IRAN-UNITED STATES CLAIMS TRIBUNAL 211 دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. A/57 Date of filing: 10-Dec86

** AWARD - Type of Award Interlocutory
- Date of Award 10-Dec86
57 pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

_____

- Date _____
_____ pages in English _____ pages in Farsi

R/12

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

211

CASE NO. 167
CHAMBER THREE
AWARD NO. ITL 65-167-3

ANACONDA-IRAN, INC.,
Claimant,

and

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

INTERLOCUTORY AWARD

Appearances:

For the Claimant:

Mr. J.P. Coy
Representative of Anaconda-Iran, Inc.
Mr. P.J. Brophy
Attorney and Representative of Anaconda-Iran, Inc.
Mr. C. Torem
Mr. E. Kreīsel
Attorneys

For the Respondents:

Dr. J. Niaki
Deputy Agent of the Government of the Islamic Republic of Iran
Mr. Kh. Tabassi
Legal Advisor to the Agent of the Government of the Islamic Republic of Iran

I. I N T R O D U C T I O N

1. On 26 September 1972 the Claimant, ANACONDA IRAN, INC. ("AI"), entered into an agreement, entitled "Technical Assistance Agreement" ("TAA"), with the Sar Cheshmeh Copper Mining Company of Kerman, the predecessor in interest of the Respondent NATIONAL IRANIAN COPPER INDUSTRIES COMPANY ("NICIC"). According to the TAA, AI was to provide NICIC with certain technical assistance in connection with the development, construction and operation of an opencast copper mine and related plant and smelter in Sar Cheshmeh in Iran. In consideration therefor AI was entitled to reimbursement of expenses incurred and payment of a certain fee. It is common ground in these proceedings that the TAA terminated prior to its term. The circumstances surrounding the rupture of contractual relations essentially are not in dispute between the Parties. They do contest, however, the scope and applicability of certain contractual provisions, each alleging breach of the TAA by the other Party. The issues before the Tribunal include a determination as to whether either Party (or both of them) justifiably could invoke force majeure as an excuse for non-performance of contractual obligations as well as a determination of the cause of termination of the TAA. With respect to the substantial counterclaims raised in this Case, the Tribunal previously decided to deal initially only with jurisdictional and certain other preliminary issues. Consequently, the present Award does not reach the merits of the counterclaims in this Case.

II. T H E P R O C E E D I N G S

2. On 18 December 1981 AI filed a Statement of Claim seeking a principal amount of U.S. $11,190,768.50 plus contractually provided compound interest up until the date of the Award as well as its costs of arbitration. The

Claimant named the GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("Iran") and NICIC as Respondents.

3. In a submission filed on 1 September 1982 the Respondent NICIC raised counterclaims against AI amounting to U.S. $1,140,132,875 with interest from January 1979 up to the "time of the ruling." In a submission filed on 22 August 1983 NICIC "rectifie[d] and declare[d] the nature and total amount of the Claim" to be U.S. $2,065,865,229. Finally, in its submission filed 4 February 1985 NICIC raised a "set-off" claim for allegedly unpaid taxes and social security premia amounting to U.S. $6,814,463.08, subject to any amounts claimed by AI conceded to be due by NICIC.

4. On 27 October 1982 the Claimant submitted a "Motion to Dismiss" NICIC's counterclaim (as then stated) on grounds of lack of jurisdiction and inadmissibility. Following an exchange of submissions on this issue, as well as discussions at the Pre-Hearing Conference held on 21 May 1984, the Tribunal decided to separate the issue of the Tribunal's jurisdiction over the counterclaims from the merits. By Order dated 7 June 1984 the Tribunal thus scheduled a "partial Hearing" to consider, firstly, the claims of the Claimant including all issues as to both jurisdiction and the merits, and, secondly, the issue of whether or not, and, if so, to what extent, the Tribunal has jurisdiction over the counterclaims of NICIC.

5. In light of the contentions of the Parties the Tribunal instructed them, by the same order of 7 June 1984, to file Memorials on the issue of the Tribunal's jurisdiction over the counterclaims addressing the following specific points in particular:

a. What law is applicable to the Technical Assistance Agreement?

b. Is the amount which may be awarded on counterclaims in any way limited by the amount sought or awarded for the claim?

c. What exceptions, if any, e.g., based on an intentional act or gross negligence, exist under the applicable law to an enforceable contractual limitation of remedies such as appears at Article 9 of the Technical Assistance Agreement?

d. Does the Tribunal lack jurisdiction over any of the counterclaims because they were not made in a timely fashion, because they arise out of a different contract or on any other ground?

e. May a counterclaim be based upon or rely upon statements in the Feasibility Study on the basis of the Feasibility Study being incorporated by reference into the Technical Assistance Agreement or any other grounds?

6. The scheduled partial Hearing was held on 30 September 1985, at which the Parties appeared and presented oral argument.

7. At this Hearing the Respondents sought to submit certain documents not previously filed in this Case. The Respondents asserted that these documents pertained to issues which were the subject matter of the Hearing. The Claimant objected to their filing on the ground of untimeliness. The Tribunal decided, in view of the requirements of equality between, and fairness to, the Parties, that no further filings on issues which were the subject matter of the Hearing could be accepted at such stage of the proceedings.

8. Pursuant to the Tribunal's practice, however, it accepts the submission by AI of 19 November 1986 as it contains solely an itemization of counsel fees and a specification of its interest claim.

9. The Respondents have requested that the Tribunal appoint an expert for the purpose of determining the extent of the alleged damages for which the Respondents counterclaim. The Claimant has opposed this request on the ground that the issues in this Case do not require such appointment. The Tribunal will deal with this issue later in this Award.

III. J U R I S D I C T I O N

10. The Tribunal is satisfied that AI'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 1, of the Claims Settlement Declaration ("CSD"). 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, establishing that AI is a United States corporation, duly incorporated in the State of Delaware at all relevant times, and, through a chain of corporate ownerships including the United States corporations Anaconda International Corporation, The Anaconda Company ("Anaconda") and Atlantic Richfield Company, ultimately is owned by United States nationals as the CSD requires.

11. As admitted by the Respondents, the Tribunal finds that NICIC is an agency or instrumentality controlled by the Respondent Iran within the terms of the CSD. Hence jurisdiction exists in respect of both Respondents as well.

12. The Parties agree that AI's claims arise out of the TAA. The Tribunal is thus satisfied that the claims arise out of a contract and therefore are within the subject matter jurisdiction of the Tribunal as established in Article II, paragraph 1, of the CSD. It further is clear that the claims arose within the jurisdictional period applicable to the Tribunal. Indeed, as noted in the Tribunal's Order of 7 June 1984, the Parties agree that the Tribunal has jurisdiction over AI's claims as long as the nationality and continuous ownership requirements of the CSD are satisfied.

13. Jurisdictional and other preliminary issues relating to the counterclaims are discussed subsequently in this Award.

IV. T H E C L A I M

A. INTRODUCTION

14. On 7 March 1971, after extensive discussions, representatives of Anaconda and the Imperial Government of Iran signed a "Memorandum Of Principles Upon Which Definitive Agreements Are To Be Based" ("Memorandum Of Principles") with a view towards the development of a copper orebody in Iran known as Sar Cheshmeh. The Memorandum Of Principles, which expressly foresaw "definitive agreements" in due course, specifically provided that the eventual contractual parties would be AI and a then as yet unformed Iranian joint stock company.

15. By 26 September 1972 the definitive agreement, the TAA, was signed by AI and Sar Cheshmeh Copper Mining Company of Kerman, the envisioned Iranian joint stock company agreed by the Parties here to be the predecessor in interest of NICIC. The TAA was accompanied by execution of an agreement between AI and its basic parent, Anaconda, which was to provide AI with various services in performing its obligations under the TAA.

16. Generally, AI's obligations pursuant to the TAA were to provide technical data and assistance of various kinds, a detailed training program for personnel, and, at the outset, an extensive feasibility study. Essentially, AI was to provide the requested data and assistance "for the design, construction, placement into commercial operation and operation and maintenance of" an opencast mine and related equipment and a plant for the milling and concentration of sulfide ores and the smelting of the resulting concentrates by described processes to produce cast blister copper. In return for its services AI was to be paid various described costs and expenses, as well as a fee ("Technical Service Fee"), which after a certain point would be U.S.$333,333 per month "until the first day of the Calendar Month next following Commencement of Commercial

Production" (which "Commencement" also is described as the "Date of Operation"). All payments due AI were payable in U.S. Dollars. It is common ground in this proceeding that at all times relevant to the present claim the monthly Technical Service Fee amounted to U.S. $333,333 and that commercial production as contemplated by the TAA did not commence during the life of the TAA.

B. FACTS AND CONTENTIONS

17. As the Claimant has presented its case, both Parties performed under the TAA at least up until 1978. Sometime in 1978 it appears that a dispute emerged between the Parties as to AI's method of billing and justification invoked for allegedly reimbursable expenses. The Parties appear to agree that, following meetings held in June 1978, a procedure was mutually agreed for timely payment of amounts agreed to be due. Although the Claimant alleges that, in spite of this agreement, NICIC remained in default all through the rest of 1978, it is undisputed that AI did not invoke this apparent breach as a ground for termination of the TAA during the course of 1978.

i) WITHDRAWAL OF AI'S PERSONNEL

18. The Claimant alleges that by 5 January 1979 social and political unrest in Iran had increased to such a degree that AI felt compelled to exercise its right, pursuant to Section 2.06 of the TAA, to invoke force majeure as an excuse for non-performance of its obligations, and proceeded to withdraw its personnel from Iran. Section 2.06, the only contractual provision on force majeure, reads as follows:

> AI shall have no responsibility to the extent and for the period that its obligations under this Agreement are affected by a force majeure incident, including without limitation, floods, tempest, earthquakes, sabotage, uprising, civil war, acts of government, epidemics and incidents

> beyond the control of AI. If prior to the Date of Operation any force majeure incident prevents the continuation of the Project and such incident continues in effect for a period of six months, then [NICIC] alone may upon notice to AI terminate this Agreement. If such notice is not given by [NICIC] within 12 months from the commencement of such incident and if such incident continues to be in effect, this Agreement shall be terminated effective at the expiration of such 12-month period. Upon any such termination, [NICIC] shall pay to AI within 30 days after such termination (i) all amounts then due and unpaid under this Agreement, (ii) all Termination Costs, and (iii) an amount in U.S. dollars equal to the aggregate of the fee that would otherwise have been payable to AI under this Agreement during the three-month period subsequent to the date of termination. [The following text contains stipulations regarding the occurrence of force majeure incidents after the Date of Operation. These stipulations are not relevant here (cf. paragraph 16, in fine, supra)].

19. AI notified NICIC by letter (and cable or telex) of its invocation of force majeure as follows:

> Due to the internal disruptions in Iran, it has become impossible for Anaconda-Iran seconded employees to function in their assigned tasks with respect to the Sar Cheshmeh project. The persistence of force majeure incidents beyond the control of Anaconda-Iran requires that we send to you the enclosed notice [not in evidence in this Case] of force majeure and take steps to reassign the seconded staff to locations outside of Iran.
>
> Our present plan is to return the seconded staff and their dependents to their point of origin. Employees will be retained on the payroll and, to the extent feasible, will be assigned other duties. Our objective is to have the staff available to return to Iran when the force majeure conditions cease and work can resume on the Sar Cheshmeh project.

20. The following day, 6 January 1979, NICIC replied, denying the existence of force majeure and demanding that "the personnel . . . remain at the site and continue to perform their duties and obligations under the" TAA. The same communication stated also that "we have no objection to Anaconda's seconded staff dependents leaving Iran."

21. Despite NICIC's plea, the Claimant withdrew its personnel and reassigned them to locations outside Iran.

22. NICIC contends that this withdrawal of AI's personnel from Iran constituted a breach of the TAA on the part of AI as NICIC rejected AI's invocation of force majeure by its telex of 6 January 1979. In any event, it argues, the conditions in Iran, at the time, did not constitute force majeure.

ii) TERMINATION OF THE TAA

23. Although the Parties disagree in other respects, it is, in any event, undisputed that neither Party performed under the TAA after 31 May 1979. In support of their respective contentions regarding termination the Parties rely, inter alia, on an exchange of telexes and letters during the period 22 March 1979 - 31 May 1979.

24. This exchange was initiated by AI's notification to NICIC, by letter and telex dated 22 March 1979, that NICIC was "in arrears" to the extent of U.S. $2,280,944.82 and that if such total were not paid within 25 days AI would exercise its right to terminate the TAA under its Section 9.03.

25. NICIC protested by telex, dated 11 April 1979, stating that "we ... still await the documents substantiating the expenses incurred by you" and that in any event such action was unjustified because of "your unilateral action of withdrawal". NICIC further suggested that an authorized representative be sent to Tehran to negotiate and settle outstanding differences.

26. By return post (and confirming telex) AI then advised that necessary documentation had been provided already, but noted that nonetheless "we are sending you by courier additional copies of documents substantiating the

amounts due" and extended the cure period to 1 May 1979. AI reiterated its decision to terminate as of that latter date pursuant to Section 9.03 if by then payment were not received in full of amounts due as of 1 March 1979. AI stated that a decision whether or not to send a representative to Iran would await the passage of that deadline.

27. On 30 April 1979 NICIC once more dispatched a telex to the Claimant, this time explaining that "due to instructions by the Islamic Republic of Iran" no payment could be made except "after auditing all accounts." This message noted that such audit was under way and "we have found out differences which needs [sic] to be solved." Once more the Claimant was urged to send a representative to Iran.

28. By letter and telex of 2 and 3 May 1979, respectively, AI advised NICIC that it would extend the cure period, this time until 25 May 1979. AI suggested that NICIC in the meantime "furnish us as soon as possible your identification of any account items where you believe differences exist that need to be solved."

29. Just before this last deadline, on 22 May 1979, NICIC telexed that it had completed its audit, that certain documents still were required and that substantially the full amount claimed was still in dispute, i.e., U.S. $2,200,000. NICIC once again reiterated its request that the Claimant send a representative to Iran and that NICIC "will do ... [its] best to settle all differences in good faith".

30. Finally, AI notified NICIC by telex and letter, dated and sent 31 May 1979, that:

> [T]he agreement is terminated effective May 31, 1979. The authority for the termination is Section 9.03 of the agreement. The reason for termination is that NICIC has failed to pay in accordance with the agreement amounts due AI.

31. In support of their contentions in this Case, both Parties rely on Article 9 of the TAA, which is entitled "Termination". This Article provides, in its entirety, as follows:

> 9.01 Except in the case of force majeure as provided in Section 2.06 of this Agreement, this Agreement may not be terminated by either party without cause and may be terminated for cause only as provided in this Section 9.
>
> 9.02 Except as provided in Section 9.03, if this Agreement is breached by either party, the parties will in good faith endeavor to remedy the breach. If a party believes that a material breach has continued unremedied for a period of 90 days following notice to the other party specifying such breach, either party may apply to ICC for a decision as to whether such material breach has occurred. Any failure by [NICIC] to pay in accordance with this Agreement any amounts due AI or Staff will be deemed to be a material breach. The decision of ICC shall be determined by arbitration by three arbitrators all in accordance with the Rules of Conciliation and Arbitration of ICC. Such arbitration shall take place in Paris, France. Pending such decision, the parties will continue to perform their respective obligations in accordance with this Agreement. If a material breach is determined by ICC to have occurred, ICC shall make an award in favor of the non-breaching party terminating this Agreement and setting forth damages to the full extent (but not in excess) of the amounts specified in Sections 9.04 or 9.05, as the case may be, without reductions or offsets of any kind or type whatsoever. The costs of arbitration shall be paid by the parties in the manner directed by the arbitrators in accordance with the Rules of Conciliation and Arbitration of ICC.
>
> 9.03 Notwithstanding, and as an alternative remedy to, the provisions of Section 9.02, if [NICIC] fails to pay in accordance with this Agreement any amount due AI or Staff and such amount is not paid within 25 days after AI has given [NICIC] notice of such failure to pay, AI may terminate this Agreement and the amounts specified in Section 9.05 shall be paid by [NICIC] to AI. In the event of such termination, AI shall have the right to request ICC to determine the exact amount payable to AI specified in Section 9.05. Upon such determination by ICC, ICC shall make an award in favor of AI setting forth damages to the full extent (but not in excess) of the amount specified in Section 9.05 without

reductions or offsets of any kind or type whatsoever.

9.04 If this Agreement is terminated pursuant to Section 9.02 on account of a material breach by AI, then AI shall pay to [NICIC] within 30 days after termination, an amount in U.S. dollars equal to the aggregate fees that shall have been received by AI under this Agreement during the 18-month period preceding the date of termination.

9.05 If this Agreement is terminated pursuant to Section 9.02 on account of a material breach by [NICIC] or if AI has terminated this Agreement pursuant to Section 9.03, then [NICIC] shall pay to AI within 30 days after termination (i) all amounts then due and unpaid under this Agreement, (ii) all Termination Costs, and (iii) an amount in U.S. dollars equal to the aggregate of the fees paid or due to AI under this Agreement during the 18-month period preceding the date of termination.

9.06 The parties agree that judgment upon the award rendered by ICC under this Section 9, and any amounts payable under Sections 9.03, 9.04 or 9.05, may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the award or amounts and an order of enforcement, as the case may be.

9.07 The parties shall be entitled to no remedies of any kind or type whatsoever (except as specifically provided in Section 2.06 and this Section 9) and to no damages of any kind or type whatsoever (except for amounts payable under Sections 2.06, 9.02, 9.03, 9.04 or 9.05) under this Agreement, with respect to the performance of this Agreement, or in any way relating to the Project, the Facilities or action or inaction of any member of the Staff or any employee of [NICIC], AI or Anaconda.

32. AI contends that NICIC, at the time of termination, as well as during the major part of 1978, was in default in payments due AI. Although AI had furnished duplicate copies of all invoices and supporting documents pursuant to the procedures mutually agreed to by the Parties for timely payments of all amounts due, NICIC had not paid AI reimbursable expenses since early 1978; salaries and fringe benefits since April 1978; and the Technical Service Fee since October 1978. Contractually provided interest had not been paid at all. Section 9.03 explicitly authorized AI

to terminate the TAA for failure on the part of NICIC to pay "any amount due" on condition that NICIC was offered an opportunity to cure the default within a prescribed 25 day period. As is evidenced by AI's communications to NICIC, NICIC was in fact offered an opportunity to cure the default. AI even extended this cure period twice. The provisions in Section 9.02, requiring a referral to and determination by the Court of Arbitration of the International Chamber of Commerce as to the existence of a material breach, relate to causes other than default in payment by NICIC. AI specifically contends that pursuant to the TAA it retained its right to terminate the TAA for cause during the period when AI's performance was excused due to force majeure. As the TAA was terminated because of NICIC's material breach, AI claims entitlement to the equivalent of 18 months Technical Service Fee, as provided for in Section 9.05 (iii) ("Termination Damage"), in addition to the amounts due and its "Termination Costs." Pursuant to Section 1(w) of the TAA "Termination Costs" are defined as "any cost to AI related exclusively to termination of this Agreement that would not have been incurred by AI except for such termination, unless any such cost is specifically excluded by this Agreement."

33. Although NICIC concedes that, as of the beginning of 1979, certain amounts were due AI, it disputes that this non-payment of amounts due to AI constituted a breach of the TAA. NICIC contends that from the execution of the TAA until January 1979 there occurred, on several occasions, delays in the payments to AI. It asserts that in accordance with commercial practice as well as a practice between the Parties good faith negotiations were undertaken when disagreement occurred as to amounts due. When an agreement had been reached, the outstanding amounts were settled in lump sums. Pursuant to this practice, NICIC states it made good faith attempts, which were not heeded by AI, to seek a negotiation with AI concerning the amounts AI alleged NICIC was delinquent in paying. According to NICIC, this is evidenced by, inter alia, NICIC's responses to AI's

communications. NICIC further contends that Sections 9.02 and 9.03 of the TAA require that a dispute between the Parties as to the existence of a material breach be referred to the ICC, and that the Parties were required to perform under the TAA pending such a determination. No material breach was determined on the part of NICIC, as AI did not refer this issue to the ICC.

34. NICIC disputes AI's alleged entitlement to payment for Termination Costs and Termination Damage as well as the claimed interest thereon on the ground that AI had ceased to perform its obligations as of 5 January 1979 and that it did not resume performance prior to the termination of the Agreement.

35. NICIC further argues, although not entirely consistently, that "[u]nder the Civil Code of Iran and in accordance with the established general principles of law" AI cannot claim entitlement to payment for services not rendered, i.e., for the services not rendered for the period subsequent to 5 January 1979. NICIC does not, however, invoke this argument as a ground for disputing AI's claimed reimbursement for "administrative costs". It appears, furthermore, that NICIC's position is modified by statements made in an audit report ("Audit Report") on which it otherwise relies (see paragraph 38, infra). Although it disputes the amounts claimed pursuant to this Audit Report, NICIC appears to admit liability for employee salaries and fringe benefits as well as for the Technical Service Fee up to and including the whole month of January 1979.

36. In any event, NICIC disputes any present liability to AI. NICIC alleges that AI has been negligent in performing its duties under the TAA, as further evidenced and developed in NICIC's counterclaims, and that AI owes NICIC substantial amounts as damages far exceeding NICIC's debt to AI. In addition, NICIC claims entitlement to a "set-off" on account of unpaid taxes and social security premia in the amount of U.S. $6,814,463.08, also as further developed in

its submission. Consequently NICIC asserts it has no present liability to AI; on the contrary, it is AI which is liable to NICIC.

iii) CONTENTIONS AS TO AMOUNTS CLAIMED

37. On the basis of the foregoing facts and its contentions AI now seeks payment of the following amounts, all allegedly payable under the TAA: (i) U.S. $1,332,176.77 as reimbursable costs incurred through May 1979 (including U.S. $121,876.34 incurred prior to May 1978); (ii) U.S. $839,358.86 for employee salaries incurred from May 1978 through March 1979 and in May 1979 and U.S. $257,742.14 for fringe employment benefits incurred from May 1978 through March 1979; (iii) U.S. $2,333,331 for scheduled unpaid Technical Service Fees from November 1978 through May 1979; and, pursuant to Section 9.05 of the TAA, (iv) U.S. $428,159.73 for Termination Costs and (v) U.S. $6,000,000 equalling the Technical Service Fee paid or due to AI under the TAA during the 18-month period preceding the date of termination. The principal of the Claim thus totals U.S. $11,190,768.50. AI further seeks contractually agreed compound interest. Pursuant to calculations it has provided, AI claims interest, through November 1981, in the amount of U.S. $6,836,665.38, and from "18 December 1981" until "the date of the Award" on the total of U.S. $18,027,433.88. Finally, AI seeks reimbursement for its costs of arbitration in the amount of U.S. $418,049.94.

38. NICIC's position is reflected in the Audit Report drawn up following an audit of AI's invoices on the basis of available documentation. Pursuant to this Audit Report, and subject to the other objections raised, NICIC admits liability to AI for the following amounts: (i) U.S. $201,334.10 as reimbursement for actual costs incurred through May 1979; (ii) U.S. $753,408.02 for direct payments to AI and seconded employees and reimbursable fringe employment benefits incurred from May 1978 up to and including

January 1979; (iii) U.S. $999,999 for scheduled unpaid Technical Services Fees from November 1978 up to and including January 1979. In total, NICIC thus recognizes unpaid amounts totalling U.S. $1,954,741.12, all the while disputing all other claimed amounts as well as any interest thereon.

C. REASONS

39. The Tribunal finds that the positions of the Parties, as well as practical considerations, require the Tribunal initially to address the general contentions of the Parties, before entering into a detailed examination of the amounts claimed.

i) WITHDRAWAL OF AI'S PERSONNEL

40. The first issue before the Tribunal is to determine whether AI's undisputed non-performance under the TAA starting 5 January 1979 was excused by force majeure as claimed, or instead constituted a breach of contract as NICIC contends.

41. The Tribunal considers it generally recognized that force majeure is an excuse for non-performance of a contractual obligation which depends on the facts and circumstances. When there is a situation of force majeure, the performance of contractual obligations will, partially or totally, be suspended. Force majeure also can have the effect of terminating a contract if force majeure renders performance of the contract impossible in a definitive way or for a prolonged period of time.

42. As force majeure arises out of and depends on factual circumstances, it will affect a contract as soon as the circumstances emerge which create the obstacle to performance. The actual effect force majeure will have on

the contract depends, however, on the extent to which these circumstances, practically and objectively, render performance impossible. Consequently, the existence of force majeure does not depend on, or arise out of, an agreement between the parties as to the existence of such circumstances. Nor is the application of force majeure dependent on any special formal requirements, unless the contract in question so provides.

43. Under a variety of names most, if not all, legal systems recognize force majeure as an excuse for contractual non-performance. Force majeure therefore can be considered a general principle of law. It follows that the right to invoke force majeure does not depend on, or arise out of, an express contractual provision. The parties to a contract may, however, agree that force majeure will have certain specific consequences for their contractual performance or with respect to termination of the contract. They also can decide that their contractual obligations, or some of them, will not be affected by force majeure. It is clear, however, that a limitation on the right to invoke force majeure as an excuse for non-performance cannot be presumed, but requires instead an express contractual provision to that effect.

44. In the present Case it is undisputed that AI notified NICIC by telex, dated 5 January 1979, that AI, as of that date, could not perform its obligations under the TAA due to force majeure. The contractual authority invoked by AI was Section 2.06 of the TAA.

45. The Tribunal finds that it follows clearly from Section 2.06 that AI had a right to invoke force majeure as an excuse for non-performance of its contractual obligations.

46. The Tribunal does not accept NICIC's argument that force majeure cannot be an excuse for AI's non-performance because it rejected AI's notification by telex of 6 January

1979. As already noted, the Tribunal finds that the existence of force majeure conditions does not depend on, or arise out of, an agreement between parties, but that it is a consequence of certain circumstances.

47. As concerns NICIC's contention that force majeure conditions were not in fact prevailing in Iran at the relevant time, the Tribunal notes that it has previously ruled that, at least during the time from December 1978 until 15 February 1979, the conditions in Iran were such as to amount to force majeure:

> It can indeed be concluded that at least by . . . 5 December 1978 the conditions in Iran had ripened into a force majeure situation. As stated by the Tribunal in other cases, "[b]y December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic force majeure conditions at least in Iran's major cities. By 'force majeure' we mean social and economic forces beyond the power of the state to control through the exercise of due diligence."

International Technical Products Corporation and Government of the Islamic Republic of Iran, Award No. 186-302-3 at 21 (19 August 1985), citing Gould Marketing, Inc. and Ministry of National Defense of Iran, Award No. ITL 24-49-2 at 11 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 147, 152-153; Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 at 15 (27 June 1985).

48. Furthermore, in the cited awards the Tribunal found that these force majeure conditions entitled United States corporations to withdraw their personnel from Iran and suspend their performance for the period of force majeure. In addition, the Tribunal specifically has found that force majeure prevailed in the Sar Cheshmeh area during the time here relevant. See International Schools Services, Inc. and National Iranian Copper Industries Company, Award No. 194-111-1 at 13-14 (10 October 1985).

49. In accordance with its established practice the Tribunal finds that AI, in any event, was excused from performance under the TAA from the time of departure of AI's personnel in January 1979 up until 15 February 1979 due to force majeure.

50. The Tribunal notes that after 15 February 1979 the conditions in Iran gradually evolved towards more normal conditions, but that it is neither possible nor necessary for the Tribunal to establish, with accuracy, the exact point in time when the conditions in Iran, generally, no longer constituted force majeure conditions. Under the circumstances of this Case, however, the Tribunal finds that at least up until 31 May 1979 the conditions in Iran were such as to justify continued non-performance by AI to the extent that contractual performance required the presence in Iran of United States personnel.

ii) TERMINATION OF THE TAA

51. AI alleges a material breach on the part of NICIC, i.e., its default in payment of amounts due to AI, as the cause of termination of the TAA. Although AI contends that amounts were outstanding starting with May 1978, it does not contend that this alleged breach was invoked as a ground for termination at any time prior to 22 March 1979.

52. In its Memorial filed 4 February 1985 NICIC for the first time conceded that it owed AI a total of U.S. $1,954,741.12 as of in or about January 1979. NICIC does not allege that it paid these amounts during the year preceding termination of the TAA. NICIC disputes, however, that this default constituted a material breach within the terms of the TAA.

53. NICIC first defends its failure to pay by alleging that a practice between the Parties had emerged whereby they would be bound in case of a dispute to conduct settlement

negotiations in good faith prior to exercising their express rights pursuant to the TAA. NICIC contends that AI's refusal to participate in such negotiations in good faith, i.e., by refusing to send a representative to Iran, thus precludes AI from terminating the TAA for NICIC's failure to pay "any amount due." NICIC even has contended that this practice amounts to a general commercial practice. Although it agrees that contracting parties invariably are bound to exercise good faith in the conduct of their contractual relationship, the Tribunal finds that due to the prevailing force majeure conditions AI was justified in not sending any representative to Iran for negotiations. In any event, for want of substantiation, the Tribunal must reject NICIC's allegation of the existence of a practice, either of a general commercial nature or as between the Parties, which would preclude AI from exercising its express contractual rights.

54. It remains to consider two further lines of argument pursued by NICIC. The first argument, which NICIC invokes as a ground for rejecting AI's claim to payment of the Technical Service Fee and reimbursement for employee salaries and fringe benefits as of February 1979, is that AI is not entitled to receive payment for services not rendered.

55. The Tribunal just has found that AI's non-performance as of 5 January 1979 was excused due to force majeure. The issue before the Tribunal is thus to examine if, contractually or otherwise, NICIC remains liable to AI when AI's non-performance was excused due to force majeure. This issue must be distinguished from the issue as to whether NICIC was entitled, contractually or otherwise, to invoke force majeure in its favor. This question is dealt with separately below (see paragraph 60, infra).

56. The Tribunal has already recognized (see paragraph 43, supra) that parties to a contract may regulate and agree as to the effects that force majeure may have on their

respective obligations. Consequently, the Tribunal must first examine the contractual provisions. Having examined the TAA, particularly the relevant Section 2.06 (the text of which is quoted in paragraph 18, supra), the Tribunal notes initially that the TAA contains no provision which either explicitly or implicitly suspends NICIC's obligation to make contractual payments during the period when AI was excused from performance due to force majeure. The Tribunal notes, however, that the TAA does not contain any explicit provision to the contrary. Section 2.06 explicitly only provides for the effects that a force majeure situation will have on AI's obligations and is silent as to the effect of such a situation on NICIC's obligations. The same section, in relevant parts, authorizes, however, NICIC "alone" to terminate the TAA after six months of continuing force majeure conditions. The Tribunal finds that this right, conferred solely on NICIC, is only explained if NICIC's obligation to make contractual payments was not conditioned on AI's actual performance in case of force majeure. The Tribunal further notes that although such an obligation, prima facie, may appear unfavorable to NICIC, NICIC remained entitled to require AI's unconditional continued performance immediately upon the expiry of the period of force majeure and that it is not unreasonable to assume that such entitlement constituted valuable consideration for NICIC in view of the scope and magnitude of the project in question. Consequently, it was in the interest of NICIC that AI remained obligated to incur the costs related to retention of their personnel in view of an assumed resumption of performance of the TAA. The fact that the TAA subsequently was terminated does not affect this finding. In conclusion, the Tribunal thus rejects NICIC's contention that AI's non-performance justifies NICIC's non-payment of the Technical Service Fee, employee salaries and fringe benefits for the period from 1 February 1979 until the date of termination of the TAA.

57. The second argument advanced by NICIC is that it contends that AI did not have the right to terminate the TAA

and thus obtain entitlement to payment for Termination Costs and Termination Damage under Section 9.05 (ii) and (iii) after the point in time when AI ceased to perform its obligations under the TAA.

58. The Tribunal notes that it is not disputed that AI notified NICIC on 22 March 1979 of its intention to terminate the TAA, at which time, as the Tribunal has found, AI was excused from performance due to force majeure. The issue is thus to determine whether this finding in any way affects AI's right to terminate the TAA.

59. It follows clearly from the TAA that AI, pursuant to Article 9, had the express right to terminate the TAA for failure by NICIC to pay "any amount" due, and this right is neither explicitly, nor, in the view of the Tribunal, impliedly conditioned on actual performance by AI. In the present Case it is undisputed that NICIC was in default prior to 5 January 1979. As of 5 January 1979 AI thus, contractually, had the right to terminate the TAA. The Tribunal finds that the fact that AI chose not to do so at that time, and, due to supervening circumstances, justifiably invoked force majeure, cannot have the effect that AI waived its otherwise express contractual right to terminate the TAA.

60. This issue is, however, quite distinct from the question whether NICIC could have invoked force majeure as an excuse for non-performance of its payment obligations. NICIC has, however, not invoked force majeure as an excuse for its own admitted non-performance. It has, in fact, consistently, and indeed emphatically, maintained the position that force majeure conditions were not prevailing in Iran at the relevant time. The Tribunal is therefore not asked, nor otherwise required, to decide if the circumstances existing at the relevant time were such as to justify a suspension of NICIC's payment obligations pursuant to the TAA. The Tribunal, therefore, does not reach the issue whether such a determination could affect its findings.

61. The Tribunal notes that although NICIC in these proceedings has raised substantial counterclaims on the ground of AI's alleged negligent performance under the TAA, nothing in the record before the Tribunal suggests that NICIC either contemporaneously or in these proceedings has, on this ground, asserted a material breach on the part of AI such as to entitle NICIC to terminate the TAA. Although this does not, per se, preclude a finding of liability on the part of AI on any counterclaim, the cause of termination of the TAA remains unaffected.

62. The Tribunal thus concludes that AI was entitled to terminate the TAA on 31 May 1979 due to NICIC's material breach of the TAA.

63. The Tribunal notes that at the Hearing NICIC for the first time alleged that it was NICIC that terminated the TAA at a date subsequent to 31 May 1979. Irrespective of the fact that NICIC has not substantiated this allegation the Tribunal need not decide this issue in view of its finding above (see paragraph 62, supra).

iii) DETAILS OF THE CLAIM

64. It thus remains for the Tribunal to examine in more detail, and in the light of its findings, the claims raised by AI as well as the detailed objections thereto of NICIC. The issue of the interest claimed on the principal amounts will be dealt with separately below.

a) Reimbursement for costs

65. AI first claims U.S. $121,786.39 for allegedly reimbursable costs incurred prior to May 1978 and U.S. $89.95 on account of underpayment of an invoice dated 30 April 1978. In support of this part of its claim, AI has

submitted a one page listing of the allegedly reimbursable expenses and the underpayment.

66. NICIC objects to compensation for the allegedly reimbursable costs on the ground that they were and have remained in dispute between the Parties since, at least, June 1978 up to present. NICIC relies on a letter dated 21 June 1978 from AI, signed by "W.L. Orrell, Manager Policy and Control" and countersigned by "J. Borhany, Director of Finance-NICICO."

67. The Tribunal notes that it appears from the above-mentioned letter of 21 June 1978 that at that date payment for expenses in the total amount of U.S. $121,786.39 were disputed and that it was agreed between the Parties that this amount would not be paid pending investigation and resolution of the question as to whether reimbursement for these costs was allowable under the TAA or not. There is no evidence offered substantiating that these items were clarified subsequently to the satisfaction of NICIC. The Tribunal therefore rejects this part of the Claim. The alleged underpayment is also rejected for want of substantiation.

68. AI further claims, with the support of contemporaneous documentation in the form of copies of invoices including supporting documentation, costs in the amount of U.S. $976,860.86 for the period of May 1978 through March 1979 and U.S. $233,439.57 for the period of April 1979 through May 1979.

69. Although NICIC generally agrees that expenses in this category are due AI under the TAA, NICIC disputes, on the basis of the Audit Report, the amounts claimed. NICIC admits liability for the months May 1978 through March 1979 in the amount of U.S. $201,334.10. As to the months of April and May 1979 NICIC admits no liability, on the following ground:

> With respect to the months of April & May 1979, [NICIC] has not received any Statement of Account, besides whatever [was submitted by AI in this proceeding], and hence by considering non-presentation of substantiation documents, the aforesaid Statements of Account are not acceptable.

70. The Tribunal notes that, as concerns AI's expenses allegedly incurred from May 1978 through March 1979, NICIC's rejection of any liability beyond the admitted amounts is neither substantiated nor even explained in any way other than a statement that the amount in question "was found unacceptable". As concerns the expenses allegedly incurred for the months of April and May 1979 NICIC raises the additional ground, which AI does not dispute, that no contemporaneous invoice ever was forwarded to NICIC. Although the fact that AI did not submit any contemporaneous invoice for the expenses incurred for the months of April and May 1979 may affect the interest to which AI may be found entitled, this fact does not in itself preclude a recovery by AI.

71. The Tribunal notes that although NICIC has not further substantiated its grounds for disallowing reimbursement for these costs, the Tribunal must, in view of NICIC's objections, examine if the expenses claimed, on their face, are admissible under the TAA.

72. Upon such examination the Tribunal notes that, in the "Summary of Expenses - March, 1979", attached to the invoice submitted for "reimbursable expenses for March, 1979" AI claims reimbursement for "Estimated shipping charges for household and personal effects of seconded employees back to the U.S." in the amount of U.S. $125,000 and for "Estimated expenditures for James Moore's transfer from Iran to the U.S." in the amount of U.S. $47,579.13. Similarly, in a summary sheet attached to the invoice pertaining to May 1979 AI claims reimbursement for "Estimated Shipping charges for household and personal effects of seconded employees back to the U.S." in the

amount of U.S. $144,770. Irrespective of the general liability NICIC has for costs incurred for such expenses, the Tribunal finds that the record contains no proof that AI actually has incurred these expenses. Consequently the Tribunal disallows a total amount of U.S. $317,349.13 of the expenses claimed.

73. As to the remaining expenses, the Tribunal holds that they appear prima facie to be reimbursable under the TAA. By the submission of the justifications for the expenses for which recovery is claimed (including the months of April and May 1979) AI has offered NICIC an opportunity to analyze and take a position with respect to these expenses and there is no allegation on the part of NICIC that it, for any reason, has been unable to do so. In view of the foregoing, the Tribunal concludes that NICIC has not carried its burden of proof to sustain its position. Consequently the Tribunal awards AI the amount of U.S. $892,951.30.

b) Salaries and Fringe Benefits

74. AI claims entitlement to receive U.S. $839,358.86 for employee salaries from May 1978 through March 1979 and for May 1979 and U.S. $257,742.14 for fringe employment benefits incurred from May 1978 through March 1979, or a total of U.S. $1,097,101. AI has submitted contemporaneous documentation in the form of copies of invoices including supporting documentation.

75. NICIC's Audit Report agrees exactly with the sums sought by AI through January 1979 and rejects the claims for subsequent months only on the ground of AI's alleged failure to perform under the TAA for that period. NICIC does not, however, dispute AI's calculation of amounts claimed for February through May of 1979.

76. The Tribunal already has rejected NICIC's ground for non-payment (see paragraphs 54-56, supra). Although the

Tribunal is satisfied that the documentation necessary to form an opinion in respect of the costs here in question was submitted to NICIC both before and during this proceeding, the Tribunal notes that AI, in its invoice pertaining to expenses incurred for May 1979, has claimed reimbursement for salaries for June (presumably 1979) in the amount of U.S. $7,064.23. The Tribunal finds that the Claimant has not made any prima facie showing of why NICIC should be liable to reimburse AI for salaries after the termination of the TAA. Consequently the Tribunal disallows the claim in this part. As to the remaining amounts, the Tribunal holds that AI is entitled to the remainder of the principal amount claimed, i.e., U.S. $1,090,036.77.

c) Technical Service Fee

77. AI further seeks its Technical Service Fee under the TAA of U.S. $333,333 per month for seven months commencing with November 1978, or a total of U.S. $2,333,331.

78. NICIC does not dispute the monthly fee amount, admits liability for the period November 1978 through January 1979, but rejects any further liability on the ground the AI did not actually perform any work after January 1979.

79. The Tribunal's findings above dispose of the objections raised here by NICIC and consequently the Tribunal accepts this part of AI's claim as well.

d) Termination Costs

80. Pursuant to Section 9.05 of the TAA AI claims compensation for "Termination Costs" in the amount of U.S. $428,159.73. In support of this part of its Claim, however, AI has submitted only two pages listing the expenditures

allegedly incurred for periods from June 1979 to November 1981.

81. NICIC disputes this part of the Claim. The NICIC Audit Report states as follows:

> Whereas ANACONDA-IRAN INC. has not presented any kind of substantiating documents and evidence in connection with the costs related to the period after termination of the contract, it is therefore not possible to comment with respect to the aforesaid costs.

82. There is no issue of jurisdiction as to this part of AI's claim since, jurisdictionally, all parts of this claim arose by the termination of the TAA as of 31 May 1979 although, allegedly, certain costs were not incurred until after 19 January 1981.

83. The Tribunal notes, however, that other than the two pages listing the expenditures here at issue, and contrary to what is the case in respect of other parts of AI's claim, no backup information or further documentation has been provided to the Tribunal. Nor indeed is there any indication that any such information or documentation was ever provided to NICIC. The Tribunal further deems it relevant to take into account that the charge in question is of an exceptional nature and hence not a familiar charge under the TAA. In view of the foregoing the Tribunal rejects this part of the claim in its entirety.

e) Termination Damage

84. Pursuant to Section 9.05 (iii) of the TAA AI also seeks an amount equalling the Technical Service Fee paid or due AI under the TAA during the 18-month period preceding the date of termination, i.e., 18 x U.S. $333,333.

85. The only defenses raised by NICIC have already been rejected by the Tribunal (see paragraphs 57-59, supra).

Consequently the Tribunal awards AI U.S. $5,999,994.

D. CONCLUSION

86. In conclusion the Tribunal accepts AI's claim in the total amount of U.S. $10,316,313.07. In view of the Tribunal's findings concerning the counterclaims (see Section V, infra), however, and the consequently interlocutory nature of this Award, the Tribunal defers the execution of any payment obligation on the part of NICIC until the Tribunal finally has disposed of the counterclaims.

V. THE COUNTERCLAIMS

A. BACKGROUND

87. Originally NICIC filed a Statement of Counterclaim on 1 September 1982 in the amount of U.S. $1,140,132,875. On 22 August 1983 NICIC sought to amend its counterclaim by increasing it to a total amount of U.S. $2,068,865,229 plus interest and costs. Finally, on 4 February 1985, NICIC raised an additional "set-off" claim for allegedly unpaid taxes and social security premia amounting to U.S. $6,814,463.08, subject to any amounts claimed by AI conceded to be due by NICIC.

88. The grounds invoked by NICIC include allegations that AI "did not behave as if they were the sole owners of" the project, as required by Section 2.03 of the TAA, and thus "failed to adequately supervise the work done by the contractor ... and consequently the work was not completed on schedule." NICIC also contends that there were certain "errors in the design" of the project. It argues further that in consequence of these failures "costs of the project

have risen considerably" and that it had "not yet reached commercial production." NICIC further contends that "[b]y submitting the Feasibility Study Report [called for by Section 2.01 (d) of the TAA], which formed an inseparable part of the [TAA], [AI] committed to implement and complete the project." In its enumeration of the damages NICIC lists "cost overrun", "repairing various sections" of the facilities, "[d]amages caused by the prolongation of the length of the project" or "because the smelter and concentrator were not ready on schedule" and "for repairing the sedimentation dam".

89. The Claimant contends that the counterclaims are outside the jurisdiction of the Tribunal and inadmissible on other grounds as well. In support of its contentions the Claimant raises a series of arguments which also constitute answers to the questions raised by the Tribunal in its Order filed 7 June 1984. NICIC also have replied extensively to these questions.

90. The Tribunal finds that certain of the arguments raised by the Parties can be examined separately as a preliminary matter, while others raise issues so intrinsically related to the merits that they cannot be separated therefrom.

B. JURISDICTION AND ADMISSIBILITY

i) CONTRACTUAL LIMITATION

91. The principal argument against the Tribunal's jurisdiction is based on Article 9 of the TAA (see paragraph 31, supra) which, according to the Claimant, expressly prevents NICIC from asserting a counterclaim.

92. This elaborate provision creates, inter alia, a very specific mechanism for settling disputes between the

Parties regarding the facts which might constitute a "material" breach of contract and be a cause for termination of the TAA.

93. Section 9.02 provides that in the event the Parties disagree on the existence of a material breach the issue is to be decided by arbitration brought before the Court of Arbitration of the International Chamber of Commerce ("ICC") by the interested party. The powers of the ICC, however, have been strictly limited in such a case. The most important of these limitations is that if the ICC determines that there has been a breach of contract it is obligated to "make an award in favor of the non-breaching party terminating [the TAA] and setting forth damages to the full extent (but not in excess) of the amounts specified in Sections 9.04 or 9.05, as the case may be, without reductions or offsets of any kind or type whatsoever." (Emphasis added.) Section 9.03, which applies in case NICIC fails to pay in accordance with the agreement "any amount due AI or Staff", is even more limitative as to the powers of the ICC, but contains the identical prohibition against reductions or offsets.

94. It is clear from these provisions that in the event a claim is arbitrated through the ICC by one Party, the other Party has no right to raise a counterclaim. In case it is decided that a breach of contract has occurred damages must be awarded in the amounts stipulated in the TAA "without reductions or offsets of any kind or type whatsoever." If the other Party also claims entitlement to an award in its favor it will have to institute separate proceedings before the ICC and raise an independent claim to that effect.

95. This elaborate mechanism may have been prompted by the experience Anaconda had had in Chile just before the TAA was entered into. There Anaconda's interests had been nationalized and the compensation it was entitled to by the law of nationalization was entirely wiped out by various

reductions and offsets, including "excess profits." It is doubtful, however, that a contractual provision like the one here at issue effectively would have protected AI in such a case. In the event of nationalization the disputes that may arise in respect of compensation do not necessarily or exclusively arise out of a possible breach of contract, but rather from the application of the law of nationalization. Such disputes therefore are not always regulated solely by the application of contractual provisions for the settlement of disputes between the parties.

96. According to AI the contractual limitations to the jurisdiction and powers of the ICC apply similarly to this Tribunal. AI asserts that "[a]s Respondent could not have asserted a counterclaim or set-off before the ICC, it therefore may not be permitted to assert a counterclaim before this Tribunal without this Tribunal violating the sanctity of the Contract upon which it is sitting in judgment."

97. This sweeping assertion completely misconceives the nature of this Tribunal and of its jurisdiction. This Tribunal has not been instituted by a contractual agreement between the Parties and does not derive its authority from their will. It has been instituted by an inter-governmental agreement having the status of an international treaty and it is subject to international law. This already has been recognized in previous awards and decisions. Cf., e.g., Case No. A18, Decision No. 32-A18-FT at 14-15 (6 April 1984), reprinted in 5 Iran-U.S. C.T.R. 251, 259; and Burton Marks and Harry Umann and Islamic Republic of Iran, Award No. ITL 53-458-3 at 8-9 (26 June 1985). This agreement is evidenced, inter alia, by two declarations, the General Declaration and the CSD ("Algiers Accords"), which have defined the Tribunal's powers and jurisdiction.

98. The Algiers Accords have established a mechanism of settlement of all claims described in Article II of the CSD not settled by the parties. Pursuant to General

Principle B of the General Declaration this mechanism was set up in order

> to terminate all litigation as between the government of each party [the Islamic Republic of Iran and the United States of America] and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.

99. The establishment of this mechanism of settlement through binding arbitration is accompanied by a whole series of authoritative measures contravening the rights the claimants could derive from the contracts to which they are parties or the rights that may be derived from the domestic laws of the two States involved. As provided in General Principle B of the General Declaration, the United States agreed, in particular,

> to terminate all legal proceedings in United States Courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

Similarly, pursuant to the terms of Article II of the CSD the Tribunal's jurisdiction as to claims described therein is established by the sole authority of the Declaration, irrespective of the provisions of the contracts that constitute the subject matter of these claims.

100. These features render the mechanism of settlement of claims of nationals of either one of the States Parties to the Algiers Accords against the other completely different from all other mechanisms of commercial arbitration that can be established in respect of commercial agreements between entities of different nationality (including contracts to which a State is a party), whether included in such agreements or resulting from separate agreements. Due account has to be taken of these differences when comparing the mechanism established by the Algiers Accords with

mechanisms of a contractual origin. The same is true as concerns the precedents established by awards rendered by other tribunals. The analogies that may be drawn from such comparisons are therefore, in many cases, deprived of relevance.

101. For the same reason it is erroneous to attempt to subject this Tribunal to contractual limitations agreed between the Parties. Similarly, it is misleading to argue that this Tribunal would be a substitute for an arbitral tribunal to be established under the auspices of the ICC under a contract relevant to a claim brought before this Tribunal. At issue are actually two entirely separate settlement mechanisms which are based on two completely independent legal foundations.

102. As concerns the Tribunal's jurisdiction, procedure, and more generally its constitution and its functioning, the Tribunal is governed exclusively by the rules derived from the Algiers Accords and, pursuant to Article III, paragraph 2, of the CSD, from the UNCITRAL Arbitration Rules as modified by these Accords or by the Tribunal. Its jurisdiction does not in any way depend on the stipulation which in the present Case has been devised by the Parties in Article 9 of the TAA.

103. The Tribunal often has had occasion to affirm the supremacy of the rules, of international character, which govern its jurisdiction, over the provisions of the contracts relevant to the claims brought before it. This supremacy applies whether these rules are mandatory or confer rights upon the parties to a dispute before the Tribunal. A case in point is the exclusionary provision contained at the end of Article II of the CSD. The Tribunal has considered itself competent even when a contractual provision confers jurisdiction on other arbitral tribunals or on domestic courts, excepting the cases where these provisions "specifically" provide that "any" disputes thereunder "shall be within the sole jurisdiction of the

competent Iranian Courts". This interpretation has led the Tribunal to consider itself competent even when the applicable contract expressly conferred jurisdiction on Iranian courts, provided this grant of jurisdiction was not exclusive or did not concern all disputes arising from the contract.

104. Notwithstanding the generality of the terms employed in General Principle B of the General Declaration and in Article II of the CSD, these provisions do not require that a national of one of the two States Parties having a claim against the State Party would be obligated to submit its claim to this Tribunal. In many cases, however, recourse to this Tribunal may be the only effective means to obtain a settlement. Furthermore, due to the provisions establishing the Security Account, a settlement by this Tribunal gives successful United States' claimants the additional benefit of a guaranteed execution of the awards. The Claimants may, however, also seek a settlement by other means, notably by a friendly settlement or by renouncing their claim. If, however, they decide to submit their claim to the Tribunal, they are, ipso facto, wholly subject to the rules governing the Tribunal's jurisdiction and functioning, even if these rules would be in contradiction to the provisions of the contracts from which their claims arise.

105. The rules derived from the Algiers Accords apply to counterclaims as well as to claims. A respondent to a claim filed with this Tribunal is always free, as is the claimant, to choose another forum than this Tribunal for the claim that it may have against the opposing party (and which arises out of the same contract, transaction or occurrence that constitutes the subject matter of the claim). See E-Systems, Inc. and Government of the Islamic Republic of Iran, Award No. ITM 13-388-FT (4 February 1983), reprinted in 2 Iran-U.S. C.T.R. 51. In such a case, other fora generally are available, notably by virtue of the provisions of the contracts invoked, or by virtue of the rules of private international law.

106. On the other hand, pursuant to Article II, paragraph 1, of the CSD and Article 19, paragraph 3, of the Tribunal Rules a respondent to a claim brought before the Tribunal is granted a right to make a counterclaim together with its statement of defense (or at a later stage if the Tribunal decides that the delay was justified). The right so granted to the respondents obviously constitutes the counterpart to the exceptional grant of jurisdiction over claims otherwise contractually within the jurisdiction of other fora. The balance of the rights of the two opposing parties would thus be impaired if the right to submit a counterclaim could be denied the respondent for the reason that the contract out of which the counterclaim arises contemplated another procedure. It must be added that the right to submit counterclaims which, if admitted, could result in a set-off against damages awarded to the claimant, is of a particular importance within the framework of the Algiers Accords, which provide that payments of awards to successful American claimants will be made out of the Security Account.

107. The jurisdictional grant over counterclaims is, however, otherwise strictly limited by the Algiers Accords. Pursuant to Article II of the CSD a counterclaim must, in order to be admissible, arise out "of the same contract, transaction or occurrence that constitutes the subject matter of" the claim. On the other hand, pursuant to the same Article "any" counterclaim which fulfills these conditions is to be decided by this Tribunal.

108. Accordingly, in the present Case the Tribunal should not examine whether or not Article 9 of the TAA prohibits the submission of any counterclaim before the ICC. It should only examine whether the counterclaims presented by NICIC effectively satisfy the conditions for admissibility as defined in Article II of the CSD. If it determines that any particular counterclaim satisfies these conditions, the Tribunal has no other choice than to declare admissible such a counterclaim.

ii) LIMITATION AS TO AMOUNT OF COUNTERCLAIM

109. AI has further objected that a counterclaim which otherwise meets the requirements of Article II of the CSD "may not exceed the amount of the claim" and that the Tribunal does not have jurisdiction over that part of the counterclaim which exceeds the amount of the claim. AI does not dispute that neither the Tribunal Rules nor the CSD contains any specific provision to that effect, but argues that an "affirmative" counterclaim is not included in the specific jurisdictional powers conferred on the Tribunal by the CSD. The Claimant invokes the Tribunal's Decision in Case No. A2, Decision No. DEC 1-A2-FT (26 January 1982), reprinted in 1 Iran-U.S. C.T.R. 101, and distinguishes Gould Marketing, Inc. and Ministry of National Defence of Iran, Award No. ITL 24-49-2 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 147, as mere dictum. It further relies on an interpretation of the CSD in light of the preparatory work and the circumstances of its conclusion. The Claimant also argues that the Tribunal should consider relevant Unites States rules and regulations as well as jurisprudence.

110. NICIC disputes AI's objection with reference to the terms of the CSD and the Tribunal Rules. It argues that the CSD does not require interpretation and that the absence of any express limitation of the amount of the counterclaim must be understood to mean that the States Parties did not agree to such a limitation. On that ground it contends that United States jurisprudence is irrelevant. NICIC invokes Gould in its favor. NICIC further argues that the Claimant's interpretation is unreasonable. Its consequence would be that all respondents with counterclaims exceeding the claims who seek adjudication before this Tribunal of limited aspects of these counterclaims would be precluded by res judicata from asserting, in any other legal forum, the remaining aspects of the counterclaims for amounts exceeding the claims.

111. The Tribunal finds that the same reasoning as invoked above (see paragraphs 102-108, supra) also applies to this objection raised by the Claimant. Article II of the CSD does not contain any limitation as to the amount of counterclaims raised. Article II of the CSD, as just noted, confers upon the Tribunal jurisdiction over "any counterclaim" which fulfills the conditions listed in this Article. The Tribunal does not find reason further to interpret the terms of the CSD. The Tribunal's award in the Gould Case specifically held that the Tribunal does not lose jurisdiction over counterclaims merely because they may exceed the claimed amount. See Gould Marketing, Inc. and Ministry of National Defense of Iran, Award No. ITL 24-49-2 at 10 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 147, 151-52. This objection by the Claimant therefore must be discarded.

iii) UNTIMELINESS

112. Another argument invoked by the Claimant is that "[t]he Tribunal does not have jurisdiction over any of Respondent's counterclaims because none was filed in a timely fashion." This concerns less the issue of jurisdiction than the admissibility of a counterclaim.

113. Following several extensions granted by the Tribunal NICIC was due to file its Statement of Defense no later than 30 August 1982. NICIC finally filed its Statement of Defense and its Response and Counterclaim on 1 September 1982, i.e., two days after the date of 30 August. This counterclaim amounted to U.S. $1,140,132,857. Subsequently, on 22 August 1983, NICIC amended its counterclaim to the amount of U.S. $2,065,865,299. Eventually, on 9 March 1984, in its statement concerning the Pre-Hearing Conference, NICIC filed what the Claimant regards as a new claim for alleged fraudulent performance by the Claimant.

114. Article 19, paragraph 3, of the Tribunal Rules provides that:

> In the Statement of Defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of set-off, if such counterclaim or set-off is allowed under the [CSD]. . . .

It is expressly recognized by the Claimant that the original counterclaim was filed the same day as the Respondent's Statement of Defense. Thus it was filed in conformity with Article 19, paragraph 3, even if the Statement of Defense was filed after the time limit determined by the Tribunal.

115. It should be noted, however, that Article 20 of the Tribunal Rules authorizes the parties to amend or supplement their claim or defense during the course of the arbitral proceedings, "unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances." An amendment to a counterclaim thus is authorized by the Rules as long as the Tribunal does not consider this amendment inappropriate under the circumstances.

116. In the present Case the Tribunal finds that the last amendment invoked by the Claimant dates from 9 March 1984, or more than one year before the Hearing in this Case. The Claimant, which submitted a "Memorial in Rebuttal to Respondent's Memorial of August 29, 1984" on 4 February 1985, had ample opportunity to respond to this issue and has not suffered any prejudice. Consequently, and subject to the limitation in Article 20, that any amendment to the original counterclaim may not result in the amended counterclaim falling outside its jurisdiction, the Tribunal does not consider that it has to declare these amendments inadmissible by virtue of the date on which they were filed.

117. The Tribunal notes, however, that in its submission of 4 February 1985 NICIC raised an additional claim, labelled a "set-off", on account of social security premia and taxes. At the Hearing AI objected to this claim, stating that it was untimely filed and thus inadmissible and that such a claim, in any event, is outside the jurisdiction of the Tribunal. NICIC responded that the lateness of the filing of this claim was due to the unavailability of relevant documents until this late stage in the proceedings and maintained that this "set-off" claim was within the Tribunal's jurisdiction.

118. The Tribunal decided already by its Order of 7 June 1984 that the Hearing since held was intended to deal with jurisdictional issues related to NICIC's counterclaims. The Tribunal notes that this NICIC counterclaim was raised only after the filing of AI's last required submission and that AI thus has been unable to respond thereto. The Tribunal finds that the Respondents have failed to substantiate any circumstances which excuse the lateness of the claim raised. On the basis of the foregoing the Tribunal declares that this "set-off" claim for payment of taxes and social security premia is untimely and thus inadmissible. The Tribunal therefore does not reach the issue whether or not this "set-off" claim is within its jurisdiction.

iv) ESTOPPEL

119. Another of the Claimant's contentions is that "Respondent is estopped from asserting its counterclaim because its actions prove that it has no complaints." This argument relates even less than the preceding one to the issue of the Tribunal's jurisdiction. It raises only a question of admissibility. Furthermore, by its terms, it concerns the performance of the Parties under the TAA. The examination of this argument is thus inseparable from the merits and is therefore joined to the merits.

v) OTHER OBJECTIONS RAISED

120. For the same reasons as invoked immediately above, the Tribunal also joins to the merits the other arguments raised by AI in relation to the issue of jurisdiction, but which actually concern the object of the counterclaim, its relation to the subject matter of the claim or the procedural conditions for the Tribunal's examination of the counterclaims. As a final matter the Tribunal will, however, consider the arguments raised as concerns the issue of applicable law to the TAA.

C. APPLICABLE LAW

121. The question of the law applicable to the TAA is of particular importance in the present Case in view of the contentions raised by the Parties, particularly as concerns the validity, scope of application, and limitations to the applicability of a contractual limitation of remedies such as appears at Article 9 of the TAA.

i) AI'S CONTENTIONS

122. In its defense against the counterclaims the Claimant contends that the express terms of the TAA, as contained in Article 9 provide that AI cannot be held liable to NICIC for any amounts exceeding those stipulated therein. The Claimant further argues that the fact that the TAA does not contain any provision subjecting it to any governing national law reflects the intentions of the Parties not to subject the TAA to any particular law. The Claimant also submits that the absence of any choice of law provision must be construed to mean that the Parties to the TAA made a "negative choice", i.e., each Party refused to accept the other's national law.

123. The Claimant concludes, therefore, that the Tribunal should, under the doctrine of pacta sunt servanda, apply the express and self-executing terms of the TAA without reference to any particular law. As the Tribunal understands the contentions of the Claimant, it appears also to maintain that, by virtue of the doctrine of pacta sunt servanda, the TAA should be enforced with reference not only to its terms and but also to the usages of the trade.

124. The Claimant appears further to maintain that only in a situation where the contractual terms would be ambiguous and unclear would the Tribunal be required to resort to other sources than the contract itself and that the relevant sources in such a situation are the trade usages and general principles of international commercial law rather than the provisions of an applicable national law that the Parties themselves refused to designate.

ii) NICIC'S CONTENTIONS

125. NICIC rejects the Claimant's contention that the absence of a choice of law provision can or was intended to be construed as a choice by the Parties not to subject the TAA to any national legal system. NICIC contends that in the absence of any specific contractual choice of law provisions the Tribunal is required, by virtue of the terms of Article V of the CSD, to apply relevant choice of law rules of international commercial law. The relevant choice of law rules of international commercial law are, inter alia, the principles of lex loci contractus, lex loci solutionis and lex rei sitae. On the basis of these principles NICIC argues that Iranian law is applicable to the TAA.

126. NICIC further argues that the primary source of rights and obligations must be laws either as contained in a particular system of law or as contained in the general principles derived therefrom. NICIC also contends that the

usages of trade can only be a secondary source of law and that neither contractual provisions nor trade usages can, per se, replace law as a source of rights and obligations.

iii) THE FINDINGS OF THE TRIBUNAL

127. As concerns the Claimant's contentions regarding the absence of a choice of law provision in the TAA, the Tribunal initially finds that to the extent that these propositions imply that there is no law governing the TAA and that the TAA itself suffices to resolve all problems encountered in the application of the TAA, including problems concerning its validity, these propositions are contradictory. In support of its thesis AI is compelled to invoke the doctrine of pacta sunt servanda. This legal rule is either anterior or superior to the contract, as it is from this rule that the contract allegedly derives its authority. The Tribunal therefore has to examine the nature and actual scope of this rule as well as the source of the authority of this rule.

128. Pacta sunt servanda, in effect, is but a condensed expression of a group of rules of great complexity. Under this heading Article 26 of the Vienna Convention on the Law of Treaties[1] provides:

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This general provision refers in fact to the provisions of the Vienna Convention which determine when and how a treaty enters into force; who the parties are; what the causes are

---

[1] 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").

for nullity, extinction or suspension of the applicability of treaties; how to interpret treaty provisions; what execution in good faith implies, etc. These provisions constitute, in fact, almost the totality of the 85 Articles of the Vienna Convention.

129. What now has been said regarding treaties applies also to contracts. Consequently, it is not sufficient to invoke pacta sunt servanda. As contract law differs from one nation to another and national contract laws differ from international treaty law, one also has to determine in which legal context this rule is invoked, i.e., to which particular contractual legal system this rule pertains and, consequently, to which rules the principle pacta sunt servanda refers.

130. The Tribunal agrees with NICIC that the Tribunal is required to apply Article V of the CSD. This Article provides, in its entirety, that:

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

This Article has a vast scope of application. The Algiers Accords apply to a great number of claims arising out of contracts which may contain very differing provisions regarding applicable law. More importantly, Article V creates a novel system of determining applicable law. Contrary to NICIC's contentions, the Tribunal finds that according to this system the Tribunal is not required to apply any particular national or international legal system. On the contrary, the Tribunal is vested with extensive freedom in determining the applicable law in each case. This freedom is not a discretionary freedom, however, as the Tribunal is given a rather precise indication as to the factors which should guide its decision.

131. Contract provisions constitute one of these factors, but it is noteworthy that they are not listed first, nor foremost, among the factors enumerated. The Tribunal is of course required to take seriously into consideration the pertinent contractual choice of law rules, but it is not obliged to apply these if it considers it has good reasons not to do so.

132. In the present Case the TAA does not contain any choice of law rules. For the reasons developed above, the Tribunal cannot on that ground conclude, as does the Claimant, that the TAA is self-sufficient under all circumstances and that no law shall govern the TAA. No more can the Tribunal conclude, as does the Respondent, that Iranian law is applicable because the place of conclusion and execution of the TAA was Iran. In most contract cases before the Tribunal the contracts actually were concluded and executed in Iran. If the States Parties to the Algiers Accords had intended that Iranian law would apply to all such cases which do not contain a contractual clause to the contrary, the Algiers Accords undoubtedly would have contained specific provisions to that effect. As we have seen, however, Article V created quite a different system.

133. In conclusion, the Tribunal notes that contractual limitations of remedies similar to the provisions in Article 9 of the TAA frequently are included in international commercial contracts. In deciding the remaining issues in this Case, the Tribunal therefore must give particular consideration to the usages of the trade as well as principles of commercial and international law mentioned in Article V of the CSD. One of the legal issues which the Parties should brief in their future pleadings therefore is the relevant usages of the trade in respect of contractual limitations of remedies similar to the provisions contained in Article 9 of the TAA.

D. SUMMARY OF CONCLUSIONS

134. In conclusion, the Tribunal, by this Interlocutory Award, rejects the Claimant's contention that the counterclaims raised in this Case cannot be adjudicated by the Tribunal due to contractually provided restrictions. Furthermore, subject to the findings related to the "set-off" claim on account of social security premia and taxes (see paragraphs 117-118, supra), the Tribunal here rejects the Claimant's contentions of inadmissibility of the counterclaims on the ground of untimeliness. As to all other objections raised, the Tribunal has decided to join them to the merits and they therefore will be decided at a later stage. On the issue of the law applicable to the TAA, an issue which, according to the Parties, has a particular impact on the consideration of the counterclaims in this Case, the Tribunal here concludes that Iranian law is not applicable and that the doctrine of pacta sunt servanda is not a rule which, per se, suffices to resolve the remaining issues raised in this Case. In the present Case, and by virtue of Article V of the CSD, the Tribunal is required to take into consideration relevant usages of trade as well as relevant principles of commercial and international law.

VI. I N T E R E S T

135. AI claims entitlement to interest on all amounts due based on the following Section 7.04 of the TAA:

> [NICIC] shall pay to AI interest at the rate per annum equal to the prime rate then being charged by The Chase Manhattan Bank (National Association) or its successor, plus 2%, on any amount due AI under this Agreement, whether on account of fees or costs, from the date due until said amount, plus accrued interest on said amount, shall have been paid in full.

136. AI has submitted detailed calculations of the interest amounts claimed as well as a statement from the Chase Manhattan Bank listing the "Prime Commercial Loan Rates" of interest prevailing in the period 3 April 1974

until 25 June 1984. It appears from these calculations that AI contends that the interest amounts should be compounded on a monthly basis and that for each month the rate to be applied should be the monthly average of the "prime rate then being charged by the Chase Manhattan Bank" plus 2%. AI thus claims entitlement to U.S. $6,836,665.38 representing interest through November 1981 as well as further compound interest based on U.S. $18,027,433.88 from 18 December 1981 to the date of the Award.

137. Although NICIC in certain parts of its pleadings generally disputes AI's entitlement to interest, it specifically contends, with reference to Iranian law, that AI is not entitled to compound interest and that AI is, at most, entitled to 12% simple interest on any amount found due and owing. NICIC further contends that any higher rate of interest would amount to usury.

A. COMPOUND INTEREST

138. As noted in Sylvania Technical Systems and Government of the Islamic Republic of Iran, Award No. 180-64-1 at 31 (27 June 1985), the Tribunal has never awarded compound interest. In a particular case involving an asserted contractual provision for compound interest that the Tribunal found to be ambiguous, the Tribunal stated:

> The Tribunal, however, does not find that there are any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable".

R.J. Reynolds Tobacco Co. and Government of the Islamic Republic of Iran, Award No.145-35-3 at 19 (6 August 1984), citing III M. Whiteman, Damages in International Law 1997 (1943).

139. The Tribunal notes that there are several reasons why judicial authorities, be it on a national or international level, generally do not award compound interest.

140. First of all, the inherent and essential effect of a contractual provision for compound interest is to dissuade the other party from defaulting in fulfilling its contractual obligations. Such an effect is particularly relevant in the context of a continuing contractual relationship. If, however, a dispute emerges as to the scope and content of the contractual obligations and if, as in the present Case, such a dispute leads to a termination of the contract in question, this purpose is mooted. Secondly, the mathematical result of a full application of contractual provisions such as Section 7.04, particularly in view of the delays that any adjudication of a dispute involves, is that the interest due could, by far, exceed the principal amounts awarded. This is particularly relevant in the context of the proceedings before this Tribunal, as the great number of cases simultaneously under consideration causes the individual parties to incur additional delays. Consequently, to implement such a contractual clause would cause a benefit, and indeed a profit, to accrue to the successful party, which would be wholly out of proportion to the possible loss that the successful party might have incurred by not having the amounts due at its disposal.

141. It should be noted that, in the present Case, a full application of Section 7.04 is by no means limited to the amounts claimed by AI. AI has chosen to interpret Section 7.04 to mean that compounding should be made on a monthly basis (based on a monthly average of the applicable rates plus 2%). This choice is wholly arbitrary as Section 7.04, on the face of it, equally would entitle AI to compound interest on a weekly or even daily basis. It can safely be assumed that neither AI, nor NICIC, by any stretch of the imagination could have intended (or, indeed, agreed to) such a result. The Tribunal concludes although Section

7.04 is not unclear so as to render a technical application impossible, this clause is, in any event, ambiguous, due to the unreasonable results that such a technical application may yield.

142. Having taken the foregoing factors into consideration, the Tribunal holds that, on balance, the awarding of compound interest in the present Case must be deemed to be outside the scope of the possible common intent of the Parties, and that, therefore, compound interest pursuant to Section 7.04 must be disallowed.

B. SCOPE OF APPLICABILITY OF SECTION 7.04 OF THE TAA

143. The Tribunal notes that Section 7.04 appears to have a limited scope of application. It provides specifically that the contractually agreed interest shall be calculated "on any amount due AI under [the TAA], whether on account of fees or costs." (Emphasis added.) This provision is not deprived of a certain ambiguity. The TAA does not include any provision defining the terms "fees" or "costs". The Tribunal finds it, however, clear that, in any event, and within the context of other provisions in the TAA, "fees" refers to the Technical Service Fee and "costs" refers to such costs for which the TAA allowed AI to be reimbursed. Consequently the Tribunal holds that Section 7.04 applies to the amounts awarded AI in Section IV.C.iii) a) - c), supra. In view of its finding regarding AI's claim to Termination Costs, the Tribunal need not decide whether Section 7.04 applies to such costs as well.

144. The issue which remains to be determined is, however, whether Section 7.04 applies to the amounts payable to AI pursuant to Section 9.05 (iii), i.e., to the "amount in U.S. dollars equal to the aggregate of the fees paid or due to AI under [the TAA] during the 18-month period preceding the date of termination," as this amount cannot,

prima facie, be subsumed under either the heading "fees" or "costs." Having examined the contract, having regard to the context in which the provision appears, and having applied general rules of contract interpretation, the Tribunal finds that, on balance, Section 7.04 does not apply to the amounts payable under Section 9.05 (iii). The Tribunal considers that, while the Parties may have agreed, as between themselves, to impose contractual sanctions on a defaulting Party during the life of the contract, presumably with a view to ensure continued performance, the same reasons do not apply in a situation where the contractual relation has been terminated. It could further be argued that the pertinent payment constituted in itself a contractual remedy which, in all probability, was calculated to include such delays in payment as the Parties reasonably could have foreseen.

C. INTEREST PURSUANT TO SECTION 7.04

145. As concerns the rates of interest to be applied, and on the basis of its findings on applicable law above, the Tribunal initially rejects NICIC's contention concerning the applicability of Iranian law in general, and Iranian usury provisions in particular. The Tribunal further finds no support in either commercial trade usages or otherwise for the conclusion that interest rates higher than 12% would amount to usury.

146. In calculating the interest due AI on all amounts awarded, with the exception of the amounts awarded pursuant to Section 9.05 (iii), the Tribunal thus should apply Section 7.04 of the TAA. This provision requires the applicability of the annual rate equal to the "prime rate ... being charged by The Chase Manhattan Bank (National Association) or its successor, plus 2 %."

147. AI has furnished the Tribunal with a Statement by the Chase Manhattan Bank listing the rates and dates of effective changes of the "prime commercial lending rates" up

to and including 25 June 1984.

148. For reasons of convenience, and pursuant to Section 6.03, the Tribunal determines that interest is generally payable from the first of the calendar month closest to twenty days following the date of the invoice. The Tribunal further determines that for the point in time when the awarded amounts became due up to and including 31 May 1979 the contractually provided interest shall be based on a monthly average of the applicable rate plus 2%. The Tribunal has calculated such interest on all the awarded amounts to which Section 7.04 applies with the exception of the awarded expenses incurred from April 1979 through May 1979 (since the interest on these amounts does not accrue until after 31 May 1979), and determines that the interest amount so awarded totals U.S. $227,139.20.

149. As of 1 June 1979 the Tribunal determines, subject to the provisions concerning the amount of U.S. $88,669.57 (see paragraph 150, infra), that the applicable rate of interest on all amounts due under section 9.05 (i) shall be a calculated average of the applicable bank rate for the period 1 June 1979 up to and including the date of the final disposition of this Case plus 2%.

150. As concerns the awarded expenses incurred from April 1979 through May 1979, i.e., U.S. $88,669.57 (see paragraphs 68-72, supra), the Tribunal determines that interest shall be calculated only as of 17 September 1984, i.e., the date on which NICIC has stated it was provided the necessary documentation to examine these expenses. The Tribunal further determines that the interest rate applicable to this amount shall be the calculated average of the applicable bank rate for the period 17 September 1984 up to and including the date of the final disposition of this Case plus 2%.

D. NON-CONTRACTUAL INTEREST

151. Although the Tribunal has rejected AI's claim to

contractually provided interest on the amounts due AI pursuant to Section 9.05(iii), the Tribunal finds that AI, pursuant to generally established Tribunal practice, is entitled to interest on this amount. By application of the principles explained in McCollough & Company, Inc. and Ministry of Post, Telegraph and Telephone, Award No.225-89-3 at 98-103 (22 April 1986), the Tribunal determines that 10% simple interest per annum is a fair rate of interest to be awarded the Claimant on this amount from 1 June 1979 up to and including the date of the final disposition of this Case.

E. FINALITY OF INTEREST

152. In view of the interlocutory nature of this Award, (see paragraph 86, supra) the Tribunal reserves the final award of interest on the part of AI until the final disposition of this Case.

VII. E X P E R T I S E

153. The Tribunal will decide on the request for expertise at a later stage in the proceedings.

VIII. C O S T S

154. The Tribunal will decide on the claims to compensation for costs incurred at a later stage in the proceedings.

IX. F U R T H E R P R O C E E D I N G S

155. The Tribunal will decide on the further proceedings in this Case by separate order.

X. A W A R D

156. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a) The NATIONAL IRANIAN COPPER INDUSTRIES COMPANY is obligated to pay to ANACONDA-IRAN, INC.:

i) the amount of Four million two hundred twenty-seven thousand six hundred forty-nine United States Dollars and fifty Cents (U.S.$4,227,649.50) plus simple interest at a rate per annum (365 day basis) equal to the calculated average of the prime rate charged by The Chase Manhattan Bank (National Association) or its successor from 1 June 1979 up to and including the date of the final disposition of this Case, plus two per cent (2%), accruing from 1 June 1979 up to and including the date of the final disposition of this Case;

ii) the amount of Eighty-eight thousand six hundred sixty-nine United States Dollars and fifty-seven Cents (U.S.$88,669.57) plus simple interest at a rate per annum (365 day basis) equal to the calculated average of the prime rate charged by The Chase Manhattan Bank (National Association) or its successor from 17 September 1984 up to and including the date of the final disposition of this Case, plus two per cent (2%), accruing from 17 September 1984 up to and including the date of the final disposition of this Case;

iii) the amount of Five million nine hundred ninety-nine thousand nine hundred ninety-four United States Dollars (U.S.$5,999,994) plus simple interest at the rate of ten per cent (10%) per annum (365 day basis) from 1 June 1979 up to and including the date of the final disposition of this Case;

iv) the amount of Two hundred twenty-seven thousand

one hundred thirty-nine United States Dollars and twenty Cents (U.S.$227,139.20) as accrued interest up to and including 31 May 1979.

b) The Tribunal defers the execution of any payment obligation on the part of the NATIONAL IRANIAN COPPER INDUSTRIES COMPANY until the final disposition of this Case.

c) The Tribunal finds that the admissibility of the counterclaims raised in this Case is determined pursuant to the terms of the Claims Settlement Declaration irrespective of the existence of contractual provisions limiting the right of the Parties to raise counterclaims.

d) The Tribunal finds that no portions of the counterclaims raised in this Case are inadmissible on the ground that they exceed in amount the claims asserted in this Case.

e) The Tribunal declares untimely and thus inadmissible the "set-off" claim for payment of social security premia and taxes.

f) Subject to paragraph e) above, the Tribunal finds that the remaining counterclaims in this Case were timely raised.

g) The Tribunal joins the consideration of all the remaining objections raised against the admissibility of the counterclaims to the consideration of the merits of these counterclaims.

h) The Tribunal finds that, given the absence of any choice of law provisions in the Technical Assistance Agreement, the Tribunal, in determining the remaining issues in this Case, shall apply relevant usages of trade and take into account principles of commercial and international law, and that the Tribunal is not

required to apply any particular national system of law such as Iranian law.

Dated, The Hague,
10 December 1986

Michel Virally
Chairman
Chamber Three

In the Name of God

Charles N. Brower
See Separate Opinion

Parviz Ansari Moin
Concurring in Part,
Dissenting in Part
See my Separate Opinion.