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EXXON CORPORATION, and ESSO TRADING COMPANY OF IRAN,
PARTIAL AWARD

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;

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:

(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.

IV. Liability

A) Termination of the SPA

2) The Alleged Breaches and Repudiation of the SPA

c) The Tribunal's Findings

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. v. Islamic Republic of Iran, Award No. 180-64-1\(^1\) (27 June 1985); Starrett Housing Corp. v. Islamic Republic of Iran, Award No. ITL 32-24-1\(^2\) (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:

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.

[...]

1 Concurring Opinion, see p. 60 below.
2 The signature of Mr. Ansari is accompanied by the words "Concurring in part, Dissenting in part".
3 Filed 14 July 1987.

**Referring Principles:**
- VI.3 - Force majeure
- VIII.1 - Definition