IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

**ORIGINAL DOCUMENTS IN SAFE**

Case No. 357 357-126 Date of filing: 12 Jan '90

** AWARD - Type of Award Final

- Date of Award 12 Jan '90

49 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 _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL
«نسخه برابر اصل»

CASE NO. 357
CHAMBER ONE
AWARD NO. 473-357-1

TME INTERNATIONAL, INC.,
Claimant,
and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, NATIONAL IRANIAN OIL COMPANY, AHWAZ PIPE MILL COMPANY, S.A.T.T.I.,
Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
DATE 12 MAR 1990
تاریخ ۱۳۶۸ /۱۲/ ۲۱

AWARD

Appearances:

For the Claimant:
Mr. Mark R. Joelson,
Mr. Mark N. Bravin,
Attorneys,
Mr. Howard Huget,
Representative.

For the Respondents:
Mr. Mohammad K. Eshragh,
Agent of the Government of the Islamic Republic of Iran,
Dr. Ali Akbar Riyazi,
Mr. Hussain Piran,
Legal Advisers to the Agent,
Mr. Hussain Farhangi,
Legal Adviser to the National Iranian Oil Company,
Mr. Ali Akbar Mahrokhzad,
Mr. Ali Rahimi,
Representatives of the National Iranian Oil Company,
Mr. F. Mohammad Raiesiyan,
Representative of Ahwaz Pipe Mills Company.

Also present:
Mr. Michael F. Raboin,
Deputy Agent of the Government of the United States of America.

## I. PROCEDURAL HISTORY

1. TME INTERNATIONAL, INC., ("TME"), filed its Statement of Claim with the Tribunal on 18 January 1982. TME, a supplier of machinery for the manufacture of large steel pipes, raises claims totaling $1,904,449[1] plus interest and costs. TME's claims arise out of a contract entered into in 1974 between TME and the Respondent, Ahwaz Pipe Mill Company ("APM"), for the construction of two pipe-making plants for a major Iranian gas pipeline project, ("the Contract"), and ancillary contracts associated with that project. TME primarily seeks to enforce a settlement agreement allegedly reached in August 1978 resolving its claims for additional costs under the 1974 contract. TME also raises a claim based on the alleged expropriation of certain of its property, as well as the personal property of one of its employees, all of which was allegedly left in Iran.

2. APM is a wholly-owned subsidiary of the National Iranian Oil Company ("NIOC"), formed in 1967 to set up a steel pipe manufacturing facility to supply major gas pipeline projects. THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("GOI"), NIOC, and APM, have filed Statements of Defense. APM denies liability for the claims and makes five counterclaims against TME allegedly arising out of their contractual relationship, including claims for taxes and social security premiums. NIOC requests that it be stricken as a Respondent, arguing that none of the claims are against it.

3. TME also claimed $5,052 against S.A. Transports Tourisme Internationaux (S.A.T.T.I.). In its Hearing Memorial, however, TME withdrew this claim, acknowledging

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[1] All references to dollars in this Award are to United States dollars.

that S.A.T.T.I. was not controlled by the Government of Iran and the claim against it thus was not within the Tribunal's jurisdiction. S.A.T.T.I. seeks its costs of arbitration.

4. Further pleadings and evidence were filed by the Parties and a hearing was held on 10 November 1987.

## II. FACTS AND CONTENTIONS OF THE PARTIES

### A. The Contract

5. TME and APM entered into the Contract on 9 September 1974, under which TME agreed to supply and transport equipment for, and to construct and commission, two pipe mills in Iran for the production of steel pipe measuring 8 to 22 inches and 24 to 56 inches in diameter.[2] The pipe was intended for use in the projected IGAT II pipeline, which was to run for 1,250 kilometers from southeast Iran to the border with the Soviet Union. TME also was to manufacture the machinery for the 22-inch mill. The machinery for the 56-inch mill was to be manufactured by another company in the United States, Kaiser Steel Corporation ("Kaiser"), under a separate contract with APM. However, TME was responsible for the transportation and installation of the machinery Kaiser manufactured.

6. Article 2.3 of the Contract provided that both mills should be completed and commissioned within 22 months from the date of the Contract, with an additional running-in period of 2 months.

7. Article 2.10 of the Contract provided for TME to pay specified damages in the event of delay, except where

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[2] These pipe mills were referred to as the "22-inch mill" and "the 56 inch mill" respectively.

APM was at fault. There was no provision under which TME could claim additional compensation from APM if APM caused delay. Article 10 of the Contract provided that TME would not be responsible for delays caused by force majeure.

8. Article 3.5 of the Contract imposed on APM the obligation to:

> Pay all customs duties levied by the Iranian Government and all other taxes, charges, etc. of whatever kind levied by the Iranian Government and all other taxes, charges, etc. levied by municipalities in respect to this Agreement save only the Contractor's tax and income taxes on T.M.E.'s personnel both of which shall be paid by T.M.E. From all payments made by A.P.M. to T.M.E. for services rendered by the latter in Iran under or in connection with this Agreement, A.P.M. shall deduct the applicable contractor's tax.

9. The payment provisions contained in Articles 4 and 5 of the Contract required APM to pay for the work done outside Iran in United States dollars under three letters of credit, totaling $29,961,000. The work performed in Iran was to be paid for in Iranian rials except where payment in dollars was required for specific work or services. The Contract provided for payment of 1,156,000,000 rials for the Iranian portion of the Contract. On the date the Contract was signed, this was equivalent to 17 million United States dollars.[3]

10. TME's obligations under the Contract included the supply of all machinery and equipment for the 22-inch mill; the carrying out of all engineering, civil construction, mechanical erection and ancillary services and all other work pertaining to the pipe mills; and the construction, completion and commissioning of both the 22-inch and 56-inch mills. In fact, however, TME retained only a management

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[3] Dividing 1,156,000,000 rials by 17 million dollars, the Claimant argues that the "contractual" rate of exchange is equal to 68 rials to one dollar.

function with respect to the work to be done on project in Iran. It subcontracted to Montalev-Fassan, a joint venture between French and Iranian construction companies, both the construction of the two pipe mills and the installation of the machinery and equipment.

11. As a result of delays during the course of construction, the 22-inch and the 56-inch mills were not commissioned until February and March 1977 respectively. TME attributes the delays in completion, of six and seven months respectively, to a series of factors. In particular, TME alleges that there was a five-month delay by APM in opening the required letters of credit, which held up the commencement of the work. An additional alleged reason for the delay is that between November 1975 and January 1976 a period of abnormally severe rainfall and flooding in the Ahwaz area caused frequent work stoppages. Moreover, the unexpected discovery of subsurface rock prolonged the excavation period. TME further alleges that shortages of cement, severe port congestion at Khorramshahr, and power cuts in the Khuzestan area compounded the problems throughout 1976. All of these allegations are denied by APM.

12. TME never invoked the force majeure clause in the Contract. It alleges, instead, that it held discussions with APM as successive problems arose during the course of construction, with a view to extending the Contract's completion date. TME alleges that instead of agreeing to its request for a formal extension of the completion date, however, APM indicated that its main concern was that the project be completed as soon as possible. According to TME, APM gave assurances that TME would be fairly compensated for its extra efforts in this regard after the project was completed. On 1 March 1977, TME wrote to Mr. Mossadeghi, the Managing Director of APM, setting forth the alleged causes of the delay and requesting an extension of the completion date of 9 September 1976 specified in the Contract. TME alleges that APM subsequently agreed to treat both mills as having been completed on time, and that APM

accepted completion of the 56-inch mill on 15 February 1977 and of the 22-inch mill on 15 March 1977.

13. On 12 March 1977, TME submitted two letters to APM setting out its respective claims for its alleged additional costs under the dollar and rial portions of the Contract. It sought $1,184,525 under five itemized headings for the dollar portion and 435,232,400 rials under twelve headings for the rial portion.

## B. The Claims

### 1. Balance sought under the settlement of the claim for extra costs

14. TME's first claim is for $572,632, allegedly the dollar equivalent of 40,356,233 rials. This claim is based on a settlement agreement allegedly reached between the Parties in August 1978, which resolved TME's claims for additional costs, and which it now seeks to enforce. TME states that this agreement was the product of a series of discussions during which the data and calculations underlying its claims were examined. In essence, TME argues that the final amount of the agreed settlement was 241,200,444 rials; TME received the dollar equivalent of only 200,844,211 rials, and TME seeks to recover the balance of 40,356,233 rials. It has converted this amount into $572,632 at a rate of exchange of 70.475 rials to the dollar. TME claims interest on this amount from 20 September 1978, the approximate date of APM's partial payment. The evidence on which TME relies in support of the existence of such a binding agreement, and the amount involved, is examined more fully below. See infra paras. 56-79.

15. APM denies liability for the amount now claimed. It states that TME never raised the question of extra costs until after the completion and acceptance of the mills. APM alleges that TME's claims were contested at the time they

were raised on the ground that its performance of the Contract had been unsatisfactory. Further, since the Contract was a turnkey, fixed-price contract, APM argues that no payment was contemplated in respect of extra costs. Moreover, APM denies having entered into a binding agreement such as the one described by TME. APM points out that there is no written record of such an agreement, whereas Article 13 of the Contract required that any amendment or modification thereof be in writing and signed by both Parties. APM further argues that insofar as any agreement was reached between TME and Mr. Mossadeghi, at that time APM's Managing Director, it was invalid as he acted out of improper motives. Further, APM's Board of Directors never approved any payment to TME, and neither did the Iranian Plan and Budget Organization ("PBO").

16. APM alleges that it paid 204,273,508 rials into TME's account at the Foreign Trade Bank in Iran in September 1978, as required by the alleged settlement agreement, and therefore this is the amount at issue, not 200,844,211 rials as argued by the Claimant. As one of its counterclaims, APM seeks to recover from TME this amount, arguing that it was wrongfully paid. In the alternative, APM contends that the payment of 204,000,000 rials represented a final settlement and had been adjusted to take account of legitimate deductions.

## 2. Reimbursement of amounts withheld to cover social insurance premiums

17. In its second claim, TME seeks to recover $861,338, alleged to be the dollar equivalent of 58,571,000 rials withheld by APM from the last two invoices submitted by TME, Invoices No. 12 and 13. TME claims that APM paid TME's first two invoices in full, then withheld 5% from the third, but refunded this amount when TME protested the withholding. Invoices No. 4 to 11 were paid in full, but

APM withheld part of the last two invoices to cover TME's alleged liability for social insurance premiums.

18. TME argues that under Article 3.5 of the Contract, APM was responsible for social insurance premiums. In practice, the arrangement between the Parties was that TME would file its returns with the Social Insurance Organization ("SIO") and make the payments assessed by the SIO to be due. TME alleges that it expected to be reimbursed for these payments at the end of the Contract, however, this is not at issue in this Case. With regard to the withholdings presently at issue, TME claims that APM undertook to release them as part of the agreed settlement, after TME had received a clearance certificate from the SIO confirming that it had made all payments due. TME claims that under the conditions prevailing in Iran in fall 1978 and continuing thereafter, it was unable to obtain the clearance certificate to which it was entitled, despite repeated efforts to do so. Moreover, TME argues that there is no contractual basis to justify APM's retention of the funds in question, since there was no authorization, contractual or otherwise, for the withholding of any amounts other than the standard contractor's tax.

19. APM maintains that TME was liable for social insurance premiums under Article 12 of the Contract, and that in the absence of the clearance certificate it is under no obligation to refund the amount withheld because if TME failed to discharge its social insurance obligations, APM would be obligated to pay the retentions to the SIO. It argues, further, that TME's regular payments to the SIO were made "on account" and subject to final adjustment; and that the reason for refusal of a final clearance was the failure of TME, and, in particular, its subcontractor, Montalev-Fassan, to comply with their social security obligations. APM alleges that TME's debt to the SIO far exceeds the amounts withheld.

3. Reimbursement of increased social insurance premiums

20. TME's third claim is for $151,917 for reimbursement of increased SIO premiums that allegedly resulted from a change in the social insurance law after the Contract was signed in 1974. TME states that it paid at least 10,330,327 rials more than it would have been liable for under the social insurance legislation in effect at the time the Contract was signed. TME argues that this claim was included with the claims for extra costs it submitted to APM. According to TME, APM agreed to refund this cost as part of the overall settlement once the amount was calculated and a clearance certificate obtained from the SIO. In the alternative, TME relies on the theory of unjust enrichment.

21. APM claims that TME has no right to seek reimbursement of this cost. APM argues that TME must bear the burden of any increases in SIO payments resulting from changes in the law, and that this is consistent with Article 12 of the Contract which required TME to comply with all local statutes in force during the period of the Contract, including payment of social insurance dues. APM also denies that there was any change in the law.

4. Unpaid transshipment invoice

22. TME also seeks to recover $3,344 from APM in respect of a separate, ancillary agreement under which TME arranged for the transportation across the United States of samples of 56-inch pipe to APM's supplier of pipe expanders. TME argues that APM requested this service and undertook to reimburse TME's expenses resulting therefrom. TME submitted an invoice to APM on 18 August 1978 and a further request for payment in a letter dated 30 January 1980.

23. APM claims to have no record of any such transaction and takes the position that TME's claim in this respect should fail for lack of proof.

5. Unpaid invoices for consulting services

24. TME and APM entered into a Consulting Services Agreement on 1 January 1977 under which TME agreed to provide APM with technical and operational assistance. TME alleges that it rendered monthly invoices of $6,500 which APM regularly paid, subject to a ten percent deduction for Iranian taxes. That contract expired on 31 December 1978. TME claims that its consulting personnel remained in Iran until December 1978, but that the invoices it rendered for the last four months of the contract remain unpaid. It therefore seeks a total of $23,400.

25. APM denies liability on the grounds that TME breached the agreement by withdrawing its personnel from Iran before the contract's expiration date, and that TME also failed to pay taxes for which it was liable.

6. Unpaid invoices for field services

26. TME claims $10,000 against APM pursuant to an agreement under which it provided a field service representative to APM after the expiration in February and March 1978 of the respective contractual warranty periods for the pipe mills. TME states that it billed APM $2,500 per month for the services of its representative, Mr. Larry Jobe, and that APM paid the invoices regularly except for the period from September through December 1978. Mr. Jobe left Iran in December 1978.

27. APM has admitted liability for this part of the claim, although it states that TME never made a demand for

payment and accordingly the claim was not outstanding on 19 January 1981.

7. Property claims

a) Machinery and equipment

28. TME claims $262,179 as compensation for items of machinery and equipment it allegedly left in Iran after conclusion of its pipe mill contract with APM. The claim is made against APM, and is variously characterized in TME's pleadings as based on "expropriation" and "implied contract." TME explains this by reference to an alleged arrangement with APM under which the nine items in question were stored on APM's premises with the understanding that APM would purchase them at the end of the warranty period. TME alleges that APM retained the items after TME left Iran, and that it "presumably utilized" them. It seeks to recover either their actual cost or market value.

29. APM denies liability. It argues that there is no evidence that any such items were left in Iran and still less that APM or the Government of Iran used or appropriated them. APM contends that any such items were "mostly worthless" and had been abandoned by TME. Moreover, after the warranty period expired in March 1978 TME had several months in which to arrange for their disposal, but failed to do so.

b) Mr. Jobe's household effects

30. TME claims $19,639, apparently against the Government of Iran, as compensation for household effects allegedly left behind by its field services representative, Mr. Larry Jobe, when he left Iran. TME alleges that some of the items belonged to TME and some were Mr. Jobe's personal property. TME allegedly paid Mr. Jobe compensation for his

property in exchange for an assignment of his rights to recover that property.

31. APM denies liability both for itself and for the Government of Iran. It argues that this question is excluded from the Tribunal's jurisdiction by virtue of Article 11 of the Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration") as it concerns actions which arose out of a "popular movement," and also because TME has no standing to bring a claim on behalf of Mr. Jobe. APM argues further that TME had no obligation to reimburse Mr. Jobe, and that the claim should fail for lack of proof.

C. The Counterclaims

1. Damages for delay in delivery of plant

32. APM seeks compensation from TME pursuant to Article 2.10 of the Contract on the basis that both pipe mills were completed late. APM seeks $47,419.35 in respect of the 22-inch mill and $307,142.86 for the 56-inch mill.

33. TME denies liability, arguing that APM expressly waived any such claim by the settlement agreement and agreed to treat both mills as having been completed on schedule.

2. Refund of contractual payments

34. APM claims $318,653.66 plus bank and insurance charges of 7,744,877 rials as damages for defective, short-landed or damaged equipment it purchased from TME as part of the Contract. APM states that TME was responsible for recovering compensation for the property under its insurance policy, but that TME failed to do so.

35. TME admits that damage was sustained and that it was covered by an insurance policy. It argues, however, that APM was named as the insured party under that policy and as such was responsible for filing an insurance claim. TME alleges that it furnished APM documents enabling it to make such a claim and that APM actually agreed to replace the equipment.

3. Refund of settlement amount

36. APM seeks to recover the 204,000,000 rials paid pursuant to the alleged settlement agreement. It argues that there was no basis for such a payment and that it was made in error.

37. TME contends that APM's position in this respect is contrary to the evidence TME has adduced in support of its claim.

4. Cost of pipes sold to TME

38. APM claims 228,749 rials, which it states is the price of the pipes which it sold to TME to avoid delays that would have resulted if TME had been forced to import the material.

39. TME argues that this counterclaim should fail for lack of proof. TME claims that it paid for the pipes and that APM did not dispute this until the present proceedings.

5. Tax and social insurance

40. A total of 8,193,196 rials is claimed in taxes allegedly owed by TME, and 352,272,593 rials in social insurance premiums. These are alleged to be owed in connection with the 1974 pipe mill Contract and the service

agreements under which TME and its subcontractor worked in Iran.

41. TME argues that both these counterclaims are outside the Tribunal's jurisdiction since they arise out of the operation of municipal law and not out of any of the contracts at issue in this Case. TME also denies liability. Part of the amount claimed as taxes appears to have been assessed on the funds paid to TME as a result of the alleged settlement agreement, which TME asserts was intended to be net of all tax. TME further argues that it satisfied its tax and social insurance obligations under these agreements.

## III. REASONS FOR AWARD

### A. Procedure

#### 1. Late-filed claim

42. TME's claim for reimbursement of $151,917 for increases in social security premiums was raised for the first time in its Hearing Memorial filed on 20 October 1986. The Respondents filed an objection to its admission, arguing that it constituted a new claim and was not an admissible amendment under Article 20 of the Tribunal Rules.

43. An examination of the basis of this claim and the relief sought indicates that it is quite distinct from the other social insurance claim for $861,338, which is based on the withholding by APM of sums to cover social insurance liabilities. There is no indication of any claim for social insurance increases, as distinguished from the claim for social insurance withholdings, in the Statement of Claim. The Tribunal therefore finds that TME was in effect seeking to introduce an additional claim in its Hearing Memorial, and not merely to amend or supplement any of the claims previously raised. Neither Article 20, nor any other provision of the Tribunal Rules, permit the addition of a

separate, new claim. The third claim of TME must therefore be rejected as inadmissible.

2. Late-filed counterclaim

44. The counterclaim raised by APM for damages for default and defective work against TME under the Contract appeared for the first time in APM's Rebuttal Memorial -- its last round of written pleadings. Article 19, paragraph 3, of the Tribunal Rules requires that a counterclaim must be raised:

> [i]n 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.

Here, no attempt was made either at the time the new counterclaim was raised, or subsequently, to justify its late filing. Considerations of equality of treatment, prejudice to the other party, and the orderly conduct of proceedings have led the Tribunal uniformly to reject such late-filed counterclaims in the absence of any such justification. See Harris International Telecommunications, Inc. and Islamic Republic of Iran, et al., Partial Award No. 323-409-1, paras. 88-101 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 31, 45-53. This counterclaim must therefore be dismissed.

3. The Parties

a) The Claimant

45. While the claim was filed and prosecuted in the name of TME International, Inc., evidence has been submitted to show that as a result of changes in its corporate name that corporation is now known as IPD International, Inc.

This change is reflected in the dispositif of this Award to ensure the correct designation of the legal entity which presently owns the claims.

b) The Respondents

46. NIOC requested in its Rebuttal Memorial that all the Respondents but APM be stricken from the record as they are not proper parties to the Case. The Tribunal finds that at least part of the claim for property losses is directed against the Government of Iran and it is therefore a proper Respondent. APM was the contracting party and the entity against which TME's claims are principally directed. NIOC has, however, assumed responsibility for the conduct of the Case on behalf of the Respondents, and for this reason its name is maintained in the caption, though the dispositif recognizes that it is not a party in interest. As previously mentioned, the claim against S.A.T.T.I. has been withdrawn although its request for costs remains pending.

B. Jurisdiction

47. TME has submitted evidence showing that it was incorporated in the State of California in 1972, and that it continued to be a corporation in good standing until its name was changed by amendment to its Articles of Incorporation, first, in June 1982, to Stormac International, Inc. and later, in July 1982, to IPD International, Inc.

48. TME is a closely-held corporation. TME submitted evidence of its nationality including an affidavit of its former Corporate Secretary-Treasurer giving details of its stock ownership. From the evidence, it appears that TME's stock was at all material times owned by seven natural persons, copies of whose United States passports have been submitted to the Tribunal. In the absence of any rebuttal by the Respondents, and in view of the Tribunal's flexible approach to the types of evidence of nationality it will

accept in the case of a closely-held corporation, the Tribunal is satisfied that TME is a United States national within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration.

49. It is not disputed that, apart from S.A.T.T.I., all the Respondents fall within the Tribunal's jurisdiction and the Tribunal finds that it has jurisdiction over them.

## C. The Merits

### The Claims

#### 1. Balance sought under the settlement of the claim for extra costs

50. TME's first claim depends on a finding by the Tribunal that the Parties entered into a settlement agreement which disposed of their respective claims under the Contract, and which created mutual obligations capable of being enforced in a proceeding before this Tribunal. The principle that a supervening settlement can give rise to a claim has been previously accepted by the Tribunal. See, e.g., Computer Sciences Corporation and Islamic Republic of Iran, et al., Interlocutory Award No. ITL 49-65-1 (18 Apr. 1985), reprinted in 8 Iran-U.S. C.T.R. 99; Walter W. Arensberg, et al. and Ministry of Housing and Urban Development of the Islamic Republic of Iran, Award No. 213-61-1 (27 Feb. 1986) reprinted in 10 Iran-U.S. C.T.R. 37. Such claims are, of course, subject to the same requirements as to jurisdiction and continuous ownership that apply to other categories of contract claims.

51. TME has the burden of proving both the existence and the contents of the agreement which it now seeks to enforce. In this respect, the Tribunal notes at the outset that no signed document has been produced by either Party purporting to record the terms of the alleged agreement.

There are references in the record by TME to such a document having been destroyed by fire, though this is also disputed by APM. TME relies on contemporaneous correspondence, internal minutes, and, most importantly, payment by APM in September 1978 of the major portion of the alleged settlement amount, as evidence that such an agreement existed. There are also affidavits from Mr. Huget and Mr. Mossadeghi which give their respective accounts of events at the relevant time.

52. The Tribunal notes that the most obvious indication that a settlement agreement was reached between the Parties is the payment by APM to TME in September 1978 of a substantial part of the payment due under the agreement. Although the Parties disagree as to the exact amount of the partial payment, it is not disputed that a substantial payment occurred. The very fact that APM made such a payment strongly suggests that it did so pursuant to an agreement with TME.

53. APM argues that a fixed-price, turnkey contract such as the one at issue in this Case cannot give rise to any claim for additional payments. This argument, however, is contradicted not only by APM's own subsequent actions, but also by the attitude of the PBO, the government body responsible for determining Iran's overall policy on construction projects. See infra paras. 65 et seq. For example, the PBO promulgated regulations governing the rates applicable to claims for construction escalation costs, thereby indicating that the PBO did not, in principal, oppose such payments.

54. APM's also contests Mr. Mossadeghi's authority to enter into such an agreement. In this regard , the Tribunal notes that APM is, in principle, bound by the acts of its former officials and that TME was entitled to rely on Mr. Mossadeghi's apparent authority as Managing Director. Moreover, as the following examination of the evidence will reveal, there are numerous indications in the record that

APM's Board of Directors was actively involved in the formulation of the agreement with TME.

55. In determining exactly what the terms of the agreement were, the absence of any single signed document requires the Tribunal to examine in detail the evidence presented by both sides as to the content of that agreement.

56. The logical starting point for this analysis is to consider the negotiating history of the settlement. The Parties began their discussions on the basis of TME's claims for extra payments under the dollar and rial portions of the Contract, as set forth in two letters from TME to APM dated 12 March 1977. These letters set out in detail the basis for TME's claims under each portion of the Contract.

57. Two meetings were held between the Parties on 16 July and 24 July 1977. TME was represented by Mr. Huget, Mr. Arthur Valdez, its Managing Director, and Mr. Lloyd Bertman of Jupiter Trading Company ("Jupiter"), TME's local agent. APM was represented by Mr. Mossadeghi, Mr. Milton Daniels, its Deputy Managing Director, and Mr. Freydoon Adl, its Contract Administrator.

58. These meetings, which took place at Mr. Mossadeghi's office at the National Iranian Gas Company, are described by TME as the main negotiating sessions at which its claims were discussed. Mr. Bertman prepared Minutes of these meetings. These Minutes are in the record, they were allegedly circulated for approval and signature by those present, and no specific objection has been raised to their accuracy, although Mr. Adl denies in his affidavit that they accurately reflected the facts or that they were circulated.

59. The Minutes of the first meeting begin by recording that "Mr. Mossadeghi agreed to the contract extension as requested by TME so that no penalty is applicable." Later in the same Minutes, it is recorded that TME's claim for costs to cover the "extended construction period" was

"rejected by APM on basis that APM had waived delay penalty." The Parties then proceeded to discuss each of TME's claims, item by item. APM agreed to some, and rejected others. Others were deferred for subsequent discussion, and in certain cases TME was to furnish supporting documentation.

60. The Minutes of the second meeting held on 24 July 1977 indicate that insofar as six of TME's claims arose out of Iran's domestic problems, such as port delays and shortages of construction materials, APM's representatives considered themselves bound to refer those claims to the PBO for authority to enter into any settlement involving additional payments. Referring to a recent policy statement by the Government Minister concerned, the Minutes state:

> Mr. Mossadeghi said that he had spoken with H.E. Mr. Madjidi, Minister of State for Planning, about his press statement to the effect that 'the Government is prepared to pay extras where overruns are the result of Iran's domestic problems such as internal labour market, port delays or shortages of cement and other construction materials' and that H.E. Mr. Madjidi confirmed that such claims would be entertained by Plan Organization. Mr. Mossadeghi asked TME to write him a letter presenting 3 separate sheets documenting TME's claims on Shortage of Cement, Port Delays, and Construction Escalation which would be passed by APM to Plan Organization since these items are not in APM's jurisdiction.

61. The Minutes indicate that the Parties then discussed eleven specific claims raised by TME. The Minutes show that over the course of the two meetings APM agreed to pay an additional $323,330 under the dollar portion of the contract, and 60,809,487 rials under the rial portion. Of the remaining items claimed, some were compromised, and others deferred. The Minutes conclude:

> Mr. Mossadeghi stated that, after APM received Plan Organization's decision regarding TME's claim on the 3 items which are Plan Organization's domain, TME's entire claim as negotiated would be

> submitted to the APM Board of Directors for approval, then payment would be made.

62. The only evidence submitted by APM in support of its proposition that no settlement was reached is the affidavit of Mr. Adl, APM's Contract Administrator. He states that:

> with due regard to the position and responsibility that I have had at all the stages of the performance of contract and its supervision, I should have been aware of the negotiations on and signing of such an alleged Settlement Agreement, whereas until coming across with [sic] TME's Statement of Claim I was completely unaware of it . . .

63. Mr. Adl's attendance at the two meetings held in July 1977 is recorded in the Minutes and confirmed by Mr. Huget and Mr. Mossadeghi. He does not appear to have been involved in any subsequent negotiations.

64. Subsequently, on 25 July 1977, Mr. Valdez of TME wrote to Mr. Mossadeghi setting forth details of the claim for $434,849.32 for port surcharges and 339,000,000 rials in excess construction costs to be submitted to the PBO. This was supplemented two days later with an addendum showing the underlying calculations and data supporting the main elements of the claim.

65. It appears that Mr. Mossadeghi then submitted the claim to the PBO. The PBO, however, delayed significantly in deciding TME's claim. TME attributes this delay to a succession of changes in the leadership of the PBO which held up consideration of the claim. Notes and telexes dating from the period in question tend to support this explanation. In October 1977 TME received a telex from Jupiter Trading, its agent in Iran, indicating that the PBO was prepared to authorize those in charge of government projects to make additional payments on fixed price contracts. Nevertheless, APM evidently required a more

specific authorization before making any such payments to TME. In the words of Mr. Bertman, TME's local sales agent at Jupiter Trading, who reported on the situation in a letter to Mr. Huget on 13 November 1977:

> Mossadeghi is intent upon squeezing a clear reply from Plan Org so Plan Org cannot complain later that APM exceeded its authority.

66. It appears that Mr. Huget and Mr. Mossadeghi met on 4 December 1977 to discuss the claims. The following day Mr. Huget wrote a letter to APM in which he reiterated the urgent need to resolve the claims. Later the same month, TME approached the Economic Counselor at the United States Embassy in Tehran in order to ascertain the likely attitude of the PBO towards TME's claims.

67. The next major development took place in the summer of 1978. On 19 June 1978, Mr. Mossadeghi sent Mr. Huget a telex stating that he had met with the PBO and "their reply seems to be favourable." On 13 July the Economic Counselor, Mr. Brewin, telexed that he had been informed that the PBO "agreed to settle claim" and were willing "to resolve matter on negotiated basis." Mr. Daniels of APM sent a telex, which TME received on 17 July 1978, stating:

> It has been approved by APM Board to pay to TME about 3.5 million dollars against TME claim.

68. Considering that the overall amount of TME's claim had been close to seven million dollars, on 19 July 1978, Mr. Huget wrote to Mr. Tounian of Jupiter Trading stating that he wished to meet APM's representatives to discuss how the lower figure of 3.5 million dollars had been arrived at and which of the amounts claimed it covered. He pointed in particular to the fact that APM had already approved payment of $710,088.73 at the July meeting the year before, and a further $857,898.33 had been approved subject to minor

changes. In that letter, Mr Huget recalled:

> On several occasions late last year and early this year His Excellency Mr. Mossadeghi offered to pay TME for those items which he had approved in July, 1977, however, we took the position of not accepting payment because we felt if we accepted, then it possibly could weaken our position of putting pressure on the Minister of Budget and Plan Organization to make a decision considering that we then would have already received some funds and were not that insistent on final settlement of our entire claim.

69. It appears that Mr. Huget and Mr. Tounian held a meeting with Mr. Mossadeghi and Mr. Daniels in Tehran on 26 August 1978. There is no agreed record of what was discussed at that meeting, though Mr. Huget and Mr. Mossadeghi both discuss the events of that meeting in their respective affidavits. That meeting, and a further meeting held in Ahwaz on the following day, are critical to the Tribunal's determination of the amount the Parties agreed that TME should receive. It is TME's contention that the essence of the agreement was that APM undertook to pay 241,200,444 rials in global settlement of TME's claims, and that this amount was intended to be net of all taxes and deductions.

70. According to Mr. Mossadeghi's affidavit, the Parties agreed at the meeting of 26 August 1978 that TME would receive 241,200,244 rials net of taxes in exchange for giving up the remainder of its claim for extra costs, except for social insurance premiums. As to these, TME was to settle its accounts with the SIO in Ahwaz, and obtain a clearance certificate. Upon receipt of this certificate, APM was to refund the amounts withheld for social insurance during the life of the Contract. Mr. Mossadeghi states that he prepared a Memorandum of Agreement to record the settlement and that this was "unanimously approved" by APM's Board of Directors before being sent to Jupiter Trading. No such document has been submitted to the Tribunal. TME claims that the copy sent to Jupiter Trading was probably destroyed by fire.

71. Mr. Huget's account of the meeting with APM in Tehran on 26 August is more detailed. He states that Mr. Mossadeghi told him that the settlement was "a fait accompli" because it was the decision of APM's Board of Directors. The affidavit goes on,

> [h]e also told me that as soon as TME received a clearance certificate from the Social Insurance Organization, Ahwaz Pipe Mill would repay the amount retained from TME's fee under TME's Invoices Nos. 12 and 13 as a Social Insurance withholding (Rls.58,571,000) . . . . As for the other items of TME's claims, including those on which the Plan Organization had given its approval, Mossadeghi specified the amounts that had finally been approved by the Ahwaz Pipe Mill Board.

72. Mr. Huget also submitted a page of handwritten notes which he states that he made during that meeting as each item was discussed. The notes are headed "Settlement Breakdown." Under the subheading "U.S. Portion" they show three items accepted by APM totaling $323,330, which was then converted to 22,875,597 rials. Under the "Iranian Portion," it lists four items claimed (numbered I, V, VIII and IX, referring back to the Minutes of the July 1977 meetings) for which a total of 22,863,180 rials was agreed to be due. The sum of the two portions is shown as 45,738,777 rials. To this is added a further 187,029,000 rials arrived at by "factors established by P.O.," which appears to refer to the six cost overrun claims submitted to the PBO for approval. The total shown, 232,767,777 rials, was "rounded off to Rls. 232,768,000."

73. Thus, by the conclusion of that meeting, it appears that the Parties had agreed that TME was entitled to 232,768,000 rials under the Contract.

74. Having reached this stage, Mr. Huget was told by Mr. Mossadeghi that Mr. Pourturk, APM's Head of Finance, had raised the issue of certain "back charges," that is, expenses incurred by APM in the course of the Contract for which

he believed TME was responsible. Mr. Huget's affidavit continues:

> Mossadeghi suggested that I go to Ahwaz and meet with Pourturk to work out a final agreed amount on the back charges, and to resolve the unpaid balance for certain items on TME's final invoice (Invoice No. 13), at which time the settlement would be final. At that point, he assured me, Ahwaz Pipe Mill would arrange for payment of the final settlement amount through normal banking channels as quickly as possible. Before the meeting concluded, Mossadeghi called Pourturk and advised him that I would be coming the next morning to settle the back charges and that he should call Mossadeghi with the final agreed upon amount.

75. At this point it should be noted that, while APM disputes the validity of the settlement and, in particular, that it was ever approved by APM's Board, there is no evidence to contradict Mr. Huget's account of the meeting in Tehran, or the figures he describes as having been agreed upon there.

76. Mr. Huget states that he flew to Ahwaz that same day and met with Pourturk the following morning, 27 August 1978. He gives a detailed account of the meeting which took place. The meeting was attended on TME's behalf by Mr. Huget and Mr. Jobe. APM was represented by Mr. Pourturk, Mr. Chitsazan, APM's accountant for the project, and its Plant Manager, Mr. Alborzi. Mr. Huget relates that,

> Pourturk explained all of the back charges for which he thought that TME should be held responsible, and in most instances I accepted Pourturk's figures. . . . The final amount of the agreed backcharges was Rls. 4,053,852. We then reviewed the outstanding unpaid items from TME's final invoice and agreed on a final amount of Rls.12,486,296. . . . Just as the meeting was finishing, Pourturk called Mossadeghi and told him the agreed amounts of the backcharges and final invoice items. From these figures, as I indicated at the time in my notes, . . . TME was due to receive Rls.241,200,444 (plus the SIO withholding and SIO reimbursements).

77. The notes referred to are in the record as attachments to Mr. Huget's affidavit. The first page shows a list of back charge items totaling 4,053,852 rials under which is written "TME TO APM." The second page lists four items outstanding from TME's final invoice totaling 12,486,296 rials. The agreed back charges, 4,053,852 rials, are subtracted from this figure. The remainder, 8,432,444 rials, is then added to the figure of 232,768,000 rials described as "claims." This was the amount agreed upon by the Parties at the meeting the previous day in Tehran. The total is shown as 241,200,444 rials.

78. Mr. Huget placed on record his understanding that this was the amount of the agreed settlement in a letter to Mr. Mossadeghi dated 29 August 1978, written before he left Iran. It reads as follows:

> Your Excellency,
>
> By receipt into TME International, Inc. - Iran Account No. 5154 at the foreign trade Bank, Central Branch, Avenue Sadi, the amount of 241,200,444 Rials. [sic] TME will make no further claims against the Ahwaz Pipe Mill Company for the contract between our two companies dated September 9, 1974., [sic] except that upon presentation by TME to APM of the clearnce [sic] centificate [sic] from the Social Insurance Organization for the above contract, then APM will transfer the 58,000,000 Rials that has been retained by APM, to the TME account No. 5154 at the Foreign Tarde [sic] Bank.
>
> Upon payment to TME of the 241,200,444 Rials by APM, there will be no further demands made by APM against TME regarding the above mentioned contract, except that TME agrees to discuss and resolve the matter of 7,984,338 Rials pertaining to insurance claims.

79. Mr. Huget wrote a further letter, dated 31 August 1978, to the Foreign Trade Bank of Iran, Central Branch, informing the bank that it should expect a payment of 241,200,444 rials "[w]ithin a few days" and a second transfer of 58,000,000 rials within several weeks.

80. There is no documentary evidence in the record to suggest that Mr. Huget's understanding was not correct. It is, however, challenged by Mr. Chitsazan in his affidavit. Describing the Ahwaz meeting, Mr. Chitsazan recalls:

> I and my other colleagues in the meeting stated unanimously that [we] were not authorized to take decision on the settlement of alleged disputes, and that the only thing we could do was to reflect APC's dues from TME to them.

81. Mr. Chitsazan specifically refers to the discussion of back charges and mentions the same figure as Mr. Huget, 4,053,582 rials. Mr. Chitsazan indicates that he raised the issue of the unresolved insurance claim and of unspecified "works performed for TME." He does not mention the final invoice and does not indicate the outcome of the discussion. He states, however, that Mr. Mossadeghi instructed Mr. Pourturk on the telephone to pay 232,768,000 rials to TME "after deducting the dues payable by it." This statement conflicts directly with the recollections of both Mr. Huget and Mr. Mossadeghi. If Mr. Chitsazan was correct in his understanding it seems scarcely credible that Mr. Mossadeghi would not have taken steps to correct the figure placed on record by Mr. Huget's letter of 29 August.

82. Mr. Chitsazan states that the payment made to TME represented 232,768,000 rials "after deduction of miscellaneous expenses and other deductions," the nature of which he does not specify. It was only at the hearing that the Respondents made the argument that the deductions from the settlement represented legitimate deductions for taxes and SIO payments. The Respondents' argument can be summarized as follows. The amount agreed at the meeting of 26 August 1978 was indeed 232,768,000 rials. From this 4,053,852 rials was deducted for agreed back charges. Additional deductions were made subsequently, of 12,802,240 rials representing 5.5% in contractor's tax and 11,638,400 rials representing a 5% withholding for social insurance premiums. The balance of 204,273,508 is close, the Respondents argue, to the amount received by TME on 20 September 1978.

83. While this at first appears to be an attractive argument, the Tribunal finds on closer examination that it carries more conviction as an ex post facto explanation of the partial payment, than as evidence of the agreement actually reached between the Parties. Indeed, it may well explain the internal accounting carried out by APM in Ahwaz which resulted in a reduction in the amount finally paid to TME. Whether or not this was done pursuant to an agreement between the Parties -- the only question relevant to the Tribunal's task -- is, however, a different matter. The evidence strongly suggests that it was not. Neither Mr. Chitsazan, Mr. Mossadeghi or Mr. Huget suggest that additional deductions for tax or social insurance were discussed at the meeting. Nor does it appear in any of the notes or correspondence dating from that period. Only Mr. Adl in his affidavit suggests that:

> the alleged Agreement, assuming that it did exist, should be considered satisfied because as is inferred from the Claimant's reasonings the alleged agreed amount was paid to TME after subtracting applicable legal and contractual retentions and deductions. . . .

This explanation, however, must be taken in light of Mr. Adl's prior statement that he was "completely unaware" of the settlement.

84. By contrast, Mr. Huget's letter of 29 August 1978 refers specifically to the expected refund of the 58,000,000 rials withheld for social insurance. Any additional withholding agreed to would have been reflected in that letter, as well as in the letter of 31 August 1978 to TME's bank, but nothing was mentioned in either letter.

85. Further support for Mr. Huget's version of the facts can be found in the reaction of TME to the payment received in September 1978. TME clearly did not consider that it had been paid in full. On 11 September 1978, immediately upon receipt of the payment, Mr. Huget sent a

telex to Jupiter Trading which stated:

> Do not understand why full 241.M. not paid, as both M.D. [Mr. Daniels] and H.E. [Mr. Mossadeghi] agreed and letter was written by M.D. to Ahwaz to pay full amount.

Mr. Tounian's telexed reply stated:

> The small amount outstanding up to 241.M is delayed for few days due to internal auditing as ordered by H.E. Understand this should be okayed within few days.

86. Furthermore, Mr. Huget wrote a letter on 10 October 1978 to Mr. Mossadeghi protesting that only 204 million rials had been received. It stated specifically that "[o]ur agreement of the sum of 241,200,444 Rials was exclusive of any deductions. . . ." This understanding on the part of TME, so fundamental to its present claim, was allowed to pass unchallenged by APM until the present proceedings.

87. A further difficulty with the Respondents' argument concerns the figure of 12,486,296 rials which Mr. Huget's notes show was added to TME's entitlement at the 27 August meeting. An examination of the four items which made up this amount - customs "javaz" charges, work permits, expander modifications and the reduction in contractor's tax from 5.5% to 5.15% - establishes that the first three were included in TME's final invoice, Invoice No. 13, but remained unpaid. The fourth had already been agreed to by APM at the meeting of 16 July 1977, though for some reason it had not been included in the settlement amount of 232,768,000 rials. Mr. Huget specifically states that at the 27 August meeting:

> We then reviewed the outstanding unpaid items from TME's final invoice and agreed on a final amount of Rls. 12,486,296. . . . Pourturk called Mossadeghi and told him the agreed amounts of the back charges and final invoice items.

The Respondents' proposed calculation does not take into account these final invoice items, nor is there any alternative explanation of how they were disposed of. This omission further undermines the Respondents' explanation of how the final figure was arrived at.

88. The Tribunal therefore finds that the evidence strongly indicates that APM agreed to pay TME 241,200,444 rials in settlement of its claims and that no further deductions from this amount were contemplated for taxes, social insurance or otherwise.

89. The remaining issue is the amount that should be offset against the award for the funds actually paid by APM to TME in partial satisfaction of the Settlement Agreement. TME argues that APM should be deemed to have paid 200,844,211 rials, which represents the rial equivalent of the dollars transferred to TME's U.S. bank, Bank of America. APM, on the other hand, argues that it transferred 204,273,508 rials to TME's rial account at the Foreign Trade Bank in Iran as requested by TME in its letter of 29 August 1979 and, therefore, this amount must be considered as paid to TME.

90. This dispute turns initially on the proper interpretation of the Settlement Agreement. Mr. Huget's letter of 29 August 1978, which purports to describe the terms of that agreement, states that "by receipt into [TME's account] at the foreign trade Bank [in Iran]" of the requisite amount in rials, its claims would be satisfied. Supra at para. 78 (emphasis added). Therefore, the relevant issue is the rial amount received by TME in its account at the Foreign Trade Bank in Iran, not the amount of dollars deposited in its account in the United States after transfer from Iran.

91. The primary evidence relied on by the Respondents in support of their contention that the amount transferred by APM to the Foreign Trade Bank was actually closer to 204,000,000 rials is the statement to that effect in Mr.

Huget's letter of 10 October. He states "[w]e wish to thank you for the receipt of approximately 204,000,000 Rials which was transferred into our account at the Foreign Trade Bank." The only explanation in the Claimant's pleadings of Mr. Huget's statement is that "this was apparently a typographical error," but again the Claimant focuses on the dollar amount deposited in Bank of America, rather than the amount received in TME's account at the Foreign Trade Bank in Iran. In fact, the Claimant never specifically refutes that it received 204,000,000 rials in its account at the Foreign Trade Bank.

92. Although the Respondents argue that the amount paid was actually 204,273,508 rials, the Tribunal determines that the record supports a finding that 204,000,000 rials was paid. The Tribunal therefore finds that the Respondents should be credited with payment of 204,000,000 rials towards the agreed settlement amount of 241,200,444 rials, leaving an unpaid balance of 37,200,444 rials. Applying the exchange rate of 70.475 rials to the dollar that was in effect at the date of the partial payment, the Tribunal concludes that TME is entitled to recover $527,853 plus interest from the date when the full settlement amount should have been paid. The Tribunal estimates this date to be 30 November 1978.

2. Reimbursement of amounts withheld to cover social security premiums

93. TME's claim for $861,338 allegedly represents the dollar equivalent of the 58,571,000 rials withheld by APM from TME's last two invoices, Invoices No. 12 and 13, to cover TME's alleged social insurance liabilities.[4] TME claims to be entitled to this amount on the basis that APM

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[4] In converting rials to dollars for this element of the Claim, the Claimant applies the exchange rate of 68 rials to the dollar, which it alleges to be the "contractual rate of exchange." See supra para. 9 fn. 3.

undertook to release the SIO withholdings as part of the overall settlement reached in August 1978, provided that TME obtained a clearance certificate from the SIO confirming that it had satisfied its social insurance obligations. TME never obtained such a clearance certificate. TME argues, however, that the absence of a clearance should not defeat its entitlement to the withholdings, because it had paid all of its SIO liabilities in full and its failure to obtain the certificate was caused by the force majeure conditions prevailing in Iran in fall 1978 and continuing thereafter.

94. TME further argues that, apart from the settlement, Article 3.5 of the Contract made APM liable for social insurance payments. TME states that its normal practice was to file returns with the SIO office and make payments, which APM then routinely reimbursed. It is undisputed that APM withheld from TME's third invoice 5% of the cumulative billings under TME's first three invoices as a retention against TME's social insurance liabilities. When TME protested that there was no contractual basis for this withholding, APM refunded the money "until the final payment which [APM] shall have to withhold pending presentation of SIO certificates." The next eight invoices were not subjected to any such deduction. APM withheld the amount presently claimed from the two final invoices submitted at the end of the Contract.

95. APM argues that it was entitled to withhold these amounts pursuant to the Contract, as Article 3.5 did not cover social insurance, which was TME's responsibility according to Article 12. APM further asserts that TME's monthly payments to the SIO were made "on account," subject to adjustment when its final obligations could be determined at the end of the Contract, and that amounts were withheld from the two final invoices for this reason. APM disputes TME's claim that it was entitled to a final clearance certificate and states that the refusal of the SIO to issue one was justified by the failure of TME and, in particular, its subcontractor, Montalev-Fassan, to fulfill their obligations with respect to social insurance payments and to

obtain the proper clearance. APM further argues that if the Tribunal accepts TME's argument that it has no jurisdiction over the SIO counterclaims, the same reasoning precludes the Tribunal from deciding the dispute between TME and the SIO concerning TME's entitlement to a clearance certificate.

96. The Tribunal is satisfied that APM undertook, as part of the settlement of outstanding contract disputes, to reimburse the withholding of 58,571,000 rials "upon presentation by TME to APM of the clearance certificate from the Social Insurance Organization for the above contract." The Tribunal considers that this settlement superseded the Parties' mutual rights and obligations under the Contract itself. There is therefore no need for further discussion as to which of the Parties was responsible for social insurance premiums under the Contract; the Tribunal is concerned here only with the settlement agreement.

97. It is undisputed that TME did not obtain a final clearance certificate from the SIO. TME asserts that it had paid its SIO dues and that the certificate was wrongly withheld. TME argues that if it can demonstrate, on the evidence, that it complied with its obligations and that its failure to obtain the requisite clearance certificate was caused by force majeure, it should be entitled to enforce APM's commitment to refund the amount withheld. TME states that this solution would, in theory, avoid APM's being unjustly enriched at TME's expense by money to which only TME or the SIO had any ultimate claim. It does, however, presuppose that it is open to the Tribunal to decide this issue as between TME and APM alone without entering upon areas which are outside its jurisdiction. The SIO is not a party to the present Case.

98. The Tribunal's treatment of questions of Iranian social insurance has been determined in each case by the particular legal and jurisdictional context in which the issues were presented. For example, counterclaims for the recovery of social insurance premiums have frequently been

raised by or on behalf of the SIO in cases based on contract. The Tribunal has consistently taken the position that such counterclaims are outside its jurisdiction. The liability to pay such premiums arises by operation of municipal law and is not created by a contract of the type normally at issue, notwithstanding that such contracts typically include provisions apportioning responsibility for such payments as between the parties. See, e.g., Questech, Inc. and Ministry of National Defense of the Islamic Republic of Iran, Award No. 191-59-1, pp. 38-40 (25 Sept. 1985), reprinted in 9 Iran-U.S. C.T.R. 107, 135-36.

99. Other cases have arisen where the nature of the relief sought has involved an examination only of the rights of the contract parties vis-à-vis each other and not vis-à-vis the SIO. In Training Systems Corporation and Bank Tejarat, et al., Award No. 283-448-1, paras. 41-44 (19 Dec. 1986), reprinted in 13 Iran-U.S. C.T.R. 331, 341-42, the claimant had a contract with the Oil Service Company of Iran ("OSCO") under which OSCO made withholdings of 5 percent from each invoice, which it was to reimburse upon the presentation of "evidence" that its SIO obligations had been satisfied. The evidence of payment commonly presented by the claimant took the form of clearance certificates. In seeking reimbursement from OSCO of an outstanding retention, the claimant in that case submitted evidence that clearance certificates actually had been obtained and forwarded to OSCO. This, the Tribunal found, amounted "to a strong indication that the social insurance premiums . . . had been paid; that evidence of this, in the form of clearance certificates, had been supplied to OSCO; and that there was no reason in principle why the reimbursement should not have been forthcoming." Id. at para. 44, reprinted in 13 Iran-U.S. C.T.R. at 342. The Tribunal went on to award the amount in question.

100. In Houston Contracting Company and National Iranian Oil Company, et al., Award No. 378-173-3, paras. 82-87 (22 July 1988), reprinted in 20 Iran-U.S. C.T.R. 3,

27-29 (hereinafter "Houston Contracting"), the question of clearance certificates again arose in the context of a claim by one party to a contract that it was entitled to be reimbursed for social insurance retentions made by the other contracting party. The SIO was not a party to the case. The contract at issue in that case contained a clause which stated "'[f]inal payment shall not be made to [the claimant]' before such SIO clearance certificates are produced." Id. at para. 85, reprinted in 20 Iran-U.S. C.T.R. at 28. It was not disputed that the claimant in that case had performed the work under the contract and was entitled to receive payment. It had not, however, applied for, or obtained, SIO clearance certificates, though it did claim to have paid the appropriate SIO contributions.

101. Dealing with the issue as one concerning only the contracting parties, the Tribunal found that the claimant in Houston Contracting became entitled to the refund of the retentions on 1 September 1979, the date that a Final Certificate concerning completion of work under that contract was issued. The Tribunal noted,

> Although the Final Certificate also referred to the need to produce a clearance certificate, this is a requirement relating to the procedure to effect final payment, and does not affect HCC's entitlement to that sum.

Id. at para. 87, reprinted in 20 Iran-U.S. C.T.R. at 28.

102. The Tribunal coupled this statement with the observation that, because of the prevailing situation in Iran from November 1979, "failure to obtain such a certificate cannot be considered wrongful or a bar to payment of such sum." Id. Further, the claimant in that case satisfied the Tribunal on the evidence that it had paid its SIO contributions and had thus "attempted to satisfy its underlying obligations" to the SIO. Id. The Tribunal granted the claim for reimbursement.

103. Returning to the present Case, a number of significant differences present themselves. First, the terms of the settlement agreement reached, as expressed in the most concise form available, namely Mr. Huget's own letter of 29 August 1978, state that

> [u]pon presentation by TME to APM of the clearance certificate from the Social Insurance Organization for the above contract, then APM will transfer the 58,000,000 rials that has been retained . . .

Thus, the condition of production of the certificate was a specific obligation entered into between the Parties. It was also more than a mere procedural formality which could be waived. Furthermore, TME's settlement in August 1978, and its application to the SIO, made immediately afterwards, came more than a year before the circumstances of force majeure to which the Tribunal alluded in Houston Contracting. Also, the claimant in Houston Contracting did not claim to have applied to the SIO for a certificate, but instead provided evidence of having complied with the underlying obligation.

104. In the present Case, the Tribunal has evidence not only that TME made an application, but that the SIO -- rightly or wrongly -- did not issue such a certificate. TME has attempted to establish that it had paid its contributions; it has even been able to demonstrate that a certificate was at one stage issued to its subcontractor, Montalev-Fassan, the employer of most of the contract workforce. However, the Respondents contend that the certificate originally issued to Montalev-Fassan was not valid, and that TME was not entitled to clearance. Mr. Huget was informed of this by the SIO and he asked Montalev-Fassan to obtain a fresh certificate. Despite having agreed to do so, Montalev-Fassan still had not obtained a fresh certificate one year later. There is also some evidence that a prosecution was instituted against Montalev-Fassan for forgery in connection with the certificate, but that it was withdrawn.

105. Given these circumstances, the Tribunal concludes that it cannot pronounce upon TME's entitlement to such a certificate without, in effect, substituting its own judgment for that of the official government body charged with administering the social insurance system, namely the SIO. The Tribunal has previously held that to do so would be outside its jurisdiction.

106. Although the context in which the issues arose in Arthur Young & Company and Islamic Republic of Iran, et al., Award No. 338-484-1, paras. 77-79 (1 Dec. 1987), reprinted in 17 Iran-U.S. C.T.R. 245, 263-64 (hereinafter "Arthur Young"), was different from the present Case, it provides a legal analysis that is instructive. In Arthur Young, the claimant sought a ruling, directed against the SIO as respondent, that it had "fulfilled its Social Security obligations in all respects, or, alternatively, that the SSO [should] collect any outstanding social security charges from [the other contracting party]." Id. at para. 77, reprinted in 17 Iran-U.S. C.T.R. at 263. The Tribunal held that such a claim falls outside its jurisdiction stating:

> In order to rule on this request, the Tribunal would have to pass upon Iranian social security regulations. It is a universally accepted rule, however, that revenue laws cannot be extra-territorially enforced, and the Tribunal, in previous cases, has refused to construe, for example, local tax statutes in light of this principle. See, e.g., Computer Sciences Corp. and The Islamic Republic of Iran, Award No. 221-65-1, pp. 55-56 (16 Apr. 1986); Aeronutronic Overseas Services, Inc. and The Government of The Islamic Republic of Iran, Award No. 238-158-1, para. 72 (20 June 1986). Indeed, Computer Sciences is quite similar to the present Case. There the claimant sought a clearance certificate for tax payments. The Tribunal, however, held that "[t]ax laws are manifestations of jus imperii which may be exercised only within the borders of a state. In addition, revenue laws are typically enormously complex, so much so that their enforcement is frequently assigned to specialized courts or administrative agencies . . . . States may of course vary the rule by treaty, but in view of the firmly established practice and the deeply rooted and universally accepted conviction of the

> international unenforceability of claims jure imperii, any qualification of the customary rule will presuppose the clearest possible expression. . . . No such explicit expression appears in the Claims Settlement Declaration. . . .

Id. at para. 78, reprinted in 17 Iran-U.S. C.T.R at 263-64.

107. The Tribunal concludes that the same principle applies to the present Case. The claim for reimbursement of the amount retained for social insurance must therefore be dismissed.

3. Reimbursement of increased social premiums

108. TME's third claim, for $151,917, is rejected as inadmissible because of its late filing for the reasons discussed above. See supra paras. 42-43.

4. Unpaid transshipment invoice

109. TME's claim for $3,344 plus interest is based on a separate agreement it claims to have entered into with APM, ancillary to the main Contract. TME states that APM was required to make samples of its 56-inch pipe available to its supplier of pipe expander in Chicago. TME claims that APM sent samples in January 1978 by sea to Los Angeles, and wrote a letter to TME on 25 March 1978 notifying it of the shipment and requesting TME to arrange for the overland transport of the pipe samples to Chicago. TME did so and submitted an invoice to APM on 18 August 1978 detailing the costs it had incurred. When APM failed to pay the invoice, TME followed up its claim with a letter to APM dated 30 January 1980 requesting payment.

110. APM has not specifically denied liability, presented any rebuttal evidence, or any evidence that it paid the invoice. Nor does it appear to have contested the

invoice at the time it was received. APM states instead simply that it has no record of any such transaction. In these circumstances, the Tribunal finds that this claim is amply documented by the evidence in the record, and awards TME $3,344 plus interest from the date the invoice reasonably should have been paid, which the Tribunal estimates to be 30 September 1978.

5. Unpaid invoices for consulting services

111. TME and APM also entered into a Consulting Services Agreement on 1 January 1977 under which TME agreed to provide technical and operational assistance to APM in its pipe-making activities for a two year period expiring on 31 December 1978. The agreement required TME to make available technically qualified personnel "on a consulting basis," and to arrange for them to be present in Iran to assist APM for a minimum of fifteen days per year. Advice was otherwise to be provided by letter or telex. APM was to pay a monthly fee of $6,500 and an additional per diem fee plus travel costs for any time spent by TME's personnel in Iran in excess of the required fifteen days. Such payments were to be made "within 30 days of the close of each month" upon submission of TME's invoice, subject to deduction by APM of contractor's taxes.

112. TME describes the agreement as similar to previous agreements under which it had worked with APM for several years. TME states that it provided the technical assistance required by APM by telex and telephone from the United States, "on 24-hour call," and sent qualified personnel to APM for at least fifteen days each year as required. APM duly paid each invoice as it was submitted, deducting ten percent which it remitted to the Ministry of Finance to cover TME's liability for contractor's tax. The record contains evidence of two payments of $5,850 for the July and August 1978 invoices.

113. TME's present claim is for $23,400, the amount outstanding on invoices it submitted for the months of September through December 1978, subject to the regular deduction of contractor's tax. Copies of the four invoices, each for $6,500, are before the Tribunal.

114. APM denies liability. APM does not deny having received the invoices. It argues instead that TME breached the agreement by withdrawing its personnel from Iran before the expiration of the agreement. There is no evidence, however, that APM disputed the invoices, or took any steps to communicate these objections to TME before the present proceedings. On the contrary, a letter from APM to TME dated 16 December 1978, purporting to cancel the Consulting Services Agreement effective on 1 January 1979 (in effect, confirming its expiration by its own terms) expressed appreciation for TME's assistance and the hope of continued good relations for the future. Further, the departure of TME's staff in December 1978 would not necessarily have affected TME's performance of the agreement which required their presence in Iran for only limited time periods, with most of the consultation being conducted by telex or telephone.

115. The Tribunal finds that TME has established its entitlement to recover $23,400 from APM, with interest from the date the invoices reasonably should have been paid, which the Tribunal estimates to be 31 January 1979.

## 6. Unpaid invoices for field services

116. TME claims $10,000 in fees for the services of its field services representative, Mr. Larry Jobe, who remained in Iran by agreement with APM to provide assistance with the pipe mills after the contractual warranty periods for the 22-inch and 56-inch pipe mills expired in February and March 1978. The agreement under which Mr. Jobe remained in Iran provided that APM was to pay TME $2,500 per month towards

Mr. Jobe's expenses. This agreement was recorded in a letter from TME to APM dated 4 March 1978. TME submitted invoices each month, and APM paid them with the exception of the four months from September through December 1978. Mr. Jobe left Iran in December 1978.

117. APM admits in its pleadings that TME is entitled to recover these fees. TME is accordingly awarded $10,000 with interest from the date the invoices reasonably should have been paid, which the Tribunal estimates to be 31 January 1979.

## 7. The Property Claims

### a) Machinery and Equipment

118. TME claims to have left behind certain machinery and equipment which it had used in the construction of the pipe mills. It states that these items were stored on APM's premises with the understanding that APM would purchase them after the contractual warranty periods expired in February and March 1978, and after APM decided that it no longer needed the assistance of TME's field services representative. No such sale was ever negotiated, TME alleged, because it was precluded by the supervening difficulties in communication. TME seeks $262,179 as compensation for the loss of these items, which it claims were "retained" and "presumably" either utilized or sold by APM. The claim is variously described as being based on expropriation and implied contract.

119. TME describes various items in its Hearing Memorial and lists them in a schedule submitted as an exhibit, which also gives an estimate of their value. Accounting documents and manufacturer's information is also submitted to show the purchase price of certain of the items, together with an undated handwritten inventory of items of office equipment. The contention that those items were left in

Iran is supported only by very general statements in the affidavits of Mr. Huget and Mr. Mossadeghi, neither of whom can claim first-hand knowledge of the matter. The valuations submitted are based on estimates made by a former TME plant manager, whose general conclusions are endorsed by Mr. Huget.

120. APM points to the lack of evidence that any items were left in Iran and still less proof that they were appropriated or used by APM after TME's departure. APM claims that although several months elapsed between the expiration of the warranty period and the date of Mr. Jobe's departure, there is no evidence of any negotiations or attempts to sell or dispose of the machinery during that period. APM contends that there is nothing to suggest that either it, NIOC or the Government of Iran should be held responsible for the disposal of these items under the Contract or otherwise.

121. The Tribunal concludes that TME has failed to bear its burden of proving either the presence of specific items of machinery and equipment in Iran, their value, or any basis on which the Respondents should be held liable for compensation. This part of the Claim is therefore dismissed.

b) Mr. Jobe's household effects

122. Similar problems of proof and attributability prevent TME's recovery of compensation of $19,639 for the household effects allegedly left behind by Mr. Jobe when he left Iran in December 1978. Although TME has established that it paid Mr. Jobe for his property and that in return he assigned to TME his right of recovery for that property, there is no basis in the evidence submitted by TME for a finding that either APM, NIOC or the Government of Iran should be held liable for compensation, either to Mr. Jobe or TME. TME's assertion that the property was removed from

Mr. Jobe's house "by agents of the Government of Iran during the Revolution" is not supported by any evidence. For these reasons this part of TME's claim is dismissed for lack of proof.

8. Summary of Amounts Awarded

123. For the reasons stated in this Award, TME's Claim is granted in the following amounts:

a) $527,853 plus simple interest from 1 December 1978 representing the unpaid balance of the Settlement Agreement;

b) $3,344 plus simple interest from 1 October 1978 for the transshipment invoices;

c) $23,400 plus simple interest from 1 February 1979 for the Consulting Service Invoices; and

d) $10,000 plus simple interest from 1 February 1979 for the Field Service Invoices.

The Counterclaims

1. Damages for delay in delivery of the plant

124. APM claims $47,419.35 and $307,142.86 as damages for delayed delivery of the pipe mills, on the basis that it was entitled to these amounts under the Contract. The Tribunal has found, however, that outstanding disputes arising out of the Contract, including TME's claims for extra costs incurred to avoid delays in completing the pipe mills, were resolved in the settlement agreement arrived at by the Parties in August 1978. It follows from this finding that the Parties are bound by the terms of that global settlement, which, the Tribunal has found, created enforceable rights and obligations between the Parties. Any

claims which APM might have raised pursuant to Article 2.10 of the Contract relate directly to the issue of delay, and thus were clearly covered by the settlement. In fact, the evidence indicates that such claims were expressly waived by APM in the course of the settlement negotiations. See supra para. 59. Attempts to unravel the settlement by reference to the preexisting contractual rights of the Parties cannot now be entertained by the Tribunal. The claim of APM for damages for delayed completion must therefore be dismissed.

2. Refund of amounts paid under the Contract

125. APM claims $318,653.66 for equipment supplied by TME, which either arrived late or was defective, together with 7,744,877 rials in bank and insurance charges. APM claims that TME was responsible for effecting recovery under the relevant insurance policy or for indemnifying APM for its loss.

126. The Tribunal notes at the outset that these two amounts are mentioned by Mr. Chitsazan in his affidavit as among the items he put forward at the Ahwaz meeting on 27 August 1978 as payable by TME to APM. The evidence does not, however, reveal exactly what, if anything, was agreed at that meeting concerning this point. There is however a strong indication that the rial part of the claim, at least, was expressly excluded from the settlement. Mr. Huget's letter of 29 August 1978, which recorded the terms of the settlement, states:

> Upon payment by TME of the 241,200,444 Rials by APM, there will be no further demands made by APM against TME regarding the above mentioned contract, except that TME agrees to discuss and resolve the matter of 7,984,338 Rials pertaining to insurance claims. (Emphasis added.)

Despite the difference in amounts, this would seem to refer to the same disputed insurance and bank charges.

127. Thus, while at least part of this counterclaim was not expressly disposed of by the settlement, the fact remains that APM has not put forward any evidence in support of the claim, either as to the actual costs incurred or the legal basis of TME's liability. Accordingly, this counterclaim must be dismissed.

3. Refund of settlement amount

128. Because of its findings as to the validity of the settlement, the Tribunal also cannot entertain the counterclaim by APM for the repayment of the amount it paid TME pursuant to the settlement agreement. This counterclaim is therefore also dismissed.

4. Cost of pipe sold by APM and TME

129. APM's counterclaim for 228,749 rials relates to a transaction under which APM sold a quantity of pipe to TME during the course of the Contract. Since this transaction predated the settlement, which the Tribunal has found globally disposed of the outstanding claims, the Parties had, or could have, raised against each other arising out of the Contract, it must be taken either to have been specifically disposed of or waived by the global settlement. This counterclaim is therefore dismissed.

5. Tax and social insurance

130. The counterclaim for 8,193,196 rials in taxes and 352,272,593 rials in social insurance premiums must fail for lack of jurisdiction. These obligations arise out of Iranian municipal law and not as a consequence of a contractual relationship between the Parties. The Tribunal's practice in this regard has been consistent and the underlying reasons are set forth in Questech, Inc. and Ministry of

National Defence of the Islamic Republic of Iran, Award No. 191-59-1, p. 38 (25 Sept. 1985), reprinted in 9 Iran-U.S. C.T.R. 107, 135-36. These counterclaims are therefore dismissed.

6. Damages for default

131. The counterclaim raised by APM in its final written pleading with respect to allegedly defective work by TME has been found to be inadmissible because of its late filing. See supra para. 44.

D. Interest

132. The Tribunal considers it appropriate to award the Claimant interest in accordance with the principles outlined in Sylvania Technical Systems, Inc. and Government of The Islamic Republic of Iran, Award No. 180-64-1, pp. 30-34 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298, 320-23 (hereinafter "Sylvania"). Under the principles outlined in Sylvania, successful claimants are awarded interest in an amount equal to the rate such a claimant would have been able to earn had it invested the sum awarded in a form of commercial investment common in its own country. For successful United States claimants, the Chamber customarily uses the average interest rate earned on a six-month Certificate of Deposit for the period from the day following the date on which payment was due to the date on which the Escrow Agent instructs the Depository Bank to effect payment. The dates from which interest is to run are set forth above. See supra para. 123. In the context of this Case, the average rates will vary depending on the time period covered. Accordingly, the actual rates applied to the various elements of the Claim are set forth in the dispositif.

E. Costs

133. TME claims its costs of legal representation amounting to $435,620. Considering the nature and outcome of the proceedings, and taking into account factors such as those outlined in Sylvania, Award No. 180-64-1 at pp. 35-38, reprinted in 8 Iran-U.S. C.T.R. at 323-24, the Tribunal considers it reasonable to award TME $30,000 towards these costs.

134. The Respondent S.A.T.T.I. also claims costs. The claim against it was withdrawn, though only at an advanced stage of the proceedings. It is clear that S.A.T.T.I. incurred costs as a result of having to defend the claim, and the Tribunal determines that it is entitled to recover the amount claimed of $5,000.

IV. AWARD

135. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

i) The Respondent AHWAZ PIPE MILL COMPANY is obligated to pay the Claimant IPD INTERNATIONAL, INC. (formerly TME INTERNATIONAL, INC.) the amount of Five Hundred Sixty Four Thousand Five Hundred Ninety Seven dollars ($564,597) plus simple interest:

at an annual rate of 10.50% (365-day basis) on $3,344 from 1 October 1978 to 30 November 1978;

at an annual rate of 11.25% (365-day basis) on $531,197 from 1 December 1978 to 31 January 1979;

at an annual rate of 10.00% (365-day basis) on $564,597 from 1 February 1979

up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account,

plus costs of arbitration of $30,000.

The above obligations shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria dated 19 January 1981.

ii) The Claimant IPD INTERNATIONAL, INC. (formerly TME INTERNATIONAL, INC.) is obligated to pay the Respondent S. A. TRANSPORTS TOURISME INTERNATIONAUX costs of arbitration of $5,000.

iii) The remaining claims of IPD INTERNATIONAL, INC. (formerly TME INTERNATIONAL, INC.) and the counterclaims of AHWAZ PIPE MILL COMPANY are dismissed.

This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague
12 March 1990

Karl-Heinz Böckstiegel
Chairman
Chamber One

In the name of God

Assadollah Noori
Dissenting in Part,
Concurring in Part.

Howard M. Holtzmann
Joining fully in the Award except i) dissenting from the denial of jurisdiction over the claim for

reimbursement of social insurance withholdings, see Separate Opinion, and ii) concurring in the inadequate award of costs only to form a majority, see Separate Opinion of Howard M. Holtzmann on Awarding of Costs of Arbitration in Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 329.