IRAN-UNITED STATES CLAIMS TRIBUNAL

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Case No. 150 Date of filing: 14 JUL 87

** AWARD - Type of Award _____
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** DECISION - Date of Decision _____
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** CONCURRING OPINION of Mr. Brower

- Date 14 JUL 87
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** SEPARATE OPINION of _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده



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



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.

## CONCURRING OPINION OF JUDGE BROWER

1. The Award proceeds from an erroneous premise by mistaking Claimants' practical acceptance of the political realities in Iran in March 1979 for a conditional surrender of their legal rights under the 1973 Sale and Purchase Agreement ("SPA"). The Award nonetheless appears to reach the right concrete result and thus enjoys my concurrence.[1] An elaboration of the route by which I have arrived at these conclusions may be instructive and in any event is compelled by my professional conscience.

### I.

2. To say that the Parties in their exchange of correspondence of 10 and 23 March 1979 mutually "agreed . . . not to revive the" SPA is to suppose that a condemned man who spurns the ritual proffer of a blindfold when marched before the firing squad thereby consents to his execution. An unwanted but inevitable fate is no less unilaterally imposed by virtue of its being gracefully accepted than if it had

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[1] I agree generally with the Award's conclusions regarding jurisdiction.

been less decorously confronted. Style never has been a matter of legal consequence.

3. The words of the Parties themselves say it all:

Date: March 10, 1979
No. : TD/35

Mr. W. Gloss
Iranian Oil Participants Ltd.,
3, Finsbury Square,
London EC2A 1AR
ENGLAND

Dear Mr. Gloss,

As you are well aware, the 1973 Sales and Purchase Agreement concluded between the National Iranian Oil Company 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 the National Iranian Oil Company and the Consortium Member Companies has to be based on the following principles:

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

2. In our future operations, there will be no place for OSCO [Oil Services Company of Iran] nor for the large number of expatriate personnel who used to work for it. Expatriate personnel for secondment or direct employment by us, has already been advised as per our telex JR28 dated 22nd. January 1979 and subsequent telexes.

3. Any other services required from the Consortium Member Companies shall be

subject to the special arrangements with the individual Member Companies and such services shall be remunerated in each case by NIOC according to the relevant arrangement.

4. All Iranian personnel employed in the operations by OSCO shall be transferred to NIOC under the terms and conditions of the contracts with OSCO.

5. NIOC is willing to take over all contracts with contractors and consultants entered into by OSCO for its operations under the present arrangements.

6. The Iranian Oil Services Limited (IROS) may continue its services provided that the Consortium Members agree to transfer all their shares and interests in IROS to NIOC.

Yours Sincerely,

H. Nazih
Chairman of the Board and
Managing Director N.I.O.C.

23rd March 1979

Dear Mr. Nazih,

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.[2]

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[2] E.g., presumably, 5 Foreign Broadcast Information Service Daily Report, Middle East and North Africa, at R-4 (7 Mar. 1979) (statement of unnamed NIOC spokesman) ("This company will no longer do business through the Consortium . . . ."); 5 Foreign Broadcast Information Service Daily Report, Middle East and North Africa, at R-11 (1 Mar. 1979) (statement of Hassien Nazih, Managing Director of NIOC) ("the international consortium led by British Petroleum, Shell, the French Compagnie Francaise des Petroles and American companies would be bypassed when Iran resumes its (Footnote Continued)

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.

Yours sincerely,

WARREN J. GLOSS
General Manager
Iranian Oil Participants Limited

H.E. Mr. H. Nazih,
National Iranian Oil Company

4. It simply defies common sense to suppose that the Claimants' diplomatically stated willingness "to meet NIOC

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(Footnote Continued)
crude oil exports"); id. at R-5 ("[t]he companies that have been imposed upon us would do better to withdraw otherwise they will be made to withdraw with help from you . . . ."). 

to reach an agreement in respect to the termination of the" SPA, while "[p]ending agreement" they "reserve all their rights and cannot accept" NIOC's contention that material breaches of the SPA by them had rendered it "inoperative" years before, constituted an abandonment of any of their rights under that agreement.[3] As is implicit in the Award's contrary conclusion, the absence of such a voluntary act renders Respondents liable, for the 10 March letter unequivocally puts an end to the SPA.[4] In my view the reasonable reading of events is that Respondents as of that date subjected Claimants to an actionable deprivation of rights.

5. The Award's conclusion that the Parties in March 1979 made a legally binding "agreement to agree" on a completely new arrangement elevates the concept of an obligatory "renegotiation clause" to improbable heights. It is one thing for parties to enter into an agreement providing that certain of its terms remain to be established, J. Calamari & J. Perillo, Contracts § 23, at 29-37 (1970); E. Farnsworth, Contracts § 3.29, at 202-08 (1982), or must be renegotiated upon the occurrence of described events, Kuwait and American Independent Oil Company (AMINOIL), para. xxxiii (Reuter, Sultan & Fitzmaurice arbs., Award of 24 March 1982), reprinted in 21 Int'l Legal Mat'ls 976, 992 (1982); W. Peter, Arbitration and Renegotiation of International Investment Agreements, ch. 4, § 3.2.1, at 154-57 (1986). It strains credulity, however, to suggest that such commercially sophisticated enterprises as major

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[3]The fact that years later (on 5 September 1981) the SPA was "nullified" by Iran pursuant to the Single Article Act of 8 January 1980 suggests that Respondents themselves also perceived no such abandonment had taken place.

[4]The Award correctly concludes that the SPA was not "frustrated or terminated at this time" (para. 111) by any cause including force majeure (para. 117).

international oil companies would trade established legal rights for an "agreement" consisting entirely of an undertaking to negotiate in good faith towards a future agreement whose basic financial terms are far from precise.

6. I am sensible of the fact that in the end the present Award concludes not that the Claimants abandoned their rights under the SPA but rather that they exchanged them for a promise of new rights of equal (or possibly greater) value. Indeed, it is this result which has earned my concurrence. This does not alter the fact that the Claimants, if they acted as posited by the Award, at a minimum released their right, without a legal quid pro quo, to attack Respondents' actions as being unlawful. As all are aware, such a step potentially is of considerable import.

II.

7. The assumption of a deprivation raises the issue of its conformity with applicable law, which, as the Award correctly concludes, is international law, including "general principles of commercial . . . law" (para. 81). Given the magnitude and general significance of this Case, I think it useful to spell out my views on the several points raised by this issue, under both branches of the claim, i.e., breach of contract and expropriation.

A.

8. Clearly the repudiation of a contract, as in my view has occurred here, constitutes a breach of all its terms. Two particular and distinct questions arise, however, in the instant case: (1) Is the Government of the Islamic Republic of Iran a party, as well as NIOC, to the SPA and therefore also liable for its breach? (2) Did that Government obligate itself through a stabilization clause not to cause or

suffer the abrogation of the SPA?[5] Both questions should, as I see it, be answered in the affirmative.

9. The SPA itself recites that it is "made by and between IRAN (acting through the Imperial Government of Iran)," as well as NIOC, and, inter alia, the Claimants. It was signed "For The Government of Iran" by its Minister of Finance, J. Amouzegar, as expressly envisioned in Article 26A. Article 30B of the SPA provided that it would come into force as soon as signed and also "ratified and duly enacted as part of the law of Iran by Act of the Majlis and Senate and assent of" the Shah. The Parties agree that all this took place, resulting in the SPA taking effect 21 March 1973. Finally, by Article 26B "Iran hereby guarantees the due performance by NIOC of its obligations under the Agreement and related arrangements." There can be no doubt but that the repudiation of the SPA has engaged the legal responsibility of Iran equally with that of NIOC.[6]

10. Further, Iran effectively undertook an additional commitment not to expropriate Claimants' rights under the SPA. Article 30A of the SPA provided that "[t]he term of this Agreement shall be twenty years from the Effective Date," i.e., until 21 March 1993. This followed immediately after the final sentence of Article 29:

> The termination before expiry date or any alteration of this Agreement shall be subject to the mutual agreement of the Parties.

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[5] If the first question is answered in the affirmative, an answer to the second becomes superfluous insofar as the breach of contract claim is concerned but remains relevant to the expropriation claim, i.e., on the issue of lawfulness of the alleged expropriation. See, infra, para. 10.

[6] The Award does not expressly address this issue but implicitly makes this same conclusion.

Contemporary international precedents have concluded that such contractual provisions preclude a sovereign during the stated period from exercising the rights it otherwise possesses under international law to take an alien's property for a public purpose, and without discrimination and for a just compensation.[7] AGIP Company v. Popular Republic of the Congo, paras. 86-88 (Trolle, Dupuy & Rouhani arbs., ICSID Award of 30 Nov. 1979), reprinted in 21 Int'l Legal Mat'ls 726, 735-36 (1982); Texaco Overseas Petroleum Company v. Libyan Arab Republic ("TOPCO"), paras. 71, 91 (Dupuy arb., Award of 19 January 1977), reprinted in 53 I.L.R. 389, 477, 494-95 (1979); BP Exploration Company (Libya Ltd) v. Libyan Arab Republic, (Lagergren arb., Award of 1 Aug. 1974), reprinted in 53 I.L.R. 297, 329 (1979); Separate Opinion of Sir G. Fitzmaurice, Kuwait and American Independent Oil Company (AMINOIL), paras. 23-25 (Award of 24 March 1982), reprinted in 21 Int'l Legal Mat'ls 1043, 1051-52 (1982); see W. Peter, supra, ch. 4, § 2.1, at 141-45.

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[7]The phrasing of Articles 26B and 29 is close to that found by the tribunal in the TOPCO case to have rendered unlawful Libya's nationalization of a concession during its term:

> The Government of Libya . . . will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this Concession shall not be altered except by mutual consent of the parties.

Texaco Overseas Petroleum Company v. Libyan Arab Republic ("TOPCO"), para. 3 (Dupuy arb., Award of 19 January 1977), reprinted in 53 I.L.R. 389, 394 (1978). This clause, appearing as early as 1955 in concessions having "a minimum duration of 50 years," was supplemented as of 1966, inter alia, by this phrase:

> Any amendments to or repeal of [the Petroleum] Regulations [in force on the date of execution of the concession agreement as amended] shall not affect the

(Footnote Continued)

11. In recent memory only the award in the AMINOIL case appears consciously to have departed from this principle.[8] In that case the basic agreement between the Government of the State of Kuwait and Aminoil, which granted a concession for sixty years beginning in 1948, provided as follows:

> Save as aforesaid this Agreement shall not be terminated before the expiration of the period specified in article 1 hereof except by surrender as provided in article 12 or if the Company shall be in default under the arbitration provisions of article 18.
>
> . . .
>
> The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement.

AMINOIL, supra, paras. xxxiii, 88, 21 Int'l Legal Mat'ls at 992, 1020.

12. A majority of the three-member tribunal in that case concluded that these provisions did not amount to a stabilization clause precluding a lawful nationalization by the contracting host sovereign:

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(Footnote Continued)
contractual rights of the Company without its consent.

Id., para. 3, 53 I.L.R. at 423.

[8]The sole arbitrator in Libyan American Oil Company (LIAMCO) v. Libyan Arab Republic, (Mahmassani arb., Award of 12 Apr. 1977), reprinted in 62 I.L.R. 139, 217 (1982), ruled that the breach of clauses identical to those in TOPCO, see n. 7, supra, "is not unlawful as such, and constitutes not a tort but a source of liability to compensate." He did not elaborate reasons for this conclusion, however.

> No doubt contractual limitations on the State's right to nationalise are juridically possible, but what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the the regulations governing the conclusion of State contracts; and it is to be expected that it should cover only a relatively limited period. In the present case however, the existence of such a stipulation would have to be presumed as being covered by the general language of the stabilisation clauses, and over the whole period of an especially long concession since it extended to 60 years. A limitation on the sovereign rights of the State is all the less to be presumed where the concessionaire is in any event in possession of important guarantees regarding its essential interests in the shape of a legal right to eventual compensation.

Id., para. 95, 21 Int'l Legal Mat'ls at 1023.[9]

13. Judge Sir Gerald Fitzmaurice, concurring in the dispositif of the AMINOIL award but disagreeing, inter alia, as to this point, put it well:

> I know of no general legal principle - (there may be special rules for particular cases) - which would require something to be expressly stated rather than left to be implied from representative

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[9]The interplay thus highlighted between stabilization clauses and compensation is significant. The AMINOIL tribunal was even more precise in concluding that Kuwait's "'take-over' of Aminoil's enterprise was not . . . inconsistent with the contract of concession, provided always that the nationalisation did not possess any confiscatory character." Kuwait and American Independent Oil Company (AMINOIL), para. 21 (Reuter, Sultan & Fitzmaurice arbs., Award of 24 March 1982) (emphasis added), reprinted in 21 Int'l Legal Mat'ls 979, 1024. It is noteworthy that even the Awards in AMINOIL and in LIAMCO -- the only two recent precedents failing to find nationalisation incompatible with stabilization clauses -- granted compensation (termed "appropriate" in the former and "equitable" in the latter) which included some amount of lost profits. Id., para. 144, 21 Int'l Legal Mat'ls at 1033; LIAMCO, supra, 62 I.L.R. at 218.

> language clearly covering it according to normal canons of interpretation; or rather, and more correctly, which would prohibit something from being inferred from such language merely because it was not expressly stated.

Id., para. 23 (Separate Opinion of Sir G. Fitzmaurice), 21 Int'l Legal Mat'ls at 1051. Judge Fitzmaurice emphasized, too, that the clauses must be seen against the background of pertinent history demonstrating that even in 1948 "the eventuality of an ultimate nationalisation . . . was precisely one of the principal contingencies foreseen as possible" and which the clauses under review were intended to address. Id., para. 25, 21 Int'l Legal Mat'ls at 1052.

14. Whatever may be the merits of the majority decision in AMINOIL on this issue,[10] two facts distinguish it: The SPA was not "an especially long concession" even approaching sixty years -- a fact evidently integral to the ruling of the AMINOIL majority[11] -- but rather one for just twenty years; and it was executed in 1973, a time when possible nationalization was an eventuality having an air of ultimate inevitability.[12] Everything considered, it would seem fair to conclude that by Articles 26B, 29 and 30A of the SPA Iran

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[10]The divergence of the AMINOIL award from TOPCO in this respect has been the subject of some commentary. E.g., A. Redfern, The Arbitration Between the Government of Kuwait and Aminoil, Brit. Y. B. Int'l L. 65, 98-104 (1984); P. Tschanz, Contributions of the Aminoil Award to the Law of State Contracts, 18 Int'l Lawyer 245, 274-76 (Spring 1984).

[11]Redfern, supra, at 102; Tschanz, supra, at 276.

[12]The fact that the stabilization provisions here were part of a complete and comprehensive new agreement signed in 1973 also removes any possibility of their being regarded, as the tribunal in AMINOIL viewed clauses dating from 1948, "as being no longer possessed of their former absolute character" due to "a metamorphosis in the whole character of the Concession" over a period of nearly 30 years. AMINOIL, supra, paras. 97, 100, 21 Int'l Legal Mat'ls at 1023-24.

foreclosed nationalization as a lawful course through 21 March 1993.

15. Thus as of 10 March 1987 NIOC and Iran were in material breach of the SPA.

16. The foregoing analysis leads necessarily to the conclusion that Claimants' property in the SPA was unlawfully expropriated as of 10 March 1979,[13] for nationalization by a host state notwithstanding its agreed "stabilization" of the prescribed contractual period renders such act unlawful. AGIP, supra, paras. 86-88, 21 Int'l Legal Mat'ls at 735-36; TOPCO, supra, para. 71, 53 I.L.R. at 477; BP Exploration, supra, 53 I.L.R. at 329.[14]

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[13] 10 March 1979 should be the effective date of expropriation even had NIOC's letter of that date been thought ambiguous and the fact of expropriation been confirmed only by subsequent adoption of the Single Article Act on 8 January 1980 or its application to the SPA on 5 September 1981. See Sedco, Inc. and National Iranian Oil Company, Award No. ITL 55-129-3 at 41 (28 Oct. 1985) ("When, as in the instant case, the seizure of control by appointment of 'temporary' managers clearly ripens into an outright taking of title, the date of appointment presumptively should be regarded as the date of taking.").

[14] I do not suggest that the characterization of Respondents' actions as lawful or unlawful would in any way alter the amount due Claimants. See Concurring Opinion of Judge Brower in AMOCO International Finance Corp. and Islamic Republic of Iran, Award No. 310-56-3 at para. 7 n. 5 (14 July 1987). They seek the same so far in either event. To the extent anyone nonetheless should think that unlawful conduct would require a higher compensation in this Case than otherwise, my conclusions on the issue would call for the higher amount.

B.

17. The expropriation of the SPA was unlawful for an additional reason: Iran failed to make at any time the provision for compensation required by international law.[15] Certainly NIOC's 10 March 1979 letter offered no prospect of compensation for a contract it expressly regarded as having been "inoperative" since "soon after" its execution nearly six years before. Likewise none was expressed or implied by the Single Article Act adopted 8 January 1980:

> All oil agreements considered by a special commission appointed by the Minister of Oil to be contrary to the Nationalization of the Iranian Oil Industry Act shall be annulled and claims arising from conclusion and execution of such agreements shall be settled by the decision of the said commission. The representative of the Ministry of Foreign Affairs shall participate in the said commission.[16]

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[15] No claim has been made that the expropriation of the SPA was not made for a public purpose or that it was discriminatory.

[16] Compare this with Article 3 of the nationalization decree in AMINOIL, supra, para. 2, 21 Int'l Legal Mat'ls at 998 (emphasis added):

> A committee named the Compensation Committee shall be set up by a decision of the Minister of Oil whose task it will be to assess the fair compensation due to the Company as well as the Company's outstanding obligations to the State or other parties. It shall decide what each party owes the other in accordance with this assessment.
>
> The State or the Company shall pay what the Committee decides within one month of being notified of the Committee's decision.

The tribunal in AMINOIL did not expressly consider the question of whether Kuwait's provision for compensation complied with international law but necessarily ruled sub silentio that it did. See id., para. 23(4) (Separate Opinion of Sir G. Fitzmaurice), 21 Int'l Legal Mat'ls at

(Footnote Continued)

The international legal standards by which the obligation of an expropriating sovereign to provide compensation is judged, i.e., here the Treaty of Amity, Economic Relations, and Consular Rights between The United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957, 284 U.N.T.S. 92, T.I.A.S. No. 3853, 8 U.S.T. 900 ("Treaty of Amity"),[17] as well as customary international law,[18] clearly brand as unlawful an expropriation unaccompanied at any time by any prospect of compensation.

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(Footnote Continued)
1050. In doing so it presumably was influenced in Kuwait's favor by that State's contemporaneous appointment of a "Compensation Committee . . . to assess the fair compensation due to the Company . . . ." Id. (emphasis added). Even the Libyan decrees in TOPCO and LIAMCO provided specifically for "compensation" to be assessed by a committee (although this never was implemented). TOPCO, supra, para. 6, 53 I.L.R. at 425-26; LIAMCO, supra, 62 I.L.R. at 163-64. The Single Article Act here, however, referring only to how "claims" arising out of "annulled" agreements are to be settled, provides no scope even for wishful indulgence.

[17] I agree with the Award's conclusion that the Treaty of Amity applies. (Para. 74.) See Separate Opinion of Judge Brower in Sedco, Inc. and National Iranian Oil Company, Award No. ITL 59-129-3 at 2-6 (27 Mar. 1986), reprinted in 25 Int'l Legal Mat'ls 636, 637-39 (1986). Article IV(2) of that Treaty requires that there be no expropriation "without the prompt payment of just compensation," for the "determination and payment" of which "adequate provision shall have been made at or prior to the time of taking." Clearly these requirements were not satisfied as no provision for compensation was made at any time.

[18] This Tribunal frequently has reiterated that the compensation requirements of customary international law are the same as those contained in the Treaty of Amity. E.g., Sedco, Inc., and National Iranian Oil Company, Award No. ITL 59-129-3 at 13 (27 March 1986), reprinted in 25 Int'l Legal Mat'ls 629, 635 (1986); Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 at 16 (19 March 1986), reprinted in 25 Int'l Legal Mat'ls 619, 627 (1986); Tippetts, Abbott, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2 at 10 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225;
(Footnote Continued)

III.

18. Coming now to the question of remedies, discussion is most practicably divided according to the four categories into which Claimants' specific demands fall: (A) Damages for alleged breach of the SPA, prior to 10 March 1979, in that NIOC allegedly deviated from the terms of the Processing Agreement (envisioned by the SPA) involving the Abadan refinery; (B) the value of NGL products and other refined petroleum products to which Claimants held title but which they were unable to recover from the Bandar Mahshahr and Abadan refineries, respectively, following the events of March 1979; (C) the amount of unrecovered, liquidated balances, i.e., for pre-SPA investments in Iranian oil operations and cash advances pursuant to the SPA, as provided in the SPA; and (D) the expected future profits under the SPA, from 10 March 1979 to 21 March 1993, from the purchase and sale of NGL and crude oil.

A.

19. The dispute regarding the Abadan refinery, although it arises under the SPA, is wholly unrelated to any of the substantive issues previously discussed. To understand it requires a brief explanation of the facts. The proverbial "barrel of oil" is not in fact a homogeneous commodity and contains both "light" products, which bring higher revenues (typically aviation fuel and kerosene), and "heavy" ones, which have a lesser value. The differing products vary in their gravity, the light products having, anomalously, a heavier gravity and vice versa. Under the SPA and the Abadan Processing Agreement NIOC had a preemptive right to

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(Footnote Continued)
American International Group, Inc. and Islamic Republic of Iran, Award No. 93-2-3 at 14, 22 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 105, 109.

any products of that refinery "required for internal consumption," and such consumption conventionally was predominantly for light products. There thus was the distinct possibility that Claimants, having delivered a barrel of oil for refining, would receive back only the comparative dregs. Realizing the potential inequity of this, absent a proportional adjustment in the initial price to Claimants of the barrel delivered, the Processing Agreement included a provision, in Article 4G, for adjusting gravity (and hence the purchase price) to compensate. Claimants liken this to assuring that a cattleman who delivers a steer for slaughter and receives back only the less desirable cuts does not wind up having paid for them the average price per pound of the whole steer, but instead experiences a unit cost more in keeping with what he has received.

20. From the execution of the Processing Agreement on 19 July 1973 until 8 November 1975 there is no evidence that Claimants complained, to NIOC or elsewhere, regarding implementation of Article 4G, the gravity adjustment. Pursuant to Article 4B and C of the Processing Agreement Claimants could act on or before 31 December 1975 to reduce, or, in their view, terminate, processing for their account at Abadan effective 1 January 1978. Indeed, failure to act by then would leave them locked into the then established volume of refining at Abadan for an additional three years, i.e., until 1 January 1981. The conclusion seems inescapable that the imminence of that important deadline precipitated analysis and action. It appears that Claimants sought relief from NIOC starting with a letter of 8 November and continuing with meetings with NIOC representatives on 11 and 12 November. Not having achieved satisfaction in these meetings, Claimants notified NIOC that December that it would cease processing at Abadan as of 31 December 1977.

21. Claimants submit to the Tribunal that they collectively have been damaged to the extent of $30,527,434 because

throughout the years their oil was refined at Abadan NIOC, in making the gravity adjustments under Article 4G, used one of two methods recognized by trade usage for "assigning a value to differences in crude oil gravity" rather than the other method: It used the method commonly "used in connection with small differences in gravity . . . calculated in tenths of a degree," whereas, Claimants argue, it should have applied the different measure "employed in connection with large differences in gravity."

22. Claimants' assertions regarding the gravity adjustment tend to be undercut by their own actions. They concede that at least during 1973 "the parties" concurred in using the method now assailed,[19] albeit noting that the gravity deviations during that early period were relatively slight. (Emphasis added.) It is striking, too, that even though Claimants themselves point out that "other oil exporting nations in the Persian Gulf" had doubled "the 'quoted gravity' differential on Iranian oil" at the start of 1974, the Claimants never even raised the issue with NIOC until November 1975 (following which NIOC followed suit, in February 1976). Then, too, when Claimants finally registered their grievances regarding the Abadan situation in November 1975 the gravity adjustment was but one of six factors they cited as producing their refining losses at Abadan. Four of the other five were either market factors, e.g., reduced industrial demand, or events arguably related to other alleged past breaches of the SPA (for which Claimants appear to make no separate claim), e.g., "unilateral imposition of sulphur premium," "unilateral posted price increases" resulting in higher "uplift tax," and "a dramatic rise in the processing fee." The last cause cited was

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[19] Claimants' entire argument confirms that Article 4G either was ambiguous or had a lacuna, necessitating in either case resort to trade usage.

precisely the one originally foreseen and to which Article 4G. was addressed: A "much greater actual preemption of middle distillates for domestic market" by NIOC. As to this last item, the evidence submitted by Claimants clearly demonstrates that it was only in the last quarter of 1975 that this pattern of preemption and the consequent gravity deviation became a serious problem. This also was the first period of documented losses due to refining at Abadan, and coincided also with the October 1975 imposition by Respondents of a 22¢ per barrel profit margin.

23. It seems fair to conclude that to the extent Claimants' refining losses at Abadan were due to the method of measuring gravity differential NIOC cannot be faulted because it was a method initially accepted affirmatively by Claimants and in which they then acquiesced for the remainder of a period exceeding two years. In these circumstances it is difficult to conclude that failure to apply a different method constitutes a breach of contract. This is implicitly recognized in Claimants' final emphasis on the argument that contracting parties must deal in good faith and that this principle was disregarded by NIOC in preempting ever larger portions of the light products. I find it difficult, in turn, to characterize NIOC's conduct in that regard as being so obviously a departure from good faith as to render it liable solely on that basis.

24. In the end it seems to me that Claimants' Abadan losses are more likely to be attributable, should Respondents be responsible for them at all, to the events, such as taking over control of posted prices and imposing a 22¢ per barrel profit ceiling, that Claimants have characterized as breaches of the SPA (but for which they do not appear to have made any separate claim directed to the period preceding 10 March 1979). This leaves things in somewhat of a procedural no man's land, however, for the Award has not dealt otherwise with any issues of past alleged breaches of

the SPA, leaving these for consideration when the counterclaims eventually are taken up; yet the next phase of proceedings has been envisioned to embrace only those counterclaims, in addition, of course, to quantification of damages on the main claims. I think this dilemma has been appropriately resolved in the Award by permitting Claimants in the next round, should they wish to do so, to present their case for recovering from Respondents in respect of the alleged Abadan losses on bases other than the one here rejected.

B.

25. The claim for the value of NGL products and other petroleum products owned by Claimants but stranded in the NIOC refineries at Bandar Mahshahr and Abadan following the end of the SPA in March 1979 similarly is one divorced from the breach of contract and expropriation issues earlier discussed. Respondents do not appear to contest their liability for the detention of such property. Whether viewed as an expropriation or as a conversion, the answer is the same: Claimants are entitled to the value of the detained goods as of the date they effectively were withheld from their control, i.e., 10 March 1979. Happily the Award reaches this result.

C.

26. The claims for recovery of substantially liquidated balances representing pre-SPA investment by Claimants in Iranian oil operations and post-SPA cash advances present a fundamental issue, one common also to the claim for anticipated profits under the SPA after 10 March 1979: Should the compensation which the Award envisions supplying in lieu of the Parties having successfully completed negotiations on an agreement replacing the SPA include the full equivalent of benefits that would have been realized under the SPA as it

stood just prior to 10 March 1979, or should it simply approximate a compromise the Parties theoretically would have reached taking into account all circumstances, political and economic as well as legal?

27. Had the Award followed my view of the case this question would not, of course, have arisen. Clearly either breach of the SPA or its expropriation would result in liability, at a minimum, for fully liquidated amounts due Claimants under the SPA, as the items under this heading by common admission were. On these specific claims I think the question academic as well, for on any fair view of the situation one could not suggest that even a compromise would exclude what for all practical purposes were established past debts. This is especially so since Claimants' letter of 23 March 1979 sets out "repayment of [Claimants'] investment and advances" as one of the matters with which a new agreement would have to "deal." Indeed, Respondents appear to concede these claims and the Award honors them. Nonetheless I treat this issue since its resolution is required for consideration of the ensuing claims for future profits, and for clarification of the Award itself.

28. I do not think that in giving up the SPA, as the Award concludes they did, Claimants for a moment would have intended to surrender any of the financial benefits they enjoyed, or rightfully had expected to reap, under the SPA. This stance is inherent in the express reservation of "all their rights" in the 23 March 1979 letter. (Emphasis added). This conclusion is implicit, too, in the fact that NIOC's 10 March 1979 letter nowhere touched on financial issues but rather discussed only structural matters, such as the elimination of OSCO, the possible role of IROS, NIOC's assumption of contracts, Claimants' projected status as customers and the reduction in expatriate personnel. It was on this basis that negotiations then took place between the Parties.

29. In the end the Award comes to this same conclusion (paras. 126-127):

> 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 . . . . Such negotiations, undoubtedly, would have resulted in compensation for the loss sustained by the Consortium alluded to in the same letter [of 23 March 1979]. 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.
>
> The fact that the negotiations did not succeed . . . does not relieve the Respondents from their obligation to compensate the loss sustained by the Consortium.

The only meaning this can have is to grant Claimants that which under the SPA as it stood just prior to 10 March 1979 they otherwise would have had.

D.

30. The discrete question raised by the claims for expected future profits under the SPA in respect of the sale of NGL and crude products is the by now too familiar one of whether such expectancies may be awarded as damages. Normally this is an issue only in expropriation cases, but as I would have found an expropriation here I must, for the sake of completeness, touch on it. My views, spelled out elsewhere, see Concurring Opinion of Judge Brower in AMOCO International Finance Corp. and Islamic Republic of Iran, Award No. 310-56-3, at paras. 15-30 (14 July 1987), are briefly stated: The "value of the undertaking" which has been expropriated, which value must in all cases be awarded, whether the expropriation be lawful or unlawful, includes its future prospects, i.e., its potential for earning a profit; where the expropriated property is a contract, the

terms of the contract define that potential, and hence the full contract measure of damages must be awarded.[20]

31. Given the view of the case taken by the Award, this issue does not in fact arise. Quite simply, as the Award views it, Claimants are entitled to a compensation that is the equivalent of what was given up when, as the Award finds, Claimants agreed to replace the SPA. Clearly this includes whatever profits they would in fact have enjoyed under the SPA had it continued to be applied in accordance with its terms, as from time to time amended, for the full contract period.

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[20] Given the posture of the case I do not think it useful to review in detail additional damages that might be awarded in a case of unlawful expropriation, as I feel occurred here. I simply refer to my Separate Opinion in Sedco, Inc., supra, at 24-25 nn. 34-35, 25 Int'l Legal Mat'ls at 648-49; see also Concurring Opinion of Judge Brower in AMOCO International Finance Corp., supra, at paras. 15-30.