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Case No. 11286 Date of filing: 20 Dec 1989

** AWARD - Type of Award Final
- Date of Award 20 Dec 1989
38 pages in English — pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 11286
CHAMBER THREE
AWARD NO. 458-11286-3

UNITED PAINTING COMPANY, INC.,
a claim of less than US$250,000 presented
by THE UNITED STATES OF AMERICA,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
DATE 20 DEC 1989
تاریخ ۱۳۶۸/۹/۲۹

AWARD

Appearances:

For the Claimant:	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, Mr. David A. Balton, Attorney-Advisor of the Department of State.
For the Respondent:	Mr. Mohammad K. Eshragh, Agent of the Government of the Islamic Republic of Iran, Mr. Nozar Dabiran, Legal Advisor to the Agent of the Government of the Islamic Republic of Iran, Mr. Sohrab Rabiee, Legal Assistant to the Agent of the Government of the Islamic Republic of Iran, Mr. Ali Akbar Mahrokhzad, Mr. Hamid Foroudian, Representatives of National Iranian Oil Company, Mr. Mohammad Ali Behabadi, Mr. Hossain Ali Farzad, Representatives of Bank Markazi.

I. INTRODUCTION

1. The Claimant, UNITED PAINTING COMPANY, INC. ("United Painting"), is a corporation organized under the laws of the State of New York, United States of America. United Painting is a painting contractor engaged in, among other activities, servicing the utility and refinery industries.

2. The named Respondent is THE ISLAMIC REPUBLIC OF IRAN ("IRAN").

3. In 1977 United Painting and its Iranian joint venture partner Chemworld Company Limited ("Chemworld") concluded a contract with Lavan Petroleum Company ("Lapco"), alleged later to have become a part of National Iranian Oil Company ("NIOC"), for the sandblasting and painting of a loading dock and a crude storage tank on Lavan Island, Iran (the "Contract"). In connection herewith United Painting claims an amount of U.S.$196,397 plus interest and costs, based on the following three contentions. First, United Painting argues that Lapco breached the Contract by failing to reimburse the premium costs of an additional surety bond required to cover extra work performed at Lapco's request. Second, United Painting alleges that IRAN expropriated its equipment by not permitting its removal from Lavan Island following performance of the Contract. Finally, United Painting contends that, through imposition of exchange controls restricting withdrawals in dollars, IRAN unlawfully interfered with and expropriated funds belonging to United Painting which were deposited at the International Bank of Iran, allegedly succeeded by Bank Mellat ("Bank Mellat" or "the Bank"). NIOC asserts counterclaims, primarily for payment of taxes and social security premiums allegedly due in connection with the Lapco project.

II. PROCEDURAL HISTORY

4. On 19 January 1982 the United States of America filed a Statement of Claim on behalf of the Claimant. A Supplemental Statement of Claim was filed on 22 October 1984.

5. IRAN and Bank Mellat each filed a Statement of Defense on 2 October 1985 and NIOC filed its Statement of Defense on 3 December 1985.

6. The Claimant submitted its Reply to the Statements of Defense on 10 March 1986. IRAN, NIOC and the Bank filed a combined Rejoinder on 15 December 1986, including counterclaims by NIOC for taxes and social security premiums.

7. On 21 April 1987 a submission entitled "Presentation of New Documents by National Iranian Oi[1] Company in Respect of Claimant's Claim Concerning Expropriation of Property" was filed, which included a further counterclaim.

8. On 18 May 1987 the Claimant filed its objection thereto on the grounds that the late date of this submission left the Claimant insufficient time to prepare a response and that the delay in raising the counterclaim was not justified. However, due to the subsequent postponement of the Hearing, the Claimant was able, while maintaining its objection, to submit on 31 July 1987 a material response to the new documents and to the counterclaim submitted on 21 April 1987.

9. The Tribunal must address the admissibility of the late-filed counterclaims and documents. First, the Tribunal must decide the admissibility of the counterclaims by NIOC for taxes and social security premiums filed on 15 December 1986, one year after NIOC filed its Statement of Defense. Second, in its 21 April 1987 filing NIOC submitted an additional counterclaim, based on the alleged faulty

condition of certain equipment. Third, this submission included certain new arguments and evidence concerning the merits of the Case.

10. Article 19, paragraph 3, of the Tribunal Rules provides that counterclaims must be filed "[i]n the Statement of Defense, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances." This rule has generally been applied to dismiss counterclaims filed after the Statement of Defense where the Respondent has not provided a justification for the late filing. See Ultrasystems Incorporated and The Islamic Republic of Iran, et al., Partial Award No. 27-84-3, p. 21 (4 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 100, 113.

11. The Tribunal notes that NIOC has given no explanation for the fact that none of its three counterclaims was filed with its Statement of Defense. On the basis of the criterion set out in Article 19, paragraph 3, of the Tribunal Rules, i.e., whether "the delay was justified under the circumstances," the Tribunal rejects all three counterclaims raised. NIOC has provided no justification for the late filing of these counterclaims. Although the Claimant did not object to the late filing of the tax and social security counterclaims, under the specific language of Article 19, paragraph 3, of the Tribunal Rules, the Tribunal, in light of NIOC's failure to justify their late filing, must nevertheless reject them.

12. The Respondent's filing of 21 April 1987 raises a second, related issue. It is not disputed that this document was filed after the deadline for the submission of pleadings in this Case and that it contains new arguments and evidence. Under Tribunal precedent, in determining whether to accept such a late submission, the Tribunal considers "fundamental requirements of equality between, and

fairness to, the Parties, and the possible prejudice to either Party." Harris International Telecommunications, Inc. and The Islamic Republic of Iran, et al., Partial Award No. 323-409-1, para. 61 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 31, 46-47 (and cases cited therein). Further, "the orderly conduct of the proceedings also requires that time limits be established and enforced." Id. (citing Middle East Management and Construction Corp. and The Government of the Islamic Republic of Iran, Award No. 202-292-2, pp. 3-4 (25 Nov. 1985), reprinted in 9 Iran-U.S. C.T.R. 340, 343.) In applying these factors to a specific case, the Tribunal considers "the character and contents of late-filed documents and the length and cause of the delay." Id. at para. 62, reprinted in 17 Iran-U.S. C.T.R. at 47 (and cases cited therein).

13. The explanation given by NIOC for its late filing is that "while examining its records concerning the instant case, it came across new evidentiary material." In view of the period that NIOC had to prepare its case, the Tribunal finds this explanation insufficient to permit the filing of this document at this late stage of the proceedings. However, considering the character of the new arguments and evidence presented, and the fact that the Claimant had an opportunity to respond thereto in its filing of 31 July 1987, the Tribunal admits the part of NIOC's filing of 21 April 1987 that does not deal with the new counterclaim. Accordingly, the Tribunal also admits the Claimant's response of 31 July 1987.

14. On 23 September 1987 the Respondent sought to submit two further documents that Bank Mellat allegedly had omitted inadvertently from its Statement of Defense. At the Hearing, held two days later, the Tribunal in accordance with its practice rejected these documents as untimely filed.

III. JURISDICTION

(i) The Claimant's Nationality

15. It is not disputed that the Claimant is a corporation organized under the laws of the State of New York and exclusively owned at all relevant times by United States citizens. In support hereof, the Claimant submitted the following evidence: first, a sworn statement by the Claimant's accountants, setting out, among other things, that on 31 December 1980 Mr. A.M. Stein owned ninety percent of the Claimant's outstanding stock; second, a certificate of birth showing that Abraham Morris Stein was born in the City of New York on 13 July 1918; third, a certificate issued on 26 July 1984 by the Secretary of State of the State of New York, showing that United Painting's certificate of incorporation was filed on 4 December 1944 and that the corporation continued to exist according to the records; and last, an affidavit dated 19 September 1984 of Mr. A.M. Stein stating, among other things, that he was the Claimant's majority shareholder, president and director.

16. On the basis of the foregoing, the Tribunal is satisfied that the Claimant meets the requirements of Article VII, paragraph 1, of the Claims Settlement Declaration.

(ii) Partnership

17. On 1 November 1977 the Claimant entered into a "Joint Venture Agreement" with Chemworld, represented by its managing director, Mr. Parviz Yazdani ("Mr. Yazdani"), for the specific purpose of sandblasting and painting Lapco's dock and tank on Lavan Island. The Claimant has submitted a signed copy of this agreement. Article 1 thereof provides that "[t]he parties shall share and share alike, equally in all profits, losses, expenses, costs, investments etc. resulting from the execution of this contract."

18. IRAN contends that the Tribunal lacks jurisdiction because "there had been no joint venture company between" Chemworld and United Painting, and that, had there been any such joint venture, it should have been registered with the Iranian Corporate Registration Bureau. Similarly, Bank Mellat argues that the lack of any such registration implies that the Bank does not recognize the existence of such a joint venture. Any alleged agreements between Chemworld and United Painting, Bank Mellat asserts, should be regarded as their internal matters only.

19. The jurisdictional arguments of IRAN and Bank Mellat assume that the Joint Venture Agreement cannot provide a basis for jurisdiction if the joint venture partners have not actually incorporated and registered a joint company in Iran. Although it appears to be correct that no such company was formed, and the Claimant has not made any claim to that effect, IRAN and Bank Mellat have not established that this should affect the Tribunal's jurisdiction. They thus do not adequately respond to the Claimant's contention that its position as a partner in a contractual joint venture forms a proper basis for jurisdiction of the Tribunal.

20. NIOC does address this contention. It asserts that a partner in a partnership cannot by itself file a claim on behalf of the partnership or for its individual share of the partnership's entitlement. NIOC states that, just as obligations undertaken by a partnership affect all partners, a partnership's rights can only be exercised by the partners collectively. Therefore, NIOC argues, since Chemworld has not joined United Painting in the present claim, the Claimant lacks standing to bring suit against the Respondent. While not referring expressly to relevant provisions of the laws of Iran, NIOC cites various cases decided in United States courts allegedly supporting its position.

21. The Claimant points to case law indicating that under New York and Iranian law facts similar to those of the present Case would establish a valid partnership. The Respondent does not contest the validity of the contractual joint venture itself or that the joint venture was an existing partnership both under the laws of the State of New York and Iran. Indeed, the joint venture's validity forms the basis for NIOC's argument that the Tribunal lacks jurisdiction. Under these circumstances, and in the absence of evidence that a valid partnership did not exist, the Tribunal proceeds to the question whether a joint venture partner should be entitled to bring a claim based on a contract entered into by the joint venture without its partner acting as co-claimant.

22. In Housing and Urban Services International, Inc. and The Government of the Islamic Republic of Iran, et al., Award No. 201-174-1, p. 22 (22 Nov. 1985), reprinted in 9 Iran-U.S. C.T.R. 313, 329 ("Haus"), the Tribunal addressed this question under Iranian law. It concluded that there is substantial authority for the proposition that where there is a civil partnership, a claim must be pursued in the names of all the partners as its joint owners. The Tribunal therefore held that under the laws of Iran the Claimant might not have standing to sue. At the same time, the Tribunal noted that due to its international position, while municipal law may serve as its "point of departure," the Tribunal must also look to international law. See id. at 23-24, reprinted in 9 Iran-U.S. C.T.R. at 330.

23. Article 20 of the Joint Venture Agreement states that the agreement shall be governed in all respects by the laws of the State of New York. NIOC argues that under the laws of New York a partner is generally not permitted to sue alone on rights belonging to the partnership. Yet even if it were established that the laws of the State of New York prevent a partner from bringing suit without its partner

acting as co-claimant - as the laws of Iran appear to do - the Tribunal would, as confirmed by Haus, have to take into account international law. See id. This is consistent with Article V of the Claims Settlement Declaration, which forms the basis for the Tribunal's awards.

24. As the Tribunal concluded in Haus,

> [w]hile international law seems to accept that as a rule a partner may not sue in his own name alone on a cause of action accruing to the partnership, where special reasons or circumstances required it, 'international tribunals have had little difficulty in disaggregating the interests of partners and in permitting' partners to recover their pro rata share of partnership claims. The most relevant 'special circumstance' in this sense exists when a partner's claim is for its own interest, which is independent and readily distinguishable from a claim of the partnership as such.

Id. at 24-25, reprinted in 9 Iran-U.S. C.T.R. at 330. The primary reason for allowing a partner to bring a claim individually is that he "would otherwise be prevented from claiming before an international forum because of a foreign partner's disability." Id. at 27, reprinted in 9 Iran-U.S. C.T.R. at 332. The Tribunal observes that this rationale applies in the present Case.

25. To determine whether United Painting's claim is for its own interest, independent and readily distinguishable from a claim of the partnership as such, the Tribunal must consider the terms of the Joint Venture Agreement. In addition to Article 1 providing for equal sharing of profits and losses, Article 10 provides that "[u]pon conclusion of the jobs, and after all bills and obligations have been paid, the remaining profits or losses not previously divided shall be divided between the Parties mentioned." It is evident from these contractual provisions that the parties thereto have undertaken their project on a fifty-fifty basis. In other words, a right for each partner to half of the joint

venture's net proceeds is readily identifiable. As such, United Painting's entitlement is separable from Chemworld's and consequently is individual to United Painting.

26. Under these circumstances, and on the basis of the Joint Venture Agreement, the Tribunal finds that the Claimant is permitted to bring an individual claim for its interest against the Respondent.

(iii) Division of Assets

27. United Painting asserts, however, that it is entitled not to fifty percent but to one hundred percent of the joint venture's outstanding entitlement vis-à-vis the Respondent. According to the Claimant, upon completion of the work in August 1978 Mr. Stein and Mr. Yazdani agreed that Chemworld, as sales agent for certain paint and materials sold to the joint venture, would retain all commissions derived from these sales and that United Painting, which had the experience in painting, would retain all the sandblasting and painting equipment purchased by the joint venture for use on Lavan Island. The Claimant alleges that it was further agreed that the balance remaining in the joint venture's checking account after all outstanding transactions had cleared would go to United Painting, in consideration of the costs that would be incurred in shipping the equipment back to the United States.

28. NIOC asserts that the Claimant has not proved this alleged division of the joint venture's assets. NIOC notes that although communications submitted by the Claimant discuss arrangements for the sale to a third party of the equipment of the joint venture after the date of the alleged distribution of assets, no reference is made to the sales proceeds belonging exclusively to United Painting. The Tribunal agrees with NIOC that the communications submitted are at best ambiguous on this issue and thus do not

necessarily point to an allocation of the remaining joint venture property to United Painting. In fact, repeated references to "our equipment" in telex messages sent more than one year after the alleged division of assets seem strikingly unsupportive of such assertion.

29. The Claimant has not provided any documentary evidence unequivocally supporting its contention. In this respect the Tribunal observes that business transactions, even quite sizeable ones, in practice often are based on oral understandings without being embodied in a formal written agreement. This tends to be the case particularly in a situation where the parties to a transaction have dealt with each other before, and especially where the parties have a legally defined cooperation, as in the present Case. Under certain conditions, therefore, absence of documentary support per se need not prejudice a party's position.

30. In this Case, the sole source of evidence that the Claimant had become the sole owner of the joint venture assets at issue is the affidavit by Mr. Stein, the Claimant's majority shareholder, president and director. The reason why, according to Mr. Stein, the equipment was to become the Claimant's property was partly to reimburse United Painting for certain general and administrative overhead costs incurred by United Painting for the benefit of the joint venture. The Tribunal notes that, considering the detailed nature of the original joint venture agreement and the relationship between Mr. Stein and Mr. Yazdani, one would expect such fundamental revisions to that agreement to have been contemporaneously memorialized in some manner.

31. On balance, the Tribunal finds that, in light of the repeated statements in the joint venture agreement concerning equal distribution of profits and losses, the generality of the statements contained in Mr. Stein's affidavit and the absence of documentary evidence unambiguously

supporting his statements, the evidence is insufficient to establish with the requisite degree of likelihood that the alleged redistribution of joint venture property was, in fact, agreed to. On the basis of the foregoing, the Tribunal will consider United Painting's right to fifty percent of the expropriation claim, representing its entitlement under the Joint Venture Agreement.

(iv) Ownership of Bank Account Funds

32. The Bank also contends that the Tribunal lacks jurisdiction over United Painting's claim relating to the funds in dollar account no. 610-13-01577 and rial account no. 610-11-21819 ("the Accounts"), the two bank accounts with the International Bank of Iran allegedly belonging to United Painting. It asserts that there has never been one combined joint venture company and that the Accounts were opened exclusively in the name of Chemworld. Therefore, the Bank concludes, the Claimant is not entitled to bring a claim based on the Accounts.

33. United Painting asserts that the documentation submitted by the Bank itself demonstrates that the Accounts were owned jointly by the joint venture partners. It points out that the account opening forms give the title of the Accounts as "Chemworld Co. Ltd. UP," which is also printed on the Accounts' checks. United Painting furthermore remarks that the signature cards show both Mr. Yazdani and Mr. Stein as required signatories and that Mr. Yazdani directed the Bank by letter to honor only checks signed both by him and by Mr. Stein. The Claimant notes further that checks paid by Lapco into the Accounts were made jointly payable to Chemworld and United Painting. The Bank contends that the documents confirm that Mr. Stein could act merely as co-signatory for Chemworld, holder of the Accounts. It points out also that Chemworld's company registration number is mentioned in the account opening forms.

34. The Bank has not explained how the absence of one combined company would affect the partners' ability to open a bank account for the purpose of a contractual joint venture. The Tribunal must therefore dismiss this part of the basis for the Bank's contention.

35. Concerning the Bank's contention that the Accounts were opened exclusively in the name of Chemworld, the Tribunal notes that the parties agree that the submitted account opening forms concern the Accounts. As to the account title, the Bank maintains that "[t]here is no mention of United Painting Co. Ltd. on the said form. On the contrary, the form explicitly mentions 'Chemworld Co. Ltd.'" The record establishes, however, that United Painting is mentioned several times, albeit abbreviated to "UP," and that Chemworld is only referred to in combination with that abbreviation. On the other hand, certain data on the form, such as the address and the company registration number, do relate to Chemworld. The Tribunal observes that such data, which is of an administrative nature, normally is included for practical purposes -- for example, to record a forwarding address for bank statements -- and as such does not establish the identity of the account holder. In the present Case, it made sense for the joint venture partners to use Chemworld's presence in Tehran to facilitate the joint venture's bank affairs. This also appears consistent with Chemworld's responsibility, laid down in Article 15 (D) of the Joint Venture Agreement, to administer and to maintain the records of the project.

36. The absence on the form of the term "account holder" or a similar designation emphasizes the significance of the account title entered on the form. The Tribunal considers it probable that the account title was meant to designate the beneficiary of the account. Article 9 of the Joint Venture Agreement provides, among other things, that the partners shall "deposit all monies, both invested funds and

contract receipts, in an agreed account in the International Bank of Iran." The Bank has confirmed that Mr. Yazdani and Mr. Stein were the jointly authorized signatories for the Accounts. The copy of the Official Gazette submitted by the Bank casts doubt on the Bank's contention that the authorization of Mr. Stein solely regarded Chemworld. This notice describes the parties authorized to sign "all documents and negotiable documents" relating to Chemworld as "Engineer Parviz Yazdani, Managing Director or Mr. Fereidoun Yazdani, Member of the Board of Directors" -- no mention is made of Mr. Stein. In addition, one of the account opening forms mentions Lapco and the Chase Manhattan Bank, New York as references. Moreover, Article 11 of the Bank's Rules and Conditions governing current accounts, submitted by the Bank, implies that it offered "joint accounts in the joint names of two or more accountholders."

37. The Tribunal finds it a reasonable inference from these circumstances that the Accounts were of a joint nature, established on behalf of the joint venture. The Tribunal therefore rejects the Bank's argument that the Claimant has no right to the funds in the Accounts and that the Tribunal for that reason lacks jurisdiction over the claim relating to the Accounts. In light of its findings set out below, the Tribunal will not decide any further jurisdictional questions regarding this claim. See infra paras. 80-81.

(v) Popular Movements

38. In its Statement of Defense IRAN contends that the Tribunal has no jurisdiction over the expropriation claim on the basis of Paragraph 11 (D) of the Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration"). This provision contains an obligation for the United States to

> bar and preclude the prosecution against Iran of any pending or future claim of the United States

> or a United States national arising out of events occurring before the date of this Declaration related to . . . injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

IRAN contends that Lapco's activity came to an end due to such revolutionary events and that claims caused by the cessation of that activity should therefore be barred by this provision.

39. The Claimant rejects this argument on two grounds. It asserts that Paragraph 11 of the General Declaration applies only to the fifty-two United States nationals seized in Tehran on 4 November 1979, and, for that reason, not to the present Case. The Claimant also asserts that its losses were not caused by popular movements but by deliberate acts of the Government of Iran, specifically, its repeated denial to the Claimant of access to the equipment on Lavan Island.

40. It is Tribunal precedent that if the Claimant relies on acts which it contends are attributable to the Government of Iran, Paragraph 11 of the General Declaration does not effectively restrict the Tribunal's jurisdiction. See, e.g., Alfred L.W. Short and The Islamic Republic of Iran, Award No. 312-11135-3, p. 5 (14 July 1987), reprinted in 16 Iran-U.S. C.T.R. 76, 79; Kenneth P. Yeager and The Islamic Republic of Iran, Partial Award No. 324-10199-1, para. 33 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 92, 100-01. In view of the Claimant's contention that the acts at issue were acts of Iran, the Tribunal holds that Paragraph 11 of the General Declaration does not bar its jurisdiction over the instant claim.

(vi) The Respondent

41. The Claimant names IRAN as the Respondent in this Case. United Painting asserts that it was IRAN that: (1) imposed

illegal exchange controls preventing the Claimant from taking its dollars out of Iran and leading to unjust enrichment of the Bank; (2) denied the Claimant access to its equipment on Lavan Island; and (3) refused to reimburse the Claimant for the additional insurance premium.

42. The Claimant also asserts that IRAN is the proper Respondent in this Case because the Iranian entities involved are controlled entities within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration. Specifically, the Claimant contends that by the time of the expropriation of equipment NIOC had assumed control of Lapco. In support of this contention, the Claimant submits an affidavit dated 25 February 1986 by a former Lapco manager, John T. Harris, stating that all operations and property on Lavan Island came directly under NIOC control around the time of his departure from Iran in January 1979. In addition, the Claimant cites various pleadings filed in other cases before the Tribunal in which NIOC expressly identifies itself as the successor to Lapco. The Claimant further points out that the Tribunal has already found NIOC to be a controlled entity. As to the International Bank of Iran, the Claimant states that the Tribunal has previously determined that it has been succeeded by the state-owned Bank.

43. To the extent that United Painting's claim is directed against IRAN acting in its position of controlling NIOC and the Bank, the Tribunal must determine whether these entities meet the requirements for control set forth in Article VII, paragraph 3, of the Claims Settlement Declaration.

44. The structure of the Respondent's defense is such that separate pleadings have been submitted by IRAN, NIOC and the Bank. The Bank confirms that it is the legal successor to the International Bank of Iran. The pleadings furthermore do not contain a denial that the Bank is controlled by IRAN.

In accordance with Tribunal precedent, the Tribunal holds that the Bank is a controlled entity as defined in Article VII, paragraph 3, of the Claims Settlement Declaration. See Benjamin R. Isaiah and Bank Mellat, Award No. 35-219-2, p. 6 (30 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 232, 235.

45. It has not been disputed, either, that NIOC is a controlled entity, as the Tribunal has held unequivocally in Oil Field of Texas, Inc. and The Government of the Islamic Republic of Iran, et al., Award No. ITL 10-43-FT, p. 14 (9 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 347, 356. The Tribunal notes that the memorials filed by the Respondent do not contest that NIOC is the successor-in-fact to Lapco.[1] At the Hearing, however, the Respondent asserted a general denial, without explanation why it had not done so earlier. Acceptance of such an argument presented at this late stage in the proceedings would be likely to cause prejudice to the Claimant's position. In accordance with its established practice, the Tribunal rejects this belated jurisdictional defense.

46. On the basis of the foregoing, the Tribunal finds that it has jurisdiction over IRAN, NIOC and Bank Mellat, such entities being the proper Respondents in this Case.

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[1] The Tribunal finds that the reference to "an Iranian private company" and the remark that "[r]egarding the expropriation of the sandblasting and painting equipment of Claimant, . . . the joint venture with LAPCO had nothing to do with GOI" are not sufficient to constitute a denial. These statements, not made by NIOC but by IRAN, do not address the relationship between Lapco and NIOC. Moreover, they fail to take into account the relevant date for the Tribunal's determination, i.e., 19 January 1981. See, e.g., Eastman Kodak Company, et al. and The Government of Iran, et al., Partial Award No. 329-227-3, para. 44 (11 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 153, 165 ("Eastman Kodak").

IV. THE MERITS

A. Additional Performance Bond

47. Section A, Paragraph 15 of the Contract provides as follows:

> Upon request of LAPCO, the bidder who is awarded the CONTRACT shall furnish a Surety Bond in the amount of the total value of the CONTRACT, and guaranteeing faithful performance of the CONTRACT. The Surety Bond shall be written in a form and purchased from a source approved by LAPCO.
>
> In the alternative, if LAPCO so elects, CONTRACTOR shall furnish a Bank Guarantee in a form acceptable to, and in an amount specified by LAPCO but not to exceed the Total Contract Price.
>
> In the event that LAPCO requires CONTRACTOR to furnish either a Surety Bond or Bank Guarantee as above provided, LAPCO shall reimburse CONTRACTOR for the premium cost thereof.

Upon entering into the Contract, United Painting and Chemworld proceeded to obtain a bond from Great American Insurance Company, which agreed to act as surety up to an amount of rials 74,995,000. Lapco approved the bond by telex of 1 November 1977 and it was signed on 3 November 1977.

48. Chemworld and United Painting completed the original Contract job on 30 June 1978. The Claimant contends that Lapco subsequently requested the contractor to perform extra work on the basis of Section C, Paragraph 30 of the Contract. This paragraph sets out the administrative arrangements relating to such requests and provides, in relevant part, that "[e]xtra work or changes shall be covered by the faithful performance bond furnished under the CONTRACT although the order therefor be given without notice to the surety." To cover the resulting increase in the total dollar value of the Contract from U.S.$1,060,000 to U.S.$1,278,934.10, the Claimant arranged for an increase in

the amount of the bond at an additional premium cost of U.S.$1,587. United Painting asserts that because Lapco's final payment under the Contract did not include the extra premium, it forwarded its insurance broker's invoice, dated 29 December 1978, to Mr. Yazdani for payment by Lapco. When payment was demanded by its broker, as is evidenced by correspondence submitted to the Tribunal, United Painting allegedly remitted the additional premium itself. The Tribunal finds it reasonable to conclude that payment was indeed made.

49. United Painting bases its claim for reimbursement and interest on breach by Lapco of its contractual obligation to reimburse the contractor for the premium costs of the bond, which was to cover the total value of the Contract. Alternatively the Claimant argues that Lapco is liable on the basis of unjust enrichment. In reply, NIOC contends that Section C, Paragraph 30 did not require any new guarantee; the extra work was to be performed under the original bond. NIOC points out that the Claimant has not produced any document evidencing a request by Lapco for an extra guarantee. Finally, it invokes Section C, Paragraph 32, which requires the contractor to submit certain claims for additional compensation within ten days from the event giving rise to such claim.

50. The Contract is clear on the subject of liability for the costs of the original performance bond -- they are to be borne by Lapco. It is less clear, however, with respect to the costs of an additional bond. Initially, the Tribunal notes that Lapco, as a commercial operation employing services of third parties, cannot reasonably have expected that a 25% increase in contract value would not cause the premium to increase. It must be deemed to have been aware that the price of a bond bears a relation to the extent of the surety's potential exposure, which is fixed in the bond contract. Yet, while the Parties agreed in Section C,

Paragraph 30 that extra work should also be covered by the required bond, they did not use this paragraph to address the issue of liability for the resulting costs. Given their awareness of these costs, this omission lends importance to the reference in that Paragraph to the original bond, the cost of which Lapco undertook to reimburse pursuant to Section A, Paragraph 15 of the Contract.

51. The Tribunal observes that there is no indication that Lapco knew the amount of the original premium when it agreed to this undertaking. Neither Lapco's correspondence with the joint venture partners about the bond, nor the Contract, nor the contractor's bid mention any price. The invoice for the original bond is dated 22 November 1977, three weeks after the date of the Contract.

52. The Tribunal is satisfied that United Painting had good reason both to do the additional work and to have the performance bond extended. Considering the Parties' relationship, it is reasonable to presume that Lapco would otherwise have protested and therefore United Painting would not have incurred the additional expense. As to Section C, Paragraph 32, which requires claims for "additional compensation" to be made within ten days, the Tribunal notes that this provision relates only to claims for additional compensation "by reason of any act or omission of LAPCO, or if the CONTRACTOR considers any work demanded of him to be outside the requirements of the CONTRACT, or if he considers any record or ruling of LAPCO's Representative to be unfair." The paragraph does not pertain to additional work which Lapco and the contractor have contractually agreed upon. This is further evidenced by the fact that the subject of compensation for such work is expressly dealt with by Section C, Paragraph 30. For this reason, the Tribunal finds that the contractor was not obliged to file its claim in accordance with the procedure set out in Section C, Paragraph 32.

53. Taking the foregoing into account, the Tribunal determines that NIOC is liable for the additional premium in the amount of U.S.$1,587. United Painting seeks interest from the date payment was due from Lapco, that is, the date on which it paid the surety company. The Claimant asserts that this date is 29 December 1978. The Tribunal observes that this is actually the date of the surety company's invoice and that the broker's demand letter submitted by the Claimant indicates that on 29 April 1980 payment had yet to be made. In view hereof, the Tribunal decides that interest is payable from 1 June 1980 to the date of payment pursuant to the Award, at a rate of 10% per annum.

B. Expropriation of Equipment

54. United Painting asserts that IRAN effectively expropriated the sandblasting and painting equipment left on Lavan Island upon conclusion of the work by not permitting its removal and by failing to return it since then. According to the Claimant, which has submitted a list of items and copies of the corresponding invoices, the equipment had been kept in a fenced-in area under the exclusive control and supervision of Lapco, as is confirmed by a former Lapco manager, Mr. Harris. United Painting contends that in May 1979 Mr. Yazdani attempted to arrange for the removal of the equipment on the Claimant's behalf. The Claimant has filed a copy of a telex by Mr. Yazdani dated 30 May 1979, which states, in relevant part:

> Re our joint venture contract. It is essential that you make an immediate trip to Tehran to discuss and clear the matter with the new Islamic Revolution Government Committee. As you are aware ther [sic] has been a change in our government system and the new I.R.G.C. is reviewing our performed j.v. contract for legal procedure and inspection of all detail documents in [sic] which we must have in possession while you are in Tehran. On the other hand there has been high restriction on exchange regulation which shold

> [sic] be permitted by Iranian Central Bank Committee after clearence [sic] from I.R.G.C.
> With this [sic] regards, you should make this trip and also arrange at once for transfer of all oquipment [sic] while is possible.

The Claimant asserts that this demonstrates that Mr. Yazdani was told the equipment could not be removed until Mr. Stein appeared before the Revolutionary Committee. However, the revolutionary events taking place at the time prevented Mr. Stein from travelling to Iran.

55. On 23 November 1979 the Claimant allegedly sold the equipment to Clark Painting Corporation ("Clark"), a United States company, for U.S.$166,810. On that date, Mr. Stein sent a telex message to Mr. Yazdani, stating, in relevant part: "Imperative you call me relative to sale of our equipment to Clark Painting for $166810. Equipment to bepicked [sic] up by Clark on Lavan islands [sic] and taken to his work site in Abu Dhabie [sic] . . . . Please contact Lapco and arrange the removal of our equipment from their property." According to the Claimant, Mr. Yazdani was again informed that his joint venture partner would have to appear in Iran before the equipment could be removed. As Mr. Stein was unable to do so, the sale did not materialize. United Painting argues that the imposition of such a condition under the circumstances then prevailing in Iran constituted an unreasonable interference with its property rights amounting to expropriation. The Claimant holds IRAN liable for damages equivalent to the sales proceeds it would have received from Clark.

56. IRAN responds that no evidence has been presented that it benefited from the property or that it created some hindrance to its removal. It alleges that the owner has abandoned the equipment and that a taking thereof has not been proved. NIOC argues that if an expropriation had taken place, the Claimant would not subsequently have intended to sell its equipment as it did. NIOC makes two further

arguments which are based on the Contract. It points out that Section D, Paragraph 1-9 only requires Lapco to provide storage and office space, unless it is not able to do so, in which case the contractor itself must arrange therefor. The Respondent argues that this is an insufficient basis on which to hold Lapco responsible for the safekeeping of the property. NIOC also contends that the joint venture should have submitted its protest in accordance with Section C, Paragraph 32. As to the claimed amount of damages, NIOC asserts that it does not reflect depreciation in the value of the items and that it includes compensation for equipment which had previously been sold to and paid for by Lapco.

57. The Tribunal rejects NIOC's first three arguments in connection with the expropriation claim. The Claimant's intention to sell the property does not preclude the claim of expropriation, for it preceded the time when the expropriation claim allegedly arose. Furthermore, the contractual arrangements relating to the storage of the equipment on Lavan Island are not directly relevant to the Tribunal's determination, because United Painting does not rest its case on breach of contract but on acts of expropriation. For the same reason, NIOC cannot successfully invoke Section C, Paragraph 32.

58. In Starrett Housing Corporation, et al. and The Government of the Islamic Republic of Iran, et al., Award No. ITL 32-24-1, p. 51 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 122, 154, the Tribunal stated that "[m]easures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner." Expropriation occurs, for example, when the owner is deprived of the "effective use, control

and benefits of [his] property rights." Id. at p. 52, reprinted in 4 Iran-U.S. C.T.R. at 154. Here it should be noted that "[t]he intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact." See, e.g., Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, et al., Award No. 141-7-2, p. 11 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225-26. This does not, however, relieve a claimant asserting expropriation from the obligation to demonstrate the requisite government interference.

59. In arguing that Iran unlawfully interfered with its property rights in the equipment left on Lavan Island after the project was finished, United Painting relies initially on Mr. Yazdani's telex of 30 May 1979. The Claimant concludes from this message that Mr. Yazdani was told that the equipment could not be removed unless Mr. Stein appeared personally in Iran. United Painting contends that Mr. Yazdani received the same message when he undertook a second mission to Lapco to retrieve the property in November 1979. The Tribunal notes that the 30 May 1979 telex is the only documentary evidence submitted by the Claimant supporting its contention that NIOC refused to permit removal of the property without Mr. Stein personally appearing before the Revolutionary Committee in Iran. The Tribunal shall determine, therefore, whether this document demonstrates government interference.

60. The Tribunal concurs with the Claimant that under the circumstances of this Case, Mr. Stein could not be expected to fulfill a condition of meeting in Iran to negotiate the equipment's release. However, the telex does not establish to the Tribunal's satisfaction that such a condition was imposed. While making clear that Mr. Stein's presence was being required for a review of the "performed j.v. contract

. . . and inspection of all detail documents," it leaves doubt that this requirement encompassed the release of the equipment as well. In particular, the Tribunal is not convinced by the wording of the final part of the telex. The telex concludes "[w]ith this [sic] regards, you should make this trip and also arrange at once for transfer of all oquipment [sic] while is possible." Although this does suggest that Mr. Yazdani urged Mr. Stein to take this opportunity to handle this matter as well, this suggestion insufficiently supports the conclusion that Mr. Stein's presence was required in Iran as a prerequisite to transfer of the equipment. The Claimant's later alleged sale of the equipment to Clark, and, to some extent, the sale of certain items to Lapco, appear to indicate that Mr. Stein also drew a different conclusion from the telex. See infra paras. 67-68. On balance, the Tribunal considers the evidence submitted by United Painting too thin to justify a finding of government interference. It therefore rejects the claim based on expropriation.

61. The fact that interference amounting to expropriation has not been proved does not preclude the Tribunal from considering whether liability exists on the basis of "other measures affecting property rights" as contemplated by Article II, paragraph 1, of the Claims Settlement Declaration. See Eastman Kodak, Partial Award No. 329-227-3 at para. 59, reprinted in 17 Iran-U.S. C.T.R. at 169. Thus, the Tribunal cannot disregard the fact that NIOC does not contest that the equipment which the contractor used on Lavan Island must be considered lost to it. NIOC has neither provided an explanation concerning the whereabouts of the equipment nor offered to arrange for its recovery, presumably because it does not perceive that it had an obligation to protect it. This raises the issue whether or not NIOC was under such an obligation.

62. An issue of relevance here is the storage of the equipment. Section D, Paragraph 1-9 of the Contract provides, in relevant part:

> The CONTRACTOR shall use that space allotted to him for office, storage sheds, and space for storage and erection as directed by LAPCO . . . . Where sufficient storage space has not been provided by LAPCO and is not under the control of LAPCO at the site of the work, the CONTRACTOR shall provide storage . . . in a manner so as to prevent/ [sic] damage to such material or equipment.

These provisions purport to assign responsibility for storage for the duration of the Contract, and they do so in a rather ambiguous way. The parties agree, however, that the Contract had been fully performed, as is evidenced by Lapco's final payment. Consequently, the subsequent responsibilities of the parties are not specifically governed by the Contract. Nevertheless, the Tribunal finds the parties' references to this Paragraph helpful for its assessment of those responsibilities.[2]

63. According to NIOC, Section D, Paragraph 1-9 "explicitly specifies that in the event it is impossible for the Employer for any reason to provide contractor with sufficient space, the contractor shall be responsible to provide such

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[2] In view of its considerations set out in this paragraph, the Tribunal need not determine which party was to guard the property during performance of the work, that is before August 1978. On this subject, NIOC states that "Lavan was only liable for providing storage and office space" but "had no control or supervision on the joint-venture properties." The Tribunal observes, however, that Section D, Paragraph 1-9 establishes a connection between the provision of storage space and the supervision over the materials stored. It is only when the contractor would be the party actually providing the storage space -- and not when it is Lapco -- that the Paragraph confers the obligation "to prevent/ [sic] damage to such material or equipment" on the contractor.

storage space." This comment falls short of an assertion that it was the contractor which in fact bore responsibility for storage. In this context, the Tribunal notes NIOC's statement that "review of the whole text of the Contract is indicative of the fact that the executive unit or employer, had been responsible only for provision of the required facilities including sufficient space for office and storage for contractor's use." That the employer did indeed act according to this responsibility is corroborated by the factual account rendered by Mr. Harris, who supervised the sandblasting and painting of the storage tank on behalf of Lapco. He has testified that "Chemworld-United stored all of the equipment it purchased for the project in Lapco's warehouse yard on Lavan Island, or it was in LAPCO's custody. The equipment was still stored there when I left Iran in January 1979." Mr. Harris has also testified that Lapco was in control of all of Lavan Island during his entire tenure in Iran, which commenced in 1970, and that all operations and property on Lavan Island had come directly under the control of NIOC after January of 1979. NIOC, in its specific response to the Harris affidavit, does not take issue with the contention that Lapco provided storage space to the joint venture company on Lavan island.

64. From the evidence before it, the Tribunal concludes that the equipment had been left with Lapco in storage. It is an accepted principle of law that such a circumstance normally confers an obligation on the entity in charge to protect the property of third parties which is left in its exclusive control. For this reason the Tribunal finds that the loss of the equipment must in principle be deemed to be NIOC's responsibility, within the scope of Article II, paragraph 1, of the Claims Settlement Declaration. See General Dynamics Telephone Systems Center, Inc., et al. and The Islamic Republic of Iran, et al., Award No. 192-285-2, p. 22 (4 Oct. 1985), reprinted in 9 Iran-U.S C.T.R. 153, 165.

65. NIOC's responsibility towards the property would cease, however, if the Tribunal would find that the Claimant's actions were of such a nature as to constitute abandonment thereof. The Tribunal considers the final part of Section D, Paragraph 1-9 of the Contract relevant to this issue. It states that "[a]t the completion of the work, the CONTRACTOR shall remove temporary equipment in a manner satisfactory to the authorities or the property owners concerned." Under normal circumstances, therefore, the Claimant should have removed its property within a reasonable period of time after August 1978, when the project finished. The provision does not specifically discuss this period of time, stating only that the equipment shall be removed "in a manner satisfactory to the authorities." The Tribunal notes that there is no evidence in the record that the authorities, that is, Lapco, NIOC or any agent of the Government of Iran, ever requested the removal of the property. In fact, Lapco knowingly appeared to permit its continued storage, as is indicated by its purchases from May 1979 onwards of certain items of the equipment. See infra paras. 67-68.

66. The record establishes that the first attempt to remove the property was made in May 1979. Therefore, the issue raised is whether the Claimant's failure to remove the property between September 1978 and May 1979 should be interpreted as abandonment of the property. The Tribunal notes that, due to an illness contracted in August 1978, Mr. Stein was hospitalized in New York from late September through December 1978 and was subsequently confined to home rest until mid-1979. Consequently, during this period he could not be expected to pursue the issue of the equipment remaining in Iran. Furthermore, the Tribunal has previously held that force majeure conditions existed in Iran in late 1978 and early 1979. See, e.g., Anaconda-Iran, Inc. and The Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 65-167-3, paras. 40-50 (10 Dec. 1986), reprinted in 13 Iran-U.S. C.T.R. 199, 211-13 (and

cases cited therein). These conditions, which also affected Lavan Island, were of such a nature that the Claimant's failure to remove the property prior to May 1979 cannot be deemed to constitute abandonment of the property. The Tribunal concludes, therefore, that NIOC is liable for the damages sustained by United Painting.

67. The Tribunal must now assess the value of the equipment. The Claimant has submitted a list of equipment allegedly involved and copies of the corresponding invoices. While not contesting the list as a whole, NIOC claims that certain items on the list had in fact been sold to Lapco. In support hereof NIOC has submitted a sales invoice sent to Lapco by Mr. Yazdani on behalf of the joint venture. The items specified on the invoice include a portable house, certain painting equipment and a pick-up truck. NIOC has also submitted bank documents evidencing Lapco's payment for these items, and internal correspondence containing further specification of the items so purchased. United Painting replies that it has not been proved that these items correspond with those on the list.

68. Having investigated the evidence in detail, the Tribunal concludes that the items listed as 5C, 5K, 5M, 5O (the 3/8 inches hose and the air feed hoods) and 5Z 1 (one thereof) already had been sold to Lapco. These items, whose combined price as claimed by United Painting was U.S.$20,716, must therefore be disregarded for the purpose of assessing the Claimant's damages.

69. United Painting contends that the proper measure of its damages is the proceeds which it stood to receive from the sale of the equipment to Clark. As evidence of this sale agreement, which is confirmed by the Stein affidavit, the Claimant submits a telex message dated 9 November 1979 which it sent to Clark. This telex reads that "[w]e will send out the equipment list of items in Iran today or Monday. It is

too long to telex." In another telex message submitted by the Claimant, dated 23 November 1979, Mr. Stein issues instructions to Mr. Yazdani for the transfer of the property to Clark, stating, in pertinent part, "[i]mperative you call me relative to sale of our equipment to Clark Painting for $166,810."

70. The Tribunal finds that the documentation presented by the Claimant constitutes prima facie evidence that a sale of the equipment was agreed to with Clark. NIOC has not rebutted this evidence. On the contrary, it states that "Claimant entered into a contract for sale of equipment with a third party" and that "Claimant itself admits that such a contract has been executed." The Tribunal notes that NIOC, in its additional submission of 21 April 1987, argues that Mr. Stein's statement that he sold the property on 23 November 1979 must be dismissed because the division of joint venture assets has not been proved. It is not clear to the Tribunal whether the purpose of this statement is to deny that United Painting by itself was the selling party, or whether it is to contest the fact of the sale altogether. If it is the latter -- although the above quotations from NIOC's pleadings suggest otherwise -- the Tribunal observes that the fact that a division of assets may not have taken place does not preclude a sale of those assets on behalf of the joint venture, as the sale of certain items to Lapco demonstrates.

71. In view of the foregoing, the Tribunal must now investigate the Claimant's contention that the price agreed to with Clark was U.S.$166,810. The Tribunal notes that United Painting's telex to Clark fails to mention this -- or any other -- price for the sale. The only document which expressly mentions this price is Mr. Stein's telex to Mr. Yazdani; no confirmation by Clark has been submitted to the Tribunal. United Painting's telex to Clark does, however, refer to an equipment list. Although the Claimant has not

addressed this point, it is reasonable to assume that this list corresponds to the list presented in the proceedings. This must be the case because the total dollar value of the items listed thereon matches exactly the sales price mentioned in the telex to Mr. Yazdani.

72. The Tribunal observes that this sales price exceeds the total amount of all original invoices. The Claimant's contention that the price agreed with Clark represents about one-half of the equipment's replacement value implies that the replacement cost of the equipment would have doubled over two years. This strikes the Tribunal as unlikely. In addition, much of the equipment was used and it most likely depreciated over the two years since its purchase for the project. Even if one would allow for the inclusion of the costs of transportation from the United States to Iran, the sales price allegedly agreed with Clark fails adequately to reflect this depreciation. The Tribunal further notes that the equipment list demonstrates that the alleged sales price included those items which had previously been transferred to and paid for by Lapco.

73. The foregoing factors give rise to doubt whether there was clear agreement on the alleged sales price to Clark. In view of this doubt, the Tribunal will not use that price as the basis for its determination of the equipment's value. As previously discussed, however, NIOC has submitted evidence that Lapco purchased certain of the items of equipment from the joint venture. See supra, paras. 67-68. The price Lapco paid for this equipment provides some guidance to the Tribunal concerning the value of the equipment in late November 1979.[3] Comparing this price to the original

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[3]Being the earliest time when, in view of the failure of the sale to Clark, the equipment must be deemed to have been lost to the Claimant.

purchase price, the Tribunal concludes that in October 1979 Lapco paid approximately 74% of the original acquisition cost for the equipment in question. The Tribunal recognizes, however, that Lapco purchased only limited items of equipment, and that these may have been the more valuable or well preserved items. Taking this into account, the Tribunal determines that the value of the equipment in late November 1979, excluding the items sold to Lapco, was approximately 60% of its original purchase price, or U.S.$90,000.

74. In view of the foregoing, including the considerations set out above in paragraph 31, the Tribunal holds that NIOC is obligated to pay to the Claimant fifty percent of the equipment's value, or U.S.$45,000, together with simple interest thereon at a rate of 10% per annum from 1 December 1979 to the date of payment pursuant to the Award.

C. Bank Account Funds

75. The Tribunal now turns to United Painting's claim for recovery of the funds in the Accounts. United Painting bases this claim on the following contentions.

76. The Accounts were used to receive and to make payments related to the Lapco project. When checks were drawn on the dollar account, rials deposited in the rial account were converted into dollars. At their meeting held upon completion of the work in August 1978, Mr. Stein and Mr. Yazdani wrote the final checks to be drawn on the Accounts. They calculated that after clearance of these checks and receipt of all monies owing to the joint venture, an approximate balance of U.S.$28,000 would remain. In support of this contention the Claimant submits copies of related ledger sheets from its records and notes from that meeting. It has not submitted copies of bank account statements or the equivalent thereof.

77. The final checks written on the dollar account included two checks of U.S.$50,000 each in payment for services rendered to the joint venture. One was payable to United Industrial Coating Corporation, a Louisiana company owned by Mr. Stein's family, and the other was made out to Mr. Stein personally. The joint venture partners agreed that Mr. Stein would not present these checks for payment until Mr. Yazdani notified him of the receipt of Lapco's final payment. In November 1978 Mr. Stein had the checks presented for payment to the Bank of New York. In April 1979 the Bank of New York informed him that the checks had been dishonored[4] - unlike the other checks written in August 1978. The two notices of dishonor submitted by the Claimant state "[w]e debit and return herewith check which was returned to us for the following reason: New Iran's Central Bank Regulation. Banks are unable to convert Rial to Foreign Currency more than certain amounts." Because of these notices, no further demand for payment from the Accounts was made.

78. The Claimant holds IRAN liable for restitution of the balance of U.S.$28,000 allegedly remaining in the Accounts on three alternative grounds. First, it argues that the exchange control regulations pursuant to which the International Bank of Iran refused to transfer the funds violate the Treaty of Amity[5] and the Articles of Agreement of the International Monetary Fund, and unlawfully interfere with the Claimant's property. Second, United Painting contends that, even if the exchange controls were lawful, they are sufficiently burdensome to constitute an

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[4]These dishonored checks are the subject of Cases Nos. 12406 and 12407 before the Tribunal.

[5]Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957.

expropriation of that property. Finally, the Claimant argues that, through its failure to surrender the funds owed to United Painting, IRAN has been unjustly enriched at the Claimant's expense.

79. In response, the Bank declares that no money was left in the rial account and that the balance of the dollar account was U.S.$102.44. It notes further that it is under no obligation to make payment as long as it has not received an order to that effect from the account holder. The Bank denies any expropriation of the funds; it states that, in accordance with Iranian exchange control regulations, they have always been available for payment in rials. The Bank asserts that the exchange control regulations do not violate either the Treaty of Amity or the IMF Agreement.

80. As an initial matter the Claimant must make out a prima facie case that the claimed amount would have remained in the Accounts after all acknowledged debits were completed. In addition to the ledger sheets the Claimant presents Mr. Stein's affidavit testimony regarding the alleged remaining balances. The ledger sheets indicate that as of 23 August 1978 the joint venture partners estimated that Rls. 18,313,788 would remain for payment of "admin/consult/superv/div." The Claimant explains that after this date a number of checks were written on the rial account including at least four rial checks to Chemworld Company in the total amount of at least Rls. 10,014,145. This would leave a balance of not more than Rls. 8,299,643 or U.S.$117,558.68. From this amount the Claimant acknowledges having written at least three dollar checks in the total amount of at least U.S.$105,000, thus seemingly leaving a balance of not more than U.S.$12,558.68.

81. One explanation for this discrepancy may lie in the items left on "hold" as of 23 August 1978. Testimony by the Claimant could be interpreted to allege that one of the

"hold" items, Rls. 2,171,473 for additional work, was eventually paid. There is no testimony concerning payment of the other two items left on hold, that is, Rls. 847,200 for paint sold to Lapco and Rls. 493,416 representing "extra for oil spill." However, even if one were to add the total amount for items left on hold to the balance of U.S.$12,558.68 seemingly remaining in the Accounts, a material discrepancy would continue to exist between the amount claimed by Mr. Stein to be in the Accounts and that which his testimony and the ledger sheets appear to support. In view of the discrepancy in the evidence presented, therefore, the Tribunal denies the claim.

V. AWARD

82. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a. The Respondent NATIONAL IRANIAN OIL COMPANY is obligated to pay to the Claimant, UNITED PAINTING COMPANY, INC.:

   1. the sum of One thousand five hundred eighty-seven United States Dollars (U.S.$1,587.00), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 1 June 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

   2. the sum of Forty-five thousand United States Dollars (U.S.$45,000), plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 1 December 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

All other claims of UNITED PAINTING COMPANY, INC. against NATIONAL IRANIAN OIL COMPANY, THE ISLAMIC REPUBLIC OF IRAN and BANK MELLAT are dismissed.

b. The counterclaims of NATIONAL IRANIAN OIL COMPANY against UNITED PAINTING COMPANY, INC. are dismissed.

c. The above-stated obligations of NATIONAL IRANIAN OIL COMPANY 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. Each party shall bear its own costs of arbitration.

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

Dated, The Hague
20 December 1989

Gaetano Arangio-Ruiz
Chairman
Chamber Three

In the name of God

Charles N. Brower

Parviz Ansari Moin

1. Joining as to denial of expropriation claim.
2. Joining as to denial of division of assets.
3. Concurring as to

denial of bank account claim, even though it should have been dismissed because it was not outstanding by reason of the absence of evidence of a request for transfer of the bank account funds.

4. Dissenting as to the finding of jurisdiction over NIOC as the successor-in-fact to Lapco.

5. Dissenting as to granting of claim for additional performance bond, due to lack of evidence of actual payment.

6. Dissenting as to the finding that NIOC is liable for the loss of the Claimant's property. At the least, the doctrine of mitigation of damages, coupled with the wording of Article D (1-9) of the Contract, which states that "At the completion of the work, the CONTRACTOR shall remove temporary equipment in a manner satisfactory to the authorities", requires that the Claimant and Respondent bear equal responsibility for the loss of the property. Moreover, the award for 60% of the value of the used painting equipment is far too liberal and charitable to be sustained as a sound judicial valuation.

7. Dissenting as to rejection of the late-filed counter-claims, especially in view of the Claimant's non-objection.