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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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ORIGINAL DOCUMENTS IN SAFE

Case No. 494 [redacted] Date of filing: 23 Jan '90

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** CONCURRING and Dissenting OPINION of Judge Charles N. Brower

- Date 23 Jan '90

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL
نسخه برابر اصل

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.

CONCURRING AND DISSENTING OPINION OF JUDGE CHARLES N. BROWER

I.

1. I dissent from the Tribunal's conclusion that Respondent NATIONAL IRANIAN GAS COMPANY ("NIGC") met its obligation "to pursue, in good faith, the establishment of the Kalingas [Kangan Liquefied Natural Gas Company] project" as required by the Repayment Agreement of 23 April 1978 to which Claimant INTERNATIONAL SYSTEMS & CONTROLS CORPORATION ("ISC") was a party. In my view the record in this case demonstrates clearly that NIGC's rejection nearly a year and a half later in 1979 of certain terms of financing proposed by the Japanese Kalingas Company, Ltd. ("JKC") constituted a complete change of position and therefore was simply a pretext for its conscious refusal to pursue the Kalingas project.[1]

2. Three categories of evidence support this view. First, the dealings and developments between the participants in Kalingas regarding JKC's Kalingas proposal[2] and its financing make clear that NIGC had no objection to those terms as of the date of execution of the Repayment Agreement nearly a year and a half prior to NIGC's subsequent objection to those terms in September of 1979. Thus as of the time the Repayment Agreement was executed "the Kalingas project" was understood by both NIGC and ISC to include such terms.

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[1] I concur in the Tribunal's finding that by failing to reimburse Claimant for its pro rata share of the proceeds from the sale of drilling equipment to NATIONAL IRANIAN OIL COMPANY ("NIOC") NIGC breached its obligation under Article 2 of the Repayment Agreement and therefore must pay to Claimant the sum of U.S.$172,302.23, plus contractual interest thereon from 1 September 1978.

[2] In the Award JKC's proposed Kalingas project is referred to as "the JKC project."

3. Second, Iran's post-Revolution change in policy regarding its natural resources is evidence that NIGC refused to pursue further JKC's Kalingas project for reasons other than those given (i.e., the objection to financing terms).

4. Finally, NIGC's blunt and unjustified breach of Article 2 of the Repayment Agreement without any explanation whatsoever further confirms its lack of good faith in regard to that Agreement.

5. Claimant ISC having thus established a prima facie case that NIGC breached its obligation of good faith under the Repayment Agreement, it was incumbent on NIGC to rebut this evidence. Its failure even to attempt to do so should have led the Tribunal to grant ISC's claim in this regard.

II.

6. The Award first strays by misapprehending the precise nature of NIGC's obligation of good faith and by misconceiving "the Kalingas project" as it was understood by NIGC and ISC at the time they executed the Repayment Agreement.

7. The comments to section 205 of the Restatement (Second) of Contracts provide a general definition of the duty of good faith:

> The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency of the justified expectations of the other party . . . .

Restatement (Second) of Contracts § 205 comment a (emphasis added). More specifically, the Restatement states:

> Where a duty of one party is subject to the occurrence of a condition, the additional duty of

> good faith and fair dealing imposed on him ... may require some cooperation on his part, either by refraining from conduct that will prevent or hinder the occurrence of that condition or <u>by taking affirmative steps to cause its occurrence</u>.

Restatement (Second) of Contracts § 245 comment a (emphasis added). This view is consistently adhered to by commentators in the field. <u>See e.g.</u>, E.A. Farnsworth, Contracts 565-69 (1982) (the duty of good faith, also referred to as the duty to use "best efforts," requires a party to take affirmative steps to see that a condition occurs).

8. The Award, however, applies its own unformulated concept of good faith and holds NIGC to a much lower standard of conduct. As I believe the ensuing analysis makes clear, NIGC can in no way be accurately depicted as having remained faithful to, and having acted consistent with, the expectations established between ISC and NIGC regarding the Kalingas project when they executed the Repayment Agreement. Certainly NIGC's change in position in 1979 regarding the financial terms of the JKC scheme was not a reflection of "best efforts" to pursue JKC's proposed Kalingas project.

9. The Award's fundamental error in failing to apply the correct standard of good faith is compounded by its failure to define "the Kalingas project" as it was understood by ISC and NIGC. The Award states:

> 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.

10. While the focus thus correctly is on reviewing NIGC's <u>and ISC's</u> positions and understandings as of the time the Repayment Agreement was executed, the conclusion "that, at

that time, NIGC intended to proceed with a Kalingas project and all parties expected it to succeed" simply begs the question of what constituted "the Kalingas project" as the parties understood it. This question the Tribunal never poses and hence does not address.

11. The Kalingas project, as understood by the participants on 23 April 1978, was defined in part by the Participation Agreement entered into in 1972, and in part by the course of dealings among the participants since 1972 by which they had reached new understandings as to certain terms of financing (at least with respect to JKC's proposed Kalingas project).

12. The Participation Agreement, as the Award notes, contained the "original understandings of the parties" with respect to Kalingas including the financing arrangements. It provided first that the Second Party participants, namely ISC and the other non-Iranian entities, were to arrange "on terms and conditions acceptable to both parties ... all the financing required for the implementation of the Project, ... including without limitation, First [NIGC] and Second Party's contribution to the share capital of the Joint Company." Thus it was clear, at the outset of the dealings between the Parties, that the Second Party participants were responsible for the entire equity contribution to Kalingas.

13. The Participation Agreement further provided, however, that any credits or loans 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." (Emphasis added.) The Award mistakenly concludes this provision barred any term requiring a guarantee from the Iranian Government (which was not one of "the Parties" to the Participation Agreement). Thus, contrary to this finding of the Award, subsequent proposals by JKC that required such a guarantee were not in conflict

with the Participation Agreement. The Award's mistake in this regard results in the erroneous assumption throughout its analysis that any objection by NIGC to a provision for an Iranian Government guarantee must have been justified because such provision would be inconsistent with the Participation Agreement.

14. The subsequent dealings between the Parties reflect evolving understandings between ISC and NIGC as to what the Kalingas project encompassed. A January 1977 report from the financial advisers of Kalingas to its Board advised, inter alia, that each shareholder (including NIGC) would have to provide an equity contribution (contrary to the terms of the Participation Agreement), and that Iran would have to provide "political risk" assurances, including assumption of debt service obligations in the event that LNG deliveries were disrupted. Although neither such assurances nor a guarantee of debt service from Iran would have been inconsistent with the terms of the Participation Agreement, nevertheless, in February 1977, NIGC said it "was not prepared to agree to a change in the basic documents" and that alternatives requiring a sovereign guarantee were not acceptable. The Chairman of NIGC, Mr. Mossadeghi, emphasized that if by the end of April 1977 the Second Party did not have a viable solution for continuation of the project, then he would serve notice that there were "genuine grounds and causes for the termination of the Participation Agreement."

15. By the end of April 1977, however, there were signs that NIGC's position regarding financing was beginning to shift. A letter from the Second Party participants to NIGC, dated 29 April 1977, shortly before the end of the deadline referred to by Mr. Mossadeghi, explained that the Second Party shareholders were committed to proceeding with the Kalingas project, and that there were now two proposals within the Kalingas framework that could be implemented: a

Crinavis proposal for a sea-based liquefaction facility and the JKC proposal for a land-based facility. As to the Crinavis proposal, the letter emphasized that a guarantee from the Government of Iran regarding the natural gas supply was essential. Referring to the JKC land-based proposal, the letter, in a sentence not quoted in the Award, states "the indicated financing for the JKC proposal remains as previously reported by the Kalingas financial advisors" (*i.e.*, equity participation from NIGC and a guarantee from the Government of Iran would be required).

16. A Kalingas Board meeting held on 30 April and 1 May 1977 "accepted [the Crinavis proposal] in principle as a project that conforms to the objectives of the Participation Agreement." The Board further resolved that the JKC proposal should be implemented concurrently. Mr. Mossadeghi, on behalf of NIGC, signed the resolution on these points without objection or comment.

17. The status of JKC's proposal was next reviewed at a Board meeting on 25 June 1977. The minutes of that meeting, again signed by Mr. Mossadeghi, state that a JKC proposal was distributed to all participants. The minutes go on to report that apparently in response to this proposal Dr. Abusaidi, another NIGC representative, "stated that Mr. Mossadeghi has said that the percentage interest and the percentage equity in the finance plan must be reduced as much as possible" (emphasis added). These minutes for the first time indicate expressly that NIGC was willing to consider some equity contribution to the JKC project and that its objection was to the amount, rather than to the idea, of equity participation. Their failure to refer to the proposed guarantee of the Iranian Government suggests that it, too, was acceptable.

18. NIGC's lack of objection to these terms is confirmed by a letter sent by JKC to NIGC 22 November 1979 reviewing the

developments and evolving understandings among the parties.[3] It states that during the course of discussions held between the Parties

> "NIGC expressed its view . . . that the interest rate and equity were too high and the repayment schedule not favorable and that better financing terms should be presented by September 1, 1977. However, <u>NIGC had no objection to the above-mentioned two basic concepts, namely, equity contribution and government guarantee</u>.

(Emphasis added). The letter states also that

> [o]n August 16 and 22, 1977, NIGC and JKC met and discussed the proposed financing scheme further. At these meetings, NIGC repeated its position that the equity to be provided by the shareholders should be lowered and not be more than required for the administrative activities of Kalingas during its early years of operation. However, <u>NIGC never objected to the concepts of equity contribution and government guarantee</u>.

(Emphasis added).

19. Consistent with this account of the Parties' discussions, on 31 August 1977 JKC submitted a detailed proposal that clearly spelled out its financing scheme for the land-based project. Of the total investment 20% would be in the form of equity and the remaining 80% would be financed by loans. The equity was to be shared equally by NIGC and JKC (or JKC and other Second Party participants). The loan terms provided that 50% was to be in the form of an export credit, guaranteed by the Iranian Government, and the remaining 50% was to be a loan from JKC and the other Second Party participants.

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[3]This letter was sent in response to NIGC's notice of termination of 6 November 1979. NIGC did not respond contemporaneously to contest the views expressed in it, and has failed to produce evidence to rebut the summary of events presented in the letter.

20. Subsequent negotiations between the Parties took place until 23 October 1977, when another shareholders' meeting was held. The minutes of this meeting indicate that a "Memorandum of Understanding," agreed upon by the Second Party participants just one day before, was presented to the Board. The Memorandum noted that several projects were possible within the structure of Kalingas and that not all Second Party members would choose to continue to participate in each project. The Memorandum provided further that the non-participating members would agree to waive their rights in the projects in which they did not participate, other than their right to repayment of advances from "any or all LNG projects."

21. The minutes of the shareholders' meeting record that in response to this development Mr. Mossadeghi stated that "NIGC is committed to the repayment of advances made by the Second Party only within the framework of the Participation Agreement." He stated further that "unless a LNG Project was initiated within the framework of Participation Agreement and within six months . . . NIGC would not have an obligation to repay the funds paid by the Second Party under the Participation Agreement." Finally, he emphasized that "the Participation Agreement should be terminated within six months from the date of the service of the said notice [on] the Second Party Shareholders unless Second Party Shareholders initiate a firm LNG Project within the said six month deadline." (Emphasis added).

22. These minutes reveal that NIGC made no specific objection to any financing terms, even though it had had JKC's proposed financing for the land-based LNG project before it for some time. This striking fact is noted by the Award (para. 98), but it concludes nevertheless that "it is reasonable to infer that, by issuing notice of termination to the Second Party the next day, NIGC rejected the JKC proposal, including the financing provisions." I cannot

agree with this unsupported inference. The minutes indicate that Mr. Mossadeghi raised his objections immediately upon hearing of the Memorandum of Understanding among the Second Party participants. As the minutes also make clear, it was the possibility of the Second Party participants restructuring their roles in Kalingas that resulted in NIGC's concerns about the scope and the timeliness of the project. Nowhere is there a reference to any concern about the basic financing terms. I believe, therefore, that it is infinitely more reasonable to conclude that the admonitions regarding continuing "within the framework of the Participation Agreement" and initiating "a firm LNG Project within the said six month deadline" were in response to the news of the restructuring rather than to the financing details of the JKC scheme.

23. On the following day, 24 October 1977, NIGC formally gave the Second Party participants six months' notice of termination, quoting various provisions of the Participation Agreement and stating that "[a] review of the . . . provisions of the [Participation] Agreement clearly indicates, in 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." Here, too, there was no specific objection to the terms of finance. The termination notice was signed by Mr. Mossadeghi.

24. JKC objected to this notice by letter dated 14 November 1977. As the Award observes, NIGC, in its response of 26 November 1977, "pointed out that the Second Party participants were jointly responsible to NIGC for the fulfillment of the obligations under the Participation Agreement." Significantly, it did not mention any objections to the financing that JKC had been proposing for the land-based project. Rather, NIGC concluded by indicating that

> [w]e 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 judgment 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.

Although the letter reserves judgment on JKC's proposal, its tenor is to urge compliance with the new six-month deadline rather than suggest changes in the proposal.

25. On 26 December 1977 JKC sent its latest financing proposal and project summary to the other Second Party participants, and a copy was sent to NIGC.[4] The proposal contained the same basic terms of financing as set forth in the 31 August 1977 proposal sent to NIGC. It stated that "[t]he project is now entering the stage where actions related to financing arrangements are required to be taken" and requested that the Second Party members give notice within 30 days whether they wanted to continue to participate in the project. The record shows that NIGC was kept fully abreast of the Second Party's actions and knew that JKC was continuing to proceed with a financing arrangement requiring equity contribution from NIGC and a Government guarantee from Iran. Again, however, no objection to the financing scheme or the recent developments was forthcoming from NIGC.

26. All of this evidence is corrobrated by the testimony of Mr. Barrolaza, who acted on behalf of Chicago Bridge & Iron ("CBI"), one of the Second Party participants. He states in his affidavit that JKC's final proposal presented to NIGC

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[4] JKC's letter of 22 November 1979 to NIGC states that this project summary had been sent to each member of the Second Party "after consultation with NIGC" to "facilitate the proposed land-based Project."

> had been negotiated between JKC and NIGC and covered all aspects of the project. The financing called for in the proposal required the continuing Kalingas stockholders (including NIGC) to provide, on a pro rata basis, 20% of the cost of the project as equity in Kalingas and 80% in the form of project loans. JKC had arranged the project loans to be provided by NIGC through the Japan EXIM Bank which required NIGC only to provide Iranian Government project loan guarantees.

27. JKC and NIGC continued to discuss implementation of the land-based project. The Second Party participants other than CBI, which elected to participate to the extent of a 2.5% equity interest, chose not to participate in the continuing project.

28. Finally, on 14 March 1978, approximately one month before ISC and NIGC executed the Repayment Agreement, NIGC wrote to JKC expressly accepting a revised "Joint Implementation Schedule" for the JKC project. In the same letter, NIGC further agreed that

> it would not take any action to invoke provisions of Article 13 of the Participation Agreement [on termination in case of breach] in respect of JKC provided that the land-based LNG Project <u>now being negotiated</u> is duly implemented in accordance with the attached schedule.

(Emphasis added.) NIGC also stated 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.

NIGC's letter further requested confirmation from JKC, prior to expiration of the six-month period stipulated in the 24 October 1977 notice, of JKC's intent to implement the project. NIGC's letter, signed by Mr. Mossadeghi, concluded:

> 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.

Attached to the letter was a copy of the Joint Implementation Schedule, in which there is reference to a schedule for approval of financing arrangements and obtaining approval also from the "[Japan] EXIM [Bank]" (which required an Iranian Government guarantee).

29. The Award discounts the significance of NIGC's 14 March letter, finding that it did not withdraw objections to or acquiesce in the terms of the JKC proposal. In making such a finding, however, the Award simply ignores the developments between the Parties reviewed above. This express acceptance by NIGC of the Joint Implementation Schedule was made at a time when JKC had long maintained its financing scheme premised on an equity contribution from all shareholders of Kalingas (including NIGC) and a Government guarantee from Iran. The schedule attached to NIGC's acceptance, referring both to the schedule for approval of the financing arrangements and specifically to the Japan EXIM Bank, is confirmatory evidence that NIGC was aware of the proposed financing arrangements, including the export credits to be arranged by the Japan EXIM Bank that would require an Iranian Government guarantee. Nevertheless, NIGC never made any specific request for a change, nor was any change made, to this financing scheme. This absence of any such request is consistent with Mr. Barrolaza's testimony at the Hearing and in his affidavit to that effect that Mr. Mossadeghi had indicated that with

> NIGC's acceptance of the JKC proposal, . . . the proposal (including financing arrangements) had also been approved by NIOC officials and the Minister of Finance.

It also comports with the statement in JKC's 22 November 1979 letter that

> NIGC [had] agreed to the basic concepts of the proposed financing scheme, including the concepts of equity contribution and government guarantee, since if NIGC had any objection thereto it would have either mentioned such objection in its letter dated March 14, 1978 or, at the very least, would not have agreed to withdraw its notice of termination and go ahead with the Japanese land-based project.

This evidence suggests that the Parties had reached an understanding as to the fundamental terms and NIGC did not rebut it.

30. The Award finds also that NIGC's letter did not "constitute a revocation of the notice of termination dated 24 October 1977." This is wholly irrelevant, however, since, as the Award observes, formal revocation of that notice as to "the Second Party as a collective entity" occurred some days later, on 23 April 1978, when NIGC executed certain Accession and Repayment Agreements with the Second Party participants. By its own terms, NIGC's letter announced its intent to revoke its previous notice of termination as to JKC when it stated that "NIGC would not take any action to invoke the provisions of Article 13 of the Participation Agreement [on termination] . . . provided that the [JKC] land-based project now being negotiated is duly implemented." It is significant, too, that NIGC's Chairman, Mr. Mossadeghi, had indicated at the 23 October 1977 shareholders' meeting that the Participation Agreement would be terminated unless a "firm" LNG project was initiated within six months. By implication, the revocation of such notice indicated that NIGC considered the JKC project to be "firm."

31. On 15 April 1978 JKC sent NIGC a letter confirming that JKC would participate in the project up to 47.5% with the understanding that CBI would be a 2.5% participant and that NIGC would participate for the remaining 50%, and that "[t]he entire financing of the total investment cost of the Project <u>less the equity</u> and CBI's direct loan portion will be provided by Japan as will be mutually agreed" (emphasis

added). JKC's letter of 22 November 1979 again points out that

> there was no objection by NIGC to this confirmation, which is another clear indication of agreement on the basic contents of JKC's financing scheme, and on equity contribution in particular.

The failure by NIGC to respond to JKC's 15 April confirmation letter is yet another indication that the dealings and developments between the Parties, from January 1977 until April 1978, had created new understandings as to what constituted the Kalingas project.

32. Approximately one week later, on the basis of assurances from NIGC and in the absence of any objection to the JKC proposal, ISC agreed to terminate its interest in Kalingas and entered into the Repayment Agreement with NIGC, which made repayment contingent upon the establishment of the Kalingas project. Claimant ISC has testified that it would not have given up its rights in Kalingas and its rights to repayment under the Participation Agreement if it had not been assured that NIGC "had reached agreement with JKC" to move forward with JKC's proposed Kalingas project.

III.

33. The purpose of the foregoing review of the facts has been to demonstrate that because of developments from January 1977 into April 1978 regarding JKC's Kalingas proposal it was understood by ISC and NIGC on 23 April 1978 that the financing terms, <u>i.e.</u>, NIGC providing some equity and the Iranian Government guaranteeing Japanese export financing, had become part of the basis of the continuing Kalingas project.

34. The Award's analysis, however, is misdirected to the issue of whether NIGC had "accepted" JKC's proposed

financing scheme by the time the Repayment Agreement was executed. The Award states that

> 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.

Later, the Award goes on to state that

> [t]here is little evidence to indicate to the Tribunal that NIGC <u>accepted</u> the JKC financing proposals at some time between April 1978 and September 1979.

(Emphasis added).

35. To be sure, such an acceptance would be convincing evidence that NIGC's subsequent objection to JKC's financing terms in September 1979 was a breach of its duty of good faith. However, the focus on "acceptance" <u>per</u> <u>se</u> is misplaced. Instead, it should be on whether the financing scheme had been rejected, for it is the absence of rejection that supports the conclusion that NIGC's subsequent objection to the financing terms was a pretext for its unilateral decision to abandon the project on other grounds. Indeed, the very fact, as the Award describes it, that "this issue remained unresolved" means that it was at that time within the scope of an eventual (but as yet unconcluded) agreement. The record clearly demonstrates that the basic terms of financing, specifically regarding equity participation and a guarantee, no longer were contested by the time the Repayment Agreement was executed, and these terms had become part of the general terrain on which the Parties were approaching the Kalingas project. NIGC's subsequent "about face" in September 1979, therefore, was nothing other than an attempt to avoid its obligation to ISC under the Repayment Agreement, in breach of its duty of good faith.

36. The developments between JKC and NIGC after 23 April 1978 confirm this view. In June 1978 JKC and NIGC prepared and signed various contracts for construction, engineering and LNG purchase contracts necessary for commencement of the JKC project. On 18 October 1978 Mr. Mossadeghi of NIGC wrote to Crinavis offering a 10% share in a new company to be formed, in exchange for the transfer of the shares then still held by Crinavis in Kalingas. This apparently was to facilitate implementing the JKC project by removing Crinavis, still a Second Party participant, from Kalingas. Finally, in December 1978 JKC and NIGC met in Tehran and jointly prepared a Shareholders' Agreement to govern the new relationship between JKC and NIGC. This agreement reflected the same requirements of equity participation by NIGC and a guarantee from the Government of Iran that JKC had maintained in all of its financing proposals. That agreement was the last evidence of the Parties' intentions before the Revolution took hold in Iran.

37. The Award, however, persists in its mistaken focus on the concept of "acceptance," recording that JKC's financing proposal was not actually accepted <u>per se</u> between April 1978 and September 1979. The Award states that "[h]ad th[e] [Shareholders'] agreement been executed it would undoubtedly have superseded the provisions of the Participation Agreement on which NIGC's defense is based." The Award acknowledges, too, that failure to sign the Shareholders' Agreement was due in part to the events of the Revolution in Iran and in part "to the fact that Crinavis remained as a Second Party participant in Kalingas, and thus in the JKC project." Inexplicably, the Award attaches no significance to the Shareholders' Agreement as evidence tending to show that the basic financing terms, including equity participation and government guarantee, had disappeared as a point of contention between JKC and NIGC. Instead, the Award concludes only the obvious, namely "that the financing had not been

finalized prior to the meeting with JKC in September 1979." (Emphasis added.)

38. That JKC and NIGC jointly drafted the Shareholders' Agreement confirms yet again that JKC's financing scheme was understood to be the basis of financing for the Kalingas project when the Repayment Agreement was signed, and that it remained the basis of financing for the project until the turmoil of the Revolution disrupted the Parties' plans. If NIGC had harbored any objection to such fundamental terms, the Shareholders' Agreement would not have included them at such a late stage in the negotiation, i.e., many months after NIGC's 14 March 1978 letter. Furthermore, NIGC has submitted no evidence that it objected to these terms or that it tried to renegotiate them at any time between the announcement on 14 March 1978 of its intention to revoke its notice of termination and its change of position in September 1979.

IV.

39. Given the entire record, there is no doubt that NIGC breached its duty of good faith by objecting to the JKC financing terms at the 29 September 1979 meeting, which was held after a long hiatus to discuss the future of the project. Mr. Mossadeghi had left Iran by this time and NIGC was represented at the meeting by Mr. Etemad, a newly appointed director in charge of planning. JKC reviewed this meeting in a letter dated 29 November 1979 to CBI. Mr. Etemad is reported to have outlined "NIGC's position and the policy of the revolutionary government" of Iran as follows:

> a. First of all, natural resources should be reserved for the benefit of the nation.
>
> . . . .
>
> 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).

(Emphasis added.)

40. Both the policy statement on natural resources and the objection to the financing arrangements were contradictory to NIGC's position prior to the Revolution.[5] While the Award quotes this portion of JKC's letter, it omits reference to another portion of the same letter stating that when Mr. Etemad was presented with a copy of NIGC's letter of 14 March 1978, signed by Mr. Mossadeghi, in which NIGC stated that it would not take any action to invoke Article 13 of the Participation Agreement in respect of JKC, provided the land-based project was implemented as per the Joint Implementation Schedule, he responded "that he had never seen that letter . . . and that Mr. Mossadeghi should not have been authorized by the government about what he had accepted in his letter." (Emphasis added). It is further reported that Mr. Etemad

> did not change his basic position throughout the meeting, [but] he admitted at the last moment that NIGC would be able to approach the government in any manner, if the governmental policy was changed.

41. The fundamental change in Iran's national policy towards hydrocarbon resources underscores the pretextual nature of NIGC's sudden objection to a long anticipated financial scheme. This point is given insufficient attention in the Award. It is noteworthy that NIGC did not present any evidence to rebut the statement made by Mr.

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[5] Furthermore, the statement that "no guarantee" is permissible under the Participation Agreement is incorrect (*see* para. 13, *supra*) and itself constitutes evidence of bad faith.

Etemad that Iran's natural resources should be reserved for the benefit of the nation. Testimony of Claimant ISC at the Hearing established that as of that time it was led to believe that the Kalingas project was, for all intents and purposes, terminated. This view is supported by the affidavit of Duncan G. Clarke, Group Manager of Petroconsultants, S.A., the world's largest reporting and consulting firm on international hydrocarbon exploration and production activity. Citing several consortium agreements between NIOC and large oil companies, he states:

> Following the Revolution, the new Iranian government cancelled or otherwise terminated all such agreements, and operations formerly conducted by foreign companies were assumed by NIOC and its affiliates. Fervent resource nationalism in both the public and private sectors in Iran led to a May, 1979 government decision that foreign interests under such outstanding contracts and agreements should be taken over by NIOC.
>
> <u>Since the Revolution, the announced Iranian policy has been to utilize Iranian gas domestically rather than for export</u>.

(Emphasis added). In the past, the Tribunal has recognized the change in Iran's policies regarding its natural resources. <u>Sedco, Inc.</u> and <u>National Iranian Oil Company</u>, Award No. 309-129-3, at p. 21 & n.8 (2 July 1987), <u>reprinted</u> <u>in</u> 15 Iran-U.S. C.T.R. 23, 33 & n.12; <u>Amoco International Finance Corp</u>. and <u>The Government of the Islamic Republic of Iran, et al.</u>, Award No. 310-56-3, at pp. 28-29, 57-58 (14 July 1987), <u>reprinted</u> <u>in</u> 15 Iran-U.S. C.T.R. 189, 207-08, 228-29; <u>Mobil Oil Iran Inc., et al.</u> and <u>Government of the Islamic Republic of Iran, et al.</u>, Award No. 311-74/76/81/150-3, at pp. 53-57 (14 July 1987), <u>reprinted</u> <u>in</u> 16 Iran-U.S. C.T.R. 3, 39-42. The Award, however, completely ignores the fact that the Kalingas project thus was killed for reasons unrelated and extraneous to the Parties' agreement.

42. Moreover, the Award ignores the fact that no evidence has been presented to rebut the admission implied when Mr.

Etemad stated that Mr. Mossadeghi should not have been authorized to accept what he did in the 14 March 1978 letter. Instead, the Award's analysis adverts to wholly irrelevant points, stating that

> 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.

Of course ISC was not present at the 29 September 1979 meeting, since it no longer participated in Kalingas and had given up, in the Repayment Agreement, its right to participate in the belief that NIGC would pursue the Kalingas project in good faith. Furthermore, since it was informed about the meeting two months later by letter, it is immaterial that ISC did not immediately object to certain statements of NIGC.

43. The Award also observes that at the 29 September 1979 meeting NIGC's representative gave JKC six months in which to submit an acceptable financing proposal, which is consistent with NIGC's 6 November 1979 written notice of termination, in which Mr. Morshed, the new Chairman of the Board and Managing Director of NIGC, 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 hereinabove which established 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.

The point, however, is that it was this very notice that perfected NIGC's breach of good faith, since its objection to the JKC financing scheme is directly contrary to its earlier position to go forward with the Kalingas project on the basis of the same financing arrangements.

44. Still further damning evidence of bad faith is NIGC's unexplained and unjustified failure to meet what the Award describes as its "clear and unambiguous," and unconditional, obligation under Article 2 of the Repayment Agreement "immediately and directly [to] disburse to [ISC] its pro rate share of surplus fund" derived from the sale of drilling equipment.

Despite the fact that, as the Award itself finds, a significant sum thus was undeniably, and undeniedly, due and owing to ISC for more than a year prior to the fateful 29 September 1979 meeting, NIGC <u>has never paid</u> it to ISC. Moreover, NIGC has not once offered an excuse for its failure to do so. NIGC simply has ignored and breached a plain obligation under Article 2 of the Repayment Agreement. Even granting, as the Award finds, that "such breach does not constitute, <u>per se</u>, so fundamental a breach of the Repayment Agreement as to repudiate the entire agreement," the "continuing breach is not irrelevant to the issue of NIGC's good faith performance" and indeed is highly indicative of a general failure of good faith on NIGC's part.

45. Against all of this cumulative evidence of bad faith NIGC made no attempt whatsoever to demonstrate that it had acted in good faith. Therefore, ISC should have prevailed on this branch of its claim.

V.

46. It would remain to consider the quantum of damages. The concentration of the Award, and hence of this Opinion, on the Kalingas project somewhat obscures the fact that ISC's entitlement to repayment was not necessarily measured by that project alone. While Article 6 of the Repayment Agreement prescribed that the Kalingas project would be the sole <u>source</u> of funds for repayment of ISC's U.S.$1,992,811.67 loan to Kalingas, Article 4 provided that

the percentage of loan and interest to be repaid would equal the percentage of four million metric tons annual production achieved. There is evidence in the record that the Parties interpreted this to mean the percentage achieved by any and all projects that might produce from the Pars field, and not just by Kalingas. There is not convincing evidence, however, that any project other than the Kalingas one would have been realized. It does seem to me on the evidence more likely than not that the Kalingas project would have been realized, had NIGC acted in good faith. Since its planned production would have been 2.8 million metric tons annually, or 70 percent of the contractual yardstick, I would have awarded ISC U.S.$1,394,968.

Dated, The Hague
23 January 1990

Charles N. Brower

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