evidence of any of the assertions to the contrary. NIGC acknowledges that the JKC proposal had received technical approval but insists that approval was never given for the financial aspects of the proposal. In particular, NIGC denies that Mr. Mossadeghi stated that NIGC, NIOC and the Ministry of Finance had accepted the financial implications of the JKC project. NIGC states that, as the draft agreements governing the JKC project were subject to approval by the relevant authorities, "NIGC and its former and new Board of Directors did not find it to be in accord with Participation Agreement and waited until such time that JKC may specify the condition of financing. But JKC did not specify the question of guarantee and financing until the Participation Agreement terminated."

73. Regarding ISC's charge that NIGC changed its position on the development of Pars Field through Kalingas as a matter of government policy, NIGC denies that it ever reassigned Pars Field for other purposes and states that any allegation that NIGC indicated that the natural gas resources of Iran were reserved for the Iranian people is "meritless and without any foundation." NIGC points out that neither ISC nor Mr. Barrolaza were present at the meeting at which the alleged change in policy is reported to have been communicated. NIGC asserts that it remained

willing to pursue in good faith the Kalingas project even after the Iranian Revolution. It states that its good intent is evidenced, inter alia, by the fact that it allowed JKC more than eighteen months after giving notice of termination in November 1979 in which to produce an acceptable plan for the Kalingas project.

74. Finally, NIGC argues that, under Iranian law, and especially pursuant to Articles 221, 227, 229 and 234 of the Iranian Civil Code, NIGC is not liable to repay any amount, payment of which is conditioned on the fulfilment of an extraneous event, if it is prevented from fulfilling that condition by events beyond its control.

75. NIGC concludes that because the fulfilment of the condition precedent to repayment was prevented by events beyond its control, it did not breach any obligation that may have been imposed by the Repayment Agreement to pursue in good faith the establishment of a Kalingas project. Consequently,

[i]n view of the preceeding [sic] facts and arguments; and on the ground of the Second Party's continual defaults and breach in respect of the preamble and Article 7 of the Participation Agreement, NIGC does not believe I.S.C. is entitled to any compensation for the claimed monetary damages; bearing in mind that the Project was never implemented because of the . . . defaults and breaches by the Second Party.

76. NIGC also challenges ISC's contention that ISC is entitled to its share of proceeds from the sale to NIOC of drilling equipment. Rather, NIGC asserts that distribution of such proceeds also was subject to the satisfactory implementation of the Kalingas project.

## 2. IRAN's Contentions<sup>5</sup>

77. IRAN, while requesting the Tribunal to consider the arguments raised in defence by NIGC, relies for its defence primarily on the fact that it was not party to any contract with ISC and therefore contends that the claim is not related to it. IRAN also objects to the increase in the amount of relief requested by the Claimant in its Rebuttal Memorial and states that it has had no opportunity to comment on this.

### D. Rebuttal

78. By way of rebuttal, the Claimant asserts that NIGC in its Memorial filed 2 December 1986 acknowledges that ISC is entitled to receive its share of proceeds of the drilling equipment transferred to NIOC, and that the Respondents have failed to submit any evidence to support the contention that such payment was contingent upon implementation of the LNG project.

79. The Claimant also contends that NIGC's argument that the JKC project was terminated because the revised financing was inconsistent with the terms of the Participation Agreement is contradicted by the context and development of the Kalingas venture and that all the project participants were aware that the necessary loans could not be obtained without a "new approach to financing." The Claimant asserts that such awareness and acceptance is documented by the draft Shareholders' Agreement of 23 December 1978, pursuant to which the JKC project was to be implemented, which specifically provides for the parties, including NIGC, to provide equity contributions and loan guarantees.

---

<sup>5</sup>NIOC has not participated in the proceedings. See supra para. 4.

80. The Claimant also denies that the scope of the Repayment Agreement was limited to a Kalingas LNG project or that other LNG projects under consideration were not viable. As evidence of this, the Claimant points to the minutes of the Kalingas shareholders' meeting on 23 October 1977 and asserts, adding emphasis: "The minutes state explicitly that advances would be repaid 'out of the sales of gas from any or all LNG projects.'" The Claimant contends that this document, together with NIGC's letter of 18 October 1978, show that, as late as October 1978, LNG projects were being actively pursued by the Iranian government and that the JKC project remained viable after the Iranian Revolution.

81. The Claimant also submits in evidence, by way of rebuttal, an affidavit from Mr. Duncan Clark, Group Manager of Petroconsultants S.A., which allegedly shows that the "Respondents repudiated or otherwise terminated all of their oil and gas development contracts with U.S. and other foreign companies following the revolution." The Claimant asserts that "such wholesale terminations constitute evidence that, after the revolution, the new Iranian government simply decided to keep the benefits bestowed upon it by its foreign business partners and terminated such relationships without regard to its legal obligations."

82. Finally, the Claimant concludes that the "Respondents' unjustified refusal in bad faith to pursue implementation of the JKC and other LNG projects thus excused the condition to repayment . . . in the Repayment Agreement and Respondents' obligation to repay in full the amounts advanced by ISC to Kalingas became unconditional and absolute."

83. In its Rebuttal submission NIOC reasserts its previous arguments. Both NIGC and IRAN object to the increase in the amounts claimed by ISC due to the continuing accrual of contractual interest.

E. The Merits

84. ISC's breach of contract claim must be examined in two parts. First, the Tribunal must consider whether NIGC's failure to reimburse ISC for its pro rata share of the proceeds from the sale of equipment to NIOC constituted a breach of Article 2 of the Repayment Agreement, as alleged. Second, the Tribunal must determine whether the Respondents' actions on and after 29 September 1979 establish, as alleged, a failure to pursue LNG projects in good faith, so as to constitute a breach of the Repayment Agreement. If so, the consequences of such breach must be considered.

1. Distribution Of Proceeds From The Sale Of Equipment

85. ISC bases its claim for payment of its pro rata share of the proceeds from the sale of drilling equipment on the express language of Article 2 of the Repayment Agreement. As evidence of the quantum of its pro rata share, ISC relies upon the letter of 2 July 1978 from Kalingas to NIGC indicating ISC's share to be U.S.\$172,302.23. NIGC's only argument in defense to this part of the claim is that any payment under the Repayment Agreement, including distribution of the sale proceeds, is contingent upon completion of the Kalingas project. NIGC does not dispute that this equipment was sold to NIOC and that it received payment therefor prior to 19 January 1981. Nor has NIGC challenged the computation of ISC's portion of the payment received.

86. The language of Article 2 is clear and unambiguous: "NIGC will immediately and directly disburse to Lender its pro rata share of surplus funds." The Tribunal finds no merit in NIGC's argument that the disbursement of any such surplus funds is contingent upon completion of the Kalingas project. The only condition is that surplus funds be available. NIGC does not deny that this condition has been fulfilled. NIGC therefore became obligated to disburse the

pro rata share to ISC as soon as practicable after the receipt of funds from NIOC. Such conclusion is confirmed by the language of Article 3 of the Repayment Agreement, which defines the "Loan Amount" as the total advanced by the lender "adjusted for any credits made pursuant to payments specified in paragraph 2 above."

87. The Tribunal therefore finds that NIGC is required to pay to ISC the sum of U.S.\$172,302.23, being ISC's pro rata share in the proceeds of the sale of equipment, together with contractual interest thereon. The Tribunal also finds it reasonable to assume that this sum should have been paid by NIOC, and thus became immediately payable to ISC within sixty days after the date of the letter of 2 July 1978 from Kalingas. See infra para. 123.

88. However, the Tribunal finds that such breach does not constitute, per se, so fundamental a breach of the Repayment Agreement as to repudiate the entire agreement. The Tribunal therefore must examine as a separate issue the Claimant's right to repayment of the balance of the Loan Amount.

## 2. The Failure To Implement LNG Projects

89. In order to assess the Claimant's right to repayment of the balance of the Loan Amount, the Tribunal must consider and determine a number of disputed issues. First, the Tribunal must determine the scope of the Repayment Agreement and, in particular, whether repayment thereunder was specifically linked to and contingent upon the completion of the Kalingas LNG project or whether it could be repaid from the proceeds of other projects. The Tribunal must then consider NIGC's legal obligations towards ISC under the Repayment Agreement and the understandings of both ISC and NIGC at the time of the restructuring of Kalingas. Finally, the Tribunal must determine whether NIGC acted in good faith to attempt to fulfill those obligations with respect to the Kalingas project, and depending upon the determination as to



the scope of the Repayment Agreement, whether NIGC and IRAN together acted in good faith with respect to any of the other LNG projects from which repayment could be made.

(a) The Scope Of The Repayment Agreement

90. The Tribunal must look to the language of the Repayment Agreement when considering its scope. The preamble to the Repayment Agreement recites that Kalingas "is engaged in a project (the "Kalingas Project") involving the development and production of natural gas from the Pars Field and the manufacture therefrom of Liquefied Natural Gas." However, Article 4 of the Repayment Agreement ties the overall percentage of the loan to be repaid, not to the production of the Kalingas Project, but to "the level of annual production of LNG . . . which has been achieved during the term of repayment." The Tribunal interprets this phrase as referring to the total production from the Pars Field. Such a conclusion is supported by the example given in Article 4, in which it is stated ". . . Lender will be entitled to be repaid seventy percent (70%) of the Loan Amount . . ." and by the language of the second part of Article 6, which evidences NIGC's intention to repay the advances "within ten (10) years from the date of first production of natural gas from the Pars Field utilized for the manufacture of LNG . . . ." The Tribunal therefore concludes that the proportion of the sums advanced to be repaid was linked directly to the overall production of LNG from the Pars Field, and not just to the production of the Kalingas project.

91. Article 4, however, deals only with the total amount to be repaid. The provisions as to the manner and source of actual repayments contained in Article 6 expressly state that the amount to be paid each year shall be "payable solely out of the proceeds of the sale of natural gas by NIGC to Kalingas . . . ." The Tribunal therefore concludes that, although the overall percentage of the amount to be repaid was to be determined by reference to the total

production of LNG from the Pars Field, repayments were to be made solely from the profits realized by the Kalingas project. The repayment of the Loan Amount therefore is contingent upon there being profits available from the Kalingas project. Such a contractual condition precedent implies a good faith obligation on the party performing the condition to attempt to fulfill it. Accordingly, the Tribunal finds that a duty existed on the part of NIGC to pursue, in good faith, the establishment of the Kalingas project. Such a finding relieves the Tribunal of any necessity to examine whether NIGC and the other Respondents pursued projects outside of Kalingas in good faith.

(b) NIGC's Legal Obligations And The Understandings Of The Parties

92. The Tribunal first must review NIGC's position as of 23 April 1978, when NIGC and ISC entered into the Repayment Agreement. The Tribunal is satisfied that, at that time, NIGC intended to proceed with a Kalingas project and all parties expected it to succeed. The crucial issue, however, is whether NIGC subsequently breached its obligation to pursue the project in good faith.

93. The Claimant has asserted that it understood that NIGC had accepted the JKC proposal in full, including the revised financing commitments, prior to execution of the Repayment Agreement. The Claimant also has asserted, both in its pleadings and at the Hearing, that it would not have given up its shareholding interest in Kalingas and its rights to repayment under the Credit Agreement had it not been assured that NIGC intended to proceed with LNG production, both by means of the Kalingas project and with other projects under consideration. Moreover, the Claimant has contended that NIGC was fully aware of the financing arrangements in the JKC proposal, requiring an equity contribution from NIGC together with governmental guarantees, that had been presented to NIGC on many occasions. In particular, the

Claimant contends that NIGC's letter of 14 March 1978 to JKC constituted a firm and binding acceptance of the JKC proposal, including the financing arrangements, and a revocation of the notice of termination of the Participation Agreement. The Claimant also relies on the affidavit and oral evidence of Mr. Barrolaza, the chief representative of CBI.

94. NIGC denies that it ever accepted the revised financing proposals, pointing out that the letter of 14 March 1978 refers only to acceptance of the revised schedule for implementation and that it also refers to the "LNG Project now being negotiated." NIGC asserts that it had made known its objection to such financing proposals as early as February 1977 (see supra para. 31), and that it could not be required to accept a proposal not in conformity with the Participation Agreement.

95. The Tribunal rejects the Claimant's contention that NIGC had accepted the JKC project in full. The letter of 14 March 1978 refers only to acceptance of the revised "schedule for implementation of the Japanese Project." Further, the letter recognizes that the project is "now being negotiated."

96. The question, however, of NIGC's acceptance or rejection of the proposed financing scheme must be examined in context. Negotiations between NIGC and the Second Party had been underway since the Loan Agreement was signed in October 1976. See supra para. 28. In January 1977, the financial advisors' report first indicated that government guarantees would be required. During the shareholders' meeting in February 1977 at which that report was discussed, NIGC stated clearly that it would not agree to any change in the basic documentation, including the Participation Agreement, and that the alternatives requiring government guarantees were not acceptable to it.

97. On 29 April 1977 the Second Party notified NIGC that it was ready to proceed with the next phase of both the Crinavis and JKC projects, but stated "Iranian Government guaranty of the natural gas supply [is] essential." The next day the shareholders of Kalingas passed a board resolution which specifically referred to acceptance of the Crinavis financing proposal of 4 April 1977 (which is not in evidence) and approved continuing negotiations on the JKC project. The JKC proposal was formally submitted to NIGC in June 1977 but obviously had been in preparation for some time. The financing scheme was set forth in detail in a subsequent letter to NIGC dated 31 August 1977, providing for an equity contribution from NIGC and for government guarantee of the loan portion. The proposed financing thus was not in conformity with the terms of the Participation Agreement.

98. The next evidence available to the Tribunal is the minutes of a shareholders' meeting held on 23 October 1977. At this meeting, NIGC stressed repeatedly that it was committed solely to "LNG Projects within the framework of the Participation Agreement." Although there is no specific reference to the JKC financing proposal, the Tribunal finds it reasonable to infer that, by issuing the notice of termination to the Second Party the next day, NIGC rejected the JKC proposal, including the financing provisions. Although JKC objected to the giving of notice, NIGC in its letter of 26 November 1977 emphasized that the Second Party as a whole was in breach and that the JKC Project (as an independent project without the participation of the other Second Party participants) had "not yet reached the stage of realization."

99. In addition, just two days before NIGC issued its notice of termination, the Second Party participants had developed a Memorandum of Understanding (which is not in evidence). According to the minutes of the shareholders' meeting held the next day, this document:

recognizes that several projects within the structure of Kalingas are possible and that all Shareholders might not participate in each Project . . . . A method of repayment is included establishing the rights of non-participants in Projects to recoupe [sic] prior advances out of the sale from any and all LNG project . . . . Non-participating parties would also agree to re-structure the framework of Kalingas in order to achieve these Projects if necessary.

100. On 26 December 1977 JKC wrote to each of the other Second Party participants, giving them thirty days in which to "opt in" to the JKC project and thus commit themselves to raising their pro rata share of the equity and loan financing. Participants choosing not to continue were to "receive repayment of . . . advances in such manner as would be finally agreed upon between NIGC and members of the Second Party." ISC did not respond to this invitation and thus by 26 January 1978 had elected not to participate in the JKC project. There is nothing to indicate that ISC had commenced negotiations with NIGC at this time concerning the eventual repayment of advances made by it. JKC then submitted a revised schedule for implementation to NIGC on 13 March 1978, which NIGC accepted the following day. The full text of the letter is quoted at paragraph 40, supra. The revised schedule extended construction contract negotiation from mid-March to mid-June 1978, extended the time for signature of the gas and LNG sales contracts from March to late October 1978 but also, and most importantly, extended the "pre-negotiation" phase of the financing to mid-June 1978, when a final plan was to be presented to the (Japanese) EXIM Bank, with formal commitment and signature of loan agreements in October 1978.

101. The Tribunal finds that this letter establishes certain specific points. First, as noted above, it indicates acceptance only of the revised schedule for implementation. Second, even this acceptance is subject to receipt of confirmation from JKC of its intent to proceed with the project prior to expiration of the six-month notice. Third,

NIGC agrees not to take any action against JKC under the Participation Agreement if the project is actually implemented. Finally, the letter indicates that NIGC was aware that certain of the current Second Party participants would not be involved in the JKC project.

102. The Tribunal does not find it reasonable to interpret this letter as being an acceptance of JKC's financing proposals. The revised schedule indicates that the financing arrangements were among the last items scheduled to be finalized, that the construction and sales contract would be signed or initialed long before any formal financing commitment would be obtained and that all of the project negotiations were to be completed by mid-June 1978, thus leaving the finance negotiations as the only items still outstanding at that time. Even JKC's acknowledgement sent just eight days before the restructuring of Kalingas in April 1978 states: "The entire financing . . . will be provided by Japan as will be mutually agreed." The Tribunal finds that NIGC had raised objections to the financing requirements prior to 23 April 1978. The Tribunal also finds that this letter did not withdraw those objections or acquiesce to the terms of the JKC proposal, nor does it constitute a revocation of the notice of termination dated 24 October 1977. NIGC only had a right of termination with respect to the Second Party as a collective entity, not with respect to each participant individually. It thus follows that NIGC could withdraw its notice of termination only with respect to the Second Party as a collective entity. The Tribunal finds that NIGC did not withdraw its notice of termination to the Second Party participants until 23 April 1978, one day before the Participation Agreement was to terminate, when it executed the Accession and Repayment Agreements in which the withdrawing participants specifically waived any rights and were released from any obligations arising under the Participation and Credit Agreements.

103. The Second Party participants still were required at this time to submit a financing proposal that complied with the terms of the Participation Agreement. If it proved impossible to finance a project under the terms of the Participation Agreement, the Second Party had the option under Article 13 thereof to request an arbitral decision to dissolve the Participation Agreement by reason of total impossibility of performance.

104. NIGC's understanding of the situation is also relevant. Although both Parties would have suffered losses if the Participation Agreement had been terminated at this time, NIGC already had profited greatly under the Participation Agreement by the discovery and confirmation of the Pars Field, and if the Participation Agreement had been terminated it would have been free to enter into negotiations with other companies in respect of proven reserves. The main disadvantage to NIGC seems to have been that it would have suffered some delay in bringing the LNG on-stream. The advantage to NIGC in continuing with the existing Second Party participants was that they were committed under the Participation Agreement to financing the project without equity contribution from NIGC or government guarantee, terms that NIGC would have been unlikely to obtain from other companies.

105. Consequently, on the evidence before it -- including NIGC's objections to the proposal raised as early as October 1977 and the absence of any specific acceptance by NIGC of the revised financing proposals or amendment of the Participation Agreement -- the Tribunal finds it unreasonable to infer that by its letter of 14 March 1978 NIGC accepted financing proposals that ran contrary to its stated position. The Tribunal thus finds that, at the time ISC and NIGC entered into the Repayment Agreement, this issue remained unresolved.

106. The Tribunal also does not accept the Claimant's contention that it would not have given up its shareholding interest without assurance that NIGC intended to proceed with LNG production. ISC already had elected not be an active participant in the JKC project. Prior to execution of the Repayment Agreement, ISC was committed under the Participation Agreement to arrange substantial finance for the Kalingas project. Although not expressly conceded, it is clear to the Tribunal that ISC was not in a position to provide such financing and that, indeed, none of the Second Party participants had been able to arrange the necessary finance on the terms specified in the Participation Agreement. ISC's release from its obligations under the Participation Agreement therefore would have constituted a major factor in ISC's decision to enter into the Repayment Agreement, which had the added advantage of establishing the sums advanced as a liquidated debt and fixing a rate of interest thereon.

107. Furthermore, it appears that ISC was relying entirely on second-hand interpretations of the situation, rather than on any direct assurances from NIGC. ISC's own internal memorandum, issued just one week before the Repayment Agreement was signed, states: "Information obtained from [CBI] indicates that all parties are positive on the project going ahead so as to assure repayment of advances."

(c) The Good Faith Obligation

108. The Tribunal still must consider whether the Respondents' actions after 23 April 1978, including the ultimate failure to proceed with the Kalingas project, constituted a breach of good faith. The Claimant contends that, in September 1979, all hope of proceeding with any LNG project was shattered by the Respondents' "unreasonable decision" not to share the development of natural gas resources with foreign entities and that, in so doing, NIGC breached its duty to act in good faith. NIGC contends that it reviewed



all of the LNG proposals before it in good faith but that there was no practical project ready for acceptance.

109. The Tribunal already has found that NIGC was in breach of part of its repayment obligations under the Repayment Agreement as of 1 September 1978. See supra para. 87. Although that continuing breach is not irrelevant to the issue of NIGC's good faith performance the Tribunal already has concluded that the breach did not constitute a repudiation of the entire Repayment Agreement. See supra para. 88. The Tribunal notes that there is no contemporaneous evidence in the record to establish that ISC at any time viewed this particular breach of the repayment provisions as indicative of a general failure of good faith on NIGC's part. The Tribunal concludes that NIGC's failure to pay ISC's share of the proceeds of sale of the equipment did not constitute a breach of its obligation to pursue the Kalingas project in good faith.

110. Although the Tribunal recognizes that there may have been a change of governmental attitude to such projects in general, it is unable to find, on the evidence before it that such change constituted a breach of the good faith obligation owed to ISC by any of the Respondents. The obligation on NIGC was to negotiate in good faith to develop a Kalingas project. The Claimant has not produced any specific evidence to show that NIGC or the other Respondents failed to act in good faith, other than by relying on the failure to implement such a project and the statement allegedly made by Mr. Etemad in September 1979.

111. There is little evidence to indicate to the Tribunal that NIGC accepted the JKC financing proposals at some time between April 1978 and September 1979. The Tribunal notes that the draft Shareholders' Agreement prepared for signature in December 1978 and submitted in evidence by ISC does provide for government guarantees. Had that agreement been executed, it would undoubtedly have superseded the

provisions of the Participation Agreement on which NIGC's defense is based. NIGC cites the failure to sign as evidence of its continued rejection of the concept of government guarantee rather than of its acceptance. JKC indicated in a letter dated November 1979 that the reason this agreement was not signed was due to the events of the revolution in Iran. However, it seems to the Tribunal that the failure to execute this document was also partly due to the fact that Crinavis remained as a Second Party participant in Kalingas, and thus in the JKC project, although it is evident that this was not as JKC had intended. Subsequent communications from JKC indicate that the necessary LNG sales contracts had been signed before September 1979, but remained subject to completion of "the necessary financing arrangements and obtaining the necessary approvals of the governments of Iran and Japan" and that the failure to obtain the transfer of the shares in Kalingas held by Crinavis delayed implementation of the financing arrangements. It thus appears to the Tribunal that the financing had not been finalized prior to the meeting with JKC in September 1979.

112. Furthermore, it is clear from the language used by JKC when reporting the meeting of 29 September 1979 that NIGC's objection was a continuing one as to the Second Party obligation to provide financing under the Participation Agreement, to which JKC was still committed. The Claimant has relied heavily upon this incident as evidence of the Respondents' alleged bad faith repudiation. ISC was not present or represented at this meeting and there is nothing in the record to indicate that ISC objected to this statement when it was reported to it or even that it requested confirmation of the statement from NIGC.

113. Moreover, at the meeting in September 1979, NIGC's representative gave JKC a further six months in which to submit an acceptable financing proposal. The six-month period was further extended by NIGC, and as noted in paragraph 53 supra, NIGC did not actually terminate the

Participation Agreement until April 1981, some eighteen months later. When it did finally terminate the Participation Agreement, it did so based on the same objections as those first set out in its notice of October 1977, three and a half years earlier. Thus, NIGC has demonstrated that it continued to negotiate with JKC for the implementation of a Kalingas project up until April 1981 when it finally terminated the Participation Agreement retrospectively. It is not disputed that the Repayment Agreement itself has not been terminated by either Party.

114. The Tribunal therefore finds that the condition precedent to repayment under the Repayment Agreement had not been eliminated as a result of any material breach by the Respondents prior to 19 January 1981 and therefore no right to immediate repayment had accrued at that date. As a result, the Tribunal is not required to address the issue of whether NIGC's actions after 19 January 1981 in terminating the Participation Agreement and attempting to liquidate Kalingas -- thus rendering impossible the repayment of the Loan Amount from the proceeds of sales by Kalingas -- would constitute a material breach of NIGC's obligation to pursue such projects in good faith.

115. The balance of the Claimant's claim is therefore dismissed as not being outstanding as of 19 January 1981.

F. The Expropriation Claim

116. At the Hearing in September 1987 the Claimant raised for the first time an argument that, by virtue of the policy statements allegedly made on behalf of IRAN at the meeting of 29 September 1979, ISC's contract rights effectively were expropriated. ISC argued that this action rendered its rights under the Repayment Agreement worthless. ISC cites the Tribunal's decision in Starrett Housing Corporation and Islamic Republic of Iran, Award No. 314-24-1 (14 Aug. 1987), reprinted in 16 Iran-U.S. C.T.R. 112, in support of its

argument. The Respondents objected at the Hearing to ISC's newly raised claim of expropriation and stated that the decision in Starrett had no link with this Case.

117. The Tribunal dismisses ISC's claim for expropriation. The Claimant has not introduced any evidence to support its contention or to show any government intervention affecting Kalingas prior to 19 January 1981, other than those incidents which already have been considered by the Tribunal in paragraphs 108-113, supra. The Tribunal therefore finds it unnecessary to consider further the alternative theory of expropriation, or whether it was timely raised.

#### IV. COUNTERCLAIMS

118. NIGC asserts counterclaims for U.S.\$9,382,460 for reimbursement of funds allegedly expended by NIGC "in the unfulfilled expectation that the Project would eventually be fully implemented," plus U.S.\$616,000,000 for revenues said to have been lost as the result of the Claimant's alleged failure to arrange financing for an LNG project consistent with the terms of the Participation Agreement. NIGC argues that ISC breached its contractual obligations to NIGC and thereby prevented NIGC and IRAN from developing their LNG reserves.

119. The Tribunal dismisses these counterclaims for lack of jurisdiction. Pursuant to Article II, paragraph 1 of the Claims Settlement Declaration, a counterclaim must arise "out of the same contract, transaction or occurrence that constitutes the subject matter" of ISC's claim. Here, the counterclaims arise out of an alleged violation of the Participation Agreement. ISC's claim, however, arises not out of the Participation Agreement from which it was released by execution of the Accession Agreement, but out of the Repayment Agreement. Consequently, the counterclaims do not meet the Tribunal's requirements for jurisdiction.

V. INTEREST AND COSTS

120. At the Hearing the Claimant asserted a claim for compound interest based on the language of Article 5 of the Repayment Agreement which, the Claimant contends, implicitly provides for the accrual of compound interest. The Claimant's witnesses also testified that the use of compound interest is the norm with such agreements.

121. To date the Tribunal has never awarded compound interest. In Anaconda-Iran, Inc. and Islamic Republic of Iran, Award No. ITL 65-167-3, pp. 49-51 (10 Dec. 1986), reprinted in 13 Iran-U.S. C.T.R. 199, 234-35, the Tribunal noted that judicial authorities as a general rule avoid awarding interest at compound rates because of the inherent effect of distorting the amount of damages in relation to the real loss to be compensated.

122. The Tribunal finds no contractual basis for an award of compound interest in this Case. Nothing in Article 5 of the Repayment Agreement refers specifically or implicitly to compound interest. Moreover, as admitted by the Claimant at the Hearing, the amount of interest set forth in the Repayment Agreement accrued up to 31 December 1977 was calculated on the basis of simple interest. To suggest that methods of calculation of interest under Article 5 are to differ depending upon the period considered, i.e., whether before or after 31 December 1977, would require express language reflecting that intent.

123. Accordingly, and pursuant to the Tribunal's Award in McCollough & Company, Inc. and Ministry of Post, Telegraph and Telephone, Award No. 225-89-3 (22 Apr. 1986), reprinted in 11 Iran-U.S. C.T.R. 3, the Tribunal finds that an award of simple interest is appropriate. Pursuant to the contractual agreement contained in Article 5 of the Repayment Agreement, such interest should be at the rate of one percent (1%) above the Prime Rate of the First National Bank

of Chicago applicable to ninety-day commercial loans to substantial and responsible borrowers commencing on 1 September 1978. See supra para. 87. The Tribunal has calculated the contractual rate on the basis of an annual average and will express the Award of interest in such terms.

124. The Claimant has also requested the Tribunal to award costs in the amount of U.S.\$77,757.08 and to award reasonable attorneys' fees. Both NIGC and IRAN have requested an award of costs and attorneys' fees. At the Hearing, NIGC estimated its costs and legal fees at U.S.\$34,000. The Tribunal determines that each party shall bear its own costs for these arbitral proceedings.

#### VI. AWARD

125. For the foregoing reasons,

#### THE TRIBUNAL AWARDS AS FOLLOWS:

- (a) The Respondent NATIONAL IRANIAN GAS COMPANY is obligated to pay to INTERNATIONAL SYSTEMS & CONTROLS CORPORATION the sum of One hundred seventy-two thousand three hundred two United States Dollars and Twenty-three Cents (U.S.\$172,302.23) plus simple interest due at the rate of twelve and eighty-eight hundredths percent (12.88%) per annum from 1 September 1978 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.
- (b) All other claims of INTERNATIONAL SYSTEMS & CONTROLS CORPORATION are dismissed.
- (c) This obligation shall be satisfied by payment 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.

- (d) The Counterclaims of NATIONAL IRANIAN GAS COMPANY are dismissed.
- (e) Each Party shall bear its own costs of arbitration.

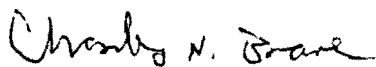
This Award is submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated, The Hague  
23 January 1990



Gaetano Arangio-Ruiz  
Chairman  
Chamber Three

In the Name of God



Charles N. Brower  
Concurring and  
Dissenting Opinion



Parviz Ansari Moin  
Concurring

I concur on the whole in the present Award, albeit I would like to add, inter alia, that the Tribunal ought to have accepted jurisdiction over the counterclaims, since they arise out of a set of

contractual relationships  
which comprise a transaction  
in the sense intended in  
Article II (1) of the Claims  
Settlement Declaration.

As for the issue of interest,  
although it is based on  
contractual agreement in the  
present Case, I see no need  
to reiterate my earlier  
opinions. See: the Separate  
Opinion of Judge Parviz Ansari  
in McCollough & Company, Inc.  
and The Ministry of Post,  
Telegraph and Telephone, et al.,  
Award No. 225-89-3 (22 Apr.  
1986), reprinted in 11 Iran-  
U.S. C.T.R. 45-52.