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CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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Case No. 74 Date of filing: 7Aug87

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

304

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.

CORRECTION TO AWARD

The following corrections are hereby made to the English version of the Award in these Cases filed on 14 July 1987:

At page 28, paragraph 60, line 3, replace "Parties'" with "parties'"

At page 38, paragraph 83, line 4 to page 39, line 6, delete the text within quotation marks commencing "In October 1973," and replace with "[I]n October 1973, Iran began to impose its own posted prices [footnote omitted] 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 Claimants] would otherwise have realized."

At page 39, paragraph 84, line 2, replace "charachterized" with "characterized"

At page 43, paragraph 92, lines 11, 12 and 14, replace "fulfillment" with "fulfilment"

At page 44, paragraph 95, line 6, replace "affect[ed]" with "affected" and line 7, replace "members" with "Members"

At page 45, paragraph 98, line 4, delete one duplicative "Persian".

Copies of the corrected pages are attached.

Dated, The Hague,
7 August 1987

Michel Virally
Chairman
Chamber Three

In the name of God

Charles N. Brower

Parviz Ansari Moin

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 interpret the Agreement and those that would govern 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

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: "[I]n October 1973, Iran began to impose its own posted prices [footnote omitted] 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 Claimants] 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 characterized 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

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 fulfilment of these obligations by the Consortium." The Respondents add that "[n]on fulfilment of these obligations removed entirely the rationale for the profit margin. In strictly legal terms non-fulfilment 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 affected 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 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