IUSCT Case No. 56

AMOCO INTERNATIONAL FINANCE CORPORATION V. THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, NATIONAL IRANIAN OIL COMPANY, NATIONAL PETROCHEMICAL COMPANY AND KHARG CHEMICAL COMPANY LIMITED

PARTIAL AWARD (AWARD NO. 310-56-3)

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14 July 1987

Tribunal:
Michel Virally (President)
Charles N. Brower (Appointed by the claimant)
Parviz Ansari Moin (Appointed by the respondent)

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Partial Award (Award No. 310-56-3)

ABBREVIATIONS

Amoco: Amoco International S.A., a company established under the laws of the Canton of Geneva, Switzerland, presently named Amoco Chemicals (Europe).

AIFC: Amoco International Finance Corporation, the Claimant, a corporation established under the laws of the State of Delaware, United States of America.

Casinghead Gas: Defined in relevant agreements to mean "Natural Gas which is produced from petroleum reservoirs with the related production of crude oil."

CSD: The Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Islamic Republic of Iran of 19 January 1981.

Dome Gas: Defined in all relevant agreements to mean "Natural Gas which is produced from petroleum reservoirs without the related production of crude oil."

Gas Purchase Agreement: Agreement executed effective 1 April 1967 between Khemco, on the one hand, and NIOC and PANINTOIL, on the other hand, for the purpose of sale and purchase of Natural Gas from the "NIOC/PANINTOIL Joint Structure Agreement Area."

JSA: Agreement entered into between Pan American Petroleum Company (whose rights on 19 May 1958 were assigned to PANINTOIL) and NIOC, dated 24 April 1958, generally referred to as the "Joint Structure Agreement." The alleged expropriation of PANINTOIL rights under the JSA is the subject matter of Case 55 presently pending before this Tribunal.

Khemco: Kharg Chemical Company Limited, a company established under the laws of Iran.

Khemco Agreement: Agreement executed as of 12 July 1966 between Amoco and NPC for the formation of Khemco as a joint venture.

LPG: Defined in relevant agreements to mean "liquified petroleum gas consisting primarily of butane and/or propane."

Natural Gas: Defined in relevant agreements to mean "Casinghead Gas, Dome Gas, and all other gaseous hydrocarbons produced through oil or gas wells, which Natural Gas may also contain other gaseous components such as hydrogen sulfide and carbon dioxide.

NGL: C sub5 plus Natural Gas Liquids, defined in all relevant agreements to mean "natural gasoline consisting of pentane and heavier hydrocarbons."

NIOC: National Iranian Oil Company, one of the Respondents, a company established under the laws

of Iran.

NPC: National Petrochemical Company, one of the Respondents, a company established under the laws of Iran.

OSCO: Oil Service Company of Iran, a company established under the laws of Iran.

PANINTOIL: The Pan American International Oil Company, a company registered under the laws of Iran, presently named Amoco-Iran.

Treaty: The Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran signed 15 August 1955, entered into force 16 June 1957 (284 U.N.T.S., 93 T.I.A.S. No. 3853, 8 U.S.T. 900).

I. INTRODUCTION

1. The present claim arises out of the Khemco Agreement, entered into on 12 July 1966 between Amoco and NPC, pursuant to which the parties thereto agreed to form a joint venture company, Khemco, for the purpose of building and operating a plant for the production and marketing of sulfur, natural gas liquids and liquified petroleum gas derived from natural gas.

2. The Claimant, AIFC, contends that the Government of the Islamic Republic of Iran ("Iran"), independently and through its agencies and instrumentalities, deprived AIFC of its 50% property interest in Khemco. AIFC now seeks recovery of the value of its property interest in Khemco. The factual circumstances relevant to the present Case are generally not in dispute, but the Parties disagree as to the legal characterization and effects of these factual circumstances. The Parties also disagree as to the applicable standards of valuation of AIFC's property interest and the appropriate method of quantifying any damages or compensation to which AIFC may be entitled.

II. PROCEEDINGS

3. On 17 November 1981 AIFC filed its Statement of Claim naming as Respondents Iran, NIOC, NPC and Khemco. All Parties have submitted extensive pleadings and documentary evidence.

4. A Pre-Hearing conference was held on 8 May 1985. By Order of 8 July 1985 a Hearing was scheduled to take place on 10 and 11 December 1985. On 7 November 1985 the Respondents submitted a "Request to Postpone Hearing" (supplemented by a submission dated 21 November 1985). By Order of 22 November 1985 the Tribunal decided not to grant this request. On 5 December 1985 the Respondents submitted an "Objection to the Order of 22 November 1985" to which the Claimant responded by a submission received by the Tribunal on 9 December 1985. In view of these

submissions, the Chairman met with the Agent of the United States of America, the Agent of the Government of the Islamic Republic of Iran, Counsel for the Claimant and Counsel for the Respondents at the Tribunal, on 9 December 1985. With the agreement of the Parties, the Tribunal then decided to make certain modifications in respect of the proceedings in this Case. These modifications were reflected in the Tribunal's Order of 11 December 1985 which stated as follows:

> 1. The Hearing in this Case on 10 and 11 December 1985 will be held as scheduled.
>
> 2. At this Hearing the Parties shall fully and finally argue all the issues in this Case with the exception of the issue of quantification of damages and the Counterclaims raised in this Case. In addition thereto, the Claimant may however present the oral testimony to be given by the three expert witnesses on the issue of quantification of damages.
>
> 3. The following written submissions shall be made by the Parties respectively:
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> a. The Respondents shall file by 10 February 1986 their final submission, solely as to the issue of quantification of damages.
>
> b. The Claimant shall file by 10 February its final submission regarding the Counterclaims.
>
> 4. No extensions of the time limits set for the final written submissions will be granted.
>
> 5. A complementary Hearing in this Case is hereby scheduled on 10 March 1986, at 9.30 a.m, at which the Parties shall present full and final arguments solely regarding the issues of quantification of damages and of counterclaims.

5. The Hearing was held as scheduled on 10 and 11 December 1985 at which the Parties appeared and presented oral argument.

6. The Parties' final submissions subsequently were filed in compliance with the above cited Tribunal Order. The Respondents' final submission included a document entitled "Affidavit of Dr. Mohammad Ali Movahed" and a notice to the Tribunal of the witnesses the Respondents intended to present at the complementary Hearing on 10 March 1986. In this list of witnesses the Respondents named, inter alia, Mr. M.E. Youssefi Bakhtiar. On 19 February the Claimant submitted a "Motion to Strike" the Affidavit of Dr. Movahed and to "exclude" the oral testimony of Mr. Bakhtiar. By Order filed 5 March 1986 the Tribunal decided that it did "not find ground to reject" Dr. Movahed's affidavit and that "[t]he same applied to Mr. Youssefi Bakhtiar's proposed testimony" which was accepted "insofar as it deal[t] with the Respondent's theory of quantification of damages."

7. The complementary Hearing was held, as scheduled, on 10 March 1986 at which the Parties appeared and presented oral argument.

8. On 27 August 1986 the Claimant submitted a document entitled "Supplemental Affidavits Relating to Costs." The Respondents objected to the filing on the ground of untimeliness. By Order filed 8 October 1986, the Tribunal decided not to reject these documents as untimely filed.

III. JURISDICTION

9. The Claimant contends that the present claim is properly within the Tribunal's jurisdiction. The Respondents have raised several jurisdictional objections, all of which, the Claimant contends, are without merit.

A. The Claimant's U.S. Nationality

10. The Respondents generally dispute the sufficiency and relevance of the evidence submitted by the Claimant as proof of its United States nationality.

11. The Claimant has provided evidence, including good standing certificates, copies of proxy statements issued during the relevant period and affidavits of corporate executives and accountants of the affiliated corporations involved, which, according to the Claimant, show that Amoco is a company duly incorporated under the laws of the Canton of Geneva, Switzerland, and that Amoco has, at all relevant times, been owned -- through a chain of corporations including the United States corporations AIFC, Amoco International Oil Company and Amoco Chemicals Corporation -- by a United States Corporation, Standard Oil Company. The evidence submitted also shows that at least 50% of the voting shares of Standard Oil Company were owned by United States nationals during the relevant period.

12. The Tribunal holds that this evidence satisfactorily proves the United States nationality of the Claimant within the terms of the CSD.

B. The Claimant's Right to Raise an Indirect Claim

13. The Respondents contend that AIFC does not have locus standi before this Tribunal as the Tribunal does not have jurisdiction over indirect claims owned directly by Amoco, a Swiss company.

14. The Tribunal finds that the terms of the CSD and the consistent jurisprudence of the Tribunal clearly recognize that the Tribunal is authorized to exercise jurisdiction over indirect claims asserted by corporations that are nationals of the United States on behalf of their wholly-owned foreign subsidiaries. Accordingly, AIFC may properly assert claims on behalf of Amoco.

C. Continuous Ownership of Claim

15. Based on the evidence submitted, and in the absence of any specific objection by the Respondents,

the Tribunal is satisfied that AIFC's claim in this Case, at all relevant times, has been owned by a national of the United States as defined in Article VII, paragraph 2 of the CSD.

D. Possible Prejudice Caused by Multiple Proceedings

16. The Respondents assert possible prejudice if the present Case is adjudicated by this Tribunal. They argue that the provisions of Article 26 of the Khemco Agreement obligate the parties thereto to settle any disputes by arbitration and that those provisions remain binding. They argue further that Amoco neither did nor was contractually able to assign its rights arising from the Agreement to AIFC. The Respondents contend that the contracting party, Amoco, in fact, has instituted separate arbitral proceedings and that these proceedings are still pending. The Respondents conclude that a decision to entertain AIFC's indirect claim before this Tribunal could prejudice the Respondents by subjecting them to multiple liability in the event Amoco subsequently decided to pursue its claim directly in a separate forum.

17. The Claimant disputes that the Tribunal's jurisdiction depends on any assignment of rights from Amoco to it, as argued by the Respondents. Although the Claimant does not dispute that Amoco instituted arbitral proceedings prior to the date of the CSD it contends that the Respondents' assertion of possible prejudice is without merit as Amoco is not pursuing those arbitral proceedings.

18. The Tribunal holds that its jurisdiction is determined exclusively by the CSD and does not depend on or arise out of any contractual assignments. As to the alleged risk that the Respondents could be subject to multiple liabilities, the Tribunal notes that, in any event, the principles of res judicata or estoppel would bar Amoco in most, if not all, legal systems, from successfully prosecuting a claim, the merits of which have been finally determined by this Tribunal.

E. Exhaustion of Local Remedies

19. The Respondents further contend that the Single Article Act passed by the Revolutionary Council in Iran on 8 January 1980 precludes the Tribunal from adjudicating AIFC's claim. The Respondents' argument is twofold: first, that the Special Commission established pursuant to the Single Article Act has exclusive competence over Amoco's -- and thus over the Claimant's -- claim to compensation, and second, that, by not seeking compensation through the Special Commission, Amoco has failed to exhaust its local remedies.

20. The Claimant contends that the Tribunal's jurisdiction is established by the CSD and that the Single Article Act does not oust the Tribunal of jurisdiction conferred by the .

21. The Tribunal notes that the objections raised by the Respondents pertain to issues both of jurisdiction and of the merits of the present Claim. To the extent that these objections pertain to issues of jurisdiction, the Tribunal holds, as it has held earlier, that its jurisdiction over claims raised is determined exclusively by the provisions in the CSD, and that the does not condition the Tribunal's jurisdiction on the exhaustion of local remedies as the Respondents contend. See Amoco Iran Oil Company and Islamic Republic of Iran, Award No. ITL 12-55-2 (30 December 1982), reprinted in 1 Iran-U.S. C.T.R. 493.

F. Outstanding Claim

22. The Respondents dispute that any claim was outstanding on 19 January 1981, as required by the CSD, since no claim had been formulated or communicated to the Respondents or filed with any court or other judicial institution prior to 19 January 1981.

23. With reference to the terms of the CSD, the Tribunal also rejects this argument.

G. Proper Parties to the Case

24. The Respondents argue that the Claimant has not sufficiently identified the Respondents against which the claim is directed. They contend that to the extent the claim is based on the theory of breach of contract the claim is inattributable to the named Respondents, Iran and NIOC, and that, to the extent the claim is based on an alleged expropriation, the claim cannot be brought against either NPC, Khemco or NIOC since they are separate corporate entities, distinct from Iran.

25. Although the Tribunal finds no reason to dispute the separate corporate status of NIOC, NPC or Khemco, such status is irrelevant in determining whether these companies are proper Respondents. It is undisputed that these three companies are entities controlled by Iran within the terms of the CSD and are thus potentially proper Respondents to this claim. The claim in this Case is based on two distinct legal theories: first, expropriation and, second, breach of contract. It is clear that each of the named Respondents is prima facie a proper party to at least one of the alternative theories. Under the expropriation theory Iran is indisputably a proper Respondent. Each of the other Respondents was directly or indirectly involved in the contractual relationship here at issue, thus raising the possibility of liability under the breach of contract theory. Whether any of the Respondents is ultimately found liable on these theories is an issue which pertains to the merits of this Case. The Tribunal thus cannot determine the attributability of the claim to the respective Respondents named as a preliminary issue.

H. Subject Matter Jurisdiction

26. Finally, and in the absence of any objections raised, the Tribunal holds that the subject matter of this claim is within its jurisdiction pursuant to the terms of Article II, paragraph 1 of the CSD.

I. Jurisdiction over Counterclaims

27. Issues of jurisdiction related to the counterclaims are examined in the section of this Award dealing with the counterclaims.

IV. THE CLAIMS

A. Facts and Contentions

1. The Contractual Background

28. The Khemco Agreement at issue in this Case, executed by Amoco and NPC on 12 July 1966, was part of the overall business relationship between the Claimant's corporate affiliates and the Respondents, arising out of their joint development of Iran's petroleum resources. Close to ten years prior to the signing of the Khemco Agreement, NIOC (the corporate parent of NPC) and an affiliate of the Claimant, then known as PANINTIOL, entered into the JSA providing for the exploration by PANINTOIL, and the joint development of production by NIOC and PANINTOIL, of four offshore oil fields in the Persian Gulf named Ardeshir, Cyrus, Darius and Fereidoon ("JSA Area"). These oil fields are situated within a radius of approximately 100 km. to the south and southwest of Kharg Island. The geological structure of the JSA Area oil fields is such that in association with the crude oil extraction substantial amounts of natural gas become available as a by-product. This gas is referred to as Casinghead Gas and sometimes also as "associated gas." The Khemco Agreement established a mechanism for processing this gas and selling various associated chemicals, especially sulphur extracted therefrom.

29. In the Khemco Agreement, Amoco and NPC agreed to and defined a structure of interrelated agreements. At the core was the establishment of an Iranian joint stock company, Khemco, which was to be jointly owned and managed by Amoco and NPC. Khemco was to receive technical assistance and services from NPC and Amoco in order to design, construct, install and initially operate the envisioned plant under a separate agreement. It was anticipated that the natural gas necessary for the operation of the Khemco plant would come primarily from the facilities on Kharg Island jointly operated by NIOC and PANINTOIL, and the Khemco Agreement was conditioned on the execution by Khemco of a gas purchase agreement with NIOC and PANINTOIL on terms and conditions set forth in the Khemco Agreement.

30. It is not disputed that Khemco in fact was formed as planned and executed all the relevant agreements. The envisioned gas processing plant was designed and constructed on Kharg Island and the Khemco plant commenced commercial operations as of 1 January 1970.

31. To the extent here relevant, the contractual history and the essential contents of the above-mentioned agreements will be described in more detail in the following.

a) The Khemco Agreement

32. The signatories to the Khemco Agreement were, as noted earlier, Amoco and NPC. NPC was legislatively authorized by Iran to enter into the Khemco Agreement by the Act Concerning the Development of Petrochemical Industries, effective 15 July 1965, which vested authority in NPC to "enter into partnership with Iranian or foreign institutions or companies possessing technical and financial qualifications." This Act also provided that "[a]ll arrangements and agreements concluded in the implementation of this object shall be enforced after approval by the High Council of Petroleum Industries, the general meeting of the N.I.O.C. and the Council of Ministers and upon ratification by the Finance and Economic Joint-Committees of the Two Houses of Majlis."

33. These conditions were reflected in the Khemco Agreement itself and the evidence submitted shows that the contractually required governmental ratification was obtained in due course. The transmittal letter dated 19 March 1967, co-signed by the President of the Senate and the Speaker of the Majlis, officially notes that the Khemco Agreement had been ratified by the Joint Economic and Financial Committees of the Majlis. Also in evidence are a letter dated 28 March 1967 in which the Prime Minister notified the Minister of Finance of this ratification and a letter of 29 March 1967 in which the Managing Director of NPC formally notified Amoco that the relevant conditions of the Khemco Agreement had been satisfied by the ratification of these committees, and by the prior approval of the High Council of Petrochemical Industries, the General Meeting of NIOC, and the Council of Ministers.

34. Pursuant to Article 2, paragraph 2 of the Khemco Agreement the ratification by the Joint Economic and Financial Committees of the Majlis was considered acceptance by the Government of all obligations of the Government and the grant by the Government of all facilities and privileges conferred by the Government under this Agreement, including privileges accorded to foreign companies under the "Law Concerning the Attraction and Protection of Foreign Investment in Iran" dated 7 Azar, 1334 (November 28, 1955), the "Act of 24 Teer 1344 (July 15, 1965) Concerning the Development of Petrochemical Industries", and any future amendments to such acts.

35. The effective date of the Khemco Agreement was 2 March 1967, i.e., the date of ratification by the Joint Economic and Financial Committees of the Majlis. The Khemco Agreement was to continue thereafter for a period of 35 years or until the termination of the JSA, whichever period was longer. Upon the request of either party, the Khemco Agreement could be extended by additional intervals of fifteen years on the basis of terms to be negotiated and concluded by both parties.

36. The Khemco Agreement incorporated, in essence, the terms and conditions governing all aspects of Khemco's establishment, management and operations. The terms and conditions of the related separate agreements for the provision of technical assistance to Khemco and purchase of gas by Khemco (described in more detail below) were thus set forth in the Khemco Agreement. The Khemco Agreement also governed the sale of Khemco products, providing that Khemco's entire production of NGL was to be resold to NPC and Amoco in equal shares at a specified price.

37. The Khemco Agreement set forth also the financial policies to be followed by Khemco, specifying that after deduction for taxes and required reserves all remaining profits were to be distributed as dividends. Pending the distribution of dividends, and subject to provisions for debt retirement and maintenance of working capital in accordance with good business practices, all cash flow was to be loaned equally to shareholders on an interest-free, due-on-demand basis, unless such loans would create a critical financial condition or the parties otherwise agreed to retain the funds in Khemco for expansion programs or other purposes.

38. The Khemco Agreement also contained detailed provisions as to the economic and regulatory aspects thereof, including terms governing applicability of foreign exchange restrictions and defining the application of import and customs regulations. Article 15 of the Khemco Agreement also provided for a five year exemption from Iranian income tax liability on net profits of Khemco from the date of commencement of commercial production, while specifying that otherwise NPC, PANINTOIL, and Khemco were subject to Iranian income tax laws.

b) Establishment of Khemco

39. Pursuant to the Khemco Agreement, Khemco was organized on 14 March 1967 as a joint stock company under the laws of Iran "for the purpose of extraction and sale of sulfur, LPG and C sub5 plus Natural Gas Liquids and the production of such other products as [NPC and Amoco] may agree upon." Khemco was to "install, own and operate" a plant "with a capacity to extract about five hundred (500) tons per day of elemental sulfur and about six thousand (6,000) barrels per day of LPG and C sub5 plus Natural Gas Liquids, with additional capacities to be provided as the parties hereto may hereafter agree."

40. Khemco's initial share capital was Rls. 524,000,000 equivalent, at that time, to approximately U.S. $7,000,000. As required, Amoco and NPC subscribed to the same number of shares, each of which entitled the shareholder to one vote. Detailed provisions in the Khemco Agreement ensured the right of both parties to participate equally in the management and affairs of Khemco.

c) The Technical Services and Assistance Agreement

41. The Technical Services and Assistance Agreement was executed as of 12 July 1966 by NPC, Amoco and Khemco. Pursuant to this agreement, Amoco agreed to provide technical assistance in connection with the design, engineering, construction, installation and initial operation of the Khemco plant. This agreement was to remain effective until twelve months after the date of completion and acceptance of the plant. In accordance with the Technical Services and Assistance

Agreement the plant was completed and was accepted by 1 January 1970.

d) The Gas Purchase Agreement

42. As noted earlier, performance under the Khemco Agreement was conditioned upon Khemco's concluding with NIOC and PANINTOIL a "mutually satisfactory" gas sale and purchase agreement within 30 days of the effective date of the Khemco Agreement. The Khemco Agreement defined the essential conditions regarding quantity, source and price of the feed stock natural gas. The Khemco Agreement provided that the natural gas could be purchased from other sources, but specified that JSA Gas, i.e., gas which was a by-product of NIOC's and PANINTOIL's oil extraction operations pursuant to the JSA, was to have priority "unless otherwise agreed between the parties."

43. These terms and conditions were incorporated in the Gas Purchase Agreement which was executed on 1 April 1967. Pursuant to Article 2, paragraph 1 of the Gas Purchase Agreement NIOC and PANINTOIL agreed to sell, in equal quantities, and Khemco agreed to buy Casinghead Gas produced from the JSA Area, "to the extent available and which may be required for the operation" of the Khemco plant as initially constructed or subsequently expanded. Pursuant to Article 2, paragraph 2, NIOC further agreed "to secure from sources on Kharg Island other than the [JSA] Area, to the extent available, and sell to KHEMCO... such amount of Natural Gas as may be required for the operation of the aforesaid Plant in addition to the Casinghead Gas purchased by Khemco pursuant to Paragraph 1 (i.e., the JSA gas)."

44. The Claimant contends that NIOC's and PANINTOIL's obligation to supply Khemco with natural gas was subject to certain contractual limitations. Article 2, paragraph 5, of the Gas Purchase Agreement provides that "the petroleum reservoirs from which the Natural Gas is to be supplied are being operated primarily for the production and sale of crude oil and... the availability of natural gas contemplated by this Agreement is subservient to such operation." Although the JSA is not otherwise in evidence in this Case, the Claimant refers to a provision of the JSA whereby the parties thereto agreed to "exert their utmost efforts to develop any discovered fields to the maximum extent consistent with good petroleum industry practice" and "to extract such petroleum as shall be discovered at a rate insuring that such part of the discovered reserves as may be economically extracted by the utilization of the most up-to-date methods and practices of the petroleum industry shall be fully extracted during the term of the [JSA]."

45. The price of the natural gas to be supplied to Khemco was essentially fixed over the life of the Khemco Agreement, and was the same regardless of whether the natural gas was provided by PANINTOIL and NIOC from the JSA Area, or whether it was provided by NIOC from other sources. For the first fifteen years the price was set at U.S. $0.02 per thousand standard cubic feet ("TSCF"). Subsequent to that period the price was to be agreed upon by the parties for each subsequent five-year interval. No adjustment was permitted, however, that would reduce the price to less than the initial U.S. $0.02 per TSCF or that would raise the price so as to reduce the ratio of Khemco's average F.O.B. product unit sales price to its average product unit cost. Moreover, the price charged to Khemco was not to exceed the price charged to other specified petroleum and petrochemical users in Iran.

2. Operation of Khemco's Facilities

46. As mentioned above, the natural gas processing plant provided for in the Khemco Agreement and the related separate agreements commenced commercial operations as of 1 January 1970. The plant facilities consisted of gas compressors, a hydrogen-sulfide extraction unit, sulfurrecovery plant, gas dehydration units, refrigerated absorption equipment, product-fractionation towers, propane and butane treating units, and power generation facilities. In addition, there were storage facilities for large quantities of propane, butane, and sulfur as well as vessel loading facilities. It appears from evidence submitted by the Claimant that, with these facilities, Khemco had a maximum daily average product yield of about 800 metric tons of sulfur, 5,300 barrels of propane, 6,200 barrels of NGL and 3,000 barrels of butane.

47. During the initial years of operation Khemco used exclusively natural gas supplied from the JSA fields. It appears, however, that other gas richer in the products extracted by Khemco was available from the Kharg Island oil fields operated by OSCO. By letters dated 15 August 1972 (not in evidence in this Case) and 7 November 1972 Khemco proposed to the two other signatories of the Gas Purchase Agreement, PANINTOIL and NIOC, that it use this richer OSCO gas for a period of two years, suspending the preferential purchases of JSA gas under the Gas Purchase Agreement. This proposal contained an offer to extend the two year period if appropriate.

48. By letter of 9 December 1972 from Mr. Parviz Mina, Alternate Director and Deputy Director, Technical and International Affairs, NIOC, to Mr. Shapur Sharifi, Director of Technical and Marketing Affairs, NPC, NIOC agreed to the proposal "for the exclusive period of two years." As required by the Gas Purchase Agreement and the Khemco Agreement, the price for this gas was set at U.S. $0.02 per TSCF, the same price charged for the JSA Gas.

49. The Parties disagree as to the continued validity of the agreement to use OSCO gas. The record before the Tribunal indicates, however, that neither Amoco nor NPC objected at the time to the continued purchase of OSCO gas by Khemco and that Khemco continued to purchase OSCO gas supplied by NIOC even after the two year period had expired.

50. The Khemco plant continued operations using OSCO gas without any significant interruptions through 1977, which was the last full year of production prior to the disruptions caused by the Iranian Revolution. According to evidence submitted by the Claimant, the plant produced during 1977 an average of 559 tons of sulfur, 3,647 barrels of NGL, and 6,319 barrels of LPG per day. Due to increasing deliveries of particularly rich gas during 1977 and early 1978 production of NGL and LPG was increasing rapidly. It is not disputed that the management of Khemco by the respective parties proceeded smoothly through this period and all funds earned by Khemco were disbursed as agreed pursuant to the Khemco Agreement.

51. According to evidence submitted by the Claimant, the Khemco plant was profitable and various expansion plans were considered. It appears that increasing amounts of low pressure gas became available to Khemco for processing. These low pressure gas streams apparently contained higher concentrations of extractable products and the processing of this gas was potentially more profitable. At the time, however, the processing of these gas streams exceeded the plant's capacity. In 1979 Khemco therefore considered and budgeted for an expansion plan estimated to cost U.S. $9

million over a two-year period. Of this amount, U.S. $4 million was designated for the purpose of installing an additional low-pressure compressor in 1979. It is undisputed, however, that the expansion plan was not effectuated by the time the claim arose.

3. Events Affecting the Operation and Management of Khemco

52. The Parties agree that after 1977 civil unrest occurring in Iran increasingly affected plant production. During 1978, as the events of the Islamic Revolution gathered momentum, strikes by workers in the oil industry disrupted production and hampered operation of oil processing facilities, including those of Khemco. These strikes began in mid-October and continued, off and on, through the end of the year. By 1 November 1978 there were total stoppages of oil exports.

53. The Claimant contends that by the end of December 1978 the increasing levels of anti-American sentiment caused Amoco to propose to Khemco that the Amoco personnel working for Khemco should be temporarily permitted to evacuate Iran. By telex dated 27 December 1978 Mr. M. Tayeban, the managing director of Khemco, informed Amoco that "we concur with Amoco's suggestion that until further notice no Amoco personnel working for Khemco should remain in Iran."

54. According to the Respondents, however, the withdrawal of Amoco's personnel was made without NPC's approval or consent and this withdrawal, as well as the general withdrawal of expatriate personnel from Iran, reduced production at the Khemco plant to negligible levels during the first quarter of 1979. As outlined in further detail below, the Respondents invoke these conditions in Iran as proof that the Khemco Agreement as well as the related agreements thereby became frustrated and non-operational. In addition, they argue that, as the JSA also had become frustrated and non-operational, the Khemco Agreement automatically was rendered non-operational.

55. Amoco's evacuated personnel were transferred to an office in Dubai, where, according to the Claimant, during the first quarter of 1979 Amoco held its personnel in readiness for return to normal operations, pending an announcement of the new government's intentions regarding Khemco. The Claimant has also submitted evidence that the Khemco plant resumed commercial operations in April 1979 without the return of Amoco personnel.

56. The Claimant contends that on 30 April 1979 it received newspaper reports containing the first significant indications that the resumption of normal activities under the Khemco Agreement probably would not be possible. According to these reports NIOC had announced that "Iran's oil industry will operate without foreign technicians."

57. It was further reported that NPC intended to terminate all foreign interests in petrochemical plants. The Claimant refers to a statement by Mr. R. Abedi, managing director of NPC, according to which NPC intended to commence negotiations to buy out all shares of petrochemical plants held by foreign interests, with the goal of bringing such plants under a single management. Khemco's plant was specifically mentioned as targeted for such a transfer and NPC displayed an interest in a possible purchase of Amoco's share in Khemco. NPC also announced that the transfer price would be the book value of shares prior to the Revolution.

58. On 13 May 1979 Mr. Abedi met in Tehran with Amoco representatives to discuss the situation. According to testimony of the Amoco's officials present at the meeting, Mr. Abedi stated that it had been and would continue to be impossible for Khemco's expatriate personnel to work in Iran because they would be in personal danger. Mr. Abedi further stated that salaries and expenses of Khemco expatriates would be suspended as of December 1978.

59. The Respondents have submitted an extract from a telex originating from the United States Department of State which reports a meeting with Mr. Abedi held in May 1979

> Abedi confirmed that NPC had notified foreign partners in all four firms [i.e., Khemco and three other joint petrochemical ventures] of NPC's... desire/intention to acquire their equity interests and had invited these firms to send delegations to Tehran to negotiate the sale. According to Abedi, discussions will take place within the next 3-4 weeks.

The telex further stated that "NPC does not expect much if any opposition by its foreign partners to the proposed take-over."

60. Whether negotiations concerning the proposed purchase of Amoco's shares were undertaken at this point is unclear from the record.

61. The next significant event occurred by the end of June 1979. In evidence is a letter dated 27 June 1979 by which Mr. Abedi advised Mr. Tayeban, managing director of Khemco, that "in accordance with company resolutions, sales of Khemco products would thereafter be managed by NPC." This letter also announced that regular reports as to the current inventory of sulfur would be required. Prior to this time, Khemco had not approved such policies.

62. On 7 July 1979 Khemco held a meeting of its board of directors in Tehran. According to the minutes of this meeting, two out of three of Khemco's U.S. expatriate directors were physically present and the third was represented by proxy. All Iranian directors were present. At this meeting the Khemco board considered and approved for presentation to the shareholders Khemco's 1978 Annual Report, which included the balance sheet and profit and loss statement for that year. Khemco's managing director proposed that Khemco transfer its marketing activities to NPC, but this proposal was not accepted. The board adopted, however, amendments to ease operations of Khemco in the event Amoco's designated representatives were physically absent from Iran; it approved telex authorizations for checks, drafts and payment orders under certain conditions.

63. A general shareholders' meeting was also held on 7 July 1979. According to the minutes of this meeting the shareholders approved the annual report and financial statements. Out of total 1978 profits of Rls. 1,107,000,000 Khemco declared approximately 10%, Rls. 111,000,000, as dividends payable in 1979. Payment of Amoco's share of this dividend was never received by Amoco.

64. On 11 July 1979 a meeting was held for the express purpose of "determining Company's policy for the sale of Khemco's products." Present at this meeting were a representative of NIOC (Mr. Reva Azima, Supervisor of International Affairs), and officials of NPC (Mr. H.A. Hajarizadeh, Supervisor

of Management of Operations; M. Mofez, Supervisor of Management of Finance, Legal and Administrative Affairs; and Mr. A.H. Khakzad, Supervisor of Management of Training), as well as Khemco's managing director, Mr. Tayeban. According to the minutes of this meeting, the following was decided:

> 1. In consideration of Government's policy that all sales of hydrocarbons produced in the country must be made by NIOC, and also, in consideration of Iran and NPC's interests, and discussions made with Amoco for the purchase of their shares in Khemco, sale of liquid gas and naptha produced in Khemco's complex, will be handled totally by NIOC International Management.
>
> 2. On the basis of a policy which will be agreed upon later, in gaining the aim mentioned in Para. 1, Khemco will advise NIOC International Affairs [of] its stock and production of liquid gas and naptha. In addition, Khemco's personnel specialized in the sale of liquid gas will be transferred to NIOC International Management.
>
> 3.... NIOC will deposit to the account of NPC the funds derived from the sale of liquid gas and naptha produced by Kharg's complex.
>
> 5. On the basis of previous instructions, sale of sulfur produced by Khemco will be made totally by NPC Trading Management. The funds derived from the sale will be deposited in a special account in NPC. Of course, all Khemco's current expenses will be borne by NPC, effective the date this policy is executed.
>
> 7. Mr. Tayeban, Khemco's Managing Director, will advise Amoco of the NIOC and NPC's policy.

65. The Claimant contends that this meeting was held under the supervision of NIOC, since NIOC's representative at the meeting signed the minutes "confirmed by me pending approval by Mr. Nazih," which the Claimant presumes to be a superior at NIOC.

66. Khemco was formally notified of these actions by letter of 17 July 1979 from Mr. Hosseinali Hajarizadeh, Acting Supervisor of Management of Operations and NPC's Shareholders Representative to Khemco. The letter requested "that action be taken in accordance with the attached minutes of the meeting," and stated that "a decision for how to sell Khemco's products, as reflected in the attached minutes of meeting, has been taken considering [both the] purchase of Amoco's shares in Khemco by NPC" and the subsequent merging of Khemco's operations in the management of NPC.

67. The events were formally announced to Amoco and its affiliates by a letter of 18 July 1979 from Khemco's managing director, Mr. Tayeban. The letter announced that "as of this date we are putting NPC's directives in this connection into effect," and "are transferring all rights and obligations under all existing contracts to NPC... and NIOC." The letter concluded that "any new sales will of course be made directly by NPC or NIOC."

68. According to the Claimant, this decision also was contemporaneously announced at a meeting held on 18 July 1979 in Tehran between representatives of Amoco and NPC. Amoco was informed at this meeting that its participation in the income and expenses of Khemco was terminated effective as

of 31 December 1978.

69. The Claimant contends that the implementation of these policies clearly and effectively excluded Amoco from all of Khemco's operations. Amoco's formal protest to the decisions announced 18 July 1979 was communicated in two telexes of 6 August 1979, one to Khemco and one to NPC. These telexes stated that the alleged takeover was beyond the authority of Khemco's managing director, inconsistent with the Khemco Agreement and Khemco's corporate articles, and had previously been rejected by Khemco's board of directors. The telex to NPC concluded that "[s]uch unilateral takeover of Khemco's marketing activities amounts to nationalization while the discussion of the purchase of Amoco's share in Khemco is still pending."

70. The Respondents do not dispute that the announced policies were, in fact, carried out despite Amoco's protest. They argue, however, that these decisions were taken with the interest of Khemco in mind and that, furthermore, NPC was obligated to implement these policies by virtue of decisions taken by NIOC. The Respondents rely, inter alia, on a telex from NPC to Amoco of 14 August 1979, in response to Amoco's 6 August 1979 telex, in which NPC stated

> that the arrangement for sales of Khemco's products was made to protect NPC's interest. Higher prices could be obtained by combining sales of sulphur from Kharg and Shampur plants. Similarly [LPG] can be sold through NIOC in conjunction with IMS product at higher prices.

This telex went on to state that:

> With regard to transfer of your [Amoco's] Khemco's share to NPC we [NPC] are ready to resume negotiation immediately.

71. Neither Party has submitted any evidence as to the substance of the proposed negotiations for the sale of Amoco's shares to NPC, and nothing in the record indicates that negotiations resumed at any time after 14 August 1979. It is in any case undisputed that the Parties never reached an agreement on the terms of NPC's purchase of Amoco's shares.

72. Subsequently, on 8 January 1980, the Revolutionary Council of the Islamic Republic of Iran promulgated the Single Article Act Concerning the Nationalization of the Oil Industry of Iran ("Single Article Act"). This Single Article Act stated that "[a]ll 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 said commission."[1] It appears that the "Iranian Oil Industry Act" referred to was the Act concerning the Nationalization of the Petroleum Industry Throughout the Country, dated 5 May 1951, by which the Iranian oil industry previously had been nationalized.

73. On 11 August 1980 Amoco served on NPC a Notice of Arbitration pursuant to the Khemco Agreement. NPC did not respond to this notice, nor did it appoint an arbitrator as required by the Khemco Agreement. As a consequence, reference was made to a third party, who appointed a sole

[1] According to the Respondents, the phrase "shall be annulled" in the Single Article Act must be read to mean "are null and void ab initio."

arbitrator. The record does not disclose whether subsequent arbitral proceedings were held. The Claimant, however, has stated that Amoco is not pursuing these arbitral proceedings.

74. On 24 December 1980 Iran's Minister of Petroleum served notice on Amoco by telex that the Khemco Agreement was declared null and void by the Special Commission established in accordance with the provisions of the Single Article Act ("Special Commission"). The notifying telex stated in relevant parts:

> This notification is served to inform you that the special committee convened by this ministry in accordance with the provisions of the Single Article Act approved by the Revolutionary Council of the Islamic Republic of Iran has, after due consideration of all relevant facts, declared the [Khemco Agreement] null and void.

The Single Article Act, inter alia, provides that any would be claim arising from the conclusion and execution of the said null and void agreement should be referred to and settled by the special committee.

75. The Claimant contends that, prior to receipt of this telex, Amoco had not received any notification that the Special Commission was reviewing the validity of the Khemco Agreement, or that it had reached a decision. There is no evidence in the record describing the process by which the Special Commission reached the conclusion under the terms of the Single Article Act that the Khemco Agreement was "null and void."

76. The Tribunal is further uninformed whether any settlement discussions took place between the Parties subsequent to Amoco's receipt of this notice of nullification. In any event, by telex of 19 September 1981 NPC notified Amoco that it was not authorized to provide any redress for Amoco since "the claims of Amoco in respect [of] nationalization of its shares/assets in Kharg is subject to negotiation with a special commission created for dealing with all such claims...." It is undisputed that Amoco has not pursued any remedy with this Special Commission.

B. The Legal Characterization of the Facts

1. The Issue

77. In the present Case, the Parties do not disagree on the occurrence of the factual events discussed above. They differ, however, as to the legal characterization and consequences of these events, these being the issues on which the Tribunal has to decide.

78. According to the Claimant these facts establish the Respondents' liability on one of two theories. First, the Claimant argues that NPC and Khemco have materially breached or repudiated the Khemco Agreement and that NIOC and Iran are liable as well because of their control over NPC and Khemco. The Claimant also argues that the record demonstrates that Iran has expropriated Amoco's rights under the Khemco Agreement or its shares and shareholders' rights in Khemco and

that such expropriation was wrongful. In response, the Respondents argue that the revolutionary events which took place in Iran "totally frustrated and [thereby] discharged by conditions of force majeure" the Khemco Agreement as of late 1978. They contend further that if the Khemco Agreement is not considered frustrated and terminated, the Single Article Act of 8 January 1980 "could also be characterized as a legitimate nationalization by Iran of the Claimant's interest in the Khemco plant."

79. The Respondents' assertion that the Khemco Agreement was frustrated by force majeure in late 1978 is preemptive in nature, and would preclude, if accepted, the claims for expropriation or breach of contract alleged to have taken place thereafter. Therefore, this contention will be discussed first. After considering force majeure the Tribunal will examine the issues of expropriation and breach or repudiation of the Khemco Agreement.

2. Frustration by Force Majeure

80. According to the Respondents, the dramatic events which took place in Iran in 1978 and 1979 had a direct bearing on the life of the Khemco Agreement. As a consequence of strikes and civil disturbances production at the Khemco plant completely stopped and remained negligible for the first quarter of 1979. Production started again in the spring of 1979, but remained "continually hampered by sporadic strikes and difficulties in obtaining required materials and technical assistance from abroad." In addition, the revolutionary events provoked the withdrawal by Amoco of all its United States personnel in the first days of December 1978. The Respondents assert that Amoco made no serious efforts to return its personnel to Iran and it is a fact that the United States personnel did not return to Iran. The Respondents insist that Amoco's experts and technical skills were needed for the project and that "[w]ithout the Claimant's participation NPC and Khemco ceased being able to fulfil their specific obligations in conjunction with the Claimant." They conclude that because of these difficulties, and the fact that the JSA was also allegedly rendered inoperable, the Khemco Agreement was "totally frustrated."

81. It cannot seriously be questioned that the conditions in Iran in late 1978 and early 1979 amounted to a state of force majeure. Both Parties admit that the departure of Khemco's expatriate personnel in December 1978 was justified by force majeure. The consequences on the Khemco Agreement of such a situation depends on the terms of the Khemco Agreement. Article 19 of the Khemco Agreement deals with the question of force majeure. The two relevant paragraphs of this Article read as follows:

> 1. Where any force majeure occurrence, beyond the reasonable control of either of the parties hereto or the Company [Khemco], renders impossible or hinders or delays the performance of any obligation or the exercise of any right under this Agreement, then this failure or omission of either Party of the Company shall not be treated as a failure or omission to comply with this Agreement
>
> 3. If the performance of any obligation or the exercise of any right is rendered impossible, hindered or delayed by a force majeure cause for a period exceeding twelve (12) consecutive

months, the parties shall, if practicable, consult together as to the best means of overcoming the applicable event of force majeure, but if they shall fail to achieve a solution or if consultation shall be impracticable then either Party may refer the situation to arbitration under Article 26 for solution.

82. It is clear from this Article that force majeure, per se, does not terminate the Khemco Agreement. Its effect is solely to suspend the performance of obligations and exercise of rights under the Khemco Agreement. Even if the situation of force majeure extends over a period exceeding twelve consecutive months, there is no automatic termination of the Khemco Agreement. Rather the parties have in such a case the obligation to consult; if they fail to find a solution, they have the right to resort to arbitration.

83. It is undisputed that, long before the expiry of the initial period of twelve months, contacts were made between the parties, meetings of Khemco's board of directors and of its shareholders were held, and decisions relating to the production and marketing of Khemco's products were taken. The record shows, therefore, that, according to its own terms, the Khemco Agreement could not be considered as terminated at the time of the events invoked by the Claimant as constituting a breach of contract or expropriation. It is true that in the event the parties did not find "the best means of overcoming" the situation, and that the Khemco Agreement did not subsequently revive. The parties' negotiations concerning the possible sale of Amoco's shares in Khemco do not suggest that at the relevant time the Khemco Agreement was terminated by force majeure, but rather demonstrate that the parties recognized that Amoco retained an interest in the enterprise which could be sold. The Tribunal therefore concludes that the Khemco Agreement survived the force majeure conditions. Consequently the Tribunal now proceeds to examine the Claimant's allegations of expropriation and breach of contract.

3. Expropriation

84. According to the Claimant, by the end of July 1979 the Respondents "had totally and unequivocally breached and repudiated the Khemco Agreement and had expropriated Amoco International's rights thereunder, including its ownership interest in Khemco, for their own benefit, use and ownership." The Claimant alleges, therefore, that 1 August 1979 should be considered the date of expropriation. In such circumstances the Claimant contends the expropriation must be unlawful.

85. The Respondents do not deny that, given the Tribunal's findings on force majeure, an expropriation took place. They emphasize that the Claimant does not contest that "the enactment of the Single Article Act of 8 January, 1980 by the Revolutionary Council of Iran was a valid legislative act under Iranian Law." Therefore they argue that "the Agreement was nullified pursuant to the Single Article Act as a valid exercise of Iran's sovereign legislative power." Noting that the Single Article Act "is expressly designed to implement the original [Nationalization] Act of 1951," the Respondents imply that the nullification of the Khemco Agreement by decision of the Special Commission in December 1980 is to be construed as a legitimate nationalization within Iran's sovereign powers. They also set its occurrence as no earlier than 24 December 1980, when the decision of the Special Commission was communicated to Amoco.

86. The Parties thus agree that Amoco's interest in Khemco was expropriated, but they disagree as to the circumstances and consequences of the expropriation, and in particular as to its lawfulness. As the Tribunal holds that the question of the lawfulness or unlawfulness of the expropriation has a direct bearing on the issue of compensation, this issue will be discussed in the following section.

4. Lawfulness or Unlawfulness of the Expropriation

a) The Applicable Law

87. Both Parties contend, and the Tribunal agrees, that the lawfulness of the expropriation must be decided by reference to international law. The Claimant maintains that the expropriation was unlawful because it was contrary to the Treaty, which in any case incorporates the rules of customary international law as a minimum standard. For their part, the Respondents contend that any expropriation was made in conformity with international law, since it was the legitimate exercise of Iran's right to nationalize, such right being recognized by customary international law. On the other hand, the Respondents submit that the Treaty is neither operative nor applicable to this Case. Given the Parties' contentions, the main issue to be discussed in this context relates to the nature of the rules of international law to be applied in the instant Case.

(i) The Treaty

88. According to the Respondents, the Treaty is applicable in the instant Case only if it was operative at the time of the expropriation, at the time of the submission of the claim to the Tribunal and, possibly, at the time of the award. The Respondents contend, however, that the Treaty was not operative at any of these times for several reasons. First, the Respondents argue that the Treaty was never binding on Iran, since it was executed by a Government installed as a result of a foreign intervention. If the Treaty was validly concluded, the Respondents continue, it ceased to be operative in November 1979 at the latest, by reason of the United States' violations of it by taking measures against Iranian assets, as well as by the general change of circumstances. At that time, the relations between the two countries could no longer be considered amicable, which fact is assertedly decisive, since the Tribunal is specifically authorized by Article V of the CSD to take into account changed circumstances. The Respondents deny that official notification of termination was necessary, since termination by conduct of the parties is largely admitted in international law. Furthermore, the Respondents argue that the decision to the contrary of the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), 1980 I.C.J. 3 (Judgment of 24 May 1980), reprinted in 19 Int'l Legal Mat'ls 653 (1980) is irrelevant, since this decision only concerned jurisdiction and the case was not argued by Iran. The Respondents similarly distinguish the Tribunal's similar holding in INA Corporation and Islamic Republic of Iran, Award No. 184-161-1, p. 9 (13 August 1985). Finally, the Respondents contend that even if the Treaty were operative, it would not be applicable to the circumstances of this Case.

89. In support of its contentions that the Treaty is applicable, the Claimant submits that the termination of a treaty can be inferred from the conduct of the parties only if this conduct demonstrates a tacit agreement to consider such treaty as lacking any authority. It asserts that no such inference is appropriate here, since the United States repeatedly has invoked the Treaty and has continued routinely to confer on Iranian nationals benefits arising from its provisions. Similarly, Iran itself has invoked the Treaty before United States courts, as recently as the summer of 1985.

90. The Tribunal finds that the time period for which the issue of the applicability of the Treaty is relevant is the time when the events which gave rise to the claim occurred, which, in all instances, was prior to signing of the Algiers Accords. The Tribunal's jurisdiction does not rest on the Treaty, but is derived from the Algiers Accords. The pertinent facts have to be assessed in the light of the law governing them at the time they occurred, not the law applicable some time after their occurrence, be it at the time of the submission of the claim to the Tribunal or at the time of the rendering of the award. The Tribunal therefore need not consider whether the Treaty was still in force when the claim was submitted to the Tribunal or whether it is in force at the present time.

91. The Tribunal further notes that at the time the Treaty was signed and ratified the two Governments were recognized by the whole international community. There is no evidence, and it has not been contended, that the Treaty was executed under duress, or by fraud, within the meaning of Articles 49, 51 and 52 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (23 May 1969), entered into force 27 January 1980, reprinted in 8 Int'l Legal Mat'ls 679 (1969) ("Vienna Convention"). None of the provisions of the Treaty can be considered as contrary to an imperative norm of international law (jus cogens), in the meaning of Article 53 of the Vienna Convention. Nothing, therefore, suggests that the Treaty was null and void ab initio.

92. In its judgment of 24 May 1980 in Case Concerning United States Diplomatic and Consular Staff in Tehran, supra, the International Court of Justice held that the Treaty was in effect at least as of 29 November 1979. It is true that because Iran declined to participate in the argument the case was not argued as a case normally would be presented under the Statute and the Rules of the Court, but the Iranian Government stated its position in two communications to the Court. In these communications it objected to the jurisdiction of the Court, but made no suggestion that the Treaty was not in force on 29 November 1979 when the United States submitted the dispute to the Court, as was noted by the Court itself. See 1980 I.C.J. at 28, 19 Int'l Legal Mat'ls at 566.

93. While the Court dealt with the question of the applicability of the Treaty mostly in relation to the problem of jurisdiction, it did not make its findings thereon in its jurisdiction only on a prima facie basis. Rather, the Court pronounced itself on the validity of the Treaty, after a careful scrutiny, in its judgment on the merits. Its holding is still more forceful because, as the Court explained, it might have grounded its decision on two other conventions which already furnished an indisputable basis of jurisdiction, without addressing the question of the validity of the Treaty. Id. at 26, 19 Int'l Legal Mat'ls at 565. Furthermore, the Court dismissed the suggestion that the Treaty was rendered inapplicable because of the counter measures the United States had taken against Iran. Id. at 27-28,

19 Int'l Legal Mat'ls at 565-66. Finally, the Court emphasized, in this context, that "mutual undertakings [of the Parties] to ensure the protection and security of their nationals in each other's territory" are specially related to the "very purpose of amity and, indeed, of a treaty of establishment" like the Treaty. Id. at 28, 19 Int'l Legal Mat'ls at 566.

94.

In addition to the Judgment of the International Court of Justice, three previous Awards of this Tribunal have concluded that the Treaty is applicable to the relations between the two nations at the time the relevant claims arose. INA Corporation and Islamic Republic of Iran, Award No. 184-161-1 (13 August 1985); Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (19 March 1986); Sedco Inc. and National Iranian Oil Company, Award No. ITL 59-129-3 (27 March 1986), reprinted in 25 Int'l Legal Mat'ls 629. The Tribunal sees no reason to depart from these precedents.

95.

To some extent, the judgment of the International Court of Justice gives an anticipatory answer to the Respondents' argument that changed circumstances and violations of the Treaty brought about its termination. The most dramatic events invoked in support of this argument -- the Islamic Revolution, the attack on the United States Embassy in Tehran and taking of embassy personnel as hostages, and the subsequent presidential freeze orders and rescue attempt -- took place before the Court's finding that the Treaty was still in force. In any event, the Tribunal need not determine whether these events constituted changes of such a nature and magnitude as to justify the termination of the Treaty in conformity with customary rules of international law as declared in Article 62 of the Vienna Convention. As Article 62 clarifies, change of circumstances never automatically terminates a treaty. It is always up to the parties to evaluate the consequences of the change and, if one or both of them arrive at the conclusion that these consequences legally justify termination of a treaty, to take the necessary steps to this effect. The same is true in case of violation of a treaty by a party.

96.

On the other hand, the events which took place in 1978, 1979 and 1980 and caused the revolutionary change of government in Iran, the overrun of the United States Embassy in Tehran and the prolonged detention of its nationals as hostages, could not be without consequences upon the implementation of the Treaty. It is clear that the part of the Treaty which relates to consular relations was suspended with the closure of the consulates of both nations and the rupture of diplomatic relations. The implementation of the articles relating to the treatment of nationals of the other country was greatly disturbed by the civil unrest and disorders which preceded and accompanied the revolution in Iran and continued for some time after the establishment of a new government, as well as by the counter measures taken by the President of the United States in connection with the crisis. These events brought about a virtually complete interruption of communications between the two countries until after the execution of the Algiers Accords. Obviously, such a legal and factual context has to be kept in mind in considering the application of the Treaty to specific facts during this period, but it does not necessarily lead to the conclusion that the Treaty was no longer applicable, since, in the words of the International Court, "[i]t is precisely

when difficulties arise that the [T]reaty assumes its greatest importance." See Case Concerning United States Diplomatic and Consular Staff in Tehran, supra, at 28, 19 Int'l Legal Mat'ls at 566. Thus there was no termination by changed circumstances or alleged violations of the Treaty.

97. Formal notification of treaty termination is not necessary in every case. The intent of a party to terminate a treaty can be implied from its conduct. Yet such conduct may be construed as an implicit denunciation only if it clearly demonstrates the intent of the party concerned to terminate the treaty. In the present case, the Tribunal finds that, at all relevant times, the conduct of the parties was not such as to warrant such a conclusion.

98. Similarly the Tribunal does not agree that the negotiation of the Algiers Accords in January 1981 constitutes a termination of the Treaty. The severe crisis which plagued relations between the two parties in 1979-1980 found its epilogue in the Algiers Accords. In the words of the Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration"), the Accords were the result of negotiation on "the commitments which each [of the Parties] is willing to make in order to resolve the crisis within the framework of the four points stated in the Resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran." The Accords, which provided for the release of the 52 United States nationals and the lifting of the freeze of the Iranian assets, do not mention the Treaty. The general reference to "changed circumstances" in Article V of the CSD, which deals with the law to be applied by the Tribunal, cannot be construed as a notice of intention to terminate the Treaty, or as constituting a finding that the Treaty was terminated on such a basis.

99. Algiers AccordsBefore the , Iran could easily have denounced the Treaty if it thought it proper to do so. Such a decision could be notified at any time, pursuant to the procedure described in Article XXIII, paragraph 3 of the Treaty, or made known by any other means of publicity. If Iran considered the judgment of the International Court of Justice to be in error in finding that the Treaty remained applicable, it could certainly have remedied the error by an express notice of termination to remove all doubt. Such a course of conduct was adopted by the French Government after the International Court of Justice held that France's status as a party to the General Act of Arbitration, which France had considered to have lost its effectiveness and fallen into desuetude, provided a basis for jurisdiction over it. See The Nuclear Tests Case (Australia v. France), 1973 I.C.J. 99 (interim protection order of 22 June 1973). While France reiterated its position, it formally denounced the Act. Following the judgment of the International Court of Justice concerning the Treaty, however, Iran took no such action.

100. For the foregoing reasons the Tribunal does not find evidence that the parties considered the provisions of the Treaty relating to the treatment of nationals to be terminated or suspended at the time of the occurrence of the facts to which the claim relates.

101. The Respondents submit a second line of arguments to the effect that even if the Treaty is deemed to be in force, it is not applicable to the expropriation of Amoco's interest in Khemco for four

reasons: (1) Amoco's interest in Khemco is not "property" in the meaning of Article IV, paragraph 2 of the Treaty; (2) the Treaty clearly recognizes Iran's right to nationalize; (3) the Treaty creates rights and duties only between Iran and the United States, not for private entities; and (4) the United States and its nationals cannot take advantage of the Treaty's special standard of compensation, since the Treaty originated from the unlawful conduct of the United States. The Tribunal will discuss these arguments in reverse order.

102. The last objection is disposed of by the Tribunal's finding that the Treaty was valid and in force at the time of the expropriation. Since the Treaty was in force, the rights and obligations it established were valid and enforceable according to its terms.

103. The question raised by the third objection, whether the Treaty did or did not create rights or duties for private persons, cannot be answered in the abstract, but can be decided only by reference to the terms of the Treaty and the procedures available for its implementation. It is indisputable, however, that certain provisions of the Treaty, including Article IV, set standards of treatment that each party must accord to the nationals and companies of the other party. The nationals and companies concerned, therefore, are entitled to receive such treatment. In an adjudication before an international tribunal such as this, which is expressly authorized by Article V of the CSD to apply the rules and principles of international law, it is immaterial whether or not the enforcement of such treaty rights and law by domestic courts would be dependent on the enactment of legislation introducing the provisions of the treaty into the law of the State.

104. As discussed further below, the Treaty recognizes the right of each party to nationalize the assets of the nationals and companies of the other party, under stated conditions. This recognition does not mean that any nationalization automatically is lawful, since this will be the case only if the conditions listed in Article IV are actually met. The Tribunal will consider at a later stage in this Award whether or not the expropriation here at issue was made in conformity with the requisites of the Treaty.

105. The first of the Respondents' objections to the applicability of the Treaty to the expropriation here at issue is by far the most elaborated one. The Respondents contend that (1) the Claimant's ownership interest in Khemco cannot be regarded as "property" within the meaning of Article IV, paragraph 2 of the Treaty, and (2) that Amoco, the party to the Khemco Agreement and the owner of 50% of the capital stock of Khemco, is a Swiss company whose property rights are not protected by the Treaty.

106. The first portion of the Respondents' argument, i.e., that the Claimant's rights under the Khemco Agreement do not fall within the scope of the Treaty provisions relating to expropriation, is inconsistent with their concession that Iran's nullification of the Khemco Agreement pursuant to the Single Article Act can be construed as a nationalization. Furthermore, the Respondents expressly note that in matters of nationalization "[t]here is... no basis for any distinction between

real property and contract rights: both are subject to the State's right of eminent domain."

107. While that concession alone would suffice to condemn the Respondents' argument, the Tribunal notes that nothing in Article IV, paragraph 2 suggests that the word "property," as used in that paragraph, should be construed as applying only to rights in tangible assets. No convincing explanation has been adduced to justify such a narrow interpretation, which is not in line with the common usage of the word, nor with the express terms of the Treaty protecting not only "property" but also "interests in property."

108. Clearly the purpose of the second sentence of Article IV, paragraph 2 is to protect the property of the nationals of one party against expropriation by the other party. Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value. The rights created by the Khemco Agreement had such a monetary value as was expressly recognized in the Khemco Agreement itself. Article 20 provides that the shares of either party could be transferred under certain conditions to any other company or companies and Article 24 granted NPC the right to purchase the shares of Amoco upon the termination of the Khemco Agreement. It is because Amoco's interests under the Khemco Agreement have such an economic value that the nullification of those interests by the Single Article Act can be considered as a nationalization.

109. More generally, it would be incongruous if Article IV, paragraph 2 could be construed as granting protection only against certain acts of expropriation, and not against others, according to the nature of the rights expropriated. Any interpretation of the term "property" to this effect would lead to "a manifestly absurd or unreasonable" result within the meaning of Article 32, paragraph b of the Vienna Convention. It therefore cannot be admitted.

110. As to the Respondents' objection that Amoco, as a Swiss corporation, is outside the protection of the Treaty, the Tribunal agrees that the legal protection afforded by the Treaty applies only to nationals of the parties to the Treaty. As a Swiss corporation, Amoco could not invoke such protection, just as it is not allowed to bring a claim before this Tribunal, which under the CSD has jurisdiction only over claims submitted by nationals of Iran or of the United States. In the present Case, however, the Claimant is not Amoco, but AIFC, the United States corporation which wholly owns and controls Amoco. AIFC relies on the terms of Article VII, paragraph 2 of the CSD, which defines "claims of nationals" as including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in judicial persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this agreement.

111.

This phraseology is more elaborate than the simple phrase "interests in property" used in Article IV, paragraph 2 of the Treaty, and it contains specifications which substantially narrow its ambit. But, apart from this, the meaning is not very dissimilar. The property interests assertedly protected by the Treaty are not those of Amoco, but of AIFC. The term "interests in property" in ordinary usage, refers to the interests that one entity can own in the property of another entity. If such interests are owned by a national of one party to the Treaty, they are protected by the Treaty. See Sedco, Inc. and National Iranian Oil Company, Award No. 309-129-3, pp. 22-23 n. 9 (7 July 1987). The Tribunal concludes, accordingly, that the rights invoked by the Claimant fall within the scope of Article IV, paragraph 2 of the Treaty, which therefore is applicable.

(ii) Customary International Law

112. As a lex specialis in the relations between the two countries, the Treaty supersedes the lex generalis, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the Treaty to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.

113. It is worthwhile, in this context, to compare the provisions of Article IV, paragraph 2 of the Treaty with the customary rules of international law in the field of expropriation. A leading expression of these rules is the judgment of the Permanent Court of International Justice in the Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland), 1926 P.C.I.J., Ser. A, No. 7, (Judgment of 25 May 1926). As reflected in this case, the principles of international law generally accepted some sixty years ago in regard to the treatment of foreigners recognized very few exceptions to the principle of respect for vested rights. The Court listed among such exceptions only "expropriation for reasons of public utility, judicial liquidation and similar measures." Id. at 22. A very important evolution in the law has taken place since then, with the progressive recognition of the right of States to nationalize foreign property for a public purpose. This right is today unanimously accepted, even by States which reject the principle of permanent sovereignty over natural resources, considered by a majority of States as the legal foundation of such a right.

114. The importance of this evolution derives from the fact that nationalization is generally defined as the transfer of an economic activity from private ownership to the public sector. It is realized through expropriation of the assets of an enterprise or of its capital stock, with a view to maintaining such enterprise as a going concern under State control. Modern nationalization often brings into State ownership a number of enterprises of the same kind and may even be applied to all enterprises in a particular industry. It may result, therefore, in a taking of private property of much greater magnitude than the traditional expropriation for reasons of public utility, and is also of a very different nature, since it is always linked to determined political choices. For these reasons, and because it applies to going concerns, taken as such, modern nationalization raises specific legal problems, notably in relation to the issue of compensation.

115. The provisions of Article IV, paragraph 2 of the Treaty must be read against this background, since the negotiation of the Treaty must be presumed to have taken place in this legal context. Although the provisions are phrased in a negative form and emphasize the principle of the respect due to foreign property, they nevertheless amount to a clear recognition of the right to nationalize. In stating that "[s]uch a property shall not be taken except for a public purpose," the Treaty implies that an expropriation which is justified by a public purpose may be lawful, which is precisely the rule of customary international law.

116. The other condition to a lawful expropriation provided for in the same paragraph is "the prompt payment of just compensation," an obligation which is also accepted as a general rule of customary international law as well. While a few recent resolutions of international bodies or conferences, including the General Assembly of the United Nations, have cast doubts on the existence of an international rule to this effect (see especially the Charter of the Economic Rights and Duties of States, G.A. Res. 3281 (XXIX) (12 December 1974)), other less controversial resolutions, such as G.A. Res. 1803 (XVII) (14 December 1962) on the Permanent Sovereignty over Natural Resources, confirm the existence of the rule. Furthermore, the rule is generally recognized and applied by international tribunals and reflected in the practice of States, notably in numerous conventions relating to the treatment of foreign property or to the settlement of disputes arising from nationalizations. A number of such awards and conventions were referred to by both Parties in their pleadings. The Treaty on this point is just another example of such a practice.

117. The rules of customary international law relating to the determination of the nature and amount of the compensation to be paid, as well as of the conditions of its payment, are less well settled. They were, and still are, the object of heated controversies, the outcome of which is rather confused. Terms such as "prompt, adequate and effective," "full," "just," "adequate," "adequate in taking account of all pertinent circumstances," "equitable," and so on, are currently used in order to qualify the compensation due, and are construed with broadly divergent meanings. The parties to the Treaty agreed on a common position on this problem by the choice of the term "just compensation" and by listing, in the last sentence of Article IV, paragraph 2, what should be included under this term. The wording of the sentence, however, does not solve the problem of the method to be used in order to determine the value of the property or interest in property which was expropriated.

b) The Application of the Law to the Facts of the Instant Case

118. The Claimant lists five arguments in support of its contention that the expropriation was unlawful: (1) the expropriation was "supported by no shadow of legal authority or regularity under Iranian law;" (2) no compensation was paid and no offer of compensation was made prior to the taking; (3) the expropriation was discriminatory; (4) the expropriation violated the Khemco Agreement, including its stabilization clauses; and (5) the decision to expropriate was not prompted by a public purpose but by the motive to avoid contractual obligations and to stop paying a share of profits. All

these arguments are rejected by the Respondents. The Tribunal will consider them seriatim below.

(i) The Alleged Violation of Iranian Law

119. According to the Claimant, the expropriation of its rights in the Khemco Agreement was a violation of the 1965 Act Concerning Development of Petrochemicals Industries, which was in force at this time and which provided for the enforcement of such an agreement, once entered into and approved by the government and the competent parliamentary committees. The Claimant alleges furthermore that no statute or decree authorized the expropriation, which is therefore devoid of any legal basis. The Claimant denies that the Single Article Act and the decision of the Special Commission furnish such basis for several reasons. First, the Single Article Act and decision came much too late, since, according to the Claimant, the expropriation was complete by 1 August 1979, more than five months before the adoption of the Single Article Act. Second, the Single Article Act did not authorize or ratify takings of property; its only purpose was to authorize the Special Commission to declare contracts "null and void." Third, the Special Commission's decision was itself unlawful because it lacked fair procedure and any legal basis for its declaration. Finally, this decision did not purport to effect a nationalization, but merely repudiated ("nullified") the Khemco Agreement.

120. Conformity with domestic law is not usually cited as a condition for an internationally lawful nationalization, and the Treaty specifies no such condition. It is therefore doubtful whether it is one of the requisites of international law. The case law on this point is not very helpful. Violation of domestic law, when invoked, is most often analyzed as evidence of the lack of fulfillment of one of the conditions imposed by international law, such as the existence of a public purpose, as in the Amco Asia case referred to by the Claimant, Amco Asia Corporation and Republic of Indonesia, 24 Int'l Legal Mat'ls 1022, 1030-31, paragraph 190 (1985), or of the payment of compensation.

121. In any event, a judgment on the compatibility of the expropriation with Iranian law requires a determination of the divergent views of Parties of the facts constituting the nationalization. It is now necessary to scrutinize these facts more closely.

122. As noted above, the Claimant alleges that NPC and NIOC "moved to exclude [Amoco] from its rightful role in the management of Khemco, in violation of the Khemco Agreement" approximately in April 1979, when the chairman of the board of NPC "declared publicly that Iran sought to purchase all foreign interest in its petrochemical industry" and "specially identified Amoco International's interests in Khemco as one investment that Iran sought to purchase." The Claimant identifies the following events and decisions as having effectuated the taking by 1 August 1979:

> In May 1979 the chairman of the board of NPC advised Amoco that the expatriate United States citizens employed by Khemco who had been forced to leave Iran for reasons of personal safety in December 1978 would not be permitted to return to Iran;
>
> By letter dated 27 June 1979, the same chairman informed Khemco that from then on the sale

of products of NPC "complexes," including Khemco, would be managed by NPC. This policy was explicitly rejected at Khemco's board of directors meeting on 7 July;

On 11 July 1979, NPC and NIOC decided nevertheless that all sales of liquids produced by Khemco would be handled by NIOC and all sales of sulfur produced by Khemco handled by NPC, the proceeds of all sales would be deposited in an account of NPC and all Khemco expenses borne by NPC;

By letter dated 17 July 1979 NPC directed Khemco's managing director to implement the decisions just described;

By letter dated 18 July 1979, Khemco's managing director agreed to put into effect those directives;

The dividend declared at a 7 July 1979 meeting of Khemco's shareholders was never paid to Amoco and Amoco has not, since 1978, received any of the loans and dividends to which it was entitled under the Khemco Agreement.

123. According to the Claimant, the "cumulative effect" of those actions "was totally to deprive Amoco International of its rights under the Khemco Agreement and interest in Khemco by August 1, 1979" so that Amoco's "rights thereunder, including its ownership interests in Khemco, had been expropriated." Subsequent events "confirmed" the repudiation of the Khemco Agreement and the expropriation, notably a declaration by the Acting Foreign Minister of Iran, on 15 November 1979, "that all American assets in Iran had been nationalized," and a telex dated 24 December 1980 from Iran's Minister of Petroleum, which advised Amoco that the Khemco Agreement had been declared "null and void" by the Special Commission established pursuant to the Single Article Act.

124. It appears from this recital that the Claimant does not rely on any single act of nationalization, but considers that the expropriation of Amoco's contractual rights and interests in property was the result of a series of decisions of NIOC and NPC from May to July 1979, none of which can be singled out as an act of expropriation. In other words, the expropriation was the result of a process, which extended over several months, rather than of a discrete legal decision. The date of 1 August 1979, identified by the Claimant as the date of expropriation, does not correspond to a specific action or event, but was chosen for reasons of convenience as the first day of the first month following the time at which the deprivation of its rights, according to the Claimant, was complete.

125. The Tribunal agrees that the expropriation which took place in this Case was the outcome of a lengthy process, but it finds that the precise character of this process was, at the beginning and for a rather long period of time, ambiguous. The starting point of this process, according to the Claimant, is a declaration by the managing director of NPC that Iran sought to purchase all foreign interests in its petrochemical industry. The documents produced by the Claimant evidence that this intention of purchasing Amoco's interests in Khemco was announced at an early stage to Amoco and that both parties agreed to start negotiations to this end. Express reference to these negotiations is made in the minutes of the meeting of 11 July 1979, at which it was decided that the sales of Khemco products would be handled by NIOC and NPC. In a telex dated 6 August 1979, that is, after the date on which the Claimant believes the expropriation to be complete, Amoco expressly

mentions the discussions pending between the parties on the purchase of Amoco's interests in Khemco and invokes them in support of its protest against the measures taken for the marketing of Khemco products, which, Amoco said, "amounts to nationalization."

126. In view of these facts, the Tribunal finds it difficult to accept the theory that an expropriation had taken place on 1 August 1979. It is well established that at this time, and already from April 1979 onwards at least, Iran had decided to acquire Amoco's share in the capital stock of Khemco. It seems equally clear that Amoco arrived at the conclusion that, in the circumstances then prevailing in the country, it had no future in the petrochemical industry in Iran. Both parties were substantially in agreement to terminate the participation of Amoco in Khemco. The way contemplated by the parties at the time, in order to arrive at such a result, was a purchase of Amoco's rights by NIOC, but according to their declarations before the Tribunal, serious differences concerning the price to be paid necessitated negotiations in order to try to solve this problem.

127. It was apparent that the negotiations to be conducted would be difficult and lengthy, but the final transfer of Amoco's rights could not be doubted by either party. Pending their outcome, NIOC and NPC decided to take a certain number of decisions relating to the management of Khemco. These decisions were the result of the situation then existing in Iran in the first months following the revolutionary change of government. They were rejected by Amoco's board of directors, but implemented by Khemco's managing director, in spite of Amoco's protest. The evidence that the decision of Amoco's board of directors was ignored on this matter does not affect the fact that at this time the Respondents were contemplating a purchase of Amoco's rights at a price to be agreed upon, rather than an expropriation.

128. The Tribunal is not aware of the way in which the purported negotiations were pursued during the following months or even whether such negotiations actually took place. The Claimant contends that, after the measures taken in the matter of marketing, it could no longer pursue negotiations. The events of November 1979, in any case, dramatically changed the whole situation and made it impossible for both parties to conduct any discussions. Eventually a new stance was taken by the Iranian authorities, which decided to include the Khemco Agreement on the list of contracts nullified pursuant to the Single Article Act. The decision by the Special Commission, notified on 24 December 1980, declaring the Khemco Agreement "null and void," was the final act of the process started in April 1979. It was also the first decision taken directly by a governmental authority.

129. The Claimant contends that "the Act did not nationalize Claimant's property or even purport to ratify the prior taking; it merely authorized the Special Commission to declare contracts 'null and void.'" It adds that the nullification was unlawful, since it "violated due process and because no adequate legal basis for a declaration of nullity was offered or could be offered." This last objection cannot be sustained since the decision of the Special Commission was taken pursuant to the Single Article Act, which is of a legislative nature. This fact suffices to give it a legal basis.

130. Formally, it is true that the Khemco Agreement was declared "null and void" by the Special Commission, pursuant to the terms of the Single Article Act. The real issue, however, is to determine how such a decision must be characterized in international law, which is the applicable law. In view of the tremendous political importance of the Single Article Act in the attainment of the objectives of the Islamic Revolution in Iran, the international legal meaning of this Single Article Act can certainly not be ascertained without placing it in the context of the events which

took place at this time in Iran, and without taking into account the political and legal position of the Islamic Government towards the previous regime.

131. The Single Article Act relates to the oil industry, which is not only Iran's major industry and source of revenue, but which has played a major role in the politics of Iran since the time of Mossadegh's national government. It is generally recognized that the strikes in the oil industry were decisive in the upheaval which led to the overthrow of the Shah and the establishment of a revolutionary government and that the exclusion of all foreign interests in the oil industry was one of the main objectives of the revolutionary movements. Since such interests were based on contracts executed after the Shah's return in 1953, numerous declarations of the new authorities tended to affirm that all such contracts were in violation of the 1951 Nationalization of the Iranian Oil Industry Act, and, therefore, null and void. The Single Article Act was framed in order to comply with this political, rather than legal, aim. It does not carry all the consequences of the theory of the nullity of the contracts, however, since it provides that compensation might be paid in case of nullification. As a matter of fact, its effect was a complete re-nationalization of the oil industry and, for all practical purposes, it amounted to a nationalization of the rights of the foreign parties to the nullified contracts. Such a construction of the Single Article Act as a measure of expropriation is, furthermore, expressly conceded by the Respondents. The Tribunal finds that it correctly defines the real meaning in international law of the Single Article Act and of the decision of the Special Commission.

132. The analysis of all the relevant facts known to the Tribunal thus reveals that the process which led to the expropriation of Amoco's rights and interests in Khemco was complete only on 24 December 1980, with the notification of the decision of the Special Commission. This process, which started more than twenty months before, was exceptionally lengthy, due to the extraordinary events which took place during this period. It also changed orientation over time, since, even if its original purpose was the transfer of Amoco's rights and duties to NPC, such a transfer was initially not contemplated to be accomplished by way of expropriation. Such a purpose was eventually realized by a decision taken under a procedure decided by a legislative act, the legality of which, under Iranian law, cannot be doubted by this Tribunal. The Claimant's argument that the expropriation was made in violation of Iranian law, therefore, is rejected.

(ii) Lack of Compensation

133. According to the Claimant, the "expropriation of Amoco International's rights, interests and property under the Khemco Agreement was wrongful because no compensation has been paid for this taking."

134. The Respondents reject this argument. They emphasize that the Single Article Act provided that compensation would be paid and that the Special Commission was empowered to determine its amount. They insist that Amoco never availed itself of the opportunity provided by the Single Article Act and never applied for compensation, while a number of settlement agreements were arrived at with other expropriated companies of various nationalities, including American companies, and the compensation payments were actually made. According to the Respondents, the Claimant cannot complain that there was no due process, since the expropriated companies were free to produce all documents they wanted in support of their demands and could be heard by the

Commission. Neither, they assert, is it reasonable for the Claimant to contend that the compensation was not adequate, since neither the Claimant nor Amoco sought compensation and other companies considered the compensation offered to be adequate, and accepted it.

135. Article IV, paragraph 2 of the Treaty provides that the property of nationals and companies of either Party "shall not be taken... without the prompt payment of just compensation." The following sentence adds more precisely that

> [S]uch compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

136. The question of the standard of compensation, i.e., what is "the full equivalent," will be discussed in a later section of this Partial Award (see Section IV.C infra). For the present purposes, it suffices to note that the Treaty does not require that the amount of the compensation should be determined at or prior to the time of the taking. It only provides that "adequate provision shall have been made" in due time. The implementation of such a provision raises some problems in the case of an expropriation realized through a process which extended for more than twenty months, as in the present Case. However, the transfer of property formally took place upon the decision of the Special Commission, notified on 24 December 1980, and the provisions relating to the payment of compensation were included in the Single Article Act and hence made "at or prior to the time of the taking."

137. Another issue is to determine whether the provisions of the Single Article Act relating to compensation were "adequate," in the meaning of the Treaty. In so far as it does not apply to the compensation itself, but to the procedure for determining such compensation, this term is not very often used in practice and does not have a specific legal connotation. Taking into account the ordinary meaning of the term, the Tribunal considers that, to be "adequate," the provisions for the determination and payment of compensation must provide the owner of the expropriated assets sufficient guarantee that the compensation will be actually determined and paid in conformity with the requisites of international law, that is, in the present Case, that "just compensation" will be promptly paid. This does not necessarily imply that a judicial procedure should be set up to this effect. As a matter of fact, such a procedure is seldom provided for in the practice of States. More usually, compensation is decided by administrative authorities, very often without formal negotiation with the interested parties, but, in many cases, in implementation of principles defined by statute, or by constitutional law, with a possible recourse to ordinary judicial remedies.

138. The Single Article Act does not fix any standard for the compensation to be paid, but only empowers the Special Commission to determine such compensation. In practice, the Special Commission instituted negotiations with the companies party to the nullified contracts, in order to arrive at settlement agreements. Furthermore, in case of failure of the negotiations, the interested companies were entitled to have recourse to the procedures of settlement provided for in the contracts, usually by international arbitration. A number of settlement agreements were in fact executed and, in a few cases, arbitration procedures took place. In view of these facts, the Tribunal

deems that the provisions of the Single Article Act for compensation were neither in violation of the Treaty nor, indeed, in violation of rules of customary international law.

(iii) Discrimination

139. In support of its contention that the expropriation was discriminatory, the Claimant relies on the fact that, in another of NPC's joint ventures, the Japanese share of a consortium, the Iran-Japan Petrochemical Company ("IJPC"), was not expropriated. In contrast, all American interests in petrochemical joint ventures with NPC were expropriated. The Claimant thus argues that the expropriation of Amoco's interest in Khemco was based on discrimination against American interests and was unlawful for this reason.

140. Discrimination is widely held as prohibited by customary international law in the field of expropriation. Although Article IV, paragraph 2 does not expressly prohibit a discriminatory expropriation, paragraph 1 of the same article obliges each party to "refrain from applying unreasonable or discriminatory measures that would impair [the] legally acquired rights and interests" of the nationals and companies of the other party. This wording is so broad that it certainly applies to expropriations. In any event, the Respondents recognize that a discriminatory expropriation is wrongful, but deny that the expropriation was discriminatory in the instant Case.

141. The Respondents assert that the Single Article Act applied to the entire oil industry, irrespective of the nationality of the foreign companies involved in this industry. In the event, it was applied to non-United States corporations as well as United States corporations. Therefore, it can not be held to be discriminatory. That the Special Commission did not include the contract with IJPC among those which were nullified, the Respondents submit, was an exception due to specific circumstances. They mention specifically the fact that the operation of the IJPC joint venture was not closely linked with other contracts relating to the exploitation of oil fields, whereas the operation of the Khemco plant was linked to the supply of gas from the oil fields operated jointly by Amoco and NIOC pursuant to the JSA. Furthermore, the Respondents emphasize that IJPC was not yet an operational concern at the relevant time, a point that was confirmed by the Claimant.

142. The Tribunal finds it difficult, in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated. Reasons specific to the non-expropriated enterprise, or to the expropriated one, or to both, may justify such a difference of treatment. Furthermore, as observed by the arbitral tribunal in 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, 1019, a coherent policy of nationalization can reasonably be operated gradually in successive stages. In the present Case, the peculiarities discussed by the Parties can explain why IJPC was not treated in the same manner as Khemco. The Tribunal declines to find that Khemco's expropriation was discriminatory.

(iv) Breach of Contract

143. The Claimant's contention that the expropriation was unlawful under international law because it violated the Khemco Agreement intermingles with its alternative theory that the Respondents are liable for breach of contract. In order to avoid repetition, the Tribunal will deal with this objection in the Section devoted to the discussion of this second theory.

(v) Lack of Public Purpose

144. When referring to the reasons why the Japanese interests in IJPC were not expropriated, the Claimant's counsel suggested, during the Hearing, that "a principal motive and perhaps the principal motive" for the expropriation of Khemco was simply to free NPC from the obligations created by the Khemco Agreement and, particularly, from the obligation to share the profits of the venture. The Claimant asserted that such a motive certainly is not legitimate. Counsel added that "only the ventures where all the money had been put up were expropriated, not the others." This last remark, indeed, suggests a differentiation for financial reasons rather than a discrimination on the basis of nationality.

145. A precise definition of the "public purpose" for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that States, in practice, are granted extensive discretion. An expropriation, the only purpose of which would have been to avoid contractual obligations of the State or of an entity controlled by it, could not, nevertheless, be considered as lawful under international law. See AMINOIL, supra, para. 109, 21 Int'l Legal Mat'ls at 1025. Such an expropriation, indeed, would be contrary to the principle of good faith and to accept it as lawful would run counter to the well-settled rule that a State has the right to commit itself by contract to foreign corporations. Id. para. 90, 21 Int'l Legal Mat'ls at 1021-22. It is also generally accepted that a State has no right to expropriate a foreign concern only for financial purposes. It must, however, be observed that, in recent practice and mostly in the oil industry, States have admitted expressly, in a certain number of cases, that they were nationalizing foreign properties primarily in order to obtain a greater share, or even the totality, of the revenues drawn from the exploitation of a national natural resource, which, according to them, should accrue to the development of the country. Such a purpose has not generally been denounced as unlawful and illegitimate.

146. The Tribunal need not determine the delicate legal issues raised in the preceding paragraph. It cannot be doubted that the Single Article Act was adopted for a clear public purpose, namely to complete the nationalization of the oil industry in Iran initiated by the 1951 Nationalization of the Iranian Oil Industry Act, with a view to implementing one of the main economic and political objectives of the new Islamic Government. The decision of the Special Commission relative to Khemco was taken in apparent conformity with the Single Article Act. Even if financial considerations were considered in the adoption of such a decision -- which would have been only natural, but which has not been evidenced -- this fact would not be sufficient, in the opinion of the

Tribunal, to prove that this decision was not taken for a public purpose.

147. In conclusion the Tribunal finds that the Claimant's arguments so far considered do not sustain the contention that the expropriation of Khemco was unlawful. The Tribunal has yet to consider the allegation that the Respondents' breached the Khemco Agreement. This question and its possible consequences on the lawfulness of the expropriation will be discussed in the following section.

5. Breach or Repudiation of Contract

a) The Issue

148. The Claimant's alternative theory that the Respondents are responsible for breach and repudiation of the Khemco Agreement is based on the same facts that were invoked as evidence of expropriation. According to the Claimant, Amoco was wrongfully deprived of its lawfully acquired rights under the Agreement by NPC, NIOC, Iran and Khemco. Amoco was excluded from the management of Khemco allegedly contrary to Articles 4 and 5 of the Khemco Agreement and excluded from its rights to use Khemco's net cash flow on an interest free loan basis and from its rights to dividends allegedly contrary to Article 22 of the Khemco Agreement. All that occurred before the end of July 1979. The deprivation of Amoco's management rights was confirmed on 13 December 1979 when the Amoco-nominated managing director was not permitted by NPC to assume his office. The Claimant also alleges a breach of what it calls the "stabilization clauses" of the Khemco Agreement.

149. The Claimant contends that this claim arises under international law. The Claimant maintains that the Khemco Agreement "belongs to a special category of international contracts referred to as economic development agreements." For the Claimant, such contracts "by their nature require that they be insulated from the disruptive effects of changing municipal law" and therefore "the law from which they derive their binding force (loi d'enracinement) is international law." In support of this assertion, the Claimant relies on Article 30, paragraph 1 of the Khemco Agreement, which, according to the Claimant, provides that the terms of the Khemco Agreement must first govern the interpretation and implementation of the Khemco Agreement and that the laws of Iran apply only "subject thereto." Furthermore, in case of inconsistency between the terms of the Khemco Agreement and the laws of Iran, the former must prevail. "Consequently this Tribunal should enforce the contract according to the plain meaning of its terms and should not apply Iranian Law except insofar as it is consistent with the terms of the contract and furthers the intentions of the parties as manifested in the contract."

150. The practical consequences of this analysis, according to the Claimant, are that the Khemco Agreement would not only be governed by the principle of good faith mentioned in Article 21 of the Khemco Agreement, but also by the rule pacta sunt servanda. Therefore any breach of the Khemco Agreement would also be a breach of international law, for which the State is internationally responsible.

151. The Respondents completely reject this analysis. According to them, "the power of the State in the

exercise of eminent domain to annul contracts, is generally recognized in municipal legal systems and, a fortiori, cannot be questioned in international law." This right is not precluded by the terms of the Khemco Agreement. Furthermore, the fact that Iran was not a party to the Khemco Agreement and thus was not bound by its terms, excludes the possibility of a breach of contract by Iran.

152. As to the remaining Respondents, the Respondents consider, on the basis of Article 30 of the Khemco Agreement, that Iranian law governs the Khemco Agreement and must be applied by the Tribunal. They assert that under Iranian law the Agreement was frustrated by force majeure. They contend further that the concept of "changed circumstances" incorporated in Article V of the CSD must also be applied to the interpretation and implementation of the Khemco Agreement and they assert their conclusion that the Khemco Agreement was terminated by frustration. Since the Khemco Agreement allegedly was terminated before any breach took place, the Respondents deny that there can be any breach of contract.

153. The Tribunal will address the Claimant's allegation of contract breach after a discussion of a preliminary question which has a direct bearing on the solution to this issue, namely the question of the law applicable to the contract.

b) The Law of the Contract

154. In the present context the issue of the applicable law is quite different from the question of the law applicable to expropriation. It relates to the problem known in conflicts of laws, or private international law, as "the law of the contract," namely the law governing the validity, interpretation and implementation of the Khemco Agreement. Although such a distinction is rather simple, the discussion of the two issues by the Parties was not always pursued without some confusion.

155. The choice of the parties relating to the law of the Khemco Agreement appears in Article 30, headed "Applicable Laws," which reads as follows:

> 1. This Agreement shall be construed and interpreted in accordance with the plain meaning of its terms, but subject thereto, shall be governed and construed in accordance with the laws of Iran.
>
> 2. The provisions of any current laws and regulations which may be wholly or partly inconsistent with the provisions of this Agreement shall, to the extent of any such inconsistency, be of no effect in respect of the provisions of this Agreement.

156. Construed according to the ordinary meaning of the terms, Article 30, paragraph 1 provides that an interpretation of the Khemco Agreement must be based first on the terms thereof. This is, of course, the normal way of interpreting a contract. If problems arise which cannot be solved in this way, the interpreter will have to look at the laws of Iran, which is also the usual way of applying the law of the contract in practice. On the basis of this reading, the Tribunal cannot accept that

Iranian law plays only a subordinate role, as contended by the Claimant. Nor is the Tribunal convinced that the Khemco Agreement should be characterized as an agreement governed, by nature, by international law. Such a construction is manifestly contrary to the plain meaning of the terms of Article 30, paragraph 1. It is clear that the parties chose Iranian law as the law of the contract and no reason appears for reading the provisions otherwise.

157. Paragraph 2 of Article 30 does not change this conclusion; it only qualifies it. The purpose of this paragraph was not to submit the Khemco Agreement to law other than Iranian law, but only to solve any question which may arise in case of inconsistency between the "current laws and regulations" of Iran and the terms of the Khemco Agreement itself. In such a case the terms of the Khemco Agreement would nevertheless be considered as valid and binding on the parties. Thus, the contractual regime established by the Khemco Agreement may constitute an exception to the legal regime otherwise existing in Iran.

158. The Khemco Agreement was thus of a specific nature, since its provisions could be contrary to Iranian law without losing their binding force on the parties. In fact, a series of clauses of the Khemco Agreement determine how a number of public laws of Iran would apply to the parties in the implementation of the Khemco Agreement (see, inter alia, Articles 9, 10, 14, 15, 16, 17 and 18). For this reason, the provisions of Article 2 required NPC to submit the Khemco Agreement for approval and ratification by the High Council for Petroleum Industries, NIOC, the Council of Ministers and the Joint Economic and Financial Committees of the Majlis.

159. Nothing in Article 30, paragraph 2 or Article 2 militates against the choice of Iranian law as the law of the contract made in Article 30, paragraph 1. Article 2 only provides for the approval by the competent Iranian authorities necessary to authorize those articles of the Khemco Agreement which establish a special regime within the framework of Iranian law. Article 30, paragraph 2, clearly intended that articles which are not inconsistent with Iranian law, as it existed at the time of execution of the Khemco Agreement, are subject to it as provided in Article 30, paragraph 1.

160. The law of the contract applies only to the interpretation and implementation of the Khemco Agreement (and possibly to its validity) as between the parties. Therefore, while it certainly applies to NPC and Amoco, as well as to Khemco, it does not apply to NIOC, which was not a party to the Khemco Agreement. The issue then arises as to whether the law of the contract applies to the other Respondent, namely Iran.

161. It cannot easily be found that Iran became a party to the Khemco Agreement through approval and ratification thereof pursuant to Article 2. The Preamble clearly identifies the parties between which the Khemco Agreement is concluded as NPC and Amoco, and makes reference, several times, to them as "both parties." While NPC is controlled by Iran and was established pursuant to a State law, it has a legal personality distinct from that of the State and NPC contracted only for itself.

162. It can be admitted that, in certain circumstances, the separate personality of an entity fully controlled by a State can be discarded and the State considered as bound by the terms of a contract entered into by such an entity. See K.-H. Bockstiegal, Arbitration and State Enterprises 34-48 (1984); K.-H. Bockstiegel, "The Legal Rules Applicable in International Commercial Arbitration Involving States or State-Controlled Enterprises," in International Chamber of Commerce, 60 Years On -- A Look at the Future 117, 130-46 (1984). Such a conclusion, however, can legitimately be drawn only

if this entity acted as an instrument of the State. The Tribunal is not satisfied that such was the case in the present instance. It is true that the development of petrochemical industries was considered by the Iranian Government as an important goal of the development policy of the country, and was promoted by the enactment in 1965 of an Act authorizing NPC to enter into joint ventures with foreign companies to this effect, and providing for tax exemptions and other privileges beneficial to such joint ventures. Such legislation, however, clearly shows that the State had no intention itself to engage in such industrial and commercial endeavors and left NPC to take the financial and commercial risks associated with them. In approving and ratifying the Khemco Agreement, the Iranian authorities only acted pursuant to Article 1 of the Act concerning Development of Petrochemical Industries of 15 July 1965 ("the Act of 15 July 1965"), in order to permit Khemco to enjoy the statutory exceptions and privileges defined by Article 3 thereof. This approval and ratification were the conditions of application of the Act of 15 July 1965 to the Khemco Agreement but, for the reasons just set forth, cannot be considered binding Iran as a party to the Khemco Agreement.

163. The obligations of the government described in Article 2, paragraph 2 of the Khemco Agreement are based on Iranian law (and not international law), irrespective of the law governing the Khemco Agreement as between the parties. This is made clear in Article 1 of the Act of 15 July 1965, which does not require that agreements establishing joint ventures in implementation of that act be governed by Iranian law. These obligations, under the Act of 15 July 1965, as well as under the Law Concerning the Attraction and Protection of Foreign Investment in Iran of 28 November 1955, are referred to in Article 2, paragraph 2 and may be amended in the future, as expressly provided in the same Article. Such an amendment would not be forbidden by Article 30, paragraph 2, which is fully consistent with Article 2.

164. The conclusion to be drawn from the preceding analysis is that the obligations embodied in the Khemco Agreement are obligations only as between the parties, namely NPC and Amoco, and as between the parties and Khemco, within the limits set forth in Article 28. Iran's obligations are only those embodied in the two Acts of 1955 and 1965 in so far as they are also defined in the Khemco Agreement. Since only the rights of the parties in their mutual relationship, including matters of management and share of dividends and loans, are at stake in the present Case, such rights can in no way be construed as creating obligations on the State. Iran is thus not liable for breach of contract on this basis. Such a finding was probably envisaged by the Claimant and it could be the reason why it laid great emphasis on the applicability of what are called the stabilization clauses.

c) The "Stabilization" Clauses

165. The Claimant alleges that the conduct of Iran in terminating the Khemco Agreement violated two articles thereof which the Claimant characterizes as "stabilization" clauses, namely Article 21, paragraph 2 and Article 30, paragraph 2. These clauses are actually quite different in nature, as revealed by the heading of the respective articles. Article 21 is headed "Guarantee of Performance and Continuity" and Article 30 "Applicable Laws."

166. Article 30, paragraph 2, as discussed above, had the effect of affirming the validity of contractual clauses inconsistent with Iranian laws and regulations. This cannot be considered as a stabilization clause in the usual meaning of the term, however, since that term normally refers to contract

language which freezes the provisions of a national system of law chosen as the law of the contract as of the date of the contract, in order to prevent the application to the contract of any future alterations of this system. Article 30, paragraph 2 applied only to the provisions of any current laws and regulations, clearly referring solely to the laws and regulations existing at the time of execution of the Khemco Agreement. Therefore it provided no guarantee for the future and is not a stabilization clause.

167. Article 30, paragraph 2, furthermore, must be read in conjunction with Article 2, which, as already noted, referred to the grant of facilities and privileges conferred by the Government under the two Acts, but with the proviso that "any future amendments to such Acts" would also apply. This is the contrary of a stabilization clause.

168. Article 21, paragraph 2 is of a quite different nature. It does not relate to applicable law but to performance of the Khemco Agreement. It reads as follows:

> Measures of any nature to annul, amend or modify the provisions of this Agreement shall only be made possible by the mutual consent of NPC and AMOCO.

169. The Claimant contends that this paragraph must be read in conjunction with the first paragraph of the same Article by which the parties to the Khemco Agreement undertook to perform the Khemco Agreement "in accordance with the principles of mutual good will and good faith and to respect the spirit as well as the letter of the provisions of the Agreement." It maintains that the reference to the principle of good faith is a clear indication of the intention of the parties to submit the contract to international law, where this principle plays an important role. The Tribunal cannot accept such a construction in view of the clear wording of Article 30. The principles of good will and good faith apply in practically all systems of law to contracts as well as to treaties. Article 21, paragraph 1 simply sets forth a principle of interpretation and implementation of the Khemco Agreement, which, as a long-term contract, implies a continuous cooperation between the parties and therefore must not be performed in a strict and formalistic way.

170. Paragraph 2 of Article 21 has a more precise meaning in so far as it prohibited changes in the provisions of the Khemco Agreement by unilateral measures. According to the Claimant the term "measures" in this context refers to legislative or regulatory measures. Such an interpretation is not easily reconcilable with the terms of Article 21, however, which mentions "[m]easures of any nature" and distinctly states that such measures "shall only be made possible by the mutual consent of NPC and Amoco," neither of which has power to take legislative or regulatory measures.

171. Article 21, paragraph 2 led the Parties to a discussion about the nature of the Khemco Agreement. It was questioned whether the Khemco Agreement was an administrative agreement, an international agreement or an economic development agreement. The Tribunal does not see any reason to decide this issue. It observes, however, that in State practice relating to contracts in the oil industry, at the time of the drafting of the Khemco Agreement and before, numerous examples of unilateral changes imposed by States parties to agreements with foreign companies can be found. For this reason, contracts concluded at this time often include a clause of renegotiation, in order to avoid such unilateral changes. This applies to contracts between foreign companies and States as well as to contracts between such companies and national entities controlled by the States,

such as NPC in the present Case. On its face, Article 21, paragraph 2 appears to be a guarantee against unilateral changes by one party.

172. This does not mean, however, that Article 21, paragraph 2 imposed an obligation on the government of Iran. It certainly creates obligations for NPC and Amoco, confirming the preceding conclusions that they are the only parties to the Khemco Agreement. It should be noted that Khemco is not mentioned in Article 21, although pursuant to Article 28 Khemco is to be treated "as if [it] were" a party to the Khemco Agreement, but it did not become a party to the Khemco Agreement in the fullest sense of the term. Similarly, the government did not become a party to the Khemco Agreement and had nothing to do with the process of amending it.

173. In conclusion, the Tribunal does not find that the Khemco Agreement contains any "stabilization" clauses binding on the government. The clauses referred to by the Claimant bind only the parties to the Khemco Agreement, namely NPC and Amoco. According to its own terms, Article 30, paragraph 2 cannot be construed as a stabilization clause and Article 21, paragraph 2 only prohibits unilateral measures by NPC or Amoco to "annul, amend or modify" the provisions of the Khemco Agreement.

d) Breach of Contract as a Separate Basis of Claim

174. From the previous finding of the Tribunal that Iran was not party to the Khemco Agreement it is apparent that only NPC or Khemco could be held responsible for breach of contract. The facts of this Case demonstrate, however, that although NPC acted only for itself when it concluded the Khemco Agreement, it acted as an instrument of the Iranian Government when it took, together with NIOC, the measures characterized by the Claimant as breach and repudiation of the Khemco Agreement. It has already been emphasized that the minutes of the meeting at which these measures were adopted expressly reflect that they were taken "[i]n consideration of Government's policy that all sales of hydrocarbons produced in the country must be made by NIOC." See paragraph 64, supra. This clearly evidences that NPC did not act in its own interest, but as a performer of the government's policy of completely reorganizing the petroleum industry in Iran. In the framework of this reorganization, its own functions were to be reduced and its interest in Khemco sacrificed. NPC thus did not act independently, but with, and under the supervision of, NIOC which, although not a party to the Khemco Agreement, was to be the main actor and beneficiary of the reorganization.

175. For the reasons just set forth, NPC (or Khemco) cannot be held liable for breach of contract for taking measures attributable to NIOC and, through NIOC, in the final analysis, to the Iranian Government. Such a conclusion is fully consistent with the previous finding of the Tribunal that these measures constituted the first steps of a process which, after the failure of the attempt to purchase Amoco's shares in Khemco, became a process of nationalization. It is, therefore, in this context that they have to be considered.

e) Breach of Contract as a Cause of Unlawfulness of the Expropriation

176. Article V of the CSD obliges the Tribunal to "decide all cases on the basis of respect for law." According to Article II of the CSD, the Tribunal's jurisdiction extends to claims of nationals of the United States or Iran which arise, inter alia, out of contracts. To decide such cases "on the basis of respect for law" means to decide them on the basis of respect for the contracts validly entered into and binding the parties at the time the claims arose. Such has been the consistent approach of the Tribunal in all the cases decided up to now.

177. It is worthwhile to emphasize that the CSD, concluded in dramatic circumstances between two States with very different political and judicial beliefs and traditions, thus contributed, to a greater extent than any other international compact, to the consolidation of the rule of international law that a State has the duty to respect contracts freely entered into with a foreign party. As is well known, this rule was spelled out by the United Nations General Assembly in 1962 in G.A. Res. 1803 (XVII) on Permanent Sovereignty Over Natural Resources, reprinted in Basic Documents in International Law 141 (I. Brownlie 2d ed. 1972). While the rule has been questioned since then, the CSD constitutes an implied but unequivocal recognition of this rule, which has been constantly confirmed by the abundant case law of the Tribunal and is not disputed by the Parties in this Case.

178. The quoted rule, however, must not be equated with the principle pacta sunt servanda, often invoked by claimants in international arbitrations. To do so would suggest that sovereign States are bound by contracts with private parties exactly as they are bound by treaties with other sovereign States. This would be completely devoid of any foundation in law or equity and would go much further than any State has ever permitted in its own domestic law. In no system of law are private interests permitted to prevail over duly established public interest, making impossible actions required for the public good. Rather private parties who contract with a government are only entitled to fair compensation when measures of public policy are implemented at the expense of their contract rights. No justification exists for a different treatment of foreign private interests. To insist on complete immunity from the requirements of economic policy of the government concerned would be the most certain way to cause the repudiation of the quoted rule.

179. In international practice, and notably in the cases submitted to international arbitration, the dispute has focused on the question of the so-called "stabilization clauses." For the reasons set forth in the preceding paragraph, it is not seriously questioned that, in the absence of such a stabilization clause, a contract does not constitute a bar to nationalization. That is one aspect of the evolution of international law in this area and of the general recognition of the right of States to nationalize. As a fundamental attribute of state sovereignty, this right, commonly used as an important tool of economic policy by many countries, both developed and developing, cannot easily be considered as surrendered. The award in the AMINOIL case, rightly in the view of the Tribunal, held that while contractual limitations on a State's right to nationalize are undoubtedly possible, "what that would

involve would be a particularly serious undertaking which would have to be expressly stipulated for and be within the regulations governing the conclusion of State contracts; and it is to be expected that it should cover only a relatively limited period." AMINOIL, supra, para. 95, 21 Int'l Legal Mat'ls at 1023. In the present Case, the Khemco Agreement was concluded for a shorter period (35 years) than the concession in the AMINOIL case (60 years), but in economic and legal terms 35 years cannot be considered a "relatively limited period." Neither the Law concerning the Attraction and Protection of Foreign Investment in Iran of 28 November 1955 nor the Act concerning the Development of Petrochemical Industries of 15 July 1965, referred to in Article 2 of the Agreement, exclude nationalization. Furthermore, it would be particularly adventurous to construe any provision of a contract to which the State is not named as a party as forbidding nationalization.

180. To sum up, the Tribunal finds that the expropriation in this Case cannot be characterized as unlawful as a breach of a contract, since Iran, the expropriating State, was not a party to the Khemco Agreement and, therefore, not bound by any stabilization clause allegedly contained herein. Moreover, even if Article 21, paragraph 2 could be considered as binding upon the government, that clause does not expressly prohibit nationalization of the contract.

181. It therefore remains only to be seen whether the fact that Iran caused NPC, NIOC and the managing director of Khemco to act in July 1979 contrary to the position taken by the board of directors of Khemco, thus practically depriving Amoco of its rights in the management of Khemco, should be considered to have some bearing on the Claimant's right to compensation. The Tribunal decides that this fact will be duly taken into account by determining that the date to be considered for the valuation of such compensation will be the date at which measures definitively took effect, rather than the date of the final decision of nationalization. Accordingly, the date of valuation of Amoco's expropriated interest in Khemco will be 31 July 1979.

6. Conclusion

182. For the reasons set forth above, the Tribunal finds that Amoco's rights and interests under the Khemco Agreement, including its shares in Khemco, were lawfully expropriated by Iran, through a process starting in April 1979 and completed by the decision of the Special Commission, notified by telex on 24 December 1980. The next issue, therefore, relates to the rules to be applied in determining the compensation to be paid in such a circumstance.

C. The Rules Applicable to Compensation

1. The Contentions of the Parties

183. According to the Claimant "[w]henever foreign-owned property is expropriated, and specifically when an agreement between a State and a foreign investor, such as the Khemco Agreement, is

repudiated by the state party and the foreign investor's rights under that agreement are expropriated, the foreign investor is entitled to receive just compensation that is the full equivalent of the property or rights expropriated or repudiated, that is, compensation that will place the foreign investor in as good an economic position as he was in before the expropriation or repudiation occurred." Furthermore, "[t]he foreign investor's rights must be valued without regard to any reduction in value that would have resulted from apprehension that the rights might be expropriated without full compensation or that the state party might otherwise breach the agreement."

184. Another aspect of the Claimant's contention is that both the Treaty and customary rules of international law not only require the payment of compensation but also establish the standard of the compensation to be paid, which is "just compensation." The Claimant insists that international law requires compensation for expropriation whether the expropriation is lawful or unlawful, but asserts that an illegal seizure of property requires a standard of compensation higher than the standard for a lawful expropriation.

185. In determining "the full equivalent of the property or rights expropriated" the Claimant contends that when the expropriated rights involve an ongoing business activity with demonstrable future earning power, the just compensation is the going concern value, which, according to the Claimant, is equivalent to the fair market value.

186. In spite of some reservations of the Respondents on the general principle in customary international law, the question whether compensation is due in case of expropriation is not in dispute in this Case. In any event the obligation of compensation is clearly stated in the Treaty as was already noted. On the other hand, considerable disagreement exists between the Parties about the standard of compensation to be applied.

187. The Respondents further consider that the most relevant issue to be considered for the valuation of the compensation to be paid is whether the nationalization was lawful or not, and put great emphasis on such a distinction. According to them, if the nationalization is lawful the measure of compensation must be substantially less than the measure of damages for breach and, in any event, no compensation should be paid for loss of future profits. In such a case, the duty to compensate would be limited to the unjustified enrichment of the nationalizing State. This means that the compensation should be the equivalent of the net book value of the residual nationalized assets of the foreign person or entity. The Respondents contend, furthermore, that the award of future profits in the present Case would fall "outside [the] legitimate expectation" of the parties to the Agreement.

188. The main dispute thus relates to the consequences of the lawfulness or unlawfulness of the expropriation. This issue is therefore to be discussed first. After that, the Tribunal will consider the question of the standard of compensation in case of lawful nationalization as in the present case.

2. The Effects of Lawfulness or Unlawfulness of Expropriation on the Standard of Compensation

189. Both Parties consider that this issue must be decided by reference to customary international law. The Tribunal agrees. Article IV, paragraph 2 of the Treaty determines the conditions that an expropriation should meet in order to be in conformity with its terms and therefore defines the standard of compensation only in case of a lawful expropriation. A nationalization in breach of the Treaty, on the other hand, would render applicable the rules relating to State responsibility, which are to be found not in the Treaty but in customary law.

190. The Claimant asserts that in case of unlawful expropriation compensation would be more than the "full equivalent" standard which applies to lawful expropriation. The Respondents argue that in case of lawful expropriation the measure of compensation must be substantially less than for a wrongful expropriation and assert that in such a case compensation is limited to the unjustified enrichment realized by the nationalizing State, with no compensation for lost profit.

191. By and large, both Parties refer to the same authorities in the discussion of their respective theses, but give them opposite interpretations. They agree that the leading case in this context is Case Concerning the Factory at Chorzow (Germany v. Poland), 1928 P.C.I.J., Ser. A. No. 17 (Judgment of 13 September 1928) ("Chorzow Factory"), decided by the Permanent Court of International Justice in 1928. The Tribunal shares this view. In spite of the fact that it is nearly sixty years old, this judgment is widely regarded as the most authoritative exposition of the principles applicable in this field, and is still valid today. It must be recognized, however, that its treatment of compensation is fairly complex and must be carefully analyzed.

192. Undoubtedly, the first principle established by the Court is that a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking. Id. at 46-47. Such a principle has been recently and expressly confirmed by the celebrated AMINOIL case, also invoked by both Parties. AMINOIL, supra, para. 138, 21 Int'l Legal Mat'ls at 1031.

193. According to the Court in Chorzow Factory, an obligation of reparation of all the damages sustained by the owner of expropriated property arises from an unlawful expropriation. The rules of international law relating to international responsibility of States apply in such a case. They provide for restitutio in integrum: restitution in kind or, if impossible, its monetary equivalent. If need be, "damages for loss sustained which would not be covered by restitution" should also be awarded. See Chorzow Factory, supra, at 47. On the other hand, a lawful expropriation must give rise to "the payment of fair compensation," id. at 46, or of "the just price of what was expropriated." Id. at 47. Such an obligation is imposed by a specific rule of the international law of expropriation.

194. The difficulty, obviously, is in determining the practical consequences of the distinction between reparation of the damage caused by a wrongful expropriation and payment of compensation in case of lawful expropriation. The legal bases of the two concepts are totally different and, logically, the practical methods to be used in order to derive the amount due should also differ. On this

question, the principles enunciated by the Chorzow Factory case are equally important and have not lost their validity.

195. In Chorzow Factory the Court dealt with the question of reparation of the damages resulting from an unlawful expropriation. The analysis of the Court was so thorough, however, and its comparisons with the reverse hypothesis so systematic, that the judgment is also illuminating in analyzing the lawful expropriation before us.

196. Restitutio is well defined by the Court. It means the restitution in kind or, if that is impossible, the payment of the monetary equivalent. In both cases the principle on which it lies is the same: "that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if this act had not been committed." [2] Id. at 47. One essential consequence of this principle is that the compensation "is not necessarily limited to the value of the undertaking at the moment of dispossession" (plus interest to the day of payment). According to the Court, "this limitation would be admissible only if the Polish Government]the expropriating State[has had the right to expropriate, and if its wrongful act consisted merely in not having paid... the just price of what was expropriated." Id. This last statement is of paramount importance: It means that the compensation to be paid in case of a lawful expropriation (or of a taking which lacks only the payment of a fair compensation to be lawful) is limited to the value of the undertaking at the moment of the dispossession, i.e., "the just price of what was expropriated."

197. Obviously the value of an expropriated enterprise does not vary according to the lawfulness or the unlawfulness of the taking. This value can not depend on the legal characterization of a fact totally foreign to the economic constituents of the undertaking, namely the conduct of the expropriating State. In the traditional language of international law it equates the damnum emergens, which must be compensated in any case. Such a conclusion was already accepted by this Tribunal in Sedco Inc. and National Iranian Oil Company, Award No. ITL 59-129-3, pp. 11-12 (27 March 1986), reprinted in 25 Int'l Legal Mat'ls 629. The difference is that if the taking is lawful the value of the undertaking at the time of the dispossession is the measure and the limit of the compensation, while if it is unlawful, this value is, or may be, only a part of the reparation to be paid. In any event, even in case of unlawful expropriation the damage actually sustained is the measure of the reparation, and there is no indication that "punitive damages" could be considered.

198. What can be added to the value of the enterprise in order to meet the requirements of restitutio? An answer to this question can be found in the formulation of the questions on which an expert inquiry was arranged by the Court. See Chorzow Factory, supra, at 51. These questions are an integral part of the judgment, with the same authority as all the other parts, and have the advantage, with the benefit of explanations which the Court added to their terms, of being much more precise and concrete than the general principles previously enunciated.

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[2] Reparation, as the Court sees it, would cover restitutio, or its monetary equivalent, plus any potential consequential damages, in order to "wipe out all the consequences of the illegal act."

199. The Court "considers it preferable to endeavor to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others." Id. at 53. Consequently, it contemplated essentially two methods, corresponding to two different questions. Both methods have the same purpose: to determine how "to wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if this act had not been committed." Id. at 47.

200. The first method corresponds to Question I. The experts were asked to, as far as possible, separately determine: (A) the value of the enterprise on 3 July 1922, i.e., the date of the expropriation, and (B) the financial results (profits or losses) "which would probably have been given by the undertaking" from this date to the date of the judgment "if it had been in the hands" of the expropriated owners. The clear implication is that, with this method, the compensation would include the two elements: the value of the undertaking at the date of the expropriation, plus the profits which would have been earned after this date, had the taking not occurred, until the date of the judgment. Equally clear is the consequence to be drawn from this finding: that this lost profit was not included in the valuation of the enterprise as of the date of the taking. Otherwise, there would be double recovery.

201. Of paramount interest is the list of the components enumerated by the Court as included in the value of the undertaking. They appertain to three categories: corporeal properties (lands, buildings, equipment, stocks), contractual rights (supply and delivery contracts) and other intangible valuables (processes, goodwill and "future prospects"). Using today's vocabulary, this would mean "going concern value", which is not a new concept after all. Only one component relates to the future: "future prospects." Since, for the reasons set forth in the preceding paragraph, future prospects does not mean lost profits, we safely can say, using the traditional vocabulary of international arbitration, that all these components pertain to damnum emergens.

202. On the other hand, part (B) of Question I indisputably relates only to "lucrum cessans," according to the same vocabulary, systematically calculated for a fixed period of time. The financial results (profit or losses) to be assessed are hypothetical, but their valuation implies no projection into the future, since they would have been earned before the date of the expert enquiry.

203. The comparison of the two subquestions (A) and (B) permits of only one conclusion: The lucrum cessans to be determined under subquestion (B) is something different from the "future prospects" mentioned in subquestion (A). The reasoning of the Court on this point is perfectly clear and was expressed without any ambiguity:

> The purpose of question I is to determine the monetary value, both of the object which should have been restored in kind and of the additional damage, on the basis of the estimated value of the undertaking, including stocks, at the moment of [the] taking... together with any probable profit that would have accrued to the undertaking between the date of taking possessions and that of the expert opinion.

Id. at 52 (emphasis added). This statement confirms the previous finding that, for the Court, lost profit (lucrum cessans) is not incorporated in the value of the undertaking, although this value

includes "future prospects." In other words, according to the Court, "future prospects" does not equal lost profit (lucrum cessans). Those are two different concepts. The first one clearly refers to the fact that the undertaking was a "going concern" which had demonstrated a certain ability to earn revenues and was, therefore, to be considered as keeping such ability for the future: this is an element of its value at the time of the taking. The second relates to the amount of the earnings hypothetically accrued from the date of the taking to the date of the expert opinion, had the enterprise remained in the hands of its former owner.

204. The other method used by the Court in order "to wipe out" the consequences of a wrongful taking consists of an estimation of the value of the undertaking at the time of the judgment. It is the object of Question II. The valuation of the undertaking is exactly the same, with the same components. Only the date changes. Furthermore, the valuation is hypothetical, since it refers to the undertaking as it would have been if it had remained in the hands of the expropriated owners. The Court deems that, in this second hypothesis, the profits, real or supposed, accrued between the taking and the judgment would be for the most part incorporated in the supposed value of the undertaking at the time of the judgment, [3] since they would have been absorbed by the costs of upkeep of the corporeal properties and of improvement and normal development of the installation. Id. at 53. If, however, there remains "a margin of profit," it "should be added to the compensation to be awarded." On the contrary, if an investment of fresh capital would have been required for the normal development of the undertaking, the amount of such sums should be deducted. Accordingly, if the expert study was well performed, the results yielded by the two methods should have been identical and confirm each other. If, on the contrary, these results had been different, the Court would have had to combine them and to make the necessary adjustments. To this effect, it expressly and fully reserved its right to review the expert's valuations and to determine the sum to be awarded in conformity with the legal principles set out in the judgment. Id. at 53-54. Obviously, had the second method yielded a value of the undertaking at the time of the expert opinion which was lower than the value at the time of the taking, the higher value would have prevailed. [4]

205. It is relevant to note that, even for the purpose of restitutio, the Court takes into consideration lucrum cessans (in the meaning previously defined) only for a limited and rather short period of time. Furthermore, the quantification of lucrum cessans implies no projection into the future, since it finds its dies ad quem at the date of the judgment.

206. The case law developed since the judgment of the Court has generally followed the principles set forth in this judgment, at least on the distinction between lawful and unlawful expropriation. It is particularly remarkable that all the awards which adopted the standard of restitutio relate to expropriation found unlawful. See Lighthouses Arbitration Between France and Greece, (Verzijl, Mestre and Charbouns arbs., Claim 27, 24 July 1956), reprinted in 23 I.L.R. 299 (1956); Sapphire International Petroleums Ltd. v. National Iranian Oil Company, (Cavin arb., Award of 15 March

[3] Note the use of the term of lucrum cessans by the Court in the part of the judgment, which confirms the interpretation of Question I.

[4] This does not seem to have been questioned by any of the judges, although Judge Rabel, in "observations" appended to the judgment, expressed his regrets that this was not expressly said by the Court. The other judges dissenting on this point considered that the compensation should be limited to the value of the undertaking at the date of the taking without any right to an enhanced value.

1963), reprinted in 35 I.L.R. 136, 186 (1967); BP Exploration Co. (Libya) v. Libyan Arab Republic, (Lagergren arb., Award of 1 August 1974), reprinted in 53 I.L.R. 297 (1979); Texaco Overseas Petroleum Co. (TOPCO) v. Libyan Arab Republic, (Dupuy arb., Award of 19 January 1979), reprinted in 53 I.L.R. 389 (1979); Benvenuti et Bonfant Srl. v. People's Republic of the Congo, (Trolle, Bystricky and Razafindralambo arbs., Award of 8 August 1980), reprinted in 21 Int'l Legal Mat'ls 740 (1982); AGIP Co. v. People's Republic of the Congo, (Trolle, Dupuy and Rouhani arbs., Award of 30 November 1979), reprinted in 21 Int'l Legal Mat'ls 726 (1982). The LIAMCO award could at first glance be considered as an exception, since it awards the Claimant a certain amount of lost profit after having found that the expropriation of LIAMCO by Libya was lawful. See Libyan American Oil Company (LIAMCO) v. Libyan Arab Republic, (Mahmassani arb., Award of 12 April 1977), reprinted in 62 I.L.R. 139 (1982). It is clear, however, that this part of the compensation, awarded on the basis of "equity," does not conform to the concept or the standard of restitutio in integrum. As already noted, the AMINOIL case clearly recognizes that it is only in cases relating to indemnifications due in consequence of illicit acts that the calculation is effected as the equivalent of a restitutio in integrum. In that case limited lost profit was awarded only on the basis of the concept, specifically agreed upon by the parties, of "legitimate expectations" and in implementation of such an agreement. AMINOIL, supra, para. 138, 21 Int'l Legal Mat'ls at 1031.

3. The Standard of Compensation in Case of Lawful Expropriation

207.

The standard of "just compensation" for a lawful expropriation referred to in Article IV, paragraph 2, of the Treaty is more precisely defined in the last sentence of the paragraph, which provides that "such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken."

208.

As previously noted, by the phrase "just compensation" the parties to the Treaty chose one of the various ways of describing the compensation due in case of nationalization. It is therefore apparent that the wording chosen in Article IV, paragraph 2, has as a first purpose and effect to exclude consideration of factors foreign to the value of the expropriated assets, such as excessive past profits or the rate of return on the initial investment, which have been invoked in a few cases of nationalization in order to reduce the compensation due to an amount less than the full value of these assets. Although counsel for the Respondents made some references to the rate of return on Amoco's initial investment, the Respondents do not appear to suggest that this factor should enter into the calculation of the compensation due, and no other factor of this kind was invoked.

209.

"Just compensation" has generally been understood as a compensation equal to the full value of the expropriated assets. This is confirmed in the wording of Article IV, paragraph 2, which refers to "the full equivalent of the property taken." The Tribunal does not see any material difference between this phrase and the usual term of "just compensation." The Tribunal has expressed this point in the

Sedco case, where it held that full compensation was the standard to be applied. See Sedco, Inc. and National Iranian Oil Company, supra, Award No. ITL 59-129-3 at 11-13. Such a finding, however, leaves without a precise answer the difficult question of the proper method to be used in order to determine what the "full value" or "full equivalent" of the property taken means in figures. This question of method goes beyond the issue of the standard of compensation, because several methods are available and the choice between them depends on the particular circumstances of each case. This will be dealt with in the following section.

D. The Compensation

1. The Contentions of the Parties

210. As noted above, the Claimant asserts the right "to receive just compensation that is the full equivalent of the property or rights expropriated or repudiated, that is, compensation that will place [it] in as good an economic position as [it] was in before the expropriation or repudiation occurred." It is clear from these words that the Claimant seeks restitutio in integrum, as previously defined, and the method of valuation which it advocates has been devised in conformity with this premise. This method rests on the assumption that the full value of a property is the market value, which means, in the case of "an ongoing business with future earning power," the going concern value, since, in such a case, "going concern value and market value are the same."

211. The Claimant further explains that "the value of an income-producing asset will depend primarily upon the net cash flow it is expected to generate in the future, 'discounted' (reduced) to a 'present value' (value as of the valuation date) at a percentage rate that fully accounts both for the time value of money and for all relevant risks." It adds that "the monetary 'full equivalent' of an ongoing business must at least be an amount sufficient to enable the expropriated owner to purchase a comparable ongoing business." This last statement, by the way, is perhaps not fully consistent with the preceding one, since it evokes the idea of replacement value, otherwise rejected by the Claimant.

212. On the basis of these principles, the Claimant considers that the proper methodology to be used in the instant case is the "Discounted Cash Flow" ("DCF") method. Such a method takes into account the fact that the value of any income-producing asset depends on two factors:

> (1) the amount and timing of the revenue that is expected over the remaining life of the asset, less the costs required to operate and to maintain the asset (generally referred to as the 'future net cash flow' of the asset), and
>
> (2) the rate at which the projected net cash flow should be 'discounted' to produce the 'present value' of the cash flow.

213. The first step in valuing an asset pursuant to the DCF method must be to project from the valuation date onward the most likely revenues and expenses of the ongoing concern, year by year. The revenues less the expenses will give the future net cash flow. The second step will be to discount the projected net cash flow to its "present value" as of the valuation date. To this end it will be necessary to determine the proper discount rate, taking into account the probable risks, inflation and the real rate of interest. The factor of inflation, however, can be discarded in consistently using a currency of constant purchasing power, as was the case in the calculations made by the Claimant and its expert, in "real" terms (i.e. in 1979 U.S. dollars). The proper discount rate, then, allegedly equals the annual rate of return available in the market on assets of comparable risk. Therefore, according to the Claimant, it can be said that "the market value of an asset and its present value determined by the DCF method are one and the same thing." The Claimant concludes that the value arrived at by the DCF method is not speculative "because the risk that the actual cash flow will be less that the projected cash flow is fully taken into account in the market-determined discount rate."

214. The Claimant contends that such a valuation "determines the price at which going-concern business assets are bought and sold." In the instant Case, the Claimant calculated the future net cash flow to be generated by Khemco at $564,795,680 in 1979 dollars and the proper discount rate to be applied at 6.5 percent. The present value of Khemco, therefore, would be $360,076,230 as of 1 August 1979, and Amoco's 50 percent share of this value would be $183,232,986.

215. In response to these contentions the Respondents affirm that the DCF method is not appropriate in the instant Case and must completely be put aside. For them, the fair value of the expropriated assets is best represented by net book value. They contend that this accords with State practice and case authorities and is supported by the theory of unjust enrichment. Furthermore, in the Respondents' view, recovery of future profits in the case of a lawful expropriation should be excluded for various obvious reasons. One of them is that "going-concern value could never have been part of the legitimate expectations of the parties." The result of the award of lost profits pursuant to the DCF method would also be absurd, since the Claimant would be able to invest the amounts, including lost profits, received as compensation, and therefore obtain a real rate of return for such an investment, which would be tantamount to double recovery. Such an award would also produce an unreasonable rate of return. Amoco made an investment of $6 million (in 1967 and 1968), it is averred, for a half share of the capital. By the end of 1978 the net book value of Khemco had increased to $29.3 million, of which $14.65 million was Amoco's share. Moreover, Khemco had earned, after taxes, $82.5 million by the end of 1978, that is $41.25 million in profit for Amoco. This means a return in excess of $50 million on an investment of $6 million. The Respondents contend that compensation of $183.2 million on top of that for loss of future profits would be the opposite of fairness and equity.

2. The suggested Methods of Valuation

216. The valuations respectively proposed by the two Parties are separated by a large gap. These considerable discrepancies are the consequence of radical differences of approach to the very

concept of value in relation to the issue of compensation. A few general remarks about this concept, therefore, are appropriate before entering into a discussion of the various methods proposed by the Parties.

a) General Remarks

217. For the purpose of valuing the compensation due in case of the lawful expropriation of an asset, market value, apparently, is the most commendable standard, since it is also the most objective and the most easily ascertained when a market exists for identical or similar assets, i.e., when such assets are the object of a continuous flow of free transactions. The price at which these transactions take place is the reflection of the perceptions of value of a great number of willing buyers and sellers. If temporary and artificial factors which could distort these perceptions are deleted, market price is the most reliable indicator of the actual value of an asset at a determined date. Often the most disturbing of such factors is the information which can transpire about an anticipated nationalization. Their effect can be nullified by the choice of a market price at a date when such information was not yet public.

218. Actually, market value has frequently been used for the valuation of compensation in case of expropriation. This specifically applies in case of expropriation of discrete properties such as real estate needed by a State in view of certain public works. Market value is also regularly referred to in case of nationalization where the nationalized undertaking is a corporation the capital stock of which is freely traded in the stock exchange. Such was the case, for instance, with the French nationalizations in 1982, to take the most recent example of nationalization by an industrialized country.

219. Market value, on the other hand, is an ambiguous concept, to say the least (it might be more accurate to term it misleading), when an open market does not exist for the expropriated asset or for goods identical or comparable to it. A situation of this kind can be observed in the case of transactions of such a magnitude that they are relatively rare, always individualized, and prompted by special circumstances and motives, like transactions relating to large corporations the shares of which are not traded on stock exchanges. In such circumstances, referring to market value for the purpose of determining compensation in case of expropriation inevitably leads to a pyramid of hypotheses, since it is necessary to conjecture as to the price on which a hypothetical willing buyer and a hypothetical willing seller negotiating at arms length would eventually agree. Such a conjecture is more especially artificial as the owner of the expropriated asset usually is not a willing seller.

220. The truth is that the absence of a market giving rise to the fixing of an objective market value compels recourse to alternative methods of valuation, as was implicitly recognized by the Claimant's expert. A great number of such methods have been advocated by parties involved in cases of nationalization, such as net book value, replacement value, DCF calculation, etc. Their proponents inevitably contend that these methods permit a determination of "full value," the just price, an adequate or equitable value, and so on. None of these values can, however, legitimately be labelled "market value." Such a label is used as a magic word intended to encourage the belief that the value determined by a specific method is the value which must be accepted as the scientifically true one. Obviously, however, it is impossible to verify that had a free transaction

taken place the price would have corresponded to this value. At the most, it is a question of probability, but it is hard to say, when one takes note of all the subjective conjectures incorporated into most of these methodologies, what is the degree of probability attained. The Tribunal is therefore of the view that the phrase "market value" is of no help in the absence of regular transactions in a free market and can too easily be misleading. The choice between all the available methods must rather be made in view of the purpose to be attained, in order to avoid arbitrary results and to arrive at an equitable compensation in conformity with the applicable legal standards. The use of several methods, when possible, is also commendable.

221. The Claimant and its experts assert that the DCF method is widely used in business practice. The Tribunal has no reason to doubt the correctness of such a contention. According to the Claimant's own statements, this method is most usually employed in one of two situations: the purchase or merging of an enterprise, when no market price is available, and the decision to make a new and large investment.

222. In both cases an investment of an exceptional size is involved, and in the first case an important divestiture as well. In such circumstances, the DCF method provides a valuable assistance to the decision to be taken, which is a difficult and far-reaching one. It produces valuable information on the future earnings, as they can be anticipated, with precise figures, taking into account the risks associated with the investment. It remains for the investor to judge the reliability and probability of these forecasts, and to make up his mind, weighing them in relation to the amount and conditions of the financing he must dedicate to the proposed investment.

223. The most interesting aspect of the method is that it provides a systematic assessment of all the risks incurred by the envisaged investment and a way to translate into figures their probable impact on the expected returns. This does not, however, result in an automatic decision and, for the reasons already set forth, provides no foundation to the assertion that the value so determined is the market price. The Tribunal, accordingly, cannot agree with the Claimant's contention that "the market value of an asset and its present value determined by the DCF method are one and the same thing."

224. Any investment depends on the free decision of the investor and, in any case, such a future oriented decision requires the acceptance of a certain measure of risks. Any investment, therefore, includes a speculative element. Moreover, an investment can be motivated by extraneous factors, like the financial and commercial strategy of the investor.

225. It may be convenient, at this juncture, to recall that a nationalization cannot be equated to a normal business investment or to a transaction in a free market. This is so not only because the expropriated owner is usually not a willing seller, as already noted, but also because the expropriating State acts for a public purpose. Commercial motivations are rarely paramount in decisions to nationalize, and may even be lacking altogether. Political considerations and considerations of economic policy or general national interest are usually more decisive. It goes without saying that the Tribunal is not in the position of a prospective investor. Rather the Tribunal must determine, ex post facto, the most equitable compensation required by the applicable law for a compulsory taking, excluding any speculative factor. Its first duty is to avoid any unjust enrichment or deprivation of either Party.

226. This conclusion is fully in conformity with the practice of international arbitral tribunals, which, in considering lawful expropriation, have consistently tried to determine according to the law, by all the available means, often using several methods, the appropriate compensation to be paid in the circumstances of each case, even when the parties have submitted elaborate calculations made with the help of the DCF method. See, e.g., LIAMCO, supra, at 146-51, 62 I.L.R. at 208-10; AMINOIL, supra, paras. 146-49, 153, 21 Int'l Legal Mat'ls at 1033-35.

b) The DCF Method

227. As previously noted by the Tribunal, the DCF method was specifically proposed by the Claimant as a method that would "place the foreign investor in as good an economic position as he was before the expropriation." Such a statement is equivalent to the words of the Permanent Court of International Justice in the Chorzow Factory case: "as far as possible, [to] wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if this act had not been committed." As discussed above, however, such a restitutio in integrum was contemplated by the Court only in the case of an unlawful expropriation. Since the Tribunal in the instant Case, has found the expropriation to be lawful, the DCF method prima facie seems not fitted to the present issue. See AMINOIL, supra, para. 138, 21 Int'l Legal Mat'ls at 1031.

228. As used by the Claimant in the present Case, however, the DCF method goes even further: it amounts to a complete departure from, and a reversal of, the approach traditionally adopted in international practice, notably, by international tribunals. Under the traditional approach, in case of expropriation of an enterprise the compensation to be paid is calculated according to the net value of the transferred -- that is, expropriated -- assets. As we have seen this can extend to physical properties, movable and immovable, as well as to intangibles, including profitability in the case of an ongoing enterprise: the "going concern" value. To this element of damnum emergens, a complementary one is added where the expropriation is unlawful: the value of the revenues that the owner would have earned if the expropriation had not occurred, i.e., lucrum cessans.

229. The Claimant's calculation completely leaves aside the net value of the expropriated assets; this value has no place whatsoever in the Claimant's reasoning. Exit damnum emergens. The Claimant's method is instead a projection into the future to assess the amount of the revenues which would possibly be earned by the undertaking, year after year, up to eighteen years later in this Case. These forecasted revenues are actualized at the time by way of a discounting calculation, and capitalized as the measure of the compensation to be paid, as well as the alleged market value of the enterprise. With such a method, lucrum cessans becomes the sole element of compensation.

230. Such a substitution has been justified as reflecting a better understanding of economics and of the usual practice in the business world. The Tribunal has already recognized that the DCF method is probably extremely helpful when an investor has to decide whether to make a large investment: his first concern, obviously, relates to the time necessary to recoup his money and to the likely level of return. The Tribunal can also perceive the advantages of such a method for a claimant seeking

substantial compensation. The calculation of the revenues expected to accrue over a long period of time in the future, which opens a large field of speculation due to the uncertainty inherent in any such projection, will probably yield higher results than any other method. For this reason, however, such a method cannot easily be accepted by a tribunal, and the reluctance of all tribunals and claims commissions, including domestic fora, even in the United States, to make use of it is easy to understand. [5]

231. In the case of a going concern, as the AMINOIL tribunal aptly put it, the value of the enterprise as a whole is higher than the sum of the discrete elements which constitute it, see id. at para. 1781, 21 Int'l Legal Mat'ls at 1041, but it remains related to these elements. With the DCF method, as used in this Case, the alleged value of the undertaking has no relation whatsoever to the value of these elements -- and therefore to the investment made in order to create the concern and to maintain its profitability. The replacement value, that is the investment necessary to create a similar undertaking, is no more taken into consideration. The capitalization of the future earnings will probably amount to a much higher figure, which could lead to unjust enrichment for the beneficiary of such compensation, since he could, hypothetically, establish a similar enterprise with comparable earnings, spending only a portion of the compensation received, and earn additional revenues with the remaining part. If the enterprise were less profitable, the Claimant would probably refer to another method, as the claimant did in the Chorzow Factory case. It is one thing to recognize, as this Tribunal and many other international tribunals and courts before it have done, that the profitability of a going concern is one of the elements to be considered in the valuation of such a concern; it is another thing to substitute a capitalization of hypothetical future earnings for all other elements of valuation.

232. These initial remarks do not necessarily lead to an absolute rejection of the DCF method for any purpose in this Case. For the reasons already set forth, one element of valuation of a going concern, as was Khemco, is its profitability. This element is not easy to translate into figures, and the DCF method could provide the Tribunal with useful information pertaining to profitability, if the method is correctly applied. Accordingly, it will be appropriate to consider how this method has been used in the present Case and to determine to what extent the results arrived at are reliable.

c) The DCF Calculations

233. Apart from a general rejection by the Respondents of the DCF method in the instant case, almost all of the assertions brought forward by the Claimant in supporting the use of this method have been severely criticized by the Respondents. The Tribunal does not intend to take sides in the debate between the experienced and distinguished experts of both Parties. Nevertheless, without entering into the technical aspects of the matter, some assumptions relied upon by one Party or the other call for a few general comments, especially from a legal point of view.

234. The projection of the cash flow into the future, as made by the Claimant's experts, was subject to a

[5] See, e.g., S.P.P. (Middle East) Limited. v. Arab Republic of Egypt, (Bernini, Elghatit, Littman arbs., Award of 11 March 1983), reprinted in 22 Int'l Legal Mat'ls 752, 782-783 (1983); for a description of the practice of the U.S. Foreign Claims Settlement Commission, see R. B. Lillich, "The Valuation of Nationalized Property by the Foreign Claims Settlement Commission" in 1 The Valuation of Nationalized Property in International Law, 95-116 (R. B. Lillich ed. 1972).

sharp and highly technical dispute about the availability of sufficient quantities of gas for processing during the relevant period of time. Without entering into the details of the dispute, it is sufficient to note that the disagreement between the Parties relates less to the quantity of the existing reserves than to their availability for processing by Khemco, in view of possible fluctuations in oil production levels and possible diversions to other uses of the gas produced. These objections, therefore, are dependent on factors which are relevant to the most important issue -- the forecasts of the cost of gas available to Khemco for processing and of the likely sales price of Khemco products -- and will be considered in relation with those factors.

235. The price of gas produced from the JSA fields operated by NIOC and Amoco was set by the Gas Purchase Agreement and was very low ($.02 per thousand cubic feet for fifteen years, until 1985, with a prescribed formula for determining maximum price increases thereafter). The same price was applicable to gas that NIOC agreed to provide from other sources. The Claimant's expert assumed that the agreed formula would be strictly applied during the whole life of the Khemco Agreement. This assumption inevitably is correct from a legal point of view. However, in view of the past experience in the oil industry, especially among oil producing countries surrounding the Persian Gulf, it could not be excluded that, at some point in time, this price would be renegotiated in order to take into consideration the evolution of the market. In such a case the gas price could be modified without a breach of the contract. It is not possible, however, to evaluate the probability and the consequences of such a renegotiation, since the experts of the Parties did not fully brief this issue. Furthermore, the fact that the JSA itself was nullified by application of the Single Article Act introduces additional uncertainty.

236. Significantly, the Claimant's expert projected gas prices as well as Khemco product prices over 18 years, from 1979 onward to 1997, i.e., until the end of the Khemco Agreement. The sales price projections for LPG and NGL products were made by reference to the expected changes in oil prices, since the Khemco NGL production was sold at a per-barrel price determined by reference to the price for crude oil from the JSA Darius field, and LPG production sold at prices closely related to the price of crude oil. For the purpose of these projections, the Claimant's expert used what he described as the most conservative and reasonable product-price forecasts prepared by well-known econometric and forecasting firms. To use his own terms, "these forecasts are an indispensable part of such evaluations." They "are based on available data and expert judgment at the time of the valuation."

237. As conceded by the same expert, in the case of a gas processing plant earnings are a direct function of product prices that vary from year to year, so that past earnings cannot provide a reliable measure of the value of such a plant. Actually, it is well known that oil prices have demonstrated a great instability. Independently of the fluctuations of the free market, decisions relating to fixed prices or to the volume of production, taken in the past by the big oil companies, or more recently by OPEC or other producing countries, have been responsible for these price variations. The difficulties and risks of error inherent in every price forecast are therefore considerably aggravated. A clear illustration of this situation is provided by the discrepancies which can be observed between the oil price forecasts used in the Claimant's expert study and the actual evolution of prices from 1979 to 1987.

238. As a projection into the future, any cash flow projection has an element of speculation associated with it, as recognized by the Claimant. For this very reason it is disputable whether a tribunal can

use it at all for the valuation of compensation. One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded. This holds true for the existence of the damage and of its effect as well.[6] Such a rule, therefore, applies in the case of unlawful expropriation. A fortiori, the reasoning on which it rests must also apply in the case of compensation for a lawful expropriation. It does not permit the use of a method which yields uncertain figures for the valuation of damages, even if the existence of damages is certain.

239. The element of speculation in a short-term projection is rather limited, although unexpected events can make it turn out to be wrong. The speculative element rapidly increases with the number of years to which a projection relates. It is well known, and certainly taken into account by investors, that if it applies to a rather distant future a projection is almost purely speculative, even if it is done by the most serious and experienced forecasting firms, especially if it relates to such a volatile factor as oil prices. Such projections can be useful indications for a prospective investor, who understands how far it can rely on them and accepts the risks associated with them; they certainly cannot be used by a tribunal as the measure of a fair compensation.

240. The projection of the future earnings of Khemco over 18 years was made by the Claimant in order to take into account the totality of the return which could be derived from the Khemco Agreement for the remaining time of its life. Clearly, this is a consequence of the Claimant's misconception that the measure of the compensation is restitutio in integrum. A case of expropriation of an undertaking with no contractual time limit would, under this reasoning, require a projection into the future ad infinitum, or, to be more precise, up to the time when the application of the discount rate would result in a return amounting to nil. The Tribunal need not express an opinion upon the admissibility of such a projection when the reparation must wipe out all the consequences of an illegal taking, but it certainly cannot accept it for the compensation due in case of a lawful expropriation.

241. The second stage of the DCF method is the calculation of the proper discount rate. It starts with the determination of a reference or "benchmark" discount rate, based on market data allowing comparisons within a certain industry or type of investment. The Claimant's expert chose as a reference nine large oil companies with substantial international operations and concluded from their relevant market data that the reference discount rate would be 3.5 percent. This figure was disputed by the Respondents. The Claimant's expert admitted that some differences existed between the operations of these companies and those of Khemco but gave the assurance that they were duly taken into consideration. The Tribunal is unable to test the veracity or the importance of the adjustments made for this purpose. A certain degree of uncertainty, therefore, is to be borne in mind in taking cognizance of the results of this part of the study.

242. As a second step in the calculation of the proper discount rate, an adjustment must be made specifically to account for the relative risk characteristics of Khemco's future net cash flow. Three series of risks were considered: tax and currency risk, business risk, and force majeure risk. The risk of uncompensated breach or expropriation, on the contrary, was disregarded as irrelevant upon counsel's instruction. The Claimant's expert concluded that tax risk and force majeure risk were higher than the average for Khemco, but that currency risk and business risk were lower. On

[6] See, e.g., Norwegian Shipowners Claims (Norway v. U.S.), 1 R. Int'l Arb. Awards 307, 339 (1922); S.P.P. (Middle East) Limited. v. Arab Republic of Egypt, supra; Lillich, supra, at 95-116.

the whole, these risks were weighted to an upward adjustment of 3 percent. The total discount to be used in evaluating Khemco rights would, therefore, be 6.5 percent.

243. No precise information was provided by the Claimant on the technique used in order to translate into figures the general qualitative considerations presented in the expert's report on each specific risk. These considerations, indeed, were relatively succinct and not very elaborated. Furthermore, the mere mention that a risk was higher or lower than the average is too vague to furnish a valuable indication and to assist the Tribunal to assess the validity of the adjustment of 3 percent.

244. In the words of the Claimant's expert, "there necessarily will be room for some variations in detail and the exercise of expert judgment in applying the [DCF] analysis in a specific instance." It appears that "the exercise of expert judgment" is at a peak for the determination of the adjustment of the reference discount rate. With all respect for the undoubted experience of such a distinguished expert, it remains true that expert judgment means subjective judgment, and that the reasons on which it rests in relation to this specific issue have not been fully disclosed.

245. In addition, some comment is appropriate concerning the Claimant's general approach to evaluation of specific risks. Not all of these risks relate only to economics and, in the words of one of the Claimant's experts, the assessment of some of them was given by him "just as a common-sense layman." In certain instances, these risks seem to have been underestimated, as subsequent events have demonstrated, even if unforeseeable risks are disregarded.

246. Such is the case for currency risk and force majeure risk. At the time, although the Revolution in Iran was successful in establishing a new government, the political turmoil was still very high and the situation far from a return to the normal, with all the uncertainties and economic consequences inherent in such a hectic environment. In spite of the provisions of the Khemco Agreement to this effect, free convertibility was not certain (exchange controls not necessarily being a breach of contract in the circumstances). Civil disorder and labor strife could last for an unlimited time and, in spite of its geographic location, Khemco was not immune from these disorders. Furthermore, while it was impossible to forecast the war with Iraq as it actually developed, no one acquainted with the history of relations between the two countries could, in the circumstances prevailing at the time, discard entirely the risk of military actions, which would directly concern Kharg Island. In any event, there was a clear risk that Iran's relations with the outside world could be profoundly disturbed for an unpredictable period of time, with evident consequences for the operation of an undertaking like Khemco.

247. The exclusion of uncompensated expropriation is still more troubling. According to the Claimant, such an exclusion was imposed as a matter of law, since the Respondents cannot take advantage of their unlawful acts. The legal principle on which the Claimant relies is undoubtedly correct, but should more accurately be expressed as forbidding the taking into account of the consequences of an unlawful expropriation in the calculation of the compensation to be paid. Conversely, lawful expropriation should not be excluded. The risk of such an expropriation, to be sure, would have constituted a deterrent for any prospective investor, especially if such a taking might occur in the near future. Furthermore, as noted before, compensation in such case of lawful expropriation does not mean restitutio in integrum, as reducing the risk to zero presupposes. In fact, expropriated oil companies have often found it to be in their best interest to accept settlements at net book value of the expropriated asset. Even if such a concession was usually made in the framework of a broader,

positive commercial arrangement, this cannot be construed as nullifying the risk of expropriation. The instruction given to the expert by the Claimant assumed that any compensation would reestablish things, at least financially, as they would have been if the expropriation did not take place. In other words, it was grounded on the contention that compensation for a lawful expropriation and damages for an unlawful one are one and the same thing, which the Tribunal has rejected.

248. Even if limited to lawful expropriation, the inclusion of this risk would have considerably changed the results of the study. Taking into consideration actual threats of expropriation, according to the Claimant's expert, would have resulted in valuing a lawsuit rather than the value of a particular facility. In fact, the dispute between the two Parties about this particular risk takes on a surrealistic character given the fact that the risk actually was realized. It is another illustration of the artificiality, in such circumstances, of an exercise devoted to the determination of the price that would result from a free transaction between a hypothetical willing buyer and a hypothetical willing seller negotiating at arms length. Expropriation cannot be construed as a mere risk when it has actually taken place. On the other hand, it has always been recognized that the effects of the prospect of expropriation on the market price of expropriated assets must be eliminated for the purpose of evaluating the compensation to be paid, since they are artificial and unrelated to the real value of such assets.

d) The Net Book Value as a Measure of Compensation

249. The net book value of an asset has the advantage of being easily and objectively assessed. According to the Respondents, the net book value of Khemco amounted to $29.3 million as of the end of 1978, resulting in a value of $14.65 million for Amoco's fifty percent share. These figures, however, were not substantiated.

250. For the Respondents, compensation for a lawful expropriation should be based on the book value of tangible assets, after deduction of the liabilities registered in the accounts, with no compensation for future profits. The many arguments invoked by them to support this contention actually address two distinct (although interrelated and complementary) theories:

(i) net book value is the proper measure of compensation for a lawful expropriation;

(ii) lost profits need not be compensated in case of a lawful expropriation.

251. As for the first theory, the Respondents' main argument relates to State practice. Net book value, indeed, was accepted as a measure of compensation in many settlement agreements following expropriation in the oil industry, mostly since 1973, including the 1973 Sale and Purchase Agreement executed between Iran and several oil companies, as well as settlement agreements negotiated by the Special Commission. According to the Respondents, net book value may be considered as the normal standard of compensation in case of lawful expropriation, especially in the oil industry and particularly in the Persian Gulf countries.

252. As a rule, State practice as reflected in settlement agreements cannot be considered as giving birth to customary rules of international law, unless it presents specific features which demonstrate the conviction of the State parties that they were acting in application of what they considered to be settled law. The provisions of such an agreement, indeed, are the outcome of negotiations in which many motivations other than legal ones may have prevailed. This is specially true here, where certain commercial advantages given to companies (even if they were not expressly detailed in the agreements) produced the concessions that they accepted on the standard of compensation. The 1973 Sale and Purchase Agreement with Iran is an example, since the issue of compensation was only a part of a much broader arrangement described in that agreement.

253. The other arguments advanced by the Respondents more properly address exclusion of lost profits as part of a reestablishment of the expropriated owner in the situation which would have existed had the expropriation not taken place. The finding by the Tribunal that a lawful expropriation does not give rise to a right to restitutio in integrum frees it from a detailed examination of these arguments. Nevertheless, it does not necessarily flow from this conclusion that net book value is the appropriate standard of compensation. A few additional remarks on this point, therefore, are required.

254. The Respondents insist on taking into account the legitimate expectations of the parties, a central concept in the AMINOIL award. They underline that Amoco's initial investment was too small to give rise to legitimate expectations of a compensation of such magnitude as claimed by the Claimant, and still less if the returns made before the nationalization are taken into consideration. This reasoning is partially contradictory, since the high level of the returns obtained in the first years of the Khemco Agreement would normally have given birth to expectations of substantial revenues for the following years and, accordingly, of a higher level of compensation in case of expropriation. In any event, while the initial investment and the returns prior to the expropriation, whatever they are, may assist in evaluating the legitimate expectations of the owner, there is no proof that these expectations were limited to the net book value of the undertaking in case of expropriation.

255. More generally, the theory that net book value is the appropriate standard of compensation in all cases of lawful expropriation overlooks the fact that a nationalized asset is not only a collection of discrete tangible goods (equipments, stocks and, possibly, grounds and buildings). It can include intangible items as well, such as contractual rights and other valuable assets, such as patents, know-how, goodwill and commercial prospects. To the extent that these various components exist and have an economic value, they normally must be compensated, just as tangible goods, even if they are not listed in the books. Furthermore, nationalization does not take place in order to disperse, by auction, the assets of the expropriated undertaking, or to use them for other purposes. On the contrary, the undertaking is nationalized as a going concern to be placed as such under State control, with a view to developing its activity and allowing the community to benefit fully from its returns. Therefore, the fact that the expropriated assets form a going concern can certainly not be disregarded at the time of the valuation of the compensation to be paid.

256. It should not be concluded from these remarks, however, that net book value is of no interest in the matter of compensation for expropriation, as maintained by the Claimant, which insists that

only the future earning power of an expropriated asset is relevant for this purpose. This may be true from a purely commercial point of view and in case of an investment, although the Claimant's expert himself relied, in several instances, on past earnings in order to assess, or, at least, to confirm, the profitability of Khemco. From a legal point of view it is impossible completely to ignore the assets, the title to which was transferred from the private owner to the State, or to an entity controlled by it, as a result of the expropriation. Neither is it permitted completely to forget the existing debts, incurred in creating the expropriated assets and for which the new owner of such assets will be liable. The classical concept of damnum emergens, which took such an eminent place in the development of international law in this field, does not permit such omissions.

257. In the same vein, another way of valuing an expropriated property is to use the replacement cost, which in the instant case was calculated by the Claimant as being about $110 million for the Khemco plant, and, therefore, $55 million for Amoco's share. The Claimant considered that such a method was inappropriate, since it is without relation to the earning power of the asset. For their part, the Respondents did not dispute the figure advanced by the other Party, but denied that replacement cost was relevant in the instant Case, since there is no question of the assets being reacquired. Such an objection manifestly confuses two issues. The intentions of the expropriated owner relating to the reinvestment of the amounts it will receive as compensation for the expropriation of its asset is immaterial to the determination of the measure of the loss sustained.

258. Finally, in support of their contention that net book value must be considered as the right standard of compensation, the Respondents invoke the theory of unjust enrichment. This theory, indeed, has been recently cited by eminent writers as the legal basis for the obligation to compensate in case of expropriation. See, e.g., E. Jimenez de Arechaga, International Law in the Past Third of a Century, 1978 Recueil des Cours 299. It is a specific application of the general principle of equity. The theory of unjust enrichment normally extends to cases where a physical or legal person benefits at the expense of another from enrichment which is the result of neither a legal right, nor of tort or breach of contract. See Sea-Land Service, Inc. and Islamic Republic of Iran, Award No. 135-33-1, p. 27 (22 June 1984), reprinted in 6 Iran-U.S. C.T.R. 149. Its extension to a case in which the transfer is the product of a legal act -- namely nationalization -- is at least a new development of the theory, if not inconsistent with its equitable premises. Furthermore, the theory of unjust enrichment is referred to in the writings of several authorities, as a ratio legis of the applicable rule rather than as the rule itself.

259. If the theory of unjust enrichment were to be considered as the basis of the obligation to compensate in case of expropriation, it would represent a reversal of the traditional view, according to which the loss sustained by the expropriated person, i.e., his deprivation, is the standard of compensation. This reversal, however, is not complete: it would be difficult to understand why an enrichment resulting from a lawful act -- a lawful expropriation -- would be "unjust," except, precisely, if it were the consequence of the refusal adequately to compensate the expropriated party for the loss it sustained. The practical difference between these two theories, furthermore, is probably rather limited in the case of nationalization of an undertaking. As the nationalizing State normally intends to maintain such an undertaking as a going concern and to benefit from its profitability, the value of the expropriated assets as a going concern will be the measure of the enrichment of the nationalizing State as well as of the deprivation of the expropriated owner. For this reason, the Tribunal fails to understand how the theory of unjust

enrichment could support the contention that the standard for valuation of compensation should be net book value. On the other hand, it is true that the profits earned after the lawful takeover of the concern by the nationalizing State cannot be recovered by the expropriated owner under the same theory, but as already seen, this is not necessarily at variance with the settled practice. It rather confirms the preceding conclusions of the Tribunal.

3. Valuation of the Compensation Due to Amoco

260. Having rejected the two methods proposed by the Parties, the Tribunal is now confronted with the task of determining what practical ways can be utilized to ascertain the proper compensation to be paid in this Case. Before entering into this issue, however, it will be helpful to summarize the relevant findings previously made.

261. As a starting point, the Tribunal finds that the measure of such compensation shall be the full value of the asset taken, pursuant to Article IV, paragraph 2, of the Treaty, that is the full equivalent of the property. Compensation which would only amount to a part of this value is, therefore, excluded.

262. In the instant Case the expropriation for which the Claimant seeks compensation occurred or was completed by the Special Commission's decision nullifying the Khemco Agreement. Formally, therefore, the Claimant was deprived of its contractual rights under the Khemco Agreement, and the compensation due relates to these rights. It is not disputed, however, that the value of such rights equals the value of the shares owned by Amoco in the joint stock company incorporated pursuant to the Khemco Agreement. The measure of the compensation to be paid, therefore, is half the value of Khemco at the date of valuation. Both Parties have submitted their own valuations on the basis of this assumption.

263. Khemco was a going concern at the time of the expropriation, even if its activity was temporarily reduced by reason of the events associated with the revolutionary movement which came to its peak with the establishment of the Revolutionary Islamic Government in February 1979, with the troubled situation in Iran continuing for some time after the proclamation of the new regime. After its expropriation Khemco remained a going concern, even if it was at some time merged into NPC, and the plant from which it had drawn its revenues continued to be exploited as late as the subsequent events permitted. Going concern value, accordingly, is the measure of compensation in this case.

264. Going concern value encompasses not only the physical and financial assets of the undertaking, but also the intangible valuables which contribute to its earning power, such as contractual rights (supply and delivery contracts, patent licences and so on), as well as goodwill and commercial prospects. Although those assets are closely linked to the profitability of the concern, they cannot and must not be confused with the financial capitalization of the revenues which might be generated by such a concern after the transfer of property resulting from the expropriation (lucrum cessans).

265. The value of a going concern -- of Khemco in this case -- is "made up of the values of the various components of the undertaking separately considered, and of the undertaking itself considered as an organic totality -- or going concern -- therefore as a unified whole, the value of which is greater than that of its components parts," to take the words of the award in the AMINOIL case. AMINOIL, supra, para. 178, 21 Int'l Legal Mat'ls at 1041. The arbitral tribunal in that case added that account should also be taken "of the legitimate expectations of the owners." This last remark, however, has to be understood in relation to a previous finding of that tribunal, which noted that this concept of "legitimate expectations" had been used by the parties in their contractual relations with a specific meaning. In the present Case, the legitimate expectations of the Parties can only be deduced from the history of the concern and from its various components, as well as from the terms of the Khemco Agreement, taking into account the circumstances prevailing at the time of the taking. Finally, the liabilities of Khemco at the valuation date have to be deducted from the total value so determined.

266. Regrettably, because the Parties focused on the two methods previously rejected, they did not provide the Tribunal with much of the data relating to the various components listed in the two preceding paragraphs. The Claimant produced learned studies including numerous calculations relating, for the most part, to projections into the future. Only a few documents relating to Khemco's financial situation, contemporaneous with or prior to the process of expropriation, were submitted. The Respondents, for their part, advanced only a few figures, and those are without substantiation. The Tribunal, therefore, is not in possession of the data necessary to take a meaningful decision, and such data as has been provided has not been properly discussed by either of the Parties outside of the context of its favorite theory. In any event, therefore, it would not be fair for the Tribunal to use that data in another context without asking the Parties to present their comments.

267. Accordingly, the Claimant is ordered to submit to the Tribunal all the data relating to the various components listed in paragraphs 264 and 265 above, as well as its views on the most appropriate method, or methods, to be used in order to calculate the value of these components and of the concern as a whole, taking into consideration the findings of the Tribunal contained in this Award. Among other elements, the Claimant should provide the Tribunal with the following: the total investment made by the two parties in Khemco (amounts and dates); the annual reports, control budgets and financial statements (with all the relevant annexes) of Khemco; the net book value of Khemco as of 31 July 1979; the replacement value of Khemco's assets at the same date; and the estimated value of Khemco's intangible assets at the same date, including goodwill and commercial prospects.

268. The time limit for the submission of that evidence and views will be determined by a separate order, as well as the time limit for the submission by the Respondents of their comments and complementary data and evidence. The Tribunal intends to issue its final Award on compensation on the basis of the written pleadings and evidences so submitted. If it deems it necessary, the Tribunal may invite the Parties to submit additional comments or data.

V. THE COUNTERCLAIMS

269. The Respondents assert four separate counterclaims against the Claimant in this case. The Respondents seek payment of: (a) allegedly outstanding tax liabilities; (b) excess profits derived from alleged improper use of non-JSA gas; (c) cost materials purchased by Khemco but not delivered by Amoco; and (d) excess profits caused by breach of Article 8 of the Khemco Agreement. These counterclaims are examined in turn in the following.

A. Outstanding Tax Liabilities

270. The Respondents allege that during the period from 1970 to 1979 Khemco underpaid certain tax obligations including (1) income taxes based on Khemco's sales; (2) contractors' taxes and salary taxes; and (3) withholding taxes on interest payments made abroad by Khemco. Although the amounts sought for parts of this counterclaim have not been specified, the total amount of taxes allegedly due is U.S. $33,566,255 plus interest and late charges amounting to U.S. $150,000 per month.

271. The Claimant contends that this counterclaim is inadmissible, lacks a jurisdictional basis and fails on the merits.

272. The jurisdictional objection raised is, according to the Claimant, that the counterclaim does not arise out of the "same contract, transaction or occurrence" as the claim raised in this Case, as required by Article II, paragraph 1, of the CSD. The Tribunal agrees with the Claimant that the tax counterclaim raises an issue of jurisdiction. The Tribunal need not, however, decide this issue here as this counterclaim fails on grounds relating to the admissibility and the merits, as discussed in the following.

1. Failure to Pay Income Taxes

a) The Contentions

273. The Respondents contend that Khemco underpaid the taxes due on its income "from NGL and LPG non-exempt products during 1970-74 as well as total revenues during 1975, 1976, 1977, and 1978." The Respondents contend that, according to decisions by Iranian taxation authorities, the five year tax exemption of which Khemco took advantage applied only to "petrochemical" products such as sulfur products and not to "petroleum" products such as LPG and NGL. As Khemco paid no tax on income from LPG and NGL during the first five years of operation, income tax is due from those products from the date of commencement of commercial operations through 1974. The Respondents further assert that Khemco underpaid taxes on its total revenues for the period 1975 through 1978 but have not further specified the cause of this alleged underpayment.

274. According to the Respondents this underpayment of Khemco's income tax resulted in an overpayment of dividends to Amoco and Amoco is therefore liable to pay (or repay) fifty percent of the outstanding tax liability. The Respondents have not specified the amount sought except by stating that Amoco's share of the alleged underpayment amounts to fifty percent of "approximately U.S. $29 million" plus interest and penalties amounting to Rials 500,300,764 "until June 1973" and Rls. 17,868,884 per month thereafter.

275. In support of these contentions the Respondents rely on a number of documents issued by taxation authorities of Iran. In chronological order, the first of these documents is Consultative Opinion No. 7368/17 of the "Taxation High Council" of the Ministry of Finance date 5 Azar 1352 (i.e., 26 November 1973) ("Consultative Opinion"), which states:

> Whereas the five year tax exemption set forth in clause 3 of Article 15 of the [Khemco] Agreement... shall be subject to the terms and conditions of the preceding clauses and in particular Clause 1 of the said Article, therefore any income of [Khemco], derived from petrochemicals shall be tax exempt for five years from the date of operation of the related units and any income derived from other products thereof seem to be subject to taxation.

276. The Respondents also rely on a letter date 17 Day 1352 (i.e., 7 January 1974) from the "Petroleum Department General" to NIOC regarding the exemption of Khemco. This letter states that

> this is to inform you that the opinion of tax experts and the records of the case was sent to Mr. Hadavi the Deputy Minister of Finance... for adoption of a final decision. Mr. Hadavi has in reply to our letter, served upon us the opinion of the Taxation High Council according to a letter numbered 9183/20 dated 1352/9/29.
>
> Whereas in our opinion the products of [Khemco], except sulfur, e.g. LPG and NGL are considered to be petroleum products and may not be tax exempt therefore we would like to ask you [NIOC] to kindly provide us with your technical views on the above issue so that the applicable taxes may be collected with due consideration of the judgment issued by the Taxation High Council.

277. On 20 January 1974 Khemco forwarded this communication from the Petroleum Department to representatives of NPC and Amoco, noting that the taxing authorities had requested NIOC's "technical advice as to action to be taken"

278. NIOC responded to the 7 January 1974 letter from the Petroleum Department General by a communication dated 23 Day 1352 (i.e., 13 January 1974) stating:

> please not that LPG and NGL and in general the liquids obtained from natural gas are considered as crude oil in all petroleum contracts and are subject to regulations governing crude oil.

279.

The Respondents have further submitted a copy of a letter dated 24 December 1981 from the Corporate Taxation Office to NPC. This letter states that

> according to preliminary findings [Khemco's] tax liability, based on its incomes from NGL and LPG non-exempt products during 1970-74 as well as total revenues during 1975, 1976, 1977 and 1978 amounts to Rls 3,171,748,336 which shall be equally shared on a 50-50 basis between [NPC] and Amoco. It should be noted that the case file of the said Company for the above-mentioned years is under investigation, and it is anticipated that their unpaid income tax and statutory taxes will exceed the above figure which will be advised in due course.

A note at the bottom requested that Khemco "[p]lease act to pay on account against your tax liability demanded" the above-stated amount.

280. Finally the Respondents rely on a letter dated 23 May 1984 to Khemco from the Chief Tax Assessor on Petroleum. This letter, which refers to the Consultative Opinion, to NIOC's letter of 13 January 1974 and to the 24 December 1981 letter, states that Khemco

> has made deficient payments and your [Khemco's] tax account is therefore short of Rials 3,057,731,102 with respect to two petroleum products known as LPG and NGL during 1970-1974 which were not tax exempt as well as the account of your total income for the years 1975, 76, 77 and 78 according to the schedule attached hereto. [This schedule is not in evidence.]

You are requested hereby to pay the above amounts plus penalties accrued thereon... you shall be otherwise deemed to have objected to assessed taxes and your file shall then be referred to the Special Petroleum First Instance Commission....

281. This letter also asserted that other taxes were outstanding due to Khemco's failure to withhold an amount of Rls. 2,950,571 on account of a five percent tax on commissions paid to agents for sales of sulfur. Recovery of this amount has not been specifically requested by Respondents, however, and the Tribunal concludes that the Respondents are not counterclaiming for this amount.

282. The Claimant disputes that this counterclaim is admissible on the theories of estoppel and laches. On the merits the Claimant argues that Article 15, paragraphs 1-3 of the Khemco Agreement directly contradicts the preliminary conclusions reached by the taxation authorities, that Article 30, paragraph 1 of the Khemco Agreement binds Iran not to assert any tax claims which are in inconsistent with the Khemco Agreement, and that, in any event, Amoco is not liable for any of Khemco's debts.

283. The Claimant also contends that the documents issued by Iranian tax authorities on which the Respondents rely evidence the existence of a dispute between Khemco and the tax authorities which has remained unresolved.

b) The Tribunal's Findings

284. Having reviewed the documents submitted the Tribunal finds significant the letter of 24 December 1981 from the Corporate Taxation Office in which the finding of tax liability was stated to be "preliminary," as well as the 23 May 1984 letter from the Chief Tax Assessor on Petroleum, which stated that non-payment of the assessed taxes would merely result in referral to another administrative authority, the "Special Petroleum First Instance Commission." As Khemco apparently never paid the assessed taxes, the matter presumably was referred to the Special Petroleum First Instance Commission, but the Tribunal is uninformed as to the outcome or status of these administrative proceedings. On the basis of the record, the Tribunal must conclude that no final decision has been reached as to the taxes here at issue, for which reason the counterclaim must be rejected.

285. In view of the foregoing the Tribunal need not reach the issue of the alleged inconsistency between the conclusions of the taxation authorities and the Khemco Agreement. The Tribunal notes, however, that Article 30, paragraph 2 of the Khemco Agreement as ratified by Iran, would exclude Iran or its tax authorities from asserting a tax liability inconsistent with the terms of the Khemco Agreement.

286. Finally the Tribunal finds in any case that Amoco would not be liable for Khemco's tax debts. The Respondents have not substantiated their assertion that under Iranian tax law that "a corporate shareholder may be held responsible for the tax liabilities of its subsidiary" and have advanced no other theory according to which Amoco could be liable for the tax debts of its subsidiary corporation, Khemco. The Respondents have also failed to explain why, in this Case, the alleged tax liability would not have been assumed by NPC upon its acquisition of Amoco's shares in Khemco.

287. On the basis of the foregoing the Tribunal rejects the counterclaim for allegedly unpaid income taxes.

2. Non-Payment of Contractors' Taxes and Salary Taxes

a) The Contentions

288. The Respondents allege that the Claimant failed to pay contractors' taxes and taxes on salaries allegedly assessed pursuant to the Iranian Taxation Act. The Tribunal is, however, unable to determine from either the pleadings or the documents the exact amount of the counterclaim.

289. In their Statement of Defense and Counterclaim, unsupported by any further documentation, the Respondents seek recovery of Rls. 115,392,113 plus penalties and interest of Rls. 203,981,242, for a total claim of Rls. 339,313,355. The only document which appears to relate to these taxes is a letter dated 14 September 1982 from the "Chief Tax Assessor on Petroleum" to Khemco. According to this document an amount of Rls. 5,544,707 (plus interest and penalties) is due on account of "third party taxes by your company for 1973." The Respondents further rely on a document from the Chief Tax

Assessor on Petroleum to Khemco dated 20 May 1984 which refers to "Verdict No. 331/Petroleum dated May 19, 1984," requesting payment of "finalized taxes" in the amount of Rls. 71,237,746 "plus all penalties accrued thereon." This document does not specify which taxes have been "finalized," however, and the "verdict" referred to is not in evidence.

290. The Claimant contends that this counterclaim should be dismissed either for lack of substantiation or for lack of jurisdiction. In any event, the Claimant disputes that any taxes are due.

b) The Tribunal's Findings

291. Upon an examination of the evidence submitted the Tribunal finds that the Respondents have provided no basis for a recovery on this counterclaim, which is hereby rejected for want of substantiation.

3. Taxes and Penalties for Interest Paid on Funds Borrowed Abroad

a) The Contentions

292. The Respondents allege that Khemco failed to pay withholding taxes due on interest paid in 1972 on a loan received from First National City Bank. The Respondents contend that Amoco is liable to pay an amount of approximately U.S. $270,000 including interest and penalties.

293. The Respondents contend that, according to relevant Iranian tax law, Khemco was liable to withhold a certain amount on account of taxes on a U.S. $6,600,000 loan obtained in February 1971. Khemco sought an exemption from this liability, pending which Khemco made special allowance in its budget for its potential exposure to the liability. A final decision denying the exemption was taken in about July 1982, and Khemco paid the tax in question in 1983. The Respondents allege that under Iranian tax law Amoco remains liable for fifty percent of this liability.

294. In support of their contentions the Respondents invoke a letter dated 5 Mordad 1353 (i.e., 26 May 1974) from NPC to an official at NIOC. This letter refers to "enclosed" letter from NPC and the Petroleum Department General of the Ministry of Finance (not in evidence) and requests NIOC to "make necessary arrangements concerning the exemption on interests paid to First National City Bank of New York." This letter does not, however, further specify the existence of any tax liability.

295. The Respondents also invoke Khemco's 1977 Annual Report which states:

> Unresolved tax matters at the end of 1977 are as follows:
>
> 1. Tax exemption on interest paid to First National City Bank in 1972, Exposure on this item is about $180,000.

Further, a footnote to the balance sheet entry for "Contingent Liabilities - Taxation" states as follows:

> On September 24, 1977, Khemco representatives attended a meeting at the Ministry of Finance in regard to tax on interest paid to First National City Bank in the amount of Rls. 12,624,619 in connection with a U.S. $6,600,000 loan obtained in February 1971. Khemco protested that interest on this loan is exempted from tax. On November 3, 1977 the Ministry of Finance requested Khemco to obtain specific approval for tax exemption from [NIOC] for this loan in question. Khemco requested NPC to obtain this approval from NIOC; to date this approval has not been issued by NIOC.

296. The next item on which the Respondents rely is an undated record of a meeting held on 25 Mordad 1361 (i.e., 16 August 1982) at the Ministry of Economic and Financial Affairs, which states:

> The opinion of the meeting was declared as follows:
>
> Whereas according to Clause 6 as amended to Article 112 of the Direct Taxation Act, the interest on loans received for development and promotion of agriculture, industries and mines, power, etc. are exempt from payment of taxes set forth in Article 39 and whereas the loan which is the agenda of the discussion of this meeting in the amount of $6,600,600 (six million, six hundred thousand US dollars) was not obtained for any of the above purposes, but received in order to pay the debts of the said company, therefore the said loan does not fall in the category described in clause 6 as amended to Article 112 of the said law.

The document is signed by two representatives of the Ministry of Economic and Financial Affairs as well as three representatives of NIOC.

297. The final item of documentation in the record is a letter dated 14 September 1982 to Khemco from the Chief Tax Assessor on Petroleum regarding "third party taxes during the years 1972 - 1973." In relevant part this letter refers to a "letter No.812/Petroleum" of 30 Mordad 1361 (not in evidence) "claiming taxes in the amount of 12,694,619 rials on the interest of a loan of 6,600,000 dollars your company received from the First National City Bank of New York," and requests Khemco to arrange payment.

298. The Claimant disputes the present counterclaim, contending that, if any taxes were owed, these taxes were the obligation of Khemco, and not of Amoco or the Claimant. Furthermore, the Claimant asserts that under Article 16, paragraph 3 of the Khemco Agreement, Khemco was expressly exempted from the withholding taxes at issue. This Article provides, in relevant part, that

> [t]he following payments made abroad for the account of the Company with the approval of the Company and charged to the Company shall be considered as earned outside of Iran and not subject to withholding of Iranian taxes:
>
> e. Payments of interest on funds borrowed abroad.

Consequently, the Claimant argues, the taxes were never due from Khemco.

b) The Tribunal's Findings

299. It is indisputable that the first document on which the Respondents rely, i.e., the letter from NPC to NIOC dated 26 May 1974, does not prove the existence of any tax liability. Further, although Khemco's Annual Report of 1977 establishes that a dispute had emerged on this issue, Khemco's provisional allocation in its budget for a potential debt is not evidence of Khemco's recognition of the debt. The Tribunal finds no evidence of any kind as to what action, if any, was taken by Khemco or NPC in order to obtain the "specific approval for tax exemption" from NIOC for the loan in question. Indeed there is no evidence that any action at all was taken with respect to this issue before the meeting of August 1982. On the basis of the record before it, the Tribunal thus determines that no final decision as to the existence of a debt for the taxes here at issue was taken prior to 16 August 1982. The debt thus arose after 19 January 1981, and after Khemco was expropriated, and therefore is outside the jurisdiction of the Tribunal under the CSD. In view of the terms of the Article 16, paragraph 3, of the Khemco Agreement and in the absence of any contrary evidence, the Tribunal further disagrees with the Respondents apparent contention that Khemco's liability for the present tax debt, by the mere operation of Iranian tax law, can be deemed to have arisen prior to the decision taken on 16 August 1982.

300. The Tribunal further notes that, as discussed above, the Respondents have not substantiated their assertion that Amoco would be liable for any debt of Khemco, nor explained why Article 30 of the Khemco Agreement does not apply in the present case.

301. In view of the foregoing the Tribunal rejects the counterclaim for withholding taxes.

B. Damages for Use of Non-JSA Gas

1. The Contentions

302. According to the Khemco Agreement and the Gas Purchase Agreement the gas supplied by NIOC and Amoco-Iran from fields they operated pursuant to the JSA ("JSA Gas") was to have priority over any other gas supply. The Respondents assert that from 1972 onwards Khemco purchased and processed Natural Gas from the OSCO fields near Kharg Island ("OSCO Gas"), instead of JSA Gas, without the authorization of NIOC or NPC, in contravention of the Khemco Agreement. The Respondents claim the right to payment of an amount equal to the Claimant's half of the unauthorized income allegedly earned by Khemco by use of the OSCO Gas, which they claim amounts to U.S. $11,000,000. The Respondents further contend that the NIOC official, Dr. Parviz Mina, who signed the 9 December 1972 letter from NIOC authorizing Khemco's use of OSCO Gas for

an "exclusive" two year period ("December Agreement") did not have the required authority to make such authorization on behalf of NIOC, since only the Iranian legislature was entitled to modify the Khemco Agreement. In any event, the Respondents argue, NIOC could not bind NPC, and Amoco should also have obtained NPC's approval to use OSCO Gas. Finally, the Respondents claim that even if the use of the OSCO Gas was authorized, such authorization expired on its terms after two years. The Respondents thus argue that Amoco breached the Khemco Agreement and that the excess income earned by Amoco by means of the breach should be returned.

303. The Claimant denies that Khemco's use of OSCO Gas constituted a breach of contract. It agrees that pursuant to the Khemco Agreement and the Gas Purchase Agreement NIOC and Amoco-Iran were obligated to sell JSA Gas to Khemco, and that JSA Gas was to have priority over gas from other sources. It points out, however, that Article 2, paragraph 2 of the Gas Purchase Agreement obligated NIOC to sell to Khemco "such amount of [non-JSA] Natural Gas as may be required for the operation of the... [Khemco] Plant in addition to the [JSA] Gas" and that the preferential use of JSA Gas could be suspended by an agreement between the parties to use gas from other sources.

304. The Claimant further contends that such an agreement to suspend the preferential use of JSA Gas was reached between Khemco and NIOC by the December Agreement. The Claimant asserts that Dr. Mina, who signed the December Agreement, was acting on behalf of NIOC in his capacity as an Alternate Director and Deputy Director of Technical and International Affairs of NIOC; moreover, Dr. Mina's authority to bind NIOC to such an agreement was never questioned by NIOC, NPC or Khemco, as is evidenced by NIOC's and Khemco's subsequent implementation of the December Agreement. By participating and acquiescing in the sales, the Claimant states, NIOC is now estopped from contesting Dr. Mina's authority.

305. The Claimant further argues that after the expiration of the two year period contemplated by the December Agreement, it continued to be more profitable for Khemco to process the richer OSCO Gas. NIOC thus continued to supply and Khemco continued to purchase the OSCO Gas on the same terms and conditions as embodied in the December Agreement. Although the agreement to continue the OSCO Gas sales was not put in writing, all parties, including NIOC and NPC, allegedly concurred in this arrangement as is evidenced by their course of conduct. According to the Claimant, the Respondents therefore are thus barred from now arguing that they did not agree to the continued purchase of OSCO Gas.

306. As to the Respondents' argument that the arrangement required approval of NPC, the Claimant points out that it was Khemco which used the gas, and that, by its fifty percent ownership and control of Khemco, NPC was in a position at the time to raise any objection it may have had against the use of the OSCO Gas. By its acquiescence NPC allegedly agreed to the use of the OSCO Gas under the December Agreement and thereafter.

2. The Tribunal's Findings

307. The Tribunal finds it indisputable that the terms of the Khemco Agreement and the Gas Purchase Agreement authorized the parties thereto to enter into an agreement suspending the preferential use of JSA Gas provided for in these agreements.

308. The Respondents' objection that the December Agreement was signed without authority was raised at no time prior to the proceedings in this Case. Even if Dr. Mina's position at NIOC did not vest him with the required authority, the Tribunal finds that, by their subsequent conduct, the Respondents are now, in any event, barred from disputing Dr. Mina's authority.

309. In addition, the Respondents have provided no evidence that NPC raised any contemporaneous objection to the December Agreement. In addition, nothing in the record indicates that NPC was in any way prevented from exercising its rights as a shareholder and participant in the management of Khemco. Indeed, the minutes of the Khemco board of directors meetings, at which the purchase of OSCO Gas was discussed and unanimously approved, evidence the contrary. The Tribunal thus holds that the December Agreement was validly entered into and that its execution and implementation did not constitute a breach of the Khemco Agreement.

310. It is undisputed between the Parties that Khemco's purchase of OSCO Gas continued beyond the term of the December Agreement up until the Khemco Agreement was "nullified" in December 1980. The Tribunal observes that although neither Party contends that the terms of the continued purchase were reduced to writing, it has not been contended that either the Khemco Agreement or the Gas Purchase Agreement imposed any such requirements as to form. The Tribunal further notes that the Respondents have not alleged that the terms and conditions on which the purchase and sale of OSCO Gas continued otherwise were at variance with the Khemco Agreement.

311. The Tribunal observes that the December Agreement explicitly states that the term thereof is limited to two years and that, after the expiration of this period, the OSCO Gas "will be used for" other projects. The Claimant contends, however, that no alternative uses were available to NIOC at the expiration of the term of the December Agreement, and that, had Khemco not purchased the OSCO Gas, this gas would have been flared. Although this contention by the Claimant is not supported by any evidence other than the fact that NIOC continued to supply Khemco with OSCO Gas, the Respondents have made no allegation to the contrary.

312. As evidence of NPC's participation in, and continued approval of, all decisions taken by Khemco related to the purchase of OSCO Gas, the Claimant invokes the minutes of meetings of the board of directors held after the expiry of the term of the December Agreement and the unanimous decisions taken at these meetings. The Tribunal finds that nowhere in these minutes, or elsewhere in the record, is there any indication that NPC raised any contemporaneous objection to this continued purchase and sale of OSCO Gas. On the basis of the foregoing and the record in this Case, the Tribunal concludes that all the parties understood and accepted the benefits of the continued arrangement under which NIOC supplied OSCO Gas to Khemco. Consequently, the Tribunal cannot find that the continued sale and purchase of OSCO gas constituted a breach of the Khemco Agreement or any agreement related thereto.

313. In view of this holding, the Tribunal does not need to examine the issue of whether or not the Respondents suffered any actual damage from this alleged breach of the Khemco Agreement.

C. Materials Purchased and Not Delivered

314. The present counterclaim raised by the Respondents concerns certain goods allegedly purchased by Khemco from an affiliate of the Claimant, but never delivered. The Respondents claim that the Claimant is liable to compensate the Respondents for the value of the goods not received in the amount of U.S. $54,000.

315. The Tribunal deems it relevant first to discuss certain issues of jurisdiction raised by the counterclaim as well as certain issues raised by an apparent new claim asserted by the Claimant.

1. The Factual Background

316. It appears that one of Amoco's affiliates, Amoco International Oil Company ("AIOC"), and Khemco executed a Purchasing Service Contract on 1 June 1970 ("AIOC Service Contract"). Pursuant to the AIOC Service Contract, AIOC was the designated purchasing agent for Khemco for the purposes of purchasing "outside Iran such material, equipment, services and supplies as [Khemco] may request in writing."

317. Article 4 of the AIOC Service Contract provides that:

> [Khemco] agrees to indemnify [AIOC] against, and hold [AIOC] harmless from, all loss, cost, damage and liability which might arise by virtue of all judgments against [AIOC] or by virtue of all claims asserted against [AIOC] in connection with or arising out of its services hereunder.

Article 5 provided further as follows:

> All purchases of material, equipment and supplies, insurance contracts and all other obligations undertaken hereunder in connection therewith shall be made or taken by [AIOC] in the name of [Khemco], which latter company shall bear sole responsibility for payment of any sums due under any such purchases contracts or undertakings.

318. Neither of the Parties disputes that the goods in question were actually purchased by AIOC on account and on behalf of Khemco. Nor is it otherwise in dispute that the AIOC Service Contract was factually (and causally) related to the Khemco Agreement and the related Technical Services and Assistance Agreement. The main jurisdictional aspect of the dispute rather concerns the issue as to whether the relationship among these agreements was such as to justify a conclusion that the counterclaim based on the AIOC Service Contract arises out of the same contract, transaction or occurrence as the claim.

2. The Contentions as to Jurisdiction

319. The Respondents assert that the AIOC Service Contract was entered into as part of the Claimant's obligation to provide technical services as provided in the Khemco Agreement and the related Technical Services and Assistance Agreement. They also note that pursuant to Article 1, paragraph

3 of the Technical Services and Assistance Agreement, the Claimant was entitled to perform its obligations through affiliates, but would still remain liable for the performance of those obligations.

320. The Claimant disputes the Tribunal's jurisdiction over the present counterclaim because the goods in question were purchased pursuant to a separate and independent agreement between parties different from those in the present Case. Consequently this counterclaim allegedly does not arise out of the same "contract, transaction or occurrence" as the claim in this Case as required by the CSD.

3. The Tribunal's Findings as to Jurisdiction

321. The party which allegedly breached the service agreement, AIOC, is not a party to this proceeding. The Tribunal has previously recognized that "a counterclaim may not be asserted against any person or entity other than Claimant itself," even when the putative counter-respondent is the sole shareholder of the subsidiary or is the alleged guarantor of performance under the contract allegedly breached. See American Bell International Inc. and Islamic Republic of Iran, Award No. ITL 41-48-3, pp. 13-14 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. 74, 83. To the extent that this counterclaim is directed against AIOC it is clearly outside the Tribunal's jurisdiction.

322. The Respondents assert, however, that the counterclaim is directed against Amoco (and thus attributable to the Claimant) by virtue of the terms of the Khemco Agreement and the Technical Services and Assistance Agreement. The Tribunal finds that Amoco's obligation contained in the Khemco Agreement to provide technical services only governed initial operations between Amoco and Khemco, however, since it expressly expired within one year after the acceptance of the plant and commencement of operations, i.e., on 31 December 1971.

323. The Tribunal finds no reference in the AIOC Service Contract either to the Khemco Agreement or to the Technical Services and Assistance Agreement, and no necessary relation between these agreements and the AIOC Service Contract. The Tribunal notes, moreover, that it has previously ruled that even such an express connection is not necessarily sufficient to form a basis for jurisdiction: "That the Contracts may refer to one another or may even contemplate the execution of one another does not necessarily make the linkage between them sufficiently strong so as to make them form one single transaction within the meaning of the Claims Settlement Declaration." See Morrison-Knudsen Pacific Ltd. and Ministry of Roads and Transportation, Award No. 143-127-3, p. 53 (13 July 1984), reprinted in 7 Iran-U.S. C.T.R. 54, 83. In this case, the alleged linkage between the AIOC Service Contract and the Khemco Agreement is even more tenuous. Thus, the Tribunal finds that there is no legal relationship between these contracts such that a breach of the AIOC Service Contract would amount to a breach of the Khemco Agreement. In view of the foregoing the Tribunal rejects the present counterclaim for lack of jurisdiction, and does thus not reach the merits thereof.

324. One final issue, however, is raised by one line of the Claimant's defenses against the present counterclaim. The Claimant asserts that Khemco was in breach of the AIOC Service Agreement by failing to purchase goods ordered by it. Although the Claimant concedes that, pursuant to Article 4, Khemco was liable to hold AIOC harmless from any claims raised against AIOC, AIOC felt compelled to settle the claims raised by the vendors and, to the extent possible, sell goods in its possession in order to limit the damages. Subsequently, and in exchange for releases and assignment to the Claimant of the vendors' claims against Khemco, AIOC was indemnified by the Claimant. Based on the foregoing, and in response to the present counterclaim, the Claimant now raises an additional claim against Khemco for the unsettled balance between the settlement amounts and the proceeds from the sales of the goods which it claims amounts to U.S. $24,727.33.

325. The Tribunal notes that the Claimant thus appears to raise a new claim which, in view of the Tribunal's finding above and the Claimant's contentions, jurisdictionally rests on the alleged assignment to the Claimant of the vendors' claims against Khemco. The Tribunal notes, however, that the alleged assignment rests solely on the assertions by the Claimant and otherwise unsubstantiated listings of the allegedly unpaid invoices and the dates of assignments. On the basis of this record the Tribunal concludes that this claim must be rejected for want of substantiation.

D. Breach of Khemco Agreement Article 8

326. The Respondents allege that in violation of an "overall gas supply agreement," Amoco's affiliate PANINTOIL and NIOC improperly entered into an agreement whereby NIOC gave to PANINTOIL the equivalent of one half of NIOC's and PANINTOIL's joint production of JSA Gas. This agreement allegedly permitted PANINTOIL or Amoco to reap "unlawful" earnings and deprived NIOC of profits that it otherwise would have earned through the sale of gas. The Respondents argue that this agreement also constituted a violation of Article 8 of the Khemco Agreement. The Respondents value those unlawful earnings as the net amount earned by PANINTOIL for its share of sales of JSA Gas from 1970 to 1978. On the basis of the foregoing the Respondents seek damages from the Claimant in the amount of U.S. $777,000.

327. The Claimant disputes this counterclaim both on jurisdictional grounds and on the merits. As to the Tribunal's jurisdiction, the Claimant argues that the counterclaim is based on the JSA, which is not at issue in this Case. Furthermore, to the extent the counterclaim is based on an allegation of breach of the Gas Purchase Agreement, which is at issue in this Case, the Claimant points out that the counterclaim is directed against PANINTOIL, which is not a party to this Case. On either of these grounds, the Claimant alleges, the Tribunal lacks jurisdiction. On the merits the Claimant disputes that any action (or inaction) on its part constitutes any breach of either the Khemco Agreement of the Gas Purchase Agreement.

1. The Factual Background

328. Article 8 of the Khemco Agreement stipulates that:

> NPC and AMOCO will use their best efforts to have each of their respective affiliates, NIOC and PANINTOIL, sell in equal shares from their separate one-half of the total quantity of their joint production of Casinghead Gas from the NIOC/PANINTOIL Joint Structure Agreement Area... on the following principal terms and conditions:
>
> > a. Khemco will pay NIOC and PANINTOIL, and NIOC and PANINTOIL will each receive, two cents (U.S. $.02) per 1000 SCF... for their respective separate one-half quantity of the gas sold to the Company....

329. The Gas Purchase Agreement contained in Article 2, paragraph 1 the following provision:

> NIOC and PANINTOIL each hereby agree to sell, in equal quantities, from the NIOC/PANINTOIL Joint Structure Agreement Area, and KHEMCO agrees to buy from NIOC and PANINTOIL Casinghead Gas produced from said Area to the extent available and which may be required for the operation of the... [Khemco] Plant...

330. It is undisputed that under Article 27, paragraph 1, of the JSA, NIOC was entitled to receive free of any payment (other than that specified in Article 27) all jointly produced natural gas required by NIOC "for internal consumption in Iran." The Tribunal is uninformed as to the other provisions of the JSA.

331. It is further undisputed that, as evidenced by a letter to PANINTOIL dated 1 April 1967 from NIOC's chairman of the board and managing director, PANINTOIL and NIOC entered into an agreement ("April Agreement") which, in relevant part, provided as follows:

> 1. The gas to be supplied to KHEMCO shall be considered as natural gas required by NIOC for internal consumption in Iran pursuant to the provisions of Article 27(1) of the [JSA].
>
> 2. In observance of the considerations leading to the encouragement of Amoco's participation in KHEMCO and for the purpose of implementing the Khemco Agreement, NIOC shall make available and convey to PANINTOIL, at the well-head one half the quantity of the gas produced from the NIOC/PANINTOIL Joint Structure Agreement Area" which is to be supplied to KHEMCO pursuant to the aforesaid "Gas Purchase Agreement," free of any payment therefor.
>
> 3. It is understood that the provisions of the Khemco Agreement shall not prejudice the rights of NIOC and PANINTOIL under the [JSA]; provided, however that NIOC and PANINTOIL hereby recognize that they shall have no further claim with respect to the gas sold to KHEMCO under the "Gas Purchase Agreement," except as may otherwise be provided for therein.

2. The Tribunal's Findings

332. The relevant language of the Gas Purchase Agreement is virtually identical to the Khemco

Agreement: NIOC and PANINTOIL were each required to sell one half of their entitlement to the JSA Gas to Khemco to satisfy Khemco's requirements. It is not in dispute that both NIOC and PANINTOIL actually did so, and received payment for its gas. As the Tribunal understands it, however, the present counterclaim is based on the contention that the gas that PANINTOIL thus sold was obtained by the April Agreement on terms and conditions which were in violation of an "overall arrangement," apparently including (but not limited to) the Khemco Agreement and the JSA.

333. The Tribunal fails to find any ground to accept the Respondents' theory. Is is indisputable that the contractual relationships by which NIOC and PANINTOIL secured their sources of gas are factually related and relevant to the contractual relationships by which NIOC and PANINTOIL subsequently sold the gas they thus had procured to Khemco. The Tribunal does not find, however, that these agreements are legally related so as to warrant a finding that a breach of the terms and conditions on which NIOC and PANINTOIL obtained their gas under the JSA would constitute a breach of the terms and conditions on which NIOC and PANINTOIL sold this gas to Khemco pursuant to the Gas Purchase Agreement.

334. It is further clear that PANINTOIL is not a party to this Case. Consequently, to the extent the present counterclaim is directed against PANINTOIL, the Tribunal lacks jurisdiction.

335. The Tribunal also rejects the Respondents' contention that the Tribunal would have jurisdiction over a counterclaim asserted against the Claimant but based on allegedly improper actions by PANINTOIL solely on the ground that PANINTOIL is an affiliate of the Claimant. American Bell International Inc. and Islamic Republic of Iran, Award No. ITL 41-48-3, pp. 13-14 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. 74, 83.

336. The remaining argument the Tribunal has to examine is the Respondents' contention that the Claimant could be held liable for breaching Article 8 since it was obligated to exercise its best efforts to ensure that PANINTOIL entered into an overall gas supply arrangement consistent with those terms. Without resolving the alleged inconsistency between the April Agreement and the "overall gas supply arrangements", the Tribunal finds that nothing in the record indicates that the Claimant did not exercise its best efforts to induce a correct arrangement. Nor does the Agreement that the Claimant was under any obligation to guarantee the actions of its affiliate PANINTOIL.

337. Finally, and although the Tribunal, in view of these findings, need not examine the merits of the contention that the April Agreement was inconsistent with the Khemco Agreement, the Tribunal deems it relevant to note that the parties themselves saw no such inconsistency; the April Agreement recites that it was executed to implement the Khemco Agreement and to encourage Amoco's participation in it.

338. For the foregoing reasons, the Tribunal denies the Respondents' counterclaim based on the alleged breach of Article 8 of the Khemco Agreement.

VI. REQUEST FOR APPOINTMENT OF EXPERT

339. The Respondents have requested that the Tribunal appoint an expert to give an opinion on certain issues raised in this Case, most notably on the valuation of Amoco's shares in Khemco. In the circumstances of this Case the Tribunal finds no need or justification for such an appointment. It is envisaged that the additional information the Tribunal has requested of the Parties in this Partial Award, together with the documentation already contained in the record, will be sufficient to allow the Tribunal to make all necessary findings without additional assistance. The appointment of an expert is therefore not necessary at this stage. The request accordingly is denied.

VII. INTEREST AND COSTS

340. In light of the Tribunal's holdings in this Partial Award, a decision on interest and costs is deferred to a later stage.

VIII. AWARD

341.

For the foregoing reasons:

THE TRIBUNAL AWARDS AS FOLLOWS:

a) The shareholding interest of AMOCO INTERNATIONAL S.A. in Kharg Chemical Company Limited was lawfully expropriated by THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN as of 24 December 1980,

b) THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN shall pay to the Claimant, AMOCO INTERNATIONAL FINANCE CORPORATION, a compensation measured at fifty percent (50%) of the going concern value of Kharg Chemical Company Limited as of 31 July 1979, without addition of future lost profits beyond such value,

c) The Tribunal defers the determination of the amount of the compensation to be paid to the Claimant, AMOCO INTERNATIONAL FINANCE CORPORATION, until such time as the Parties to this Case have been given opportunity to submit further documentation, as determined in paragraph 267 of this Partial Award, pursuant to the schedule which will be determined by separate order,

d) All Counterclaims raised in this Case are dismissed.