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دیوان داوری دعاوی ایران - ایالات متحده

85

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Case No. 155 Date of filing: 9 Jun 87

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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____

- Date _____
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** SEPARATE OPINION of _____

- Date _____
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

85

CASE NO. 155
CHAMBER THREE
AWARD NO.308-155-3

EXXON RESEARCH AND
ENGINEERING COMPANY,
Claimant,

and

NATIONAL IRANIAN OIL COMPANY,
BANK MARKAZI IRAN,
and
THE GOVERNMENT OF IRAN,
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date 9 JUN 1987 تاریخ
۱۳۶۶/۳/۱۹
No. 155 شماره

DUPLICATE ORIGINAL
«نسخه برابر اصل»

AWARD

Appearances:

For the Claimant:
Mr. Albert P. Lindemann,
Attorney and Representative;
Mr. George Th. Foundethakis
Attorney.

For the Respondent:
Mr. Mohammad K. Eshragh,
Agent of the Islamic
Republic of Iran;
Dr. Mohammad Taghi Naderi,
Legal Adviser to the Agent;
Mr. Hossein Piran,
Legal Assistant to the Agent;
Mr. Ali Akbar Mahrokhzad,
Representative of NIOC;
Mr. S. Mehdi Hosseini,
Technical Representative of
NIOC;
Mr. Mohammad Ekhterai-Sanai,

Representative of Bank Markazi.

Also Present: Mr. John Crook,
Agent of the United States of America.

I. PROCEDURAL HISTORY

1. On 14 December 1981, EXXON RESEARCH and ENGINEERING COMPANY ("Exxon Research") filed a claim in the total amount of U.S.$462,502.99 against NATIONAL IRANIAN OIL COMPANY ("NIOC") arising out of the alleged breach by NIOC of two contracts. Also named as respondents were BANK MARKAZI IRAN ("Bank Markazi") and the GOVERNMENT OF IRAN ("Iran") (collectively with NIOC, "Respondents"). Exxon Research also seeks interest, attorney's fees and costs of arbitration.

2. NIOC and Bank Markazi filed Statements of Defense. NIOC also filed a counterclaim composed of several items and seeks interest and costs of arbitration.

3. The Parties submitted memorials on all issues in the Case.

4. A Hearing took place on 13 January 1987. The Parties appeared and presented oral arguments.

5. Mr. Carl F. Salans participated as a member of the Tribunal in the Hearing and Award in this Case pursuant to Presidential Order No. 51, filed 3 February 1987.

II. JURISDICTION

6. Exxon Research alleges that it is a corporation organized under the laws of the State of Delaware qualifying as a United States national within the meaning of the Claims Settlement Declaration. It states that it is a wholly owned subsidiary of Exxon Corporation and that more than 50% of the capital stock of Exxon Corporation is owned by citizens of the United States. Exxon Research submitted a certificate of the Secretary of State of Delaware certifying that in 1922 it was duly incorporated under the corporate title of "Standard Development Company" under the laws of that

State and that it continued in existence as of 29 August 1985. Exxon Research also submitted a certificate of the Secretary of State of New Jersey showing that Exxon Corporation was duly incorporated in that state in 1882, although under another corporate title, and that as of 1 February 1983 it was still existing and in good standing. Exxon Research submitted an affidavit of the Assistant Secretary of Exxon Corporation, Mr. R.E. Chandler, testifying that the percentage of Exxon Corporation stock held by shareholders of record reporting a United States address has at all material times exceeded 97.9%. Exxon Research also submitted excerpts from proxy statements in the form filed with the United States Securities and Exchange Commission for Exxon Corporation 1979 and 1981 annual shareholders meetings. These proxy statements show that no shareholder holds more than 5% of the shares of Exxon Corporation. Exxon Research also submitted an affidavit of a member of a public accounting firm, Mr. T.M. McDonald, who testified that 100% of the shares of Exxon Research were owned by Exxon Corporation at all relevant times.

7. Exxon Research asserts that because NIOC and Bank Markazi are wholly owned and controlled by Iran, they, together with Iran, clearly fall within the definition of "Iran" in Article VII, paragraph 3, of the Claims Settlement Declaration. Exxon Research clarifies that it named Bank Markazi as a respondent in connection with its obligations as the Central Bank of Iran with respect to the maintenance of the Security Account created to secure the payments of the awards against Iran, while Iran is ultimately liable on the two contracts underlying the claim since it controls NIOC.

8. The Respondents contend that Exxon Research has not submitted sufficient proof of its United States nationality in accordance with the requirements of the Claims Settlement Declaration. In addition Bank Markazi and Iran deny that

they are proper respondents, since they are not parties to any contract or transaction with Exxon Research.

9. The Tribunal finds sufficient evidence in the record that Exxon Research is a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration pursuant to the standards set forth in Flexi-Van Leasing, Inc. and Islamic Republic of Iran, Case No. 36 (Order of 20 December 1982), and General Motors Corp. and Government of the Islamic Republic of Iran, Case No. 94 (Order of 21 January 1983).

10. Exxon Research's claim clearly arose out of "debts, contracts . . . or other measures affecting property rights" as required by the Claims Settlement Declaration. Accordingly, the Tribunal has jurisdiction over the claim.

11. NIOC is clearly a controlled entity and the Tribunal has previously held that claims against it are within the Tribunal's jurisdiction. Bank Markazi and Iran fall within the definition of Iran as well; however neither are alleged to be directly liable on any obligation related to this Case that was outstanding as of 19 January 1981. They are therefore dismissed as respondents.

12. The question as to whether the Tribunal has jurisdiction over NIOC's counterclaims shall be dealt with in the part of this Award discussing the merits of the counterclaims.

III. THE MERITS

13. The first component of the claim arose out of NIOC's failure to pay Exxon Research an amount of U.S.$400,000 allegedly owing under a research agreement ("Research Agreement") entered into between the Parties on 1 September 1978. The second component is a claim for U.S.$62,502.99 in

unpaid invoices associated with pilot plant and engineering studies allegedly performed by Exxon Research for NIOC.

A. The Claim Under the Research Agreement

1. Factual Background

14. Exxon Research and NIOC entered into the Research Agreement effective as of 1 September 1978. Under this Agreement Exxon Research agreed to provide to NIOC over the two-year term of the Agreement the full-time service of one professional research planning advisor and of three additional professional employees to carry out "[r]esearch programs in the areas of gasoline product quality and automotive emissions, asphalt product quality, motor oil quality requirements for Iran and engine testing facilities." Pursuant to Article III B of the Research Agreement, Exxon Research also agreed to provide a part-time professional employee to serve as consultant in the program on development of a certified laboratory for lubricant engine testing. In turn, NIOC undertook to pay Exxon Research a total amount of U.S.$3,300,000, payable in eight installments. The Agreement provided that the first installment in the amount of U.S.$500,000 was to be paid on 1 September 1978; seven additional installments of U.S.$400,000 each were due at three months intervals thereafter.

15. Three further provisions of the agreement are of particular relevance to the case. Article II and Article IV of the Research Agreement respectively provide that the research program shall be carried out "at the laboratory facilities of NIOC in Tehran, Iran and elsewhere in Iran as may be required in order to complete the programs, with the exception of that phase of the program . . . involving the use of the Smog Chamber facility at Linden, N.J." and that the full-time employees would be based in Tehran during the term of the Agreement. Article XI of the Research Agreement

provides that it could be terminated by either party nine months after 1 September 1978, upon three months advance notice.

16. Exxon Research commenced work pursuant to the Agreement on 1 September 1978. On 14 November 1978 NIOC paid the initial U.S.$500,000 installment payment, less a contractual deduction for income tax, in the amount of U.S.$458,123.23. Exxon Research alleges that on 1 November 1978 it sent to NIOC Invoice No. L0006 for the U.S.$400,000 second installment payment due on 1 December 1978. By telex of 3 November 1978, Exxon Research informed NIOC that it had airmailed the invoice for the second installment and requested payment. When no payment was received, Exxon Research sent a telex to NIOC on 18 December 1978 requesting NIOC to make payment of the "invoice L0006 for dollars $400,000 covering the second installment payment due on 1 December 1978 pursuant to the terms of]the[service agreement." NIOC did not pay any part of the second installment payment.

17. Exxon Research alleges that on 4 December 1978, Dr. A. Badakhshan, head of NIOC's Research and Laboratories, convened a meeting with Mr. G. A. Weisgerber, Senior Research Associate of Exxon Research, and Mr. M. Shahab, Deputy General Manager of NIOC's Research and Development of Energy Resources, for the purpose of discussing the safety of Exxon Research's personnel. Dr. Badakhshan allegedly informed Mr. Weisgerber that NIOC's management had decided that "the Exxon Research personnel should stay away from the NIOC Laboratory because of civil disturbance. According to Exxon Research, the discussion included the possibility that Exxon Research personnel would temporarily leave Iran". NIOC does not disagree that this meeting occurred or that Dr. Badakhshan told Exxon Research to keep its employees away from NIOC's laboratory. NIOC denies, however, that Exxon Research was authorized to withdraw its personnel from Iran.

18. On 9 December 1978 three of Exxon Research's full-time employees left Iran, and the fourth left on 16 December 1978. (The part-time employee was not at the time in Iran.) Exxon Research's personnel went to Rome where they worked on reports related to projects under the Research Agreement.

19. The Parties exchanged several telexes scheduling meetings on resumption of work under the Research Agreement, but each attempt was postponed due to continuing difficulties in Iran. Ultimately on 18 January 1979 Mr. G.F. Cox, then Vice President of Esso Middle East, an unincorporated division of Exxon Corporation, initiated a telephone conversation with Dr. Badakhshan in which, according to a memorandum to file prepared by Mr. Cox soon thereafter, Mr. Cox informed Dr. Badakhshan that Exxon Research had determined under the circumstances that it could no longer hold its personnel on the NIOC project and intended therefore to reassign the personnel to other projects. The memorandum states that Dr. Badakhshan had reached the same conclusion and had prepared a telex to the effect that the Research Agreement was declared "inoperable." On 29 January 1979, Dr. Badakhshan wrote a letter to Mr. Cox which refers to a telex, dated 18 January 1979, addressed to Exxon Research. This letter reads as follows:

> This telex has been communicated to you on 18 January, which unfortunately due to strike may not have reached you.
>
> We therefore send you as letter for your records. "I refer to the various telexes exchanged between us concerning the Research Agreement dated Sept 1st 1978 stop Taking into consideration that the said Agreement has been rendered inoperative due to the departure of ER & E experts from Iran, and that our subsequent contacts with a view to resuming the same proved to be unsuccessful, the agreement is under the circumstances considered as terminated stop It is therefore necessary to settle the accounts at this juncture on the basis of actual costs incurred by you and refunding any remaining balance from the first installment already paid to EER stop We certainly hope to be

> in a position to discuss the possibility of further cooperation with you in the future."

20. By cover letter of 23 April 1979, Mr. Cox sent to Dr. Badakhshan eight reports completed by Exxon Research's employees in Italy before they disbanded on 18 January 1979. Copies of these reports were submitted to the Tribunal. In the cover letter which accompanied the transmittal of the reports, Mr. Cox stated that

> as discussed in our telephone conversation of 18th January 1979, we had both independently but reluctantly concluded that under the circumstances existing in Iran at the time, the Contract was inoperable. As a result we subsequently disbanded the]Exxon Research[team who had been held together in Rome for a possible return to Tehran.

Mr. Cox noted that the payment due on 1 December 1978 for the second installment had not been received, and suggested an amount of U.S.$215,000, as a "fair and appropriate" final payment for the work under the Agreement representing the pro-rata portion of the second U.S.$400,000 installment that corresponds to the actual time worked, i.e., from 1 December 1978 to 18 January 1979.

21. NIOC rejected the payment of U.S.$215,000 by letter of 20 June 1979 to Mr. Cox, asserting that no payment was due following Exxon Research's departure. NIOC proposed instead that Exxon Research refund U.S.$100,000 of the original U.S.$500,000 first installment payment made.

22. No other communication between the Parties appears in the record. NIOC made no additional payment, nor did Exxon Research refund any part of amounts previously paid.

2. Exxon Research's Position

23. Exxon Research asserts that the U.S.$400,000 second installment was due and owing as from 1 December 1978 pursuant to the Research Agreement. Exxon Research argues that through 18 January 1979 it performed all its obligations under the Research Agreement. Exxon Research argues that the requirement that the work be performed in Iran was not a material condition of the Research Agreement and that in any event this specific obligation was excused by conditions in Iran constituting force majeure.

24. Exxon Research argues alternatively that should the Tribunal find that it would not have been entitled to retain the entire second installment of U.S.$400,000, it is entitled to at least the U.S.$215,000 corresponding to the amount of the second installment prorated over the period from the beginning of the second quarter, i.e., 1 December 1978, through the alleged agreed date of termination of the Agreement, i.e., 18 January 1978. As a second alternative, Exxon Research claims that it is entitled to compensation for work performed after 1 December 1978 under the theory of quantum meruit.

3. NIOC's Position

25. NIOC raises several defenses to Exxon Research's claims. As an initial matter, NIOC states that Exxon Research is not entitled to claim any amount exceeding U.S.$215,000, which is the amount requested by Mr. Cox in his letter to NIOC of 23 April 1979 as the "fair and appropriate" amount due for work up to 18 January 1979.

26. NIOC also rejects the claim for U.S.$215,000. According to NIOC, the requirement set forth in Article II of the Research Agreement that the work be performed by Exxon Research's personnel in Iran was a material condition of the

Agreement and the departure of Exxon Research's personnel without NIOC's approval was a unilateral decision amounting to an abandonment of the work, which "disqualifies Exxon to receive any payment." NIOC concedes that it instructed Exxon Research's personnel to "stay away" from the laboratories during certain civil disturbances, but argues that this statement cannot be interpreted as allowing the personnel to depart from Iran. NIOC denies that force majeure conditions existed justifying the departure of Exxon Research's personnel from Iran.

27. According to NIOC, the departure of Exxon Research's personnel from Iran was so material a breach that it constituted a termination of the Agreement as of 7 December 1978 when, according to NIOC, Exxon Research departed from Iran. In this respect NIOC points to Article XI of the Research Agreement which states that "no further payment under Article VII shall accrue on or after termination," and concludes that no further payment can be owing. NIOC refers in support to the terms of Dr. Badakhshan's letter of 29 January 1979 which states, " . . . the said Agreement has been rendered inoperative due to the departure of ER & E experts from Iran . . . ." NIOC denies that the Parties agreed to terminate the Research Agreement as of 18 January 1979, since the departure from Iran of Exxon Research's personnel without its approval already terminated the Agreement.

28. NIOC further argues that no payment is due to Exxon Research for the second quarter because payment can be only made in consideration of service performed, and that after its departure from Iran, Exxon Research in fact performed no work. NIOC argues that the reports submitted by Exxon Research after the departure from Iran do not justify compensation. NIOC submitted an affidavit of Mr. F. Behbahani, stating that two of the eight reports "are repetition of the findings of research work previously

carried out from September 1978 until November 1978 which were already reported in the monthly reports and progress reports at the time and the contents of which are partly the published findings of other research workers in previous years and partly the information gathered and obtained in NIOC's Research Center and published during the 3 months period of September 1978 until November 1978."

29. Finally, NIOC states that it never received the invoice for the second installment payment. During oral proceedings, NIOC's representative argued that Exxon Research never presented the invoice because the decision had already been taken by Exxon Research to withdraw from Iran.

4. The Tribunal's Decision

30. The Tribunal finds that the above record demonstrates that the circumstances which gave rise to the departure of Exxon Research's personnel from Iran constituted force majeure. An internal Exxon Research report dated 18 December 1978 describes a conversation between Mr. Cox and Dr. Badakhshan during which Mr. Cox "reviewed with him the circumstances leading to the decision for the team to leave." This report states that Dr. Badakhshan "recognized the difficulties experienced by the group due to circumstances beyond anyone's control." This report clearly reflects a situation which has been generally found to have prevailed in Iran at that time. As stated by the Tribunal in International Technical Products Corp. and Iran, Award No. 186-302-3, p. 21 (19 August 1985), by "5 December 1978 the conditions in Iran had ripened into a force majeure situation." The safety of Exxon Research's employees was jeopardized, as acknowledged by NIOC itself. Therefore, the withdrawal of Exxon Research's team from Iran at that time was justified by the force majeure conditions prevailing in Iran at that time.

31. NIOC argues that the departure from Iran operated as a termination of the Agreement. While both Parties agree that the Agreement eventually was terminated, they disagree on the date and circumstances of the termination and the consequences thereof. Force majeure, such as that the Tribunal finds existed here, does not necessarily have the consequence of terminating a contract. It normally suspends performance of those provisions of the contract which such force majeure circumstances have rendered impossible of performance. Exxon Research acted consistently with those principles in December 1978, suspending performance of research activities in Iran but continuing in Italy other contract required activities which could be performed outside of Iran. In American Bell International Inc. and Islamic Republic of Iran, Award No. 255-48-3 (17 October 1986), the Tribunal determined that cancellation can be inferred from the conduct of the parties. That Exxon Research sent its personnel to Rome to continue to work on NIOC's projects pursuant to the Research Agreement constitutes a showing that it did not consider itself released from performing its obligations under the Agreement.

32. The record shows that in January 1979 both Parties considered the force majeure circumstances existing in Iran at that time as temporary and made several attempts to meet in order "to discuss the future of the project." Contrary to NIOC's contention, Dr. Badakhshan's letter of 29 January 1979 does not indicate that the Agreement terminated upon the withdrawal of Exxon Research personnel from Iran, for that letter refers to the Agreement as being rendered inoperative not only because of such departure, but also because "our subsequent contacts with a view to resuming have proved to be unsuccessful." The record shows therefore that the situation prevailing in Iran in December 1978 did not operate as a termination of the Agreement. It merely suspended performance of the Agreement in Iran.

33. The record further shows that although Exxon Research originally intended to return to Iran at the beginning of January 1979, the situation in Iran worsened, and Exxon Research's inability to resume work in Iran was ultimately acknowledged by NIOC. Since there was no prospect of improvement of the situation in Iran, the Agreement was declared "inoperable." When the Parties acknowledged that performance of Exxon Research's obligations in Iran could no longer be suspended, they elected to treat the Agreement as terminated. This decision was crystallized in the telephone conversation of 18 January 1979, which date the Tribunal determines to be the date of termination of the Agreement.

34. Having determined that the full performance of the Agreement in Iran was suspended by force majeure, that the Agreement was terminated by mutual agreement on 18 January 1979, and that Exxon Research continued to perform such obligations as it could in Italy, the Tribunal's task is now to determine the Parties' financial obligations.

35. The Research Agreement contains no provision governing the circumstances faced in the present instance. The Agreement provides that it "may be terminated by either party nine (9) months after 1 September 1978 and at intervals of three (3) months thereafter on written notice to the other party at least three (3) months prior to the termination date. No further payments under Article VIII shall accrue on or after the termination date." The Tribunal has found that the Agreement was terminated on 18 January 1979, prior to the nine-month time limit contemplated by the Agreement. Therefore, the Tribunal concludes that the termination of the Agreement did not occur pursuant to the provisions of Article VIII, which is therefore not applicable.

36. NIOC argues that no work was done after the departure of Exxon Research's personnel from Iran, that the reports

submitted constitute a duplication of previous studies, and that consequently Exxon Research is entitled to no payment after 1 December 1978 regardless of when the Agreement was terminated. The record shows that eight reports dated 31 December 1978 were prepared by Exxon Research's team in Italy and forwarded to Dr. Badakhshan of NIOC under cover letter dated 23 April 1979. The record does not show that NIOC raised any objections to the adequacy of the work until the proceedings before the Tribunal. Even NIOC's letter to Mr. Cox of 20 June 1979 "with regard to the settlement of the financial aspects of the contract" makes no reference to any deficiencies of the reports. Therefore the Tribunal finds that this defense has no merit.

37. The Tribunal finds that by its partial performance Exxon Research conferred a contractual benefit on NIOC. Therefore, Exxon Research is entitled to remuneration for the work done. The Tribunal's task is now to determine on what basis the remuneration shall be calculated. Exxon Research alleged that it performed work and bore the cost of maintaining its personnel in Rome ready to resume full performance in Iran when possible until 18 January 1979, the date the Tribunal has determined is the date the Agreement terminated. Thus Exxon Research seeks the full contractual remuneration for the time up to the date of termination of the contract. However, given the fact that Exxon Research's inability fully to perform the contract in Iran was not the fault of NIOC but was due to circumstances of force majeure beyond the control of either party, the Tribunal finds no basis for placing the full consequences of these circumstances on NIOC. Rather it appears to the Tribunal that Exxon Research should be paid for the work which it was able to complete in its good faith effort to continue performance, and that otherwise the Parties should be excused from liability towards each other. This amount, however, is not necessarily to be determined by reference to the date on which the Agreement finally terminated, but

rather by the work actually performed by Exxon Research during the period. The Tribunal notes that the work performed was materialized in the form of reports, all of which bear the date of 31 December 1978. Under the circumstances, the Tribunal considers it reasonable to grant Exxon Research remuneration up to this date calculated with reference to the price contemplated in the Agreement.

38. As mentioned above, the U.S.$3,300,000 total contract price was to be paid by quarterly installments of U.S.$400,000, except that payment for the first quarter was set at U.S.$500,000. The Tribunal considers it significant, however, that the Agreement could, because of the force majeure situation, only be performed for four months, i.e., significantly less than the minimum period of nine months envisaged in Article XI. The Tribunal concludes that the provisions of Article VIII dealing with payment by installment cannot be any longer feasible in a case where the Agreement was not terminated at the end of a three month period and within the nine month period contemplated by Article XI. The Tribunal therefore considers that the most equitable solution is to prorate the global contract price of $3,300,000 equally over the life of the Agreement, without regard to the provision for a larger payment for the first quarter. Thus the award to Exxon Research will be based on the ratio which the total contract price bears to the actual time during which Exxon Research was working under the Agreement, i.e., from 1 September 1978 to 31 December 1978. Since the total contract price contemplated was U.S.$3,300,000 for a period of two years, equivalent to U.S.$137,500 per month, Exxon Research is thus entitled to a total payment of U.S.$550,000 for four months' work under the Agreement.

39. Article VIII of the Agreement provides that "[e]ach installment shall be subject to tax in Iran". An 8.38% deduction for taxes in the amount of U.S.$41,876,77 was made

to the first installment, the net amount of U.S.$458,123 being paid by NIOC. In computing the amounts already paid by NIOC, however, the Tribunal shall disregard the deduction for taxes. To do otherwise would amount to a restitution to Exxon Research of the said taxes, the validity of which is not contested. Thus, deducting the gross amount of the first installment, U.S.$500,000, from the total deemed payable under the Agreement, an amount of U.S.$50,000 is due to Exxon Research.

40. As noted, NIOC's payment under the Agreement was reduced by an 8.38% tax reduction. No particulars have been given as to the exact nature of this tax nor the basis of its calculation, nor has the Tribunal been provided with any evidence indicating whether the same rate would have been applied to any subsequent installments. Therefore the Tribunal is unable to make a determination of the proper tax payable, if any, on the amount awarded. Accordingly, no deduction for tax is made, and U.S.$50,000 is awarded to Exxon Research.

B. The Claim Under the "Seventh Refinery Project"

1. Factual Background

41. In October 1977, NIOC engaged Foster Wheeler Energy Company ("Foster Wheeler") to coordinate pilot plant work for NIOC in connection with NIOC's plan to build an oil refinery in Iran, called the Seventh Refinery Project. On 5 October 1977, during a meeting with representatives of NIOC and Foster Wheeler, Exxon Research was invited to make proposals for pilot plant work involving three Exxon Research processes. After an exchange of telexes, on 3 April 1978 Exxon Research's offer was accepted by NIOC and it was authorized to proceed with the work.

42. Exxon Research states that between April 1978 and April 1979, it conducted the pilot plant and engineering studies in Louisiana and New Jersey, and that when the studies were completed, reports were submitted to NIOC. Exxon Research sent the report on one of the studies, concerning "DAO hydrotreating," to NIOC under covering letter dated 12 December 1978. Exxon Research alleges that the report on the other study, concerning "fluid catalytic cracking," was hand delivered by Mr. C.M. White of Exxon Research to NIOC's resident representative at Foster Wheeler's offices in New Jersey on 25 July 1979.

43. During the progress of its work on the Seventh Refinery project, Exxon Research issued monthly invoices to NIOC for work performed. The Parties agree that of the twelve invoices issued between June 1978 and May 1979, three invoices, totalling U.S.$62,502.99, remain unpaid. The invoices at stake are invoices No. M0315 dated 19 December 1978 for the amount of U.S.$8,482.71, invoice No. AO256 dated 22 January 1979 for the amount of U.S.$45,775.84 and invoice No. BO291 dated 23 February 1979 for the amount of U.S.$8,244.44.

44. By letter dated 7 June 1979 Mr. K.B. Gareis wrote to NIOC stating:

> During the review of our outstanding accounts receivable, we find that the items shown on the attached listing have not been paid.
>
> Possibly these invoices have been overlooked. If there are any questions regarding the validity of these charges, please let us know. I have attached a copy of all the invoices for your convenience.

Among the invoices listed are the three invoices at stake in the present case.

45. On 15 August 1979 Mr. Gareis again wrote to NIOC requesting payment of several invoices, including the three at issue. NIOC responded on 8 October 1979 that as to six of the outstanding invoices, including the three at issue, NIOC did "not have the original of . . . the invoices" and requesting that Exxon Research "please furnish us with authentical copies so as we can proceed with their payments." Exxon Research apparently did not respond to this request. Three of the six invoices were paid, however, as only three remain outstanding.

2. Exxon Research's Position

46. Exxon Research alleges that it fully performed its obligations for the Seventh Refinery Project. It argues that NIOC never disputed that the work reflected in the three invoices was properly performed, but that no payment was ever received. Therefore it claims full payment of the invoices.

47. Exxon Research argues alternatively that it is entitled to compensation on the basis of the principles of quantum meruit.

3. NIOC's Position

48. NIOC asserts that Exxon Research failed to perform the studies required under the contract. It states the reports which Exxon Research delivered to NIOC were only preliminary reports and not final reports on the studies. NIOC alleges that the final reports should have been delivered to Foster Wheeler, whose task as coordinator of the project was to gather the completed and final reports. According to NIOC, Foster Wheeler did not complete and deliver its "comprehensive report of the project" to NIOC because Exxon Research failed fully to perform its studies.

49. NIOC also objects that Exxon Research failed to submit the originals of the invoices, whereas "NIOC's usual practice is to pay on the basis of the original invoices." NIOC states that by letter dated 8 October 1979 it requested Exxon Research to submit originals of the invoices but that it received no reply. NIOC thus denies any obligation of payment.

4. The Tribunal's Decision

50. NIOC's defense that the reports of the project submitted by Exxon Research do not constitute "the final reports on the study" or that the work described in the invoices was not performed is supported by no evidence. The record does not show that NIOC ever made any objection to the work performed prior to the proceedings before the Tribunal. Accordingly the defense is rejected.

51. NIOC's argument that non-payment is excused on the ground that the originals of the invoices were not received also has no merit. The invoices seem to have been issued according to Exxon Research's normal practice, and even if original invoices were not submitted, no contractual term requires the submission of "originals" rather than photocopies of invoices. Exxon Research's failure to forward to NIOC duplicate originals of the invoices does not release NIOC from its obligation of payment, in the absence of any proof as to the invalidity of the invoices.

52. In the absence of any valid objections to the claim, the Tribunal awards Exxon Research U.S.$62,502.99.

C. NIOC's Counterclaims

53. NIOC asserted several counterclaims. NIOC first seeks the refund from Exxon Research of U.S.$100,000 as an alleged

overpayment under the first installment payment made under the Research Agreement. Two additional counterclaims are asserted against Exxon Corporation, Exxon Research's parent corporation, for payment of amounts allegedly owing for the delivery of petroleum products. Finally, NIOC has raised a claim for payment by Exxon Research of Social Security premia and penalties.

1. The Counterclaim Under the Research Agreement

54. NIOC claims a refund of U.S.$100,000 from the U.S.$500,000 first installment payment under the Research Agreement. NIOC advanced two grounds for this claim. The first is that Exxon Research "failed to perform the services it was supposed to do" during the first three months of the Research Agreement. This request was formulated by NIOC in a letter to Exxon Research dated 20 June 1979. Alternatively (and somewhat inconsistently) NIOC also states in effect that the extra U.S.$100,000 payment in the first installment was an advance payment for work to be performed over the two-year period. According to NIOC, because the departure of Exxon Research's personnel from Iran and the early termination of the Agreement, there is no justification for Exxon Research to retain the "overpayment" of U.S.$100,000. In addition, NIOC claims unquantified "damages and losses" to be assessed by the Tribunal, arising from Exxon Research's alleged breach of the Agreement.

55. Exxon Research denies any obligation to refund the amount of U.S.$100,000. It argues that NIOC's counterclaim is based on a misconception that the installment payment for each three month period was U.S.$400,000, while in fact the Agreement specified that the first payment was to be U.S.$500,000, and NIOC paid that amount. According to Exxon Research, "this larger first installment was fairly negotiated between the parties and corresponded to the greater

start-up costs incurred at the beginning of the Research Agreement."

56. The counterclaim clearly arises out of the same contract or transaction as Exxon Research's main claim, and thus is within our jurisdiction. As to the merits, there is no basis for NIOC's argument that Exxon Research failed fully to perform its obligations under the Agreement in the first quarter, justifying a refund of part of the amounts payable for that quarter. The Tribunal's decision to award Exxon Research an amount of U.S.$50,000 calculated on the basis of the total contractual period, without regard to the contractual schedule of installments disposes of NIOC's request that the "extra" U.S.$100,000 payment be applied as an advance payment for the entire contract period, rather than just for the first quarter. Thus there is no justification for any additional refund of amounts paid under the Agreement.

57. The Tribunal denies NIOC's counterclaim for "damages and losses" owing as a result of Exxon Research's alleged breach of the Agreement. As determined above, the alleged breach, Exxon Research's withdrawal from Iran, was excused by force majeure. In any case NIOC has produced no evidence of damage or loss. Therefore the counterclaim is dismissed.

2. The Counterclaims Against Exxon Corporation

58. NIOC has asserted two counterclaims against Exxon Corporation, the corporate parent of Exxon Research. In the first counterclaim NIOC alleges that, pursuant to an agreement dated 28 April 1979, it delivered 392,369 metric tons of crude oil to Exxon International Company ("International"), which is an unincorporated division of Exxon Corporation. Payment was to be made by documentary letter of credit. NIOC states that the necessary shipping documents were duly submitted to the relevant bank but no payment was

made. Thus according to NIOC, the price of the consignment, U.S.$66,017,492, is still due and owing.

59. NIOC's second counterclaim against Exxon Corporation is for allegedly unpaid invoices associated with NIOC's alleged delivery to International of fuel and oil products worth U.S.$17,380.79.

60. According to NIOC, since Exxon Research is a subsidiary of Exxon Corporation, "these companies are all related to another forming part of a whole." NIOC states that the sale of oil products to Exxon Corporation "constitutes a segment of the transaction and occurrence between NIOC and Exxon" and should be entertained by the Tribunal.

61. Exxon Research denies that the counterclaims are within the Tribunal's jurisdiction. It argues that under the Claims Settlement Declaration a counterclaim may be asserted only against a claimant making a claim, and that such a counterclaim can be entertained only if it arises out of the same contract, transaction or occurrence as the claim. Exxon Research states that Exxon Corporation is a separate legal entity which has not asserted any claim in this Case. Further Exxon Research denies that the counterclaims have any relationship to the contracts or transactions it raised in its claims, or that it was a party to or received any benefit from the sales described in the counterclaims.

62. NIOC does not deny that these counterclaims do not arise out of the same contracts that constitute the basis of Exxon Research's primary claims. Furthermore, these counterclaims are directed against Exxon Corporation, an entity which is not a claimant in this Case. The Tribunal has explained that "Respondents are barred from asserting any counterclaims against any person or entity other than Claimant itself." American Bell International Inc. and Islamic Republic of Iran, Award No. ITL 41-48-3, p. 15 (11

June 1984). Accordingly the Tribunal finds that it does not have jurisdiction over the counterclaims against Exxon Corporation for sales of petroleum products.

3. The Counterclaim for Social Security Premia

63. On 31 January 1986, NIOC filed a "new counterclaim" alleging that Exxon Research owes Rials 9,426,132 in Social Security premia and penalties. NIOC submitted a letter from the Iranian Social Security Insurance Organization informing NIOC that Exxon Research owes Rials 4,568,400 for Social Security charges from 30 August 1978 to 30 November 1978 and Rials 4,857,732 in late payment penalties up to 1 December 1985.

64. Exxon Research argues initially that the counterclaim should be dismissed on the ground of untimeliness, since the counterclaim was filed in breach of Article 19, paragraph 3, of the Tribunal's Rules, which provides that a counterclaim must be raised in the Statement of Defense. Exxon Research also states that the counterclaim is jurisdictionally defective since it does not arise out of the same contract or occurrence that constitutes the subject matter of the main claim. In addition, Exxon Research argues that the counterclaim was not outstanding as of 19 January 1981 as required by Article II paragraph 1 of the Claims Settlement Declaration. Finally, Exxon Research objects that NIOC is asserting the claim on behalf of a third party which is not a respondent in this Case. As to the merits, Exxon Research argues that the counterclaim lacks substantiation, NIOC having failed to submit "evidence of the basis and methods used to calculate the alleged amount owed."

65. The Tribunal notes that this counterclaim was not filed until 31 January 1986, several years after the claim and other counterclaims were filed. No justification has been asserted for this delay. The counterclaim is therefore

dismissed as untimely filed in accordance with Article 19, paragraph 3, of the Tribunal Rules.

IV. INTEREST AND COSTS

66. Exxon Research seeks interest at the rate of 12% on the amounts awarded by the Tribunal. It determines this rate by reference to the rate which, according to it, would have been granted for "a form of commercial investment in common use in the United States." Exxon Research also claims the costs of arbitration and attorneys' fees in the amount of U.S.$75,122.

67. In the absence of any contractual provisions for payment of interest for delay in payment and of any evidence as to the accuracy of the rate submitted by Exxon Research, the Tribunal finds it proper to fix the interest rate at 10% pursuant to the principles and guidelines established by the Tribunal in McCullough and Company Inc. and Ministry of Post, Telegraph and Telephone, Award No. 225-89-3 (22 April 1986).

68. Exxon Research claims that it should be awarded interest on the claim filed under the Research Agreement, "from the date of the act giving rise to the liability until the date of the payment from the Security Account." Pursuant to the Research Agreement, Exxon Research was entitled on 1 December 1978 to an advance payment of U.S.$400,000 for work to be done during the second three-month period of the Agreement. NIOC never made the required payment and is thus in breach of that provision. The Tribunal has determined that the Agreement terminated before the end of the second three-month period to which the $400,000 payment related. Upon termination Exxon Research would have been under an obligation to refund any amount of the advance payment which it had not earned. Nevertheless, it was clearly entitled to

the use of the funds in the meantime, which use NIOC's breach frustrated. Accordingly, the Tribunal awards interest on U.S.$400,000 from 1 December 1978 to 18 January 1979, the date of termination. Subsequent to that date, interest will be awarded on U.S.$50,000 which is the balance the Tribunal has determined Exxon Research was owed for work performed prior to termination.

69. Exxon Research also seeks interest on the amounts awarded under the Seventh Refinery Project calculated as from the date the invoices were issued. It appears more reasonable, however, in the absence of any contractual provisions in this respect, to award interest based on an assumption that NIOC was obligated to pay the invoices within 30 days of presentation. Therefore, interest on the amount of U.S.$8,482.71 due under invoice No. MO315 will be calculated from 19 January 1979; interest on the amount of U.S.$45,775.84 due under invoice No. AO256 will be calculated from 22 February 1979; and interest on the amount of U.S.$8,224.44 due under invoice No. B0291 will be calculated from 24 March 1979.

70. Each Party shall bear its own cost of arbitration.

V. AWARD

71. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a) Bank Markazi Iran and the Government of Iran are not respondents in this Case.

b) NIOC is obliged to pay to Exxon Research:

1) the amount of fifty thousand United States Dollars (U.S.$50,000) plus simple interest at a rate of ten

percent (10%) per annum (365-day basis) on the amount of U.S.$400,000 from 1 December 1978 up to and including 18 January 1979, plus simple interest at the rate of ten percent (10%) per annum (365-day basis) on the amount of U.S.$50,000 from 19 January 1979 up to and including the date on which the Escrow Agent instructs the Depositing Bank to effect payment out of the Security Account;

2) the amount of sixty-two thousand five hundred two United States Dollars and ninety-nine cents (U.S.$62,502.99) plus simple interest at the rate of ten percent (10%) per annum (365-day basis) on the amount of U.S.$8,482.71 from 19 January 1979, on the amount of U.S.$45,775.84 from 22 February 1979, and on the amount of U.S.$8,224.44 from 24 March 1979 up to and including the date on which the Escrow Agent instructs the Depositing Bank to effect payment out of the Security Account;

All of the above obligations 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.

c) NIOC's counterclaim under the Research Agreement is disposed of by the decision taken by the Tribunal with regard to Exxon Research's claim under the same contract.

d) NIOC's counterclaim for "damages and losses" is dismissed for lack of evidence.

e) NIOC's counterclaims against Exxon Corporation are dismissed for lack of jurisdiction.

f) NIOC's counterclaim for payment of Social Security premia and penalties is dismissed as untimely.

g) Each party shall bear its own costs of arbitration.

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

Dated, The Hague,
9 June 1987

M. Virally
Chairman
Chamber Three

In the Name of God

Carl F. Salans

Parviz Ansari Moin
Concurring in part,
Dissenting in part