IRAN-UNITED STATES CLAIMS TRIBUNAL

ن - ایالات متحد

150-295

۱۵۰-۲۹۵

ORIGINAL DOCUMENTS IN SAFE

Case No. 150

Date of filing: 14 Jul '87

** AWARD - Type of Award Partial

- Date of Award 14 Jul '87

81 pages in English

_______ pages in Farsi

** DECISION - Date of Decision _______

_______ pages in English

_______ pages in Farsi

** CONCURRING OPINION of _______

- Date _______

_______ pages in English

_______ pages in Farsi

** SEPARATE OPINION of _______

- Date _______

_______ pages in English

_______ pages in Farsi

** DISSENTING OPINION of _______

- Date _______

_______ pages in English

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** OTHER; Nature of document: _______

- Date _______

_______ pages in English

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL
نسخه برابر اصل

CASES NOS. 74, 76, 81, 150
CHAMBER THREE
AWARD NO. 311-74/76/81/150-3

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date 14 JUL 1987 تاریخ
۱۳۶۶ / ۴ / ۲۳
No. 150 شماره

Case No. 74

MOBIL OIL IRAN INC., and
MOBIL SALES AND SUPPLY CORPORATION,
Claimants,

and

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

Case No. 76

SAN JACINTO EASTERN CORPORATION, and
SAN JACINTO SERVICE CORPORATION,
Claimants,

and

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

Case No. 81

ARCO IRAN, INC., and
ATRECO INC.,
Claimants,

and

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

Case No. 150

EXXON CORPORATION, and
ESSO TRADING COMPANY OF IRAN,
Claimants,

and

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

PARTIAL AWARD

Appearances:

For the Claimants:	Mr. Monroe Leigh, Mr. Stewart Abercrombie Baker, Mr. Robert T. Novick, Mr. Matthew H. Adler, Counsel; Mr. Albert P. Lindemann, Jr., Counsel and Representative of Exxon; Mr. C. Lawson Willard, Counsel and Representative of Mobil; Mr. H. Francis Shattuck, Jr., Counsel and Representative of Mobil, Arco and San Jacinto.
For the Respondents:	Mr. Mohammad K. Eshragh, Agent of the Government of the Islamic Republic of Iran; Dr. N. Mokhtari, Mr. Nozar Dabiran, Legal Advisers to the Agent; Prof. D. W. Bowett, Dr. Mohammad A. Movahed, Dr. Timm T. Riedinger, Mr. Walter Sohier, Counsel; Dr. Houshang Omid, Mr. Abolghasem Shirazi, Legal Advisers to NIOC; Mr. Bryan Lea, Legal Assistant.
Also Present:	Mr. John R. Crook, Agent of the United States.

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I. GENERAL BACKGROUND

1. The present Cases arise within the broad framework of the historical contractual relationship between Iran and a group of major oil companies collectively known as the "Consortium."

2. This relationship originated in an agreement executed in 1954 ("Consortium Agreement") between the members of the Consortium, Iran and the National Iranian Oil Company ("NIOC"). In 1951 the Iranian Government, then headed by Prime Minister Dr. Mohammad Mossadegh, nationalized the Iranian oil industry. Pursuant to the nationalization, NIOC was established to operate the oil industry in place of the Anglo-Iranian Oil Company, whose concession Iran had nationalized. Subsequently, in August 1953, the Mossadegh Government was overthrown and the Shah, who had left Iran a few days earlier, returned to the country. The Consortium Agreement was negotiated during the months following these events. Under this Agreement, Iran retained ownership of its oil reserves and granted the members of the Consortium the right to purchase Iranian oil at favorable prices until 1979, with the option to extend the Agreement, at the Consortium's sole discretion, for an additional 15 years. The Consortium was required to operate the oil industry in Iran on behalf of NIOC through two companies incorporated in the Netherlands, the Iranian Oil Exploration and Producing Company and the Iranian Oil Refining Company ("Operating Companies"). In addition, each member of the Consortium was required to establish a trading company (the "Trading Companies" or the "Companies") for the purchase of crude oil and refined products in Iran.

3. The Consortium provided the capital investment required for operating expenditures. The Operating Companies were to sell and deliver crude oil and refined products on behalf of NIOC to the Trading Companies at cost

plus a one shilling fee per cubic meter of oil. The Trading Companies, in turn, were to sell the crude or product at posted prices. The difference between the posted prices and the cost constituted the net income of the Trading Companies, 50 per cent of which was to be paid to NIOC and Iran as royalty and income tax. This financial balance was consistent with the so-called 50/50 formula applied in a number of oil producing countries since its adoption by Venezuela in 1948.

4. Significant changes in the oil industry occurred between 1954 and 1973, mostly as a result of individual or collective actions of the oil-producing countries surrounding the Persian Gulf ("Persian Gulf Countries") and of the newly established Organization of Petroleum Exporting Countries ("OPEC"). The Persian Gulf Countries succeeded in causing the major oil companies to enter into negotiations with them concerning revisions to the policies then followed in the setting of oil prices. These negotiations resulted in an agreement, concluded in Tehran on 14 February 1971, between thirteen oil companies and six Persian Gulf Countries, which subsequently was complemented by the Agreement of Geneva of 20 January 1972, amended on 1 June 1973, with the participation of other members of OPEC. (These two agreements are referred to in Article 5.A of the Sale and Purchase Agreement (see following paragraph)). At about the same time, participation agreements were separately signed between several Persian Gulf Countries and various concession holding companies. According to the first of these agreements, known as the "General Agreement" (referred to in Article 6.A (3) of the Sale and Purchase Agreement (see following paragraph)), signed in late 1972 between Saudi Arabia and Aramco, Saudi Arabia was granted a 25% participation, gradually rising to a 51% participation, in Aramco.

5. The Iranian Government made known its intention to obtain the same benefits and advantages as those being derived from the participation formula in other Persian Gulf Countries. Early in 1973, it announced that it would not accept any extension of the Consortium Agreement beyond 1979 and that the Companies would have no right to purchase Iranian oil after that date, unless they entered into a new agreement on terms more favorable to Iran and NIOC. Negotiations took place between Iran and the Consortium, resulting in the execution of a new twenty-year agreement, the Sale and Purchase Agreement ("SPA" or "Agreement"), approved on 30 July 1973 by a Single Article Act of Iran's legislature. The SPA took effect on 20 March 1973 and terminated and replaced the Consortium Agreement as of the same date. It was later completed with the execution of two Processing Agreements between NIOC and the Companies, negotiated pursuant to Articles 4 and 12 of the SPA, and a Service Contract between NIOC and the Oil Service Company of Iran (Private Company) ("OSCO"), a non-profit private joint stock company established by the members of the Consortium pursuant to Article 17 of the SPA.

6. Under the SPA, the members of the Consortium had the right to purchase all crude oil produced from a defined area in Iran subject to a reduction for Iran's internal requirements and a "stated quantity" for NIOC's export sales.

7. The price that the Trading Companies paid to NIOC for crude oil consisted of four elements set forth in Article 6 of the Agreement:

(1) the operating costs attributable to the production of the crude oil purchased;

(2) "a stated payment" of 12.5 % of the export price posted by the Consortium;

(3) "a balancing margin"; and

(4) interest payments on a part of NIOC's capital expenditures.

In addition to these elements, the Companies paid Iran an income tax based on the difference between the purchase price paid to NIOC for crude oil and the posted selling price.

8. By 1 September each year NIOC was required to notify the Trading Companies of the estimated net total installed capacity for the following year and the quantity of each grade of crude oil available for sale to them. One month later, the Trading Companies were to nominate to NIOC their requirements for export of crude oil as well as for crude oil to be refined on their account at the Abadan Refinery during the following year (Articles 3.A and B of the SPA).

9. The SPA provided further that the Trading Companies had the right and obligation to deliver up to 300,000 barrels of crude oil per day for refining at the Abadan Refinery (Article 4.A). This right and this obligation, however, were subject to NIOC's pre-emptive right to take products required for internal consumption (Article 4.B). The Trading Companies paid NIOC a processing fee for the costs of operating the Refinery.

10. Pursuant to Article 12 of the SPA, the Trading Companies also had the obligation to purchase from NIOC natural gas liquid hydrocarbons ("NGL") from the Bandar Mahshahr Refinery in accordance with the Processing Agreement. The Trading Companies' purchases of NGL, however, were to be made after allowance had been made for the quantities of NGL that NIOC required for internal consumption.

11. According to Article 11 of the SPA, NIOC had to provide the investment required for all operations set forth in the Agreement. The Trading Companies, however, were committed to advance to NIOC, by way of prepayment for crude oil which they were to purchase, 40% of the funds required by NIOC for annual budgeted capital expenditures. The Companies had the option to vary the proportion upon giving two years' prior written notice to NIOC, but no notice could be given effect earlier than five years subsequent to the effective date of the SPA. Each annual advance was to be set off against sums due from the Companies for subsequent sales of crude oil in equal annual installments over a ten-year period following the year in which such advance was made.

12. The SPA further provided for the final settlement of all claims of any nature between the Parties as of the date of the Agreement. Accordingly, the Trading Companies had the right to set off against payments due to NIOC for crude oil purchased "the monthly amount of Depreciation Charges with respect to 100 per cent of the undepreciated and unamortized portion of the net book value of all assets employed and under construction" by the companies established pursuant to the 1954 Agreement for the exploration, production and refining of crude oil in Iran as well as for the manufacturing of NGL products (Article 10). These assets related, _inter alia_, to the Abadan Refinery and the Bandar Mahshahr Refinery.

13. Finally, pursuant to Article 17 of the Agreement, the Consortium members were obligated to provide NIOC with technical assistance through an Iranian service company established for that purpose ("Service Company"). Pursuant to a contract ("Service Contract") between the Service Company and NIOC, the Service Company was to carry out operations which NIOC assigned it. As previously mentioned, this Service Company was established under the name of OSCO

and the Service Contract was executed on 30 July 1973. Operations outside Iran were conducted through a company incorporated by the Consortium members in the United Kingdom under the name of Iranian Oil Services Limited ("IROS") pursuant to an agreement between OSCO and IROS dated 20 December 1973.

14. The Agreement ensured that the total financial benefits and advantages to Iran and NIOC under it would be as favorable as those achieved at any time by other countries in the Persian Gulf. This was expressly provided for in Articles 6.A (3) and 13.A of the Agreement, in Part Two of Schedule 3 relating to the determination of the balancing margin mentioned in Article 6.A (3), and in a letter annexed to the Agreement, in which the Consortium members agreed to modify the Agreement in order to extend to Iran appropriate benefits if any future arrangements between two or more Consortium members jointly and another oil-producing country or other countries in the Persian Gulf resulted in an improvement in the overall financial benefits to such country or countries.

15. Soon after its execution, a number of difficulties were encountered in implementing several of the main clauses of the SPA, resulting in unilateral actions by both sides. These actions resulted in the respective parties objecting to their conformity with the terms of the Agreement and prompted a series of negotiations. Such difficulties, however, must be considered in the context of the rapid changes in the oil industry that were taking place at that time. By the end of 1973, i.e., only a few months after the execution of the Agreement, the price of oil rose dramatically and the member countries of OPEC, including Iran, decided themselves to fix posted prices for oil. During the following years, and under pressure exercised by OPEC on the oil market, new developments occurred, including further and sizable increases in oil prices.

16. 1975 was a pivotal year in understanding the difficulties in implementing the Agreement. During that year, and for the first time, the amount of crude oil which the Trading Companies lifted was less than the amount that they had nominated in the preceding year. Later, in September 1975, the Companies stated that they had found it very difficult to make full estimates of requirements for 1976, and thus advised NIOC that their nominations might be reviewed and revised in the light of future circumstances. The same position was taken in 1977 and 1978, provoking strong protests from NIOC.

17. In turn, on 27 October 1975, NIOC notified the Companies that, pursuant to a decision of the OPEC Conference held in Vienna, the profit margin for crude oil which the Companies purchased from NIOC would be a fixed sum of 22 U.S. cents per barrel. This fixed sum replaced the amount calculated pursuant to the complex provisions of Schedule 3 of the Agreement. The Consortium members strongly objected to the decision and initiated negotiations, but Iran refused to accept any deviation from the after-tax margin of 22 U.S. cents.

18. In November 1975 the Companies requested that, as an interim measure, they not be required to advance the amounts due on 15 November and 15 December 1975 under Article 11.B of the SPA. NIOC protested the request, but agreed to provide the required funds on the understanding that it would not constitute a precedent or be considered a release of the Consortium companies from their obligations. Nevertheless, it is not disputed that the Companies made no further capital advances after this date, replacing such advances with the payment of appropriate interest.

19. In 1975 another dispute arose between the parties over the costs associated with the Abadan Refinery. The Companies complained that a shift in Iran's internal oil

consumption requirements had caused NIOC to begin taking more and more of the most valuable refined products while leaving the Consortium members with the less valuable products and a disproportionate share of the costs. The Companies thus demanded an adjustment of these costs. After NIOC had refused to make such an adjustment, the Companies informed NIOC on 23 December 1975 that, as of 1 January 1978, they would terminate their use of the Abadan Refinery.

20. On 25 November 1975 the Companies proposed to NIOC a complete revision of the 1973 Agreement, which, according to the Consortium members, was necessary to relieve the current serious financial situation they were encountering. NIOC insisted on the implementation of the Agreement but agreed to negotiate on the basis of the Companies' proposals. On 29 January 1976 NIOC proposed a framework for a new agreement that would substitute for the 1973 Agreement. Lengthy negotiations between the Parties commenced and continued until late 1978, but yielded no result.

21. In December 1978-January 1979, as a consequence of the revolutionary events that were taking place in Iran, all of the expatriate personnel of OSCO were withdrawn from Iran. The production of oil was reduced substantially and eventually interrupted. It resumed in February-March 1979.

22. On 10 March 1979 NIOC sent the Consortium a letter stating that the Agreement "proved to be inoperative soon after the Effective Date due to the fact that the latter companies failed to comply with certain essential provisions of the Agreement" and listing a series of principles upon which NIOC felt that the future relationship between NIOC and the Consortium member companies should be based. On 23 March 1979 the Companies acknowledged receipt of this letter and, while reserving all their rights, proposed a meeting with NIOC for the purpose of reaching an agreement on the

termination of the SPA. Negotiations were initiated but failed to produce any agreement before November 1979, when the rupture of all relations between Iran and the United States caused these negotiations to end.

23. On 8 January 1980 the Revolutionary Council adopted a Single Article Act ("Single Article Act") authorizing the nullification of contracts in the oil industry which a Special Commission, established by this Act, would find contrary to the Nationalization Act of 1951. Subsequently, the Special Commission nullified the SPA. The Consortium was informed of its decision on 5 September 1981.

II. PROCEEDINGS

24. Originally eleven claims were filed with the Tribunal (Cases No. 72 to 81 and 150) based on alleged breaches, repudiation and expropriation of the SPA on the part of NIOC and Iran. Pursuant to the regular procedure of the Tribunal, these cases were assigned to various Chambers. Subsequently, however, by Order of the President dated 15 April 1982, the cases which had been assigned to Chambers One and Two were reassigned to Chamber Three for further proceedings.

25. Because all of these Cases involved substantially similar issues, certain procedural arrangements were made in order to coordinate the proceedings. It was further decided to limit the scope of the first Hearing. By Order of 7 October 1983 the Chairman of Chamber Three thus decided, <u>inter alia</u>, the following:

a. Common dates were scheduled for the filing of Statements of Defense and Memorials in all cases;

b. A common Hearing date was scheduled on the following legal issues:

(i) whether or not the Tribunal has jurisdiction over the claims related to the Agreement;

(ii) whether or not, as a matter of law, the Respondents are liable under the claims related to the Agreement;

(iii) if there is liability, which of the elements of damage claimed, if any, are compensable as a matter of law;

c. Any two or more Parties were authorized jointly to submit Memorials as to the limited issues stated above as well as to present oral arguments at the Hearing scheduled through a single representative.

26. By this Order the Cases at issue are, and remain as, independent cases. The Statements of Claim and some other documents therefore are related to one case only. With reference to the foregoing Order, however, the Parties have availed themselves extensively of the authorization to submit joint pleadings.

27. In the course of the proceedings seven of the eleven Cases have been settled. Pursuant to Joint Requests by the Parties involved, these Settlement Agreements have been recorded as Awards on Agreed Terms as follows:

Case No. 72, Award No. 269-72/80-3 (17 Nov. 1986)[1]
Case No. 73, Award No. 208-73-3 (13 Jan. 1986)

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[1]The Awards on Agreed Terms in Cases Nos. 72, 73, 78 and 80 do not, by their terms, terminate the Cases. The Tribunal, however, has received notification of the (Footnote Continued)

Case No. 75,	Award No. 193-75-3	(4 Oct. 1985)
Case No. 77,	Award No. 103-77-2	(16 Jan. 1984)[2]
Case No. 78,	Award No. 209-78-3	(13 Jan. 1986)[3]
Case No. 79,	Award No. 125-79-3	(3 May 1984)
Case No. 80,	Award No. 269-72/80-3	(17 Nov. 1986)

Consequently, four Cases are still pending before this Chamber (Cases No. 74, 76, 81 and 150). All the claims in these four Cases are considered together in the present Award, with the exception of one claim in Case No. 74 based on agreements allegedly entered into between the Claimant and NIOC on 19 and 20 May 1979 for the sale of aviation gasoline. Separate proceedings are followed for this last claim.

28. Subsequent to the Order of 7 October 1983 two further exchanges of memorials took place between the Parties. On 4 April 1984 the Respondents submitted, together with their Statement of Defense, thirteen Counterclaims which, pursuant to the same Order, are reserved for a further stage in the proceedings. A Hearing on limited legal issues was held on 23 and 24 April 1986. The Parties appeared and presented oral argument.

29. The present Award is confined to the limited legal issues defined by the Order of 7 October 1983. The proceedings on the remaining issues will be scheduled in a separate Order.

(Footnote Continued)
Claimants in all these Cases stating that the terms of the Awards have been completed. Pursuant thereto the Tribunal terminated these Cases by Orders filed 15 April and 10 December 1986.

[2] By Order dated 5 January 1984 the President reassigned Case No. 77 to Chamber Two.

[3] _See_ note 1.

III. JURISDICTION

30. The Respondents have raised a series of objections to the Tribunal's jurisdiction. These objections can conveniently be broken down into three categories: (1) the Claimants' locus standi, (2) objections to the contention that the claims were outstanding on 19 January 1981, and (3) objections to the contention that the claims are not excluded from the Tribunal's jurisdiction.

A. Locus Standi

31. The Respondents have submitted three objections regarding the locus standi of the Claimants. The first relates to the right of each of the Claimants to make a separate claim under the SPA, the second to the right of the United States to exercise diplomatic protection, and the third to the nationality of the Claimants.

1. The Right of Each Claimant to Submit a Separate Claim

32. According to the Respondents, the "Second Party" to the SPA comprises twenty-eight corporations which have established themselves as a partnership. The obligations owed by Iran and NIOC to the members of the partnership are owed to the members of the partnership jointly and cannot be severed into distinct obligations owed to the individual members. The allegations of breach made by the Claimants can only be understood as allegations of breach by all the Consortium members and Trading Companies forming the "Second Party". Similarly, the decisions taken by the Consortium during the life of the Agreement, such as the nomination of their requirements of crude oil, the decisions to reduce the processing requirements in Abadan, to discontinue capital

advances, or to withdraw OSCO personnel, were collective decisions. The contention that the Agreement was breached and repudiated by NIOC, or that it was expropriated, can only be collectively submitted. It would be inconceivable that some Consortium members treat the Agreement as terminated and the others not. A claim under the SPA, therefore, can only be submitted by the "Second Party," that is the twenty-eight companies acting jointly, against the "First Party," that is Iran and NIOC. Individual claims, furthermore, would expose the Respondents to as many as twenty-eight separate claims and arbitral proceedings, with the danger of inconsistent and conflicting contentions and arbitral awards.

33. There was a considerable amount of discussion during the Hearing about the legal nature of the de facto partnership, allegedly established in the United Kingdom, the nature and extent of the joint interest of its members and the severability of rights and obligations intended to be joint. The Respondents argued in this context that, in view of the existence of such a partnership, the claims could only be indirect claims, in the meaning of Article VII, paragraph 2, of the Claims Settlement Declaration ("CSD"), that is, claims owned indirectly "through ownership of capital stock or other proprietary interests in judicial persons." Indirect claims, however, fall under the jurisdiction of the Tribunal only if the ownership interests of the Claimants, collectively, were sufficient to control the corporation or other entity. Such was not the case for the Claimants here, which hold only a minority interest, both individually and jointly.

34. Finally, the Respondents contend that the settlement agreements executed between NIOC and several Consortium members do not change the legal situation, since all of them were made without prejudice to either the jurisdiction or substantive merits of the claims involved. Therefore, they

are not an admission by the Respondents that individual interests, as opposed to joint ones, were involved in those cases; the Respondents never denied that the Companies could, on certain issues (for instance the lifting of oil or the reimbursement of capital advances), have individual interests. Furthermore, the Tribunal's approval of such settlements in Awards on Agreed Terms does not amount to a decision on jurisdictional issues, including locus standi. The object is to accept them as proper claims for payment out of the Security Account.

35. In response, the Claimants contend that all of their claims arise out of the separate and individual rights granted to each of them in the SPA with respect to the purchase and processing of crude oil and NGL. They list all the articles in the Agreement which emphasize the individual nature of these rights. In addition, they insist that the Respondents have consistently treated the Agreement as conferring individual rights upon the Claimant Companies. Such was the case not only during the life of the Agreement, but also with the settlement agreements concluded with United States and non-United States members of the Consortium. Therefore, the Respondents are now estopped from taking a different position. Finally, the Claimants refer to several international arbitral precedents which allegedly support their views and question the Respondents' allegations relating to the English law of partnership, while denying that the Companies ever constituted a partnership.

36. The Tribunal does not find any indication in the SPA that the companies listed as the "Second Party" to the Agreement were obligated to act jointly in all circumstances. Numerous provisions in its articles refer to the Companies as separate entities and the Respondents themselves concede that the Agreement gave rise to individual rights. In the present Cases, all the claims relate to such

individual rights and interests. The Tribunal does not see any provision in the Agreement which could prevent the Companies from acting individually upon such claims and which would give the Respondents the right to require that these claims be submitted jointly by all the twenty-eight Companies party to the Agreement.

2. Locus Standi of the United States

37. According to the Respondents, "[i]n the present proceedings the United States is seeking to present an international claim against Iran in respect of an injury allegedly suffered by the Claimants, each a United States corporation." The Respondents contend that such a claim is inadmissible, since the Companies concerned themselves had no right to act individually. The Tribunal fails to understand such an argument. The proceedings in these Cases were not instituted by the United States Government. The Companies listed in the caption of this Award are the proper Claimants and only their own locus standi is at stake. This objection is therefore rejected.

3. Nationality of the Claimants

38. The Respondents dispute the entitlement and/or right of any of the Claimants to present the claims here at issue. This objection is essentially based on the partnership argument already rejected above. The Tribunal is, in any event, required to determine whether or not the Claimants satisfy the nationality requirements in the CSD entitling them to raise the claims here at issue.

39. As proof of their United States nationality and entitlement to raise the claims here at issue, all the Claimants in these Cases rely on testimonial and documentary evidence in accordance with the guidelines set forth in the Order of 20 December 1982 in Flexi-Van Leasing, Inc. and Islamic Republic of Iran, Case No. 36, Chamber One.

a) Mobil Oil Iran Inc. et al. (Case No. 74)

40. Based on the evidence submitted, the Tribunal is satisfied that the Claimants in Case No. 74, the Delaware corporations Mobil Oil Iran Inc. ("MOI") and Mobil Sales and Supply Corporation ("MSSC"), are U.S. nationals within the terms of the CSD. From 1 January 1974 through 2 March 1976 MOI and MSSC were wholly owned subsidiaries of a New York corporation, Mobil Oil Corporation ("MOC"). As of 18 June 1976 MOC became a wholly owned subsidiary of the Delaware corporation Mobil Corporation ("MC"). Following a subsequent corporate restructuring on 7 December 1978 another wholly-owned subsidiary of MOC, Mobil International Petroleum Corporation ("MINT"), likewise a Delaware corporation, acquired all of the outstanding shares of MOI and MSSC from MOC. As a result the claims brought forth by MOI and MSSC have at all relevant times been owned by United States nationals.

b) San Jacinto Eastern Corporation et al. (Case No. 76)

41. The Tribunal is also satisfied that the Claimants in Case No. 76, San Jacinto Eastern Corporation and San Jacinto Service Corporation, are U.S. nationals within the

meaning of the CSD. Both corporations are Delaware corporations, which at all relevant times have been wholly owned by Conoco Inc. On 30 September 1981 this latter corporation, which was incorporated on 8 October 1920 in Delaware, was merged into another Delaware corporation, Du Pont Holdings Inc., whose name subsequently was changed to Conoco Inc. Consequently the claims in Case No. 76 have at all relevant times been owned by United States nationals.

c) Arco Iran, Inc. et al. (Case No. 81)

42. The Tribunal finds it likewise established that the Claimants in Case No. 81, Arco Iran, Inc. and Atreco Inc., are United States nationals within the meaning of the CSD. Both Arco Iran Inc. and Atreco Inc. are duly incorporated Delaware corporations and, at all relevant times, they have been wholly owned subsidiaries of Atlantic Richfield Company. This latter company is duly incorporated in the Commonwealth of Pennsylvania, and the evidence submitted satisfies the Tribunal that Atlantic Richfield Company is a United States national within the terms of the CSD. Consequently the claims in Case No. 81 have at all relevant times been owned by United States nationals.

d) Exxon Corporation et al. (Case No. 150)

43. Finally the Tribunal considers that the evidence submitted establishes the United States nationality of the Claimants in Case No. 150, Exxon Corporation ("Exxon") and Esso Trading Company of Iran ("Esso Iran"), and their continuous ownership of the claims. Exxon (formerly Standard Oil Company) is a corporation duly incorporated under the laws of New Jersey. Through a chain of corporate ownerships, involving the United States corporations Exxon Overseas Corporation and Mediterranean Standard Oil

Corporation, Esso Iran is established as a wholly owned subsidiary of Exxon.

B. Claims Not Outstanding

44. According to the Respondents the claims submitted in these cases were not outstanding on 19 January 1981, since the Claimants had not submitted such claims to the Respondents or instituted proceedings before any domestic court or international tribunal at any time before this date. Prior to November 1981, when they were first notified of these claims, the Respondents had never been presented claims based on a breach of contract or an expropriation. Such claims were neither mentioned during the meetings held between the Parties to settle various problems arising out of the termination of the SPA nor were any arbitral proceedings initiated pursuant to Article 28 of this Agreement.

45. In response, the Claimants submit that already in their letter of 23 March 1979 they mentioned that any agreement to terminate the SPA would have to deal with "repayment of Members' investment and advances and settlement of any claim of either party." They further contend that, to be outstanding, a claim need not have been formally submitted to the other party, or brought before a tribunal. It is sufficient that a cause of action existed as of 19 January 1981.

46. The Tribunal recalls that Article II, paragraph 1, of the CSD confers jurisdiction upon it over claims and counterclaims "outstanding on the date of this Agreement [that is 19 January 1981], whether or not filed with any court," which satisfy all the other conditions listed in that Article. (Emphasis added.) Thus the CSD expressly provides that, to be outstanding, a claim need not have been

filed with a court. Furthermore, the Tribunal has jurisdiction over claims, not disputes, as do intergovernmental tribunals. The question as to whether a dispute was already born, therefore, does not arise. It suffices that a claim is ripe, so that a cause of action does exist, as the Tribunal decided in Amoco Iran Oil Co. and Islamic Republic of Iran, Award No. ITL 12-55-2 (30 Dec., 1982), reprinted in 1 Iran-U.S. C.T.R. 493), and Phillips Petroleum Co., Iran and Islamic Republic ot Iran, Award No. ITL 11-39-2 (30 Dec., 1982), reprinted in 1 Iran-U.S. C.T.R. 487. This objection is therefore denied.

C. Exclusion of Jurisdiction

47. The Respondents refer to the provision of Article II, paragraph 1, of the CSD excluding from the jurisdiction of the Tribunal "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position." They contend that all claims which arise from alleged breaches of agreements like the SPA, which have been nullified under the Single Article Act of 8 January 1980, are subject to the sole jurisdiction of the Special Commission established pursuant to that Act.

48. This argument has been rejected by the Tribunal in the earlier referenced Amoco and Phillips cases. The Tribunal considers that, in the present case, the Respondents have failed to raise any new arguments which would cause the Tribunal to reconsider this issue. Consequently, the Respondents' objection is rejected.

49. The Tribunal concludes that all the objections presented by the Respondents as to its jurisdiction must be rejected. It is satisfied that Iran and NIOC are proper

Respondents in the meaning of Article VII, paragraph 3, of the CSD and that the claims in these cases arise out of contracts, expropriations or other measures affecting property rights. The jurisdictional requirements of the CSD, therefore, have been met.

IV. LIABILITY

50. In their Statements of Claim each one of the Claimants seek different amounts, but they all list seven Claims which are couched in similar terms. These claims are the following:

A. Claim for recovery of prepayments for oil not delivered;

B. Claim for repayment of the Claimants' investments;

C. Claim for damages relating to crude oil rights;

D. Claim for loss of future NGL products;

E. Claim for taking of NGL products at Bandar Mahshahr;

F. Claim for taking of products at Abadan;

G. Claim for losses at Abadan arising from breaches of the SPA's costs provisions.

51. In addition, the Claimants seek interest and costs of arbitration. On the basis of these elements, the Claims in each Case total: U.S.$262,136,422 (Case No. 74); U.S. $15,807,968 (Case No. 76); U.S.$63,331,904 (Case No. 81); U.S.$262,319,035 (Case No. 150), totalling U.S.$603,595,329 for the four claims together.

52. The nature of these claims and the issues of liability related to each differ widely. They can be divided into three categories:

(1) Claims for advances and credits not recovered and products not returned (Claims A, B, E, and F);

(2) Damages for lost profit (Claims C and D); and

(3) Losses in connection with the Abadan Refinery (Claim G).

53. Among the claims pertaining to the first category, Claims E and F must be considered separately, since they are accepted by the Respondents, subject to questions of quantification. As far as Claims A and B are concerned, the Respondents do not deny that they relate to debts recognized by NIOC and incorporated into the SPA, which provided that such debts would be paid by way of set off. According to the Respondents, however, "their recovery was designed under the Agreement on the basis of the fulfillment by the Consortium of their obligations" under the Agreement. In turn, the Respondents contend that "by reason of the breach of the Agreement by the Consortium, the right to recover those debts was, in fact, forfeited." The Claimants, however, deny committing any breach of the Agreement.

54. As to this last issue, the Tribunal notes that Claim A relates to the recovery of capital advances made by the Trading Companies "by way of prepayment for crude oil to be purchased by them," pursuant to the terms of Article 11.B of the Agreement. The termination of the Agreement and the interruption of oil purchases eventually made a recovery of these advances by way of set off, provided for in paragraph D. of the same article, impossible. This fact, however, does not impinge on the Claimants' right to recover these amounts, whatever the cause of termination and the alleged

breaches of contract by the Consortium, since the advances themselves created the right to reimbursement. The Tribunal thus finds that no legal justification exists for NIOC's retention of these advances and further concludes that NIOC would be unjustly enriched if such advances were retained. The Respondents' contention that the Claimants' right to recover these amounts was "forfeited" is therefore rejected.

55. The same reasoning and conclusion apply to Claim B, which pertains to the unrecovered balance of the compensation agreed upon by the Parties to the SPA for assets created by the Consortium's investment between 1954 and 1973. No issue of liability therefore exists in relation to Claims A, B, E and F. The sole issue remaining for these claims therefore is an assessment of the amounts the Claimants are entitled to recover.

56. The second category of claims, Claims C and D for lost profit, raises the issue of whether the parties terminated the Agreement. According to the Claimants, NIOC and Iran repudiated the Agreement and, at the same time, expropriated the Claimants' property interest in violation of international law. The third category (Claim G) raises delicate issues pertaining to the interpretation of Article 4 of the Agreement and of related agreements. Accordingly, the issue of liability will be examined in two sections devoted, respectively, to the termination of the SPA and to the alleged breaches of the same Agreement in connection with the oil processing at the Abadan Refinery.

A. Termination of the SPA

57. The Claimants' contentions rest on two alternative theories: that NIOC and Iran breached and repudiated the Agreement in the 10 March 1979 letter from NIOC to the Consortium or that Iran expropriated the interests of the

Consortium in the same letter. According to the Claimants, the Tribunal need not choose between these two theories, since they are alternative routes to a finding of liability, relate to the same facts and yield exactly the same results. By contrast, the Respondents deny committing any breach of the SPA and contend that the failure of the Claimants to comply with several essential provisions of this Agreement made the Agreement inoperative well before 1979. The Respondents thus allege that nothing existed to expropriate in March 1979, and, consequently, that the letter of 10 March only described circumstances already existing.

58. Regardless of the Claimants' position, the Tribunal finds that allegations of breach and allegations of expropriation raise different and distinct legal issues which thus must be considered separately. They will be discussed, seriatim, in the following sections. Initially, however, a preliminary issue, the issue of applicable law, on which the Parties also disagree, must be considered.

1. Applicable Law

a) The Claimants' Contentions

59. The first issue raised by the Claimants in relation to applicable law concerns the law of the contract. This question is dealt with in Article 29 of the Agreement, which reads as follows:

> This Agreement shall be interpreted in accordance with the laws of Iran. The rights and obligations of the Parties shall be governed by and according to the provisions of this Agreement. The termination before expiry date or any alteration of this Agreement shall be subject to the mutual agreement of the Parties.

60. According to the Claimants, "Article 29 thus identifies only one source of mandatory rules that will govern the Parties' rights and obligations -- the Agreement itself. By this provision, the parties plainly intended to exclude any law that would alter or terminate the Agreement by any means other than mutual consent." The Claimants further note "that the parties drew a sharp line between the rules that would be used to <u>interpret</u> the Agreement and those that would <u>govern</u> the parties' rights and obligations." In support of this contention, the Claimants refer to the initial negotiation of the Agreement and conclude that "Article 29 does not say what systems of law may be used to determine the Agreement's validity or to enforce its implementation."

61. In view of the limited scope which they accord to Article 29, the Claimants state that the Tribunal must look elsewhere to determine the law governing the implementation of the Agreement. They therefore suggest that "both the nature of the Agreement and its provisions demonstrate that the Agreement and claims arising thereunder are governed by international law, including general principles of law." In support of this position, the Claimants essentially rely on four factors: (1) the Agreement was a long-term contract; (2) it was concluded between a State or a State agency and a private foreign company; (3) its purpose was to assist in developing an important national resource through complex arrangements; and (4) it contained a clause requiring international arbitration of all disputes arising out of its interpretation and performance. According to the Claimants, these elements define the SPA as an "internationalized contract" which, as is generally recognized by arbitral tribunals and scholars, is governed by international law, including general principles of law.

62. In addition, the Claimants argue that several provisions of the Agreement clearly evinced the intent of

the Parties to internationalize the Agreement. For example, the Claimants point to Article 28.O, providing that the arbitration clause would remain in force notwithstanding the termination of the Agreement; Article 28.B and C, relating to the appointment of arbitrators by the President of the International Chamber of Commerce ("I.C.C."); Article 28.L, instructing the arbitrators to base their award on the rights and obligations of the Parties as laid down in the Agreement; Article 27, including in force majeure any event which was beyond the reasonable control of any Party, and therefore excluding governmental acts, since Iran was a Party; Article 22, providing that payments under the Agreement will be made in U.S. dollars, a foreign currency; and Article 23, freeing the Consortium members and the Trading Companies from any exchange restrictions. The Claimants thus posit that "[a] single unifying theme underlies all these provisions: They prevent Iran from using its sovereign powers to escape its contractual obligations."

63. Furthermore, the Claimants contend that, even if Iranian law were otherwise applicable, the Single Article Act would not be the governing law, since this Act purports to nullify the Agreement in direct defiance of Article 29, which makes termination of the Agreement contingent on mutual consent of the Parties. The Claimants allege that, in an international economic agreement, the terms of the agreement govern primarily the rights and obligations of the Parties. In such circumstances, "there is the strongest possible presumption that the parties intended to exclude any law that would render the contract partially or wholly void." This is particularly so in the case of the SPA, in which the Parties agreed that the Agreement would be "duly enacted as part of the law of Iran" (Article 30.B), thus demonstrating their intent "that the Agreement supersede any inconsistent principles of Iranian law."

64. Even if Iranian law generally governs the SPA, the Claimants contend further that the claims filed in the present cases arise under international law, since in repudiating and expropriating the companies' rights under this Agreement, "Iran breached duties imposed by international law." This is so because "[a] state becomes subject to international obligations when it enters into a binding contract with foreign companies." Since it is not disputed that the Agreement was binding on Iran, the Claimants allege that the Agreement therefore was subject to the international rule of pacta sunt servanda, which governs contracts between States and private persons as well as inter-State agreements.

65. Finally, the Claimants assert that the repudiation of the SPA also was an expropriation of the Companies' property interests. This uncompensated expropriation allegedly violated both customary international law and Iran's treaty obligations. More specifically, the Claimants argue that it was contrary to Article IV, paragraph 2, of the 1955 Treaty of Amity, Economic Relations and Consular Rights ("Treaty") between the United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957, 284 U.N.T.S. 92, T.I.A.S. No. 3853, 8 U.S.T. 900.

b) The Respondents' Contentions

66. To some extent, the Respondents arrive at similar conclusions as to the law applicable to the issue of liability. They assert that the claims may succeed only if "the facts invoked by the Claimants give rise to the responsibility in international law of the Government of Iran." This is because the Tribunal is a truly international tribunal, which, as such, is concerned with the rights and duties of States in public international law. In the cases before it,

therefore, "the responsibility engaged is that of the Respondent State for a breach of public international law."

67. In the present Cases, the Respondents contend that a breach of contract can be established only by reference to the proper law of the SPA, which undoubtedly is Iranian law, as clearly stated in Article 29 of the Agreement. According to the Respondents, this conclusion conforms to Article 968 of the Iranian Civil Code, which provides that the law of the contract is the law of the place where the contract was concluded, except if the parties have explicitly or impliedly declared the transaction to be subject to the law of another country (or if those parties are all foreign nationals). The Respondents further note that Iranian law also is specified in the Iranian petroleum legislation of 1957 as the law applicable to contracts concluded by NIOC. Similarly, they point out that a presumption exists in international law that the law applicable to a contract to which a State is a party is the domestic law of that State.

68. The Respondents reject the proposition that implementation and interpretation may be separated and governed by different systems of law. They point out that the Claimants have not produced any examples of such a division and further note that the historical evidence of the negotiations which the Claimants draw in support of their construction of Article 29 relates only to internal exchanges among the Companies. The Respondents thus contend that the real history of the negotiations between the Consortium and Iran in no way confirms such an interpretation. Therefore, it is argued, Article 29 must be read according to its clear wording, establishing that the Parties chose Iranian law as the law of the contract.

69. Even if there was no express choice of law, the Respondents further contend that the governing law would have to be determined by reference either to the tacit

intent of the Parties, or to factors demonstrating to which law the Agreement is most closely connected. According to the Respondents, both criteria point to Iranian law. The Agreement was concluded in Iran, it was to be performed in Iran and directly affected the natural resources of Iran. In addition, Article 39.B required Iran to make the Agreement part of its law. Article 29, furthermore, sharply contrasted with the corresponding clause in the prior Consortium Agreement (which the SPA replaced). Article 46 of the Consortium Agreement provided that that agreement would be governed in accordance with principles of law common to Iran and to all nations in which the members of the Consortium were incorporated, or by general principles of international law recognized by civilized nations, including those principles as may have been applied by international tribunals. The Respondents allege that the failure to include such a choice of law provision in the SPA was a part of the bargain. The Respondents also add that Article 28.L of the Agreement provided that the decision or award of an arbitral tribunal set up pursuant to that article "shall be governed or executed in accordance with the law of Iran."

70. The Respondents finally contend that "contracts cannot constitute a legal system," and deny that the SPA was an internationalized contract. They point out that the Agreement was not concerned with the development of Iran's natural resources and granted the Claimants only a right to purchase. A mere provision for arbitration, even with reference to the I.C.C., according to the Respondents, is not sufficient to internationalize a contract between a state and foreign companies. Even if the Agreement were considered to be internationalized, the Respondents argue that general principles of law do not constitute a legal system which could provide the Agreement with an adequate legal basis. They assert that <u>pacta sunt servanda</u> is simply inapplicable in that it is a rule of international law

specifically framed to govern treaties, i.e., inter-State agreements, and thus cannot be interpreted to limit the right of a sovereign State to legislate, even if such legislation varies contractual rights.

71. At the same time, the Respondents do not dispute that the liability of an expropriating State must be determined by reference to international law. They contend, however, that the Treaty was not a treaty in force between Iran and the United States at the relevant time.

c) The Tribunal's Findings

72. Initially, the Tribunal notes that, when dealing with an issue of applicable law, it first must comply with the relevant provisions of the Algiers Accords, found in Article V of the CSD. Article V reads as follows:

> The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

Accordingly, in determining the choice of law in a given case, the Tribunal should examine relevant legal principles and rules as well as the specific factual and legal circumstances of the case, giving special regard to relevant usages of the trade, contract provisions and changed circumstances.

73. In these cases, the Tribunal concludes, and the Parties agree, that the lawfulness of an expropriation must be judged by reference to international law. This holds true even when the expropriation is of contractual rights. A concession, for instance, may be the object of a

nationalization regardless of the law the parties chose as the law of the contract. In the instant Cases, the validity under international law of the Single Article Act and of its application to the SPA or any other agreement is not dependent upon the law which the Parties chose to govern the Agreement.

74. In this regard, the Tribunal finds that the Treaty sets forth the governing obligations of the Parties as to the expropriation. It is now well settled that the Treaty was in force between the States parties before 19 January 1981, even if some of its provisions were suspended at that time. See Amoco International Finance Corporation and Government of Iran, Award No. 310-56-3 at 88-100 (14 July 1987); Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (19 March 1986), reprinted in 25 Int'l Legal Mat'ls 619 (1986); INA Corp and Islamic Republic of Iran, Award No. 184-161-1 (13 Aug. 1985). In the present Cases, the Respondents have raised no new compelling reasons for the Tribunal to reconsider its past findings, and thus the Tribunal sees no reason to depart from them.

75. The claim for alleged breach and repudiation of the Agreement, however, raises quite different issues. At the outset, the Tribunal notes that, when determining the alleged liability of Iran or the United States, the Tribunal must act pursuant to the principles and rules of international law, as it is empowered to do by Article V of the CSD. However, when a claim is based on an alleged breach of contract, the Tribunal first must determine whether the alleged breach actually took place. Obviously, such a determination is made by reference to the terms of the relevant contract, but it also may depend upon legal issues to which the provisions of the contract do not provide a solution. Whether certain conduct of a party constitutes a repudiation of the contract or whether certain dealings of the parties constitute an agreement altering the initial

contract are examples of such issues. In questions of this kind, it becomes necessary to rely upon the law applicable to the contract. This is also the case when the Tribunal must decide upon the alleged liability of an entity other than Iran or the United States, when the entity is not a subject of international law.

76. The only provisions of the SPA concerning the applicable law are those contained in Article 29, quoted above in paragraph 63. As the dispute between the Parties over the interpretation of Article 29 demonstrates, these provisions are remarkably -- and perhaps intentionally -- ambiguous.

77. The sentence providing that "[t]he rights and obligations of the Parties shall be governed by and according to the provisions of this Agreement" states only the obvious. It is nothing more than a reaffirmation of the basic rule of contract law that a contract is the law of the parties. It therefore does not impose any specific system of law. Nor can it be construed as meaning that the contract is self-sufficient and is not governed by a system of law. Apart from the fact that some of the issues cannot be resolved by reference to the terms of the Agreement alone, it is sufficient to note that such a radical conclusion cannot be drawn from an article which specifically refers to a domestic system of law, even if it is only for the interpretation of the Agreement. Indeed, the first sentence of Article 29 states that the SPA "shall be interpreted in accordance with the laws of Iran." This is a clear recognition by the parties that the Agreement alone could not provide a solution for all the difficulties which might occur in relation to its performance.

78. It is noteworthy that the usual choice of law clause, which can be found in many international contracts and refers to the interpretation <u>and</u> implementation of the

contract, was studiously avoided, and that reference is made to Iranian law solely for interpretation of the Agreement. The emphasis put on Iranian law as applicable to interpretation is, at first glance, surprising, since the rules of interpretation of contracts set forth in Articles 224 and 225 of the Iranian Civil Code and the general rules of interpretation set forth in Article 3 of the Civil Procedure Code are rather terse and do not differ from the rules generally applied in most systems of law, including international law. The provision, however, draws some importance from the fact that the Agreement relies on specific Iranian laws, notably tax law and law applicable to the ownership of hydrocarbon reserves.

79. Read in its entirety, Article 29 appears to have had as its main objective to ensure that the Agreement would not be unilaterally amended, but, as expressly stated in the last sentence, be terminated before the expiry date or altered only by "the mutual agreement of the Parties." In light of this objective, the second sentence becomes legally meaningful. Such language is particularly significant in a contract such as the SPA, which relates to the oil industry, where it has often been held that the contracts executed between a State or a State agency and a foreign company may be unilaterally altered by the former. This was especially relevant at the time of negotiation of the Agreement, when important changes in the contractual relationship between the Persian Gulf Countries and foreign companies were introduced by unilateral measures decided by the governments of the former. Even in relations between Iran and the Consortium, the negotiation of the SPA was prompted by a decision by Iran not to permit the 1954 Consortium Agreement to be extended beyond 1979, in spite of a clause in that agreement reserving to the Consortium the right to such an extension.

80. In sum, Article 29 is only partially and secondarily concerned with a choice of law. The fact that this choice only applied to the issue of interpretation, in contrast with the usual practice, does not justify an extension of this choice to other issues. Expressio unius exclusio alterius est. The only possible interpretation is that the parties were unable to arrive at an agreement beyond the question of interpretation and that no choice of law was made in the Agreement in relation to the law applicable to any other issue.

81. In the absence of contract provisions, the Tribunal must decide what choice of law is applicable by taking into consideration all circumstances that it deems relevant. In view of the international character of the SPA, concluded between a State, a State agency and a number of major foreign companies, of the magnitude of the interests involved, of the complex set of rights and obligations which it established, and of the link created between this Agreement and the sharing of oil industry benefits throughout the Persian Gulf Countries, the Tribunal does not consider it appropriate that such an Agreement be governed by the law of one Party. This conclusion is in accord with the spirit of Article 29 and with the usages of trade, as expressed in agreements between States and foreign companies, notably in the oil industry, and confirmed in several recent arbitral awards. See Libyan American Oil Company (LIAMCO) and Government of the Libyan Arab Republic (Mahmassani arb., Award of 12 April 1977), reprinted in 62 I.L.R. 139 (1982); Kuwait and American Independent Oil Company (AMINOIL) (Reuter, Sultan & Fitzmaurice arbs., Award of 24 March 1982), reprinted in 21 Int'l Legal Mat'ls 976 (1982); Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic ("TOPCO"), (Dupuy arb., Award of 19 January 1977), reprinted in 53 I.L.R. 389 (1979). Accordingly, the Tribunal determines that the law applicable to the Agreement is Iranian law for interpretative issues, and the general

principles of commercial and international law for all other issues. For reasons previously set forth, the law applicable to the liability of Iran, as well as of NIOC, which acted as an instrumentality of the Iranian Government in these Cases, is international law.

2. The Alleged Breaches and Repudiation of the SPA

a) The Claimants' Contentions

82. The Claimants' general theory is that, in the years following the execution of the Agreement and until the end of 1978, in spite of "actions inconsistent with the original intent of the Parties," "the Agreement functioned as intended in many aspects." According to the Claimants, while the Companies sought relief from provisions of the Agreement which proved to be financially disadvantageous, they consistently and continuously complied with the Agreement's precise terms, or amended the Agreement pursuant to negotiation with the Respondents. By the end of 1978, the Consortium was forced to withdraw OSCO's expatriate personnel from Iran due to the conditions brought about by the revolution in Iran. At some time thereafter oil exports ceased. After the establishment of a revolutionary Islamic Government, the exports resumed, but, according to the Claimants, NIOC repudiated the Agreement by letter to the Consortium dated 10 March 1979.

83. In their Statements of Claim, the Claimants listed a series of unilateral actions by Iran and NIOC that "breached" the Agreement. In the terms of one of these Statements of Claim: "In October 1973, Iran began to impose its own posted prices in place of an agreed schedule; in January 1975, NIOC altered the contractual formula used to determine the price [the Claimants] paid for Iran's oil; in

October 1975, NIOC announced that [t]he margin of profit per barrel for the crude oil purchased by the Trading Companies from the NIOC shall be a fixed sum of 22 US Cents . . .. NIOC refused to change this after-tax margin of 22 cents from 1975 through March 1979, substantially reducing the profits the Claimant[s] would otherwise have realized." The Claimants contend that, as a result of these unilateral actions, they incurred substantial losses on crude oil processing at Abadan. Referring to NIOC's unilateral decision limiting their profit margin, the Claimants stated that "NIOC's breach was so serious and had so substantial an effect on [the Claimants'] financial position and on the total structure of the [Sale and Purchase] Agreement that [the Claimants] had no further legal obligation to adhere to the Agreement or related arrangements." The Claimants, however, continued to negotiate with, and purchase oil from, NIOC.

84. In subsequent pleadings, the Claimants charachterized Iran's actions only as "inconsistent with the original intent of the parties," and specified only two such actions: NIOC's decision relating to the profit margin of 22 U.S. cents per barrel of crude oil and NIOC's refusal to make adequate adjustments in the costs charged to the Companies at Abadan Refinery. In these pleadings, the Claimants thus attribute the losses which the Trading Companies allegedly sustained at the Abadan Refinery to NIOC's refusal to compensate the Companies, rather than to the decisions relating to the prices and the profit margin, as asserted in the Statements of Claim.

85. During the Hearing, the Claimants referred again to the Respondents' decision on posted prices as a breach of contract, but they stressed the flexible nature of the Agreement. A "Most Favored Nation" ("MFN") clause provided the Respondents with the opportunity to obtain overall benefits incurred elsewhere in the Persian Gulf Countries

through negotiations and consultations and the Agreement further envisioned a diminished role of the Companies as time passed and the Respondents' financial position improved. The Claimants expressly acknowledged that "many of the financial changes were agreed to pursuant to changes across the Persian Gulf." They pointed out, however, that the Respondents failed to adhere to "the spirit" of the MFN clause when Iran unilaterally imposed the 22 U.S. cents profit margin without consulting with the Companies. Furthermore, according to the Claimants, while Iran took all the financial benefits that the Agreement was structured to offer, it "was unwilling to accept the offsetting financial obligations."

86. Throughout the proceedings, however, the Claimants contended that, despite the changes which occurred in its performance of the Agreement, the SPA remained operative until NIOC's letter of 10 March 1979 repudiated the Agreement.

87. Similarly, the Claimants reject all allegations that they breached the SPA. They admit that commencing in 1975 they did not lift all the crude oil they nominated, but argue that the Agreement did not require all the nominated quantities be lifted. On the contrary, the Claimants allege that the Agreement actually contemplated and planned for the possibility of underlifting. Further, the Claimants assert that their initial changes with respect to capital advances were made pursuant to a separate agreement with the Respondents. For the first year, they agreed to advance 100% of the capital expenditure, in lieu of 40% provided for in the Agreement. Then, beginning in late 1975, by special agreement, they paid interest in an appropriate amount in lieu of putting up the 40% advance. Eventually, they exercised their right to terminate the capital advances upon giving notice, as authorized by the Agreement. They did the same in relation to the processing of crude oil at Abadan

Refinery in order to reduce to nil their requirements, but suffered losses during the two years following notice resulting from NIOC's refusal to make adequate adjustments in the costs it charged to the Companies. The Claimants' finally contend that they applied the MFN clause correctly and assert that NIOC received the same financial benefits and advantages then given to other countries in the Persian Gulf.

88. The Claimants further deny that the SPA was frustrated by force majeure. They submit that the force majeure conditions, if any, ended in March 1979 or, at the latest, in April of the same year, i.e., at the time when Iran was able to resume its exports of oil. They contend that OSCO's expatriate personnel were prevented from returning to Iran simply because Iran did not authorize them to return. Furthermore, according to the Claimants, the anti-American feelings then prevailing in Iran actually barred OSCO's return to Iran. Thus, the Claimants argue that the Iranian Government was responsible for the existence of these conditions and cannot invoke them as force majeure conditions in its own favor. The Claimants also contend that, five years after the effective date of the Agreement, the technical assistance provided by non-Iranian personnel was no longer an essential feature of the Agreement, thus giving any Party the right to terminate the Service Contract through proper notice.

89. According to the Claimants, the same reasoning also applies to the question of alleged changed circumstances. It is argued that no circumstances of this kind can be invoked in order to sustain the contention that the Agreement was frustrated prior to 10 March 1979 and that circumstances occurring after this date are irrelevant. Furthermore, as the history of the negotiations of the Algiers Accords demonstrates, the phrase "changed circumstances", as included in Article V of the CSD, only relates

to the consequences of the Islamic Revolution on the functioning of the Iranian courts.

b) The Respondents' Contentions

90. According to the Respondents, the legal significance of the letter of 10 March 1979, addressed to the authoritative Representative of the Consortium in London, is contained in its first paragraph:

> As you are well aware, the 1973 Sales and Purchase Agreement concluded between [NIOC] and the Consortium Member Companies proved to be inoperative soon after the Effective Date due to the fact that the latter Companies failed to comply with certain essential provisions of the Agreement.

The letter also referred to the "lengthy negotiations" which took place between the Parties during the preceding three years "with a view to replacing the 1973 Agreement with a new acceptable arrangement" and which proved to be unsuccessful. Taking this situation into account, NIOC set forth principles which it deemed should be the bases of the "future relationship" between NIOC and the Consortium, the first one being that NIOC was prepared to treat the Companies "as its prime customers, under equal terms and conditions."

91. The Respondents' general contention is thus that the Consortium committed a number of "successive and fundamental breaches" of the SPA within a short period of time after the execution of the Agreement. As a result, the Agreement "ceased to be operative soon after its effective date and the relationship of the Parties was governed by a series of *ad hoc* arrangements."

92. The Respondents insist that, pursuant to the Agreement, the Companies had not only the right, but the

duty, to purchase crude oil in quantities determined pursuant to the procedure established by Article 3 of the Agreement. This was allegedly one of the fundamental obligations that the Consortium accepted under the Agreement. The other fundamental obligations related to the processing of crude oil at the Abadan Refinery, the purchase of NGL products from the Bandar Mahshahr Refinery, capital advances by way of prepayment of crude oil, and the providing of required services through OSCO. According to the Respondents, "the provision of a profit margin to the Claimants was the counterpart of the fulfillment of these obligations by the Consortium." The Respondents add that "[n]on fulfillment of these obligations removed entirely the rationale for the profit margin. In strictly legal terms non-fulfillment constituted a fundamental breach of the [Agreement] and destroyed any entitlement to rights under the Agreement by the Claimants."

93. In detailing these alleged breaches of the Agreement, the Respondents contend, first, that, as early as 1975, the Claimants did not fulfill their obligation to lift crude oil. In 1975, it is alleged, the Consortium lifted only an average amount of 3.911 million barrels per day of crude oil as compared to their commitment to lift 5.9 million barrels per day. In subsequent years (1976, 1977 and 1978), the Companies refused to make any firm nominations. Each time, they indicated that the nominations they made could be revised in light of the circumstances. NIOC contends that such conduct constituted a clear breach of Article 3.3 of the Agreement.

94. According to the Respondents, another breach by the Consortium members related to the capital advances which they were to make to NIOC. In November 1975, the Companies requested that, as an interim measure, they would not be required to advance the amounts due on 15 November and 15 December 1975. NIOC objected to this request, but provided

the required funds for the two months with the understanding that this would not constitute a precedent or be interpreted as releasing the Companies from their obligations. No further capital advances were made by the Companies. NIOC now argues that, regardless of the interim agreement, the Claimants' actions constituted a breach of Article 11.C of the Agreement.

95. The Respondents also contend that the Consortium's notice of 23 December 1975, declaring that its requirements for processing crude oil at the Abadan Refinery would be reduced to nil as of 1 January 1978, amounted to a "fundamental breach of the terms of the Agreement as it dramatically affect[ed] the whole basis upon which oil was sold to the Consortium members." While the Respondents recognize that the Companies had the right under the Agreement to reduce their requirements, the Respondents allege that they were not authorized to terminate them completely.

96. The Respondents further allege that the Consortium breached the Agreement by undercompensating them for NGL products. Article 13.A of the Agreement provided that the economic benefits to Iran from the sale of NGL products were to be "no less favorable than those which currently prevail in respect of the manufacturing and export of similar production by Consortium members in and from other countries in the Persian Gulf Area." Under the Agreement, the rate of tax on such sales to be applied was 55%. The Respondents assert that, from 1 October 1974 onwards, the rate of tax applied by all Persian Gulf area countries increased from 55% to 65.75% and, from 1 November 1974 onwards, to 85%. The Respondents complain that, notwithstanding their requests, the Consortium members refused to confirm to NIOC the increases in tax paid to other Persian Gulf Countries. Payments made by the Consortium members thus never exceeded 55%, allegedly in breach of the SPA.

97. The Respondents also contend that the Consortium members restricted OSCO's capital expenditures through June 1975 in order to reduce advances made by them. Thereafter, as of June 1975, it is alleged, the Consortium members breached their obligation to provide 40% of the capital expenditures which NIOC incurred, while, at the same time, OSCO's capital expenditures increased exorbitantly. The Respondents thus allege that the Companies failed to ensure that their wholly-owned and controlled subsidiary OSCO performed its obligations in accordance with the provisions of the SPA and of the Service Contract.

98. Finally, the Respondents assert that the obligation of the Consortium members to ensure that Iran received the "most favorable nation treatment in relation with the other countries in the Persian Persian Gulf" was breached when the financial benefits under new arrangements entered into with Saudi Arabia, effective 1 January 1976, were not passed on to Iran.

99. The Respondents also submit that the Companies fully understood that their failure to adhere to the provisions of the Agreement fundamentally altered the contractual relationship between the Companies and Iran. According to the Respondents, this is the reason why the Consortium proposed in a letter dated 25 November 1975 that "a new agreement" be negotiated to replace the SPA. This new agreement would have been "substantially different" from the 1973 Agreement and would have dramatically changed the balance of rights and obligations between the Parties. More specifically, the Companies would have ceased to have any obligation in terms of capital investment, the Abadan arrangement would have been completely revised and the most favored nation clause would have been eliminated. The Companies also would have benefitted from a greater flexibility in the determination of the quantities of crude oil to be purchased by them and would have received, after

payment of Iranian taxes, at least 30 U.S. cents per barrel on the total production, with an escalation clause to allow for inflation. This new agreement would have been effective as of 1 January 1976 and would thus have provided contractual coverage for all of the breaches of the Agreement that the Companies allegedly had committed since 1976.

100. In the event the Tribunal finds that the SPA was not inoperative as of 1975, the Respondents urge the Tribunal to decide that the Agreement was terminated by frustration due to force majeure. The Respondents point out that the Claimants themselves invoked force majeure when withdrawing OSCO's expatriate personnel in January 1979. The Respondents state that they were ready to order the return of this personnel in March 1979.

101. If the Tribunal does not conclude that the Agreement was frustrated by force majeure, the Respondents submit that it was frustrated by changed circumstances. The Islamic Revolution brought about a radically new situation in Iran, especially in the the oil industry. Circumstances prevailing at the time of the execution of the Agreement were completely transformed, which necessarily implied a direct effect upon the implementation of the Agreement. The Respondents point out that Article V of the CSD directs the Tribunal to take into account such changes and imposes no limitation on the changes to be considered.

c) The Tribunal's Findings

102. The preceding sections make plain that the various arguments which the Parties assert refer to different periods of time. For the purpose of considering these arguments in an orderly fashion, it is appropriate to examine these periods in turn, starting with the initial period of life of the SPA, prior to the time when the

revolutionary events in Iran affected its performance. In view of the legal significance which the Claimants attribute to the letter of 10 March 1979, it also will be necessary to consider separately the events prior to and subsequent to that date.

i) 1975 - 1978

103. Initially, the Tribunal notes that neither Party alleges that the SPA was fully implemented according to its terms. In the months following its execution, Iran unilaterally decided to determine the posted prices. In their first pleadings, the Claimants contended that such a decision was at variance with the provisions of the Agreement. While this contention was not consistently maintained in the Claimants' subsequent pleadings, the conformity of such a decision with the terms of the Agreement is, at least, disputable. In addition, during the first year of the Agreement, capital advances required of the Trading Companies to NIOC were not made in accordance with Article 11.C, which fixed their amount at 40% of the annual budgeted capital expenditures that NIOC required. These advances were raised to 100% of such expenditures via a special agreement between the Parties.

104. In 1975, as previously mentioned, nearly all of the essential provisions of the SPA were either put aside or implemented in a manner that was not consistent with the terms of the Agreement. These included the provisions relating to the nominations of crude oil to be lifted, the implementation of nominations already made, the payment of capital advances, the determination of the Companies' profit margin, and the costs related to the processing of crude oil at Abadan Refinery.

105. By the end of 1975, the provisions of Article 6.B (2) and of Schedule 3, relating to the determination of the balancing margin, and those of Article 5.A, relating to the posted prices, had been set aside; the members of the Consortium had ceased to make the capital advances provided for in Article 11; the complex mechanism established in Articles 2 and 3 for the sharing of export crude oil between the Companies and NIOC and for the nominations of the Companies' requirements had no more than an indicative value; notice had been given to reduce the Companies' requirements for processing at Abadan Refinery from 300,000 barrels a day to nil as of 1 January 1978; and the Consortium had submitted proposals to NIOC for the negotiation of a complete revision to the Agreement. By early 1976, while insisting that the provisions of the Agreement should be implemented in their entirety until otherwise agreed upon by the Parties, NIOC indicated that it had no objection to entering into such negotiations.

106. According to the Claimants, most of these changes either conformed to the terms of the Agreement or were adopted via special agreements between the parties. They insist upon what they label the "flexibility" of the Agreement. Actually, the SPA envisioned a sizable evolution in the performance of its provisions, notably in relation to the probable shift in the respective positions of the Parties in financial and technical terms. For example, the capital advances by the Consortium and the technical assistance by OSCO were provided only for an initial period in order to make easier the transfer of the operation of the oil industry from the Consortium, under the Consortium Agreement, to NIOC, under the SPA. The Companies were granted the right to reduce their advances after five years upon giving two years' prior notice. Similarly, the Service Contract, concluded for an initial period of five years, was due to continue thereafter, subject to two years notice of

termination by either Party, such notice being authorized at the end of the third year.

107. Another important evolutionary feature of the Agreement was the so-called MFN clause, which purported to extend to Iran the improvements in the overall financial benefits to the Persian Gulf Countries resulting from any new arrangements with members of the Consortium. The Agreement was negotiated at a time of profound and rapid changes in the contractual and financial relations between the Persian Gulf countries and foreign companies. The MFN provisions were designed to extend the effects of the changes to the contractual relations between Iran and the Consortium. Pursuant to the Agreement and the related documents, the necessary amendments for such changes were to be introduced through negotiation and consultation. In practice, this procedure was not followed, and changes were applied by unilateral actions of one party with the other party in some instances registering a formal protest, but, in fact, acquiescing to such changes by its conduct.

108. It is well known that, in the months following the execution of the Agreement, certain changes in the oil industry occurred which the Parties could not have predicted and which undoubtedly exceeded their expectations. As a consequence of the international political turmoil associated with the 1973 Arab Israeli War, several Persian Gulf Countries were able to increase dramatically the price of crude oil, thereby rapidly upsetting the world economy and, in particular, the oil industry. This clearly affected the relationship between the parties and the use which they made of their options under the Agreement.

109. As previously mentioned, the Claimants have not been consistent in their characterization of some of the Respondents' actions in performance of the Agreement. In their most recent briefs, the Claimants chose not to speak

of breaches, as in their Statements of Claim, but rather spoke of "actions inconsistent with the original intent of the parties," a phrase particularly ambiguous in view of the evolutionary character of the Agreement. They also stated that in the negotiations which took place in 1979 they submitted to NIOC claims relating to the "loss of 22 cents per barrel" and "loss of NGL products," but no claim for the alleged loss sustained by the Claimants as a consequence of Iran's control of the profit margin was filed with the Tribunal. By contrast, the Respondents have listed a series of alleged breaches of the Agreement by the Claimants, which are denied by the latter, but are all presently the bases for a series of counterclaims.

110. In sum, the Tribunal notes that, by the end of 1975, the terms of the Agreement no longer governed essential aspects of the relationship between the parties. Many fundamental changes had been added to this framework through various devices, either in conformity with, or in violation of, the procedures set forth in the Agreement. In no case, however, did either party choose to treat the Agreement as terminated, but rather confined itself, in some instances, to registering its objections and to entering into negotiations with the other one. These negotiations were conducted in order to resolve specific disputes, but also in view of drafting a complete revision of the Agreement or a new agreement designed to replace it.

111. In view of these facts, the Tribunal finds difficult to accept, without qualification, the proposition that the SPA was operative at the end of 1978. Actually, a number of its most important provisions were replaced by _ad hoc_ agreements, or even _de facto_ ones, often reluctantly and only implicitly accepted by one party or the other. At the same time, the conduct of the parties does not allow the Tribunal to conclude that the Agreement was frustrated or otherwise terminated at this time. A series of its

provisions continued to be performed according to their terms, and the ad hoc arrangements substituted for those provisions can only be construed as informal amendments to this Agreement.

ii) December 1978 - 10 March 1979

112. It is not disputed that the Claimants withdrew OSCO's expatriate personnel in late December 1978 and early January 1979 because of the civil disturbances associated with the revolutionary movements. It is also common ground that oil production as well as oil exports were severely disturbed during this time and for some time were completely terminated.

113. Although the Claimants contend that "neither of the events identified by the Respondents created a situation of force majeure," they recognize that "events in Iran may have interfered temporarily with the producing and export of oil from Iran," and that "export of oil was suspended for a period." Furthermore, in letters dated 6 and 13 January 1979, explaining the withdrawal of the OSCO expatriate staff, they stated "that events in Iran had made impossible for them at present to continue to carry out their duties, and that their personnel safety was substantially at risk." This is an implicit, but clear, admission of a situation of force majeure.

114. The Tribunal has already held that the revolutionary events which occurred at the end of 1978 and the beginning of 1979 created conditions of force majeure. See, e.g., Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985); Starrett Housing Corp. and Islamic Republic of Iran, Award No. ITL 32-24-1 (19 Dec. 1983). The dispute between the Parties, however, is concerned less with the occurrence of such conditions, which is affirmed by the Respondents and not really denied

by the Claimants, than with the duration of such conditions and their effects on the SPA.

115. The Claimants contend that conditions of _force majeure_ ended in March 1979 because exports of Iranian oil resumed at that time. "Thus, performance of the Agreement, which was for sale of oil to the Claimants could have resumed." They add that the Claimants' physical presence in Iran was not required for performance to resume, since crude oil could be loaded onto non-American flag vessels. Similarly, the presence of OSCO's expatriate staff was no longer essential to the performance of the Agreement, since technical assistance at that time, more than five years after the effective date, had lost some of its importance, given that Iranian staff was able to carry out all the activities related to the oil industry in Iran. All this is strongly denied by the Respondents, who assert that the conditions of _force majeure_ persisted much later and that they completely frustrated the Agreement. They emphasize that the oil exports resumed only on a limited scale and that for months production remained well below the level attained in the preceding years.

116. Article 27 of the SPA envisioned _force majeure_ only as an excuse for failure by a party to comply with the terms of the Agreement. In other words, in this Article (the only article which deals with _force majeure_ with the exception of Article 2.B (2), which is not applicable in these Cases), _force majeure_ conditions were regarded only as causing a suspension of certain provisions of the Agreement. This is in line with the most common practice in contract law. Usually, _force majeure_ conditions will have the effect of terminating a contract only if they make performance definitively impossible or impossible for a long period of time.

117. It also is admitted generally that force majeure, as a cause of full or partial suspension or termination of a contract, is a general principle of law which applies even when the contract is silent. Therefore, although Article 27 does not so provide, that absence is no obstacle to a finding that the Agreement was terminated by force majeure if the circumstances warrant such a finding. In the circumstances of these Cases, however, the Tribunal does not find that on 10 March 1979 the situation was such that the Agreement could be considered as frustrated or terminated for cause of force majeure. A new revolutionary Islamic Government had already been established. The conditions therefore could be expected to progressively return to normal and, in fact, oil exports were resumed. In addition, it is noteworthy that NIOC's letter of 10 March 1979 made no mention at all of force majeure and spelled out the conditions of resumption of oil sales to the Consortium. At the same time, it would be erroneous to pretend that the conditions in Iran already had returned to normal by this date. It is not disputed that the quantities of oil available for export were considerably less than during the preceding years and did not reach a comparable level for months. The conditions for a return of OSCO's expatriate staff, furthermore, were not yet met.

118. The same finding applies to the Respondents' argument that the Agreement was frustrated by changed circumstances. In support of this argument the Respondents heavily rely on the use of this phrase in Article V of the CSD. The Tribunal, however, observes that, in this Article, "changed circumstances" only denotes one of the elements that the Tribunal is invited to take into account when determining the choice of law to be applied in any given case. This has no direct bearing on the merits of a claim.

119. In the instant Cases, the concept of "changed circumstances," in so far as it can be distinguished from

force majeure, can refer only to the dramatic political changes brought about in Iran by the success of the Islamic Revolution and the decision of the Islamic Government to follow a policy radically different from that of the previous Government in the oil industry. Changes of such a character and magnitude could not be without consequences to the contractual relationship between Iran and the Consortium. By themselves, however, they could not have had any effect on the validity of the Agreement before materializing in specific measures. As a matter of fact, the 10 March 1979 letter was the first expression of such a new policy in relation to the Agreement.

iii) The Letter of 10 March 1979 and Subsequent Events

120. NIOC's letter of 10 March 1979 to the Consortium, which the Claimants construe as a repudiation of the Agreement, in pertinent parts, reads as follows:

> As you are well aware, the 1973 Sales and Purchase Agreement concluded between [NIOC] and the Consortium Member Companies proved to be inoperative soon after the Effective Date due to the fact that the latter Companies failed to comply with certain essential provisions of the Agreement.
>
> You are also aware that lengthy negotiations between the two parties during the last 3 years with a view to replacing the 1973 Agreement with a new acceptable arrangement proved to be unsuccessful.
>
> Owing to the above facts and being duly mindful of the objectives and aspirations of our Nation, we feel, we should advise you that the future relationship between [NIOC] and the Consortium Member Companies has to be based on the following principles:

A series of propositions followed, the first being:

> NIOC shall be prepared to treat the Consortium Member Companies as its prime customers; under equal terms and conditions.

The other propositions related to OSCO, which would disappear with its expatriate personnel and be replaced by special arrangements with the individual companies, and to IROS, the Companies' shares and interests in which would be transferred to NIOC. The letter was signed by Mr. H. Nazih, Chairman of the Board and Managing Director of NIOC, and addressed to Mr. W. Gloss, Iranian Oil Participants Ltd., London.

121. Such a letter must be read in the context of the fluctuating contractual relationship between the Parties, contemporary events and the reaction of the Consortium, which responded to NIOC by a letter dated 23 March 1979, signed by Mr. W.J. Gloss. The letter reads as follows:

> I refer to your letter of 10th March 1979 (reference TD/35) together with the explanations of it given by Dr. Movahed and Mr. Diba at our meeting in London on 12th March, and to the statements made by NIOC in recent weeks.
>
> Members have asked me to say that they would like to meet NIOC to reach an agreement in respect to the termination of the 1973 Sale and Purchase Agreement and Related Arrangements. This would reflect generally the principles set out in your letter and in particular would establish means for implementing your proposal that NIOC will take over all contracts and obligations entered into by OSCO and IROS. It would also, of course, deal with repayment of Members' investment and advances and settlement of any claims of either party.
>
> Pending agreement, which we anticipate would be reached quickly, Members must, of course, reserve all their rights and cannot accept the points made in the first paragraph of your letter of 10th March.
>
> Members believe that it would be in the interests of all parties for a meeting to be held with NIOC

> as soon as possible and have asked me to suggest that this should take place at a mutually convenient location during the week beginning 31st March 1979. If you agree, please let me know what date and place would be suitable to NIOC.
>
> Members have asked me to tell you that they are pleased that NIOC shall be prepared to treat the Consortium Member Companies as its prime customers and so individual Consortium Members may have been, or may be, discussing this matter with you.

122. This response establishes that, at the relevant time, the Claimants did not treat the 10 March 1979 letter as a repudiation of the Agreement. While reserving their rights and rejecting the contention that the Agreement proved to be inoperative soon after the effective date due to their alleged failure to comply with certain of its essential provisions, the Claimants understood NIOC's letter as an offer to negotiate a new agreement in which the SPA would be terminated and replaced by individual sale contracts. While stating that the negotiations should deal with all issues and claims related to the termination of the SPA, they expressly accepted the principles set out in the 10 March 1979 letter as a basis for negotiations and welcomed NIOC's proposal to treat the Companies as its prime customers. They even mentioned that discussions on this subject already had started with some of the Companies. Actually, both Parties admit that a series of sale contracts were executed thereafter between NIOC and individual members of the Consortium and were performed through November 1979, when the crisis provoked by the seizure of the American Embassy in Tehran and of the U.S. nationals and diplomats therein disrupted relations between the two countries. It also is common ground that, until November 1979, negotiations took place about the various problems relating to the termination of the SPA.

123. It cannot seriously be contended that the Claimants, in this occurrence, acted under duress and, significantly, they refrained from expressing such a contention. The revolutionary events, which ultimately culminated in the

establishment of the Islamic Government, cannot be reduced to a political change at the head of the State apparatus. They dramatically transformed the whole pattern of social relations in the country. In this process, the rights of the people to the natural resources of the country and, consequently, the legal regime of the petroleum industry became a central issue of the Revolution. Realistically, the Claimants recognized that their purchases of Iranian oil could no longer be conducted within the framework of the Agreement. It is, however, remarkable that both the Companies and Iran intended to continue the sales and purchases of oil on a new contractual basis and, actually, this is in fact what most of the members of the Consortium and NIOC did.

124. Although this situation was different from the previous dealings between the parties in several respects, it was in no way an innovation in their relationship. The SPA was negotiated in the context of rapid economic and political changes in order to replace the 1954 Consortium Agreement. The history of the performance of the SPA itself, as shown above, is replete with actions at variance with the terms of the Agreement. With the consent of the Parties, more or less reluctantly given, these actions had altered the whole framework of the Agreement profoundly.

125. The principle embodied in Article 29 of the SPA, according to which "the termination before expiry date or any alteration of this Agreement shall be subject to the mutual agreement of the Parties," was eventually respected and certainly must be held as still valid in March 1979. However, it is also clear that it was applied in a very particular way, through a series of *de facto* arrangements, practically observed by the Parties even after registration of a protest or of a reservation of rights.

126. A close scrutiny of the exchange of letters of 10 and 23 March 1979, as well as of the conduct of the Parties prior to and after this exchange, demonstrates that the Parties agreed at this time not to revive the Agreement, then suspended by force majeure. This agreement, however, was not unconditional. Both parties recognized that a reconciliation of interest was to take place between them, and that this reconciliation, as well as the other issues arising from the termination of the Agreement, was to be the object of subsequent negotiations, as spelled out in the 23 March letter. Such negotiations eventually took place and, undoubtedly, would have resulted in compensation for the loss sustained by the Consortium alluded to in the same letter. Any other outcome of the negotiation, in the absence of other counterparts acceptable to the Companies, would have amounted to an unjust enrichment of Iran and NIOC and an unjust loss for the Companies.

127. The fact that the negotiations did not succeed before November 1979 and were interrupted by the events which took place during that month does not relieve the Respondents from their obligation to compensate the loss sustained by the Consortium. This holds true irrespective of the legal characterization of these events: force majeure, as the Respondents contend, or acts of the Iranian Government entailing the international responsibility of Iran, as alleged by the Claimants. In the present context the Tribunal, therefore, neither must pronounce itself on this issue nor need it consider the Single Article Act, which entered into force at a time when the Agreement was already dead. In any event, such an Act has been characterized by Iran as an expropriation and must be analyzed in this context.

3. The Case of Expropriation

128. According to the Claimants, "the Respondents' repudiation of the 1973 Agreement was not only a breach of an internationally binding agreement, it was an unlawful expropriation of [the Consortium member Companies'] property interests." In support of this contention, the Claimants take considerable effort to demonstrate that rights arising under a contract are property interests. They also submit that the expropriation was unlawful since it was not accompanied by just compensation, as required by customary international law as well as by the Treaty. Furthermore, they allege that the expropriation was undertaken in violation of Article 29 of the SPA and without any authority under Iranian law. Finally, they allege that no reasonable procedures for compensation were provided at the time of the repudiation, in violation of Article IV, paragraph 2, of the Treaty.

129. As emphasized above, the Respondents' main theories are that the SPA was rendered inoperative by the Claimants' breaches of contract or frustrated by force majeure, so that it had ceased to exist by the end of 1979. Were the Tribunal not to accept these contentions, however, they submit that the Agreement was lawfully terminated by notification on 5 September 1981 of the decision of the Special Commission established under the Single Article Act, nullifying the SPA. They submit that this decision amounted to a legal nationalization by Iran "of its natural resources and all activities concerned with their exploitation." While rejecting all of the Claimants' arguments to the contrary, they endeavor to demonstrate that such a nationalization was internationally lawful. In so doing, they admit that the consequence of a lawful nationalization "may be that the State has an obligation to compensate," but they add "that is controversial . . . and would in any event arise only if this was fair in all the circumstances. Such circumstances would include the legitimate expectations of

both parties, the compliance with minimal standards reflected in state practice, and a concept of fairness which would take account of the whole history of the relationship between the parties." The Respondents allege that "the Claimants had neither property, nor assets" which could be compensated, since the contractual right to purchase oil and to have it refined is not a property right which could be an object of expropriation. They furthermore deny any possible compensation for lost profits, inter alia, because it is inadmissible in cases of lawful expropriation and also because the Claimants, in the prevailing circumstances, could not have any non-speculative expectations of future profits.

130. The Tribunal notes that, according to the Claimants, the alleged expropriation was realized by NIOC's repudiation of the Agreement by the letter of 10 March 1979. It already has found that this letter must not be construed as a repudiation, but that the exchange of letters of 10 and 23 March 1979 embodied an agreement of the Parties to terminate the 1973 Agreement, with the understanding that the legal and financial consequences of such a termination, including the compensation to be paid to the Claimants, would be determined through negotiations. Such a finding amounts to a rejection of the contention that the letter of 10 March 1979 was an act of expropriation. Consequently, the Tribunal need not pronounce itself on the Claimants' other contentions, notably that their rights under the Agreement were property rights which could be expropriated.

131. For similar reasons, the Tribunal need not consider the subsidiary arguments submitted by the Respondents in relation to the issue of expropriation, since the acts presented by the latter as having hypothetically constituted an expropriation are subsequent to the understanding between the Parties not to revive the SPA and do not relate to the agreement concluded through the exchange of letters of 10 and 23 March 1979. In particular, it need not decide

whether it could take cognizance of, and draw legal consequences from, acts occurring after 19 January 1981.

B. The Processing Costs at Abadan Refinery

1. General Background

132. The claim relating to the processing costs at the Abadan Refinery differs from the previous ones in that it relates to losses suffered years before the events which resulted in the termination of performance of the SPA. According to the Claimants, the alleged losses began in 1975 and continued until the notice by the Trading Companies to reduce to nil their requirements took effect on January 1 1978. The facts relating to this claim are not in dispute between the Parties.

133. Pursuant to Article 4 of the Agreement and 4.B of the Processing Agreement, the Trading Companies were obligated to deliver for processing at the Abadan Refinery a programmed quantity at the average rate of 300,000 barrels per day of crude oil purchased under the SPA. This volume was submitted and subject to NIOC's preemptive right to take products required for internal consumption. The Trading Companies paid a processing fee related to the costs of operating the refinery in proportion to the total quantity of crude oil which they had processed. An operating tolerance of only plus or minus 5% from the programmed quantity was allowed.

134. Processing of crude oil produces several distinct products with different gravities and values. Light products (of higher gravity, such as aviation gasoline and kerosene) generally have a high market value. Heavy products (with a lower gravity, such as fuel oil) are less valuable. Any kind of crude oil yields products ranging across the

spectrum from very light to very heavy. Some crude oil, however, produces a larger percentage of heavy refined products and therefore sells for less than light crude.

135. The internal demand in Iran was predominately for light products and, therefore, above the average gravity of all products refined at Abadan. The parties considered this variable at the time they executed the Processing Agreement. Consequently, Article 4.G of the Agreement provided for an adjustment mechanism according to which the difference between the average gravity of the volume of the products manufactured at Abadan Refinery and that of the volume of products which NIOC lifted would be added to, or deducted from, the average gravity of the crude oil delivered to the refinery by the Trading Companies, according to which the price of crude oil in turn was calculated. The Agreements provided that this difference would be expressed in "degrees API,"[4] but did not provide for any method of calculating the adjustment to be made to the price of crude oil which the Trading Companies paid and delivered to Abadan.

2. The Parties' Contentions

136. According to the Claimants, trade usage recognizes two methods for assigning a financial value to differences in crude oil gravity. One measure is employed in connection with large differences in gravity (of degrees). The other one is used in connection with small differences (of only tenths of a degree). In 1973, because the difference in average gravity was relatively small, "the parties followed the trade usage for correcting small differences from

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[4]API gravity is a system of measurement formulated by the American Petroleum Institute for expressing in degrees the density of petroleum products and crude oil.

gravity." In the next four years, however, the evolution of internal consumption in Iran required NIOC to take more and more of the most valuable light products. As a result, the difference in average gravity expanded up to disparities of 15 degrees. Consequently, according to the Claimants, the method used for adjusting price due to the difference in average gravities was wholly inadequate to reduce the companies' crude oil costs at a pace that reflected the declining value of the products the companies received back at Abadan. As a consequence "[r]evenues from Abadan processing dropped from a profit of 81 cents a barrel in 1973 to a loss of more than a dollar a barrel by late 1975." The Claimants insist that these losses produced no tax relief because the five percent profit tax provided for by the SPA did not apply to the actual profit, but instead to a "deemed" profit. Furthermore, the unilaterally imposed 22 U.S. cents profit margin on crude oil sales foreclosed the Claimants from offsetting losses incurred when the crude oil was refined.

137. The Claimants tried to convince NIOC to change the method used for the adjustment. Furthermore, among a series of revisions proposed in November 1975, the Claimants proposed a revision of the Abadan arrangements "so that they [would] reflect a valuable commercial processing basis." NIOC, however, rejected these proposals. In view of the refusal by NIOC to act, the Companies decided to give notice, to take effect 1 January 1978, to terminate processing of crude oil for them at Abadan. In the present proceedings they contend that "in 1975-1977 the Processing Agreement plainly was not functioning as intended." According to the Claimants, while the Companies suffered large losses, Iran was benefitting from taxes calculated on the basis of the Companies' deemed profits and, at the same time, NIOC was receiving the more valuable products at less than full cost. The Claimants allege that the Respondents breached the requirement of good faith in carrying out

contractual obligations and acted contrary to the common original intent of the parties, to the proper trade usage and to the principles of equity.

138. As for the Respondents, they refer to the position taken earlier by the Consortium that they intended to take full advantage of their rights for processing at Abadan. By 4 July 1974, the Companies had expressed their concern that arrangements necessary to implement an Iranian proposal at the time to process crude oil reserved to NIOC for exports in any spare capacity available at Abadan would impinge upon such rights. According to the Respondents, this concern forced Iran to initiate, at very great cost, a massive program of increasing refining capacity in four other cities: Tehran, Shiraz, Isfahan and Tabriz. Although not expressly stated, the Respondents appear to use this argument to explain why NIOC did not consent to change the initial method that the parties used to calculate the price of crude oil which the Companies processed at Abadan.

3. The Tribunal's Findings

139. The Tribunal notes first that the parties recognized that the method to be used for calculating the adjustment of price resulting from the difference in average gravity was prescribed neither by the SPA nor by the Processing Agreement, both being silent on this subject. The Tribunal further notes that the parties accepted, since the execution of the Agreement, use of the method of which the Claimants now complain. Accordingly, the continued use of this method from 1975 onwards, whatever the losses which the Claimants possibly suffered therefrom, cannot be construed as a breach of the Agreement or of any other related agreement or arrangement.

140. The only remaining issues are whether the Respondents had a duty to accept a change in the method initially used in view of the unbalanced effects produced by the latter or whether the Claimants legitimately could expect to be compensated for these losses in the general settlement of all the claims arising from the termination of the SPA.

141. As to the first issue, the Claimants' references to good faith, trade usage and equity are clear indications that the present claim is not founded in law. It always is possible that part of a bargain will not work as expected and will yield unbalanced results. Good faith and equity do not necessarily create a duty for the party which draws profit from such a situation to agree to amend the initial contract, at least if the contract as a whole remains profitable to both parties.

142. In conclusion, the Tribunal does not find that the Respondents have breached the SPA and related agreements and arrangements in connection with the processing costs at Abadan Refinery. The Tribunal also finds that the Respondents had no duty to amend the previously agreed upon arrangement. The Tribunal will consider the second issue, i.e., the question of the legitimate expectations of the Parties pursuant to the March 1979 agreement, in the following section.

V. ELEMENTS OF DAMAGE

A. The Contentions of the Parties

1. The Claimants

143. The Claimants contend that, as a "fundamental legal standard" to be applied in these Cases, they are "entitled to receive an award that is fully equivalent to

the value of the rights of which [they have] been deprived." This means, for their various claims:

Claim A - The unrecovered balance of the Claimants' prepayments for oil in the period from 1973 to 1975;

Claim B - The unrecovered balance of the Claimants' investments in assets transferred to NIOC in 1973;

Claim C - The value of the Claimants' rights to crude oil for the full term of the Agreement (21 March 1993);

Claim D - The value of the Claimants' rights to NGL products for the full term of the Agreement;

Claim E - The value of the Claimants' NGL products withheld at Bandar Mahshahr Refinery;

Claim F - The value of the Claimants' refined products withheld at Abadan Refinery; and

Claim G - An award of past damages for the Claimants' losses in connection with the Abadan Refinery.

144. In support of these contentions, the Claimants assert that, pursuant to a well-established rule of customary international law, an indemnity, to be adequate, must fully replace the benefits of which the party entitled to damages was deprived as a result of the wrongful actions of the other party. In the context of an ongoing enterprise, such indemnity amounts to the full economic value of the enterprise rights, or, in other words, its "fair market" or "going-concern" value. They point out that the rule is the same whether the action which deprived the aggrieved party of its rights was a breach of contract or an expropriation. According to the Claimants, the general principles of law derived from national legal practices, customary

international law and the Treaty fully comport with this rule. The Treaty also requires full compensation and, more precisely, in case of expropriation, compensation amounting to the "full equivalent of the property taken." Pursuant to the Treaty, "property" includes "interests in property" and, therefore, contractual rights.

145. The Claimants insist that the motivating inducement for their acceptance of the SPA was Iran's and NIOC's commitment to provide them with a secure and profitable contract for the long-term supply of crude oil and NGL products. When forced, in 1973, to choose between continuing the advantageous Consortium Agreement for the term of six years or negotiating a different form of contract for a longer term, they chose the longer term. In their view, "the long-term supply of oil was the most important and valuable aspect of the Agreement."

146. According to the Claimants, in the case of an ongoing business, "[t]he value of a contract or an enterprise depends ultimately on how much money either will return over time." The Claimants consider that this principle is reflected in the traditional categorization of damages into <u>damnum emergens</u> and <u>lucrum cessans</u>. In the present Cases, whatever the legal basis for the Claimants' right to damage or compensation, the result is the same. Under a contract measure of damages, the Claimants are entitled to what they "would have received if Iran and NIOC had performed their obligations under the Agreement to 1993." Under an expropriation view, "the measure is the fair market value of the expropriated contractual rights to crude oil and NGL products to which [the Claimants were] entitled until 1993." Under an unjust enrichment measure, the Claimants are entitled "to the benefits Iran and NIOC received from their ouster" of the Claimants.

147. The Claimants also emphasize that the parties to the SPA "clearly anticipated" that the Consortium "would profit from the purchase and sale of crude oil and NGL products under the Agreement." Such an anticipation was clearly reflected in the preamble of the Agreement, which stated, <u>inter alia</u>, that these Companies were "in a position and willing to ensure" the continued flow of Iranian crude oil and products to consumers throughout the world "on the assurance of security of supply and the prospect of reasonable rewards."

148. Finally, the Claimants contend that the Trade Companies' operations in Iran under the SPA had a record of proven earnings derived from their rights to Iranian crude oil and NGL products, which were "the direct fruit of the contract," clearly anticipated by the Parties and a "proper element of damages compensable for breach of the contract." During the six years of the Agreement some $80 billion worth of oil was exported, all at a profitable price.

149. The actual calculation of the damages sustained, according to the Claimants, is not difficult. It requires the application of only three factors, each of which can be established:

> (i) a <u>quantity factor</u> (the number of barrels of crude oil and NGL products that [the Claimants] would have been entitled to receive over the life of the Agreement);
>
> (ii) a <u>profit factor</u> (the profit margin that [the Claimants] would have earned on each such barrel); and
>
> (iii) a <u>discount factor</u> (to adjust all profits, past and future, to their present value)."

150. Although the question of quantification will be dealt with in the second stage of the proceedings, the method to be used in order to ascertain each of these three factors has been described with some detail in the Claimants' written pleadings as well as at the Hearing. The

quantity factor depends on the existing reserves in the Iranian oil fields covered by the Agreement and of projections of the maximum efficient production rate. With respect to the profit factor, the Claimants consider the 22 US cents margin unilaterally imposed by Iran and NIOC to have established an irreducible floor profit margin for crude oil, to which any additional proven lost profits brought about by the repudiation of the SPA should be added. For the NGL products, a similar floor profit can be deduced from the average profit earned by the Claimants during the life of the Agreement. Actually, it is asserted that this profit was remarkably stable and was approximately 18% on the sale of such products. As for the discount factor, techniques of discounting universally accepted in the business and financial worlds are available and can easily be used.

2. The Respondents

151. The Respondents approached the issue of compensable damage with reference to three alternative hypotheses: breach of contract, lawful nationalization and unlawful expropriation. For the sake of clarity, the same order will be followed in the following paragraphs, in spite of the fact that the Tribunal has rejected these three theories.

152. In the case of breach of contract, the Respondents conceded that claims in the nature of alleged debts (claims A, B, E and F) are prima facie recoverable, if proved and substantiated. On the other hand, the Respondents contend that the Claimants established no breach of contract in relation to Claim G. According to the Respondents, NIOC simply exercised its preemptive right to take oil products required for internal consumption in conformity with the terms of Article 4.B.(1) of the SPA. No provision of the Agreement or other legal principle required the Claimants to

be immune from any loss sustained as a consequence of application of an article of the Agreement. The Claimants must accept that some parts of such an Agreement, for which they bargained, may be profitable, and others not.

153. As for the alleged losses of future profits, the Respondents allege that they are not recoverable because the value of the Claimants' rights is "entirely speculative and unquantifiable." In support of this contention, the Respondents recall that the Claimants refused to specify any definite requirement for crude oil during the years 1976-1978. "By their own conduct," therefore, the Claimants "refused to quantify any such rights for any particular year." Furthermore, according to the Respondents, no particular profit margin possibly could be predicted as far into the future as 1993, and, in any event, a profit margin would be justified under the Agreement only if the Claimants had fulfilled their various obligations to NIOC, which they failed to do. Finally, the Claimants "knew that Iran had the right to nationalize or otherwise to vary the contractual rights of the Claimants under the 1973 Agreement." Accordingly, the Respondents contend they could not legitimately expect the continuation of such profits until 1993.

154. As for lawful nationalization, the Respondents contend that "it is by no means clear that international law imposes an obligation to pay compensation." This would "depend on the circumstances of the particular case." The standard of the "legitimate expectations" of the alien, for instance, would not allow any compensation when the foreign corporation had no such expectation, having already received a "perfectly adequate return" on its investment. Nor must the expropriating State pay any compensation under the standard of unjust enrichment, when it has received no such enrichment. In any event, when the nationalization is lawful, the Respondents submit that any compensation, "as a matter of principle," is properly limited to the value of

tangible assets (damnum emergens) "or other legal interest in property owned by the Claimants." Any claim for loss of future profits (lucrum cessans) thus would be inadmissible in such a hypothesis. Furthermore, according to the Respondents, the issue of damnum emergens is "entirely academic" in the present Cases, since, under the Agreement, the Claimants owned no property or assets.

155. Even assuming that some obligation exists, the Respondents contend that it can only apply to what is "just," taking into account all circumstances. It would be necessary, therefore, to consider the entire history of the relationship between the Parties and the practice in the oil industry. As the Respondents point out, the concept of "a reasonable rate of return" has never been applied to the practice developed between Iran and foreign corporations engaged in exploration and exploitation of Iranian oil resources. In cases where an investment has been made, the Respondents argue that "the standard of appropriate compensation has been accepted to mean the net book value of the assets." Such a standard, for instance, was applied in the SPA itself in relation to the compensation of the investment which the Consortium made under the 1954 Agreement. Such compensation, furthermore, was to be recovered by way of set off or credits over a long period and without interest. The Respondents thus assert that the same approach cannot apply to the present claims, since the Claimants made no investment under the Agreement.

156. In the case of an unlawful expropriation, the Respondents concede that damnum emergens is recoverable and even "that it has also been suggested that loss of future profits -- lucrum cessans -- may also be taken into consideration." They do not agree with this last statement, but consider that, in any event, compensation for loss of future profits is inapplicable in the instant Cases for the following reasons: (1) the Claimants have made no capital

investment; (2) the SPA had, in practice, been replaced by a series of ad hoc arrangements of limited duration; (3) the Agreement had, in fact, been frustrated by events in 1978-1979; (4) the Claimants could not, under the circumstances, have any real expectations of retaining the same profit margin until 1993; (5) the Agreement could be terminated at any time by Iran, by virtue of its legislative power; (6) the calculation of such losses is wholly speculative; and (7) it cannot be assumed that the Claimants would not meet their needs for oil by purchase outside Iran or that such purchases would involve a lost profit.

157. In more concrete terms, the Respondents refer to the fact that the Claimants themselves insist that, under the SPA they had a right not only to purchase on an annual basis, but also a right not to purchase at all. In fact, the Claimants declined to make any firm nominations for the purchase of oil for the years 1976-1978. Consequently, the Respondents assert that they cannot claim "future profits on the basis that they would have lifted virtually the whole of Iran's production of oil up to the year 1997 [sic]." The 22 U.S. cents a barrel, of course, applies only to the oil lifted, and therefore, according to the Respondents, is as speculative as the quantities of oil which would be purchased in the future. Furthermore, according to the Respondents, this 22 cents is not a profit margin, but a discount from the posted price, which could itself change in relation to the market price.

158. Finally, the Respondents contend that all legal systems that allow awards for loss of future profits make them subject to very stringent conditions, including these: the party claiming loss of future profits must show that it has fully performed its own obligations and was not in breach; it must prove that the loss was directly attributable to the other party's breaches; and, it is obligated to mitigate the damage sustained. According to the

Respondents, none of these conditions has been met in the present Cases. The loss itself is not proved, the Respondents contend, since the Consortium would have the advantage of not buying oil from Iran at a time when the price on the spot market might be lower than the official price in Iran. Furthermore, according to the Respondents, in cases where lucrum cessans is awarded, it is only for the losses sustained before the date of judgment; after that date they are entirely speculative.

B. The Findings of the Tribunal

1. General Remarks

159. The Tribunal previously has rejected the assertions that the SPA was terminated by way of frustration, repudiation or expropriation. It need not, therefore, express any opinion on the arguments exchanged between the Parties on the basis of these theories. Instead, it has found that the Parties agreed in March 1979 not to revive the Agreement, then suspended by force majeure, and to negotiate in view of formally terminating it and settling the issues arising from its termination, including all the claims of one party against the other. Such an agreement was subject to three main conditions, spelled out in the exchange of letters of 10 and 23 March 1979: that NIOC would treat the Consortium member Companies as its prime consumers under equal terms and conditions; that NIOC would take over all contracts and obligations entered into by OSCO and IROS; and that any claims of either Party would be settled through negotiations.

160. It is common ground between the Parties that the negotiations were actively pursued in the following months, at least until October 1979, but that they were interrupted by the events which occurred in November 1979. For the same

reason, the Companies' purchases of Iranian oil, which had resumed pursuant to individual agreements, terminated at the same time. After the Algiers Accords and the Claimants' submission of their claims to the Tribunal, negotiations resumed with some Consortium member Companies. Some of them succeeded in executing settlement agreements, which were submitted to the Tribunal and registered in Awards on Agreed Terms. The failure of the Parties to conclude similar agreements in the cases still pending before the Tribunal does not reflect any breach of this agreement by either Party, since it must be presumed that the Parties had negotiated in good faith.

161. In such case, the duty of the Tribunal in ascertaining the damages or compensation to be paid by one Party to the other is to determine what the parties could legitimately have expected from negotiations conducted in good faith on the basis of the March 1979 agreement. In order to assess these legitimate expectations, the Tribunal has to take into account all the relevant factual and legal circumstances of the case. Of primary concern, obviously, are the duties and obligations of both parties under the SPA and all related agreements and arrangements. The Agreement must be construed, not only pursuant to its initial terms, but also as to the manner in which it was performed and _de facto_ or _de jure_ amended during its life, up to the time it was suspended by _force majeure_. Each Party's record in performing the Agreement so defined during the same period constitutes a second set of determinative circumstances. Finally, all circumstances affecting the exercise of such rights and the performance of such obligations, as they could be observed or foreseen at the time of the March 1979 agreement, are also relevant in order to determine the legitimate expectations of the Parties when they concluded such an agreement.

162. It is well settled that a Tribunal, which must decide a case subsequent to the failure of the parties to

arrive at a settlement by way of negotiations, need not take into account the proposals and concessions that either party might have made in the course of such negotiations. The reason for this rule is obvious: such proposals and concessions have no purpose other than to allow an agreement to be attained and may well be very far from what each party legitimately considered to be its rights. Since such proposals were rejected, they have lost all validity and have become meaningless. The Tribunal does not see any reason to depart from such a sound rule in the present case. Since the Tribunal, however, must assess the legitimate expectations of the parties in the negotiations initiated pursuant to the March 1979 agreement, it would be difficult indeed to consider issues which the parties had not raised in the negotiations. The fact that a party refrained from raising a specific issue in the negotiations is a strong presumption, indeed, that this party did not expect to obtain anything on such an issue.

163. The legitimate expectations of the Parties differ widely according to the various types of claims submitted by the Claimants. Accordingly, it will be necessary to examine each of these categories of claims separately. In dealing with them, the following paragraphs will be restricted to a few general observations which may be helpful to the Parties in the second stage of the proceedings.

2. <u>The Claims for Advances and Credits not Recovered and Products not Returned (Claims A, B, E and F)</u>

164. For the reasons already set forth, the Claimants could legitimately expect that the unrecovered balance of capital advances and of compensation agreed upon by the Parties (Claims A and B), as well as the value of products

withheld at Abadan and Bandar Mahshahr (Claims E and F), would be paid by the Respondents in their entirety.

3. Damages for Lost Profit (Claims C and D)

165. In relation to the claim for lost profit as a result of the premature discontinuance of the SPA and of the consequent interruption of the purchase of crude oil under the Agreement, two facts need to be taken into consideration. The first one relates to the terms of the March 1979 agreement. As already noted, the Respondents previously acknowledged that NIOC was prepared to treat the Consortium as its prime customers under equal terms and conditions. Undoubtedly, that was one of the most important provisions in this agreement. Following that proposal a certain number of purchase agreements were concluded by individual Companies with NIOC which, apparently, were performed until the crisis of November 1979. According to the Respondents, the terms of these agreements were similar to those of sale contracts concluded by NIOC with other companies, which were not members of the Consortium.

166. The other notable fact is that the main articles of the SPA relating to the purchase of crude oil, namely Articles 2 and 3, dealing with the quantities of crude oil to be purchased by the Trading Companies, and Article 6, dealing with the determination of the prices, were not implemented strictly in accordance with their terms.

167. It must be recalled that, pursuant to Articles 2 and 3.A, NIOC was to notify the Trading Companies, by 1 September each year, of the estimated net total installed capacity for the following year. This capacity was determined after allowing for Iran's internal consumption requirements and NIOC's "stated quantity" for export. Such "stated quantity" was very precisely set forth in Article

2.B for the years 1973 to 1981 and was to be calculated according to a complex formula for the years thereafter. Pursuant to Article 2.C, NIOC was obligated each year to produce and sell to the Consortium members such quantities of crude oil as they required in accordance with their nominations. According to Article 3.B, these nominations were to be made by 1 October each year. Article 3.D, E and F set forth in great detail how to fix the respective shares of NIOC and the Companies in cases in which the actual quantity of crude oil available would be in excess of the quantity that the Companies nominated, or less than the estimated net installed capacity.

168. The combination of these provisions established a delicate balance between the rights and obligations of the Parties and their respective shares in the export of crude oil from Iran. The Trading Companies had a recognized right to purchase the largest portion of Iranian oil available after Iran's requirements for internal consumption were satisfied; the quantities that NIOC was authorized to export were strictly limited, although progressively increased from 200,000 barrels per day in 1973 to 1,500,000 barrels per day in 1981 and to higher figures thereafter. The apparent assumption underlying these provisions was that the Companies were willing to purchase the total quantities nominated and would be free to increase their nominations if the net installed capacity was in excess of NIOC's estimations.

169. Such a balance substantially was disturbed when, in 1975, the Companies ceased to make firm nominations, stating that "many factors" rendered "their task in forecasting offtake requirements extremely difficult," one of these factors being "the imposition of changes in prices and tax paid costs for crude oil which were not envisaged at the time of the signing" of the Agreement. In response to this position, NIOC stated in a letter dated 9 October 1976:

> [T]his is to reiterate what has been pointed out in previous occasions to the effect that we cannot reserve Crude Oil quantities nominated by Member Companies, unless such nominations constitute firm and specific commitment to lift the same. Since your letter under reference [letter dated 29 September 1976] does not include such firm commitment, we have to put on record that we can only supply such quantities which may be available after meeting our own requirements for internal consumption and our exports. (Emphasis added.)

The same position was confirmed in letters dated 8 November 1976 and 3 October 1977. In the latter, NIOC specified that "since Member Companies have refused to make firm commitments to lift any specific quantity of crude oil, we have to accept supply commitments towards other parties." It added that the Trading Companies would be supplied "only such quantities which may be available after meeting our own requirements for internal consumption and our exports." The Consortium's letter in response to the letter of 9 October 1976 was not produced before the Tribunal. No reaction from the Claimants to the two other letters is apparent from the record.

170. The Parties dispute whether the Trading Companies were obligated to lift all the oil nominated. According to the Claimants, the nominations were only an indication of the quantities that they intended to lift, and they retained the right not to purchase all these quantities. They insist that such an interpretation conforms with the usual practice in the oil industry. By contrast, the Respondents contend that the nominations amounted to a commitment to lift the nominated quantities. In any event, as noted above, the Claimants thought it appropriate expressly to mention in their nominations, from 1975 onwards, that the latter could be reviewed and revised according to the circumstances. Furthermore, it is well established that the Consortium member Companies did not lift the total of the crude oil that they were entitled to take pursuant to the Agreement

during the last years of performance. Consequently, NIOC exported greater quantities of crude oil than was envisioned by the Agreement. More important is the fact that NIOC ceased to give priority to the Companies' requirements over those of other purchasers.

171. These facts demonstrate that the alleged loss suffered by the Companies as a consequence of the SPA not being fully implemented for its stated term cannot easily be ascertained with the degree of certainty necessary to allow a finding that the profits claimed were within the legitimate expectations of the parties. Even if pertinent and well founded, the factors mentioned by the Claimants would not suffice to provide a sound basis for such a finding.

172. The same difficulties do not exist in relation to the sales of NGL products, which were performed throughout the life of the SPA in conformity with the terms of Article 12. The Tribunal, however, is not informed whether the sale of these products to the Trading Companies continued after the March 1979 agreement pursuant to individual contracts, and, if that was the case, on what conditions such sales were made.

173. The purpose of these observations is to give some insight to the Parties as to the manner in which the Tribunal approached the issues raised by Claims C and D in the light of the limited information that the Parties have submitted. In the next stage of the proceedings, the Parties will need to complete this information with all the data justifying their alleged legitimate expectations in March 1979, together with that necessary for a precise assessment of the amounts requested in their claims or counterclaims.

4. <u>Damages Sustained at the Abadan Refinery (Claim G)</u>

174. For the reasons already set forth, the Tribunal has not found that the Respondents were in breach of contract in relation to the issue of the processing costs at Abadan Refinery from 1975 to 1977. It is up to the Claimants, therefore, in the next stage of the proceedings, should they wish to do so, to establish on what alternative basis they could, nevertheless, legitimately expect compensation for their alleged losses.

VI. AWARD

175. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a) The Tribunal has jurisdiction over the claims presented in this Case,

b) The Respondents are liable to the Claimants for the losses which the Claimants legitimately could have expected to recover pursuant to successful negotiation of an agreement settling all the issues relating to the termination of the Sale and Purchase Agreement, as agreed upon by the Parties in March 1979. These legitimate expectations include the recovery of the following:

i) the unrecovered balance of the Claimants' prepayments for oil in the period 1973-75;

ii) the unrecovered balance of the Claimants' investments in assets transferred to NIOC in 1973;

iii) the value of the Claimants' NGL products withheld at the Bandar Mahshahr Refinery;

iv) the value of the Claimants' refined products withheld at Abadan Refinery,

c) The Tribunal will decide whether and to what extent the Claimants could legitimately expect to recover lost profits as a result of the premature discontinuance of the Sale and Purchase Agreement after the Parties have been given an opportunity more fully to brief their Cases on this issue,

d) The Claim relating to a breach of contract in connection with the processing costs at the Abadan Refinery is denied. In the next stage of the proceedings the Claimants may, if they so wish, plead on what alternative basis they could, nevertheless, legitimately expect compensation for their alleged losses at the Abadan Refinery,

e) The Tribunal will decide on the schedule for the further proceedings in these Cases by separate orders.

The Hague
14 July 1987

Michel Virally
Chairman
Chamber Three

In the name of God

Charles N. Brower
Concurring Opinion

Parviz Ansari Moin
Concurring in part
Dissenting in part