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IRAN-UNITED STATES CLAIMS TRIBUNAL

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

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.

DISSENTING/CONCURRING OPINION
OF ASSADOLLAH NOORI

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INTRODUCTION

1. In the instant Case the Government of the Islamic Republic of Iran, the National Iranian Oil Company and a private Iranian company called S.A.T.T.I. have been named as Respondents, together with Ahwaz Pipe Mill Company (APM). However, following the withdrawal of the Claimant's claim against S.A.T.T.I. the remaining claims were all directed against APM alone, and APM should therefore be the only true Respondent in this Case. Nonetheless, and despite the findings in the Award -- particularly in the dispositive whereby APM has been held liable for payment of the judgment amount -- the names of the other Respondents have been maintained in the caption to both the Award and the instant Dissenting/Concurring Opinion, in keeping with the Case file and in order to avoid the ambiguities to which references to the names of the other Respondents in various places in the Award might otherwise give rise, as well as in view of the finding against the Claimant, requiring it to compensate S.A.T.T.I. for the latter's costs of adjudication.

2. In the Award at issue, concerning which the instant separate (Dissenting/Concurring) Opinion has been prepared, the Tribunal has accepted certain relatively minor claims brought against APM, while in respect of the two major claims, it has decided one in favor of, and the other against, APM. That is to say, on one issue, the Tribunal has awarded against APM for payment of rials 37,200,444 [1], being the unpaid balance of a settlement -- which the

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[1] Applying an exchange rate of 70.475 rials = $1.00, the Tribunal has awarded against APM for payment of $527,853. In Part II, I shall set forth my own position and my objections to the rate of exchange applied, and to the decision requiring that payment be made in dollars rather than rials.

majority held to exist in connection with the Contractor's alleged additional expenses in the course of the performance on the Project at issue. On another issue, the Claimant's claim in the amount of rials 58,571,000/-, for restitution of Social Security retentions by APM to ensure TME's compliance with its legal/contractual obligations, has been dismissed. Based on the reasons which will be presented in this Opinion, I dissent to the award in favor of the first claim, and concur in the dismissal of the second.

3. As will be discussed below, I also dissent to the dismissal of the Respondent's counterclaims, and to the award of interest and costs of arbitration in favor of the Claimant.

I. DISSENT TO AWARD FOR THE BALANCE OF THE ALLEGED SETTLEMENT AMOUNT

4. I dissent, from various perspectives, to the award in favor of this claim. In concluding (1) that the Claimant was entitled to receive monies for its alleged additional expenses, in addition to a lump-sum contractual amount, (2) that the Parties had agreed upon the amount of rials 241,200,444 as compensation for those expenses, and finally (3) that only a part of the settlement amount (rials 204,000,000/-) was paid and the balance thereof (rials 37,200,444) must now be satisfied as constituting a debt on APM's part, the majority has, in my view, basically committed numerous flagrant errors which deprive the Award of all judicial value.

At the outset of the work, the Contractor was confronted with the problem of carrying out the banking arrangements, and for some time he was unable to introduce a bank which would serve as a correspondent bank for making payments under the letters of credit outside the country. Ultimately, this problem was resolved with the introduction of the Bank of America and execution of an amendment on 27 January 1975. Moreover, the Contractor was unable to designate and send to Iran a fully authorized representative to undertake the Contract's affairs in Iran until March 1975, at which time Mr. Valdez was finally sent to Iran to carry out this responsibility.[3]

Because of these delays, and by its own failings, the Claimant wasted more than one year out of the life of a Contract pursuant to whose terms it had undertaken to complete the works thereunder within 22 months after its date of execution (paragraphs 6 and 11 of the Award). Moreover, by failing to mobilize in a timely manner during the autumn and winter seasons in the first year of the Contract, TME was unable to make effective use of the spring, the long summer, and the dry autumn of Khuzestan Province in the following year.

(Footnote continues)
joint venture (Montalev-Fassan), while retaining only a managerial function over the Project. In para. 17 of its Memorial filed on 20 October 1986, the Claimant itself concedes that it "had no particular expertise in the construction of buildings." Therefore, it was mutually agreed with the Employer that TME "would subcontract out the actual construction work on the pipemill project to a local construction contractor."

[3] In para. 17 of the above-referenced Memorial (cf. footnote 2 hereto), the Claimant admits that it sent Valdez to Iran "to manage the project in Iran and to oversee the work of the construction subcontractor... on March 5, 1975."

7. Erection of the plant was completed in February and March 1977, and the production lines commenced work in March on a trial basis. In the very midst of the work on delivering the plant, for the first time [4] and without any previous representation to that effect, Mr. Huget, the then Vice-President of TME, sent APM a letter from the United States resorting to various excuses in order to justify the delay in completing the project, and requesting that the Contract be extended by 243 days. Absent this extension,

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[4] To justify its protracted silence throughout the performance on the Project, the Claimant alleged in the course of these proceedings, through Huget, that it "was willing to rely on [the Employer's] assurances, based on [TME's] long-standing good business relationship with Ahwaz Pipe Mill," and for this reason had refrained from raising those issues until after the work was completed (paragraph 11 of the so-called "affidavit" of Mr. Huget). Except for the statements by the attorney through Mr. Huget as quoted above, there is nothing in the pleadings which would confirm this allegation. On the other hand, the uncontested evidence presented by the Respondent demonstrates that that same record of relations would have dictated that the Contractor put his allegations in writing. Prior thereto, owing to TME's failure to perform properly on its contract for the sale and construction of a plant for the production of 48-inch pipe and its inability to commission the plant in a satisfactory manner, APM was compelled in 1969, after a lengthy dispute with the Contractor, to make that plant operational at less than full production capacity by the use of Japanese experts and specialists. In addition, the disputes between the Employer and Contractor arising from TME's unauthorized drawings on the letters of credit opened for a transaction involving 22, 26 and 30-inch rollers, on the pretext of having incurred additional expenses under another contract for construction of a 26 and 48-inch pipemill, were ultimately settled through the judicial fora, with the New York courts deciding in favor of APM. This sort of record, and a sound business sense, would dictate that a businessman who thought he was owed nearly $7 million would have specified those claims in writing from the very outset, rather than remaining silent on them, if he really believed that they were legitimate.

TME would have been unable to avoid liabilities relating to the penalties for late delivery of the plant. [5]

Shortly after this request, Mr. Huget made his first demand, through two letters bearing the same date (12 March 1977), for monies under the heading of additional expenses.[6]

8. For the sake of brevity and to avoid prolixity, the Claimant's claims may preliminarily be divided into two groups.

The most important elements forming the first group of claims, which include works and matters that allegedly cost the Contractor additional time and expenses, consist of the following: (1) the Contractor's unexpected discovery of 12,000 cubic meters of subsurface rock under the area on

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[5] Article 2.10 of the Contract holds the Contractor liable for payment of a maximum of $4,700,000/- (including $2 million in connection with the 56-inch production line, and $1.6 million with respect to the 22-inch production line), for damages arising from delays in completing and commissioning the production lines within the specified time. The Claimant itself states, in Huget's words in para. 12 of his so-called "affidavit," that it was aware that extending the contractual deadlines "was of concern to TME because of the liquidated damages provision in our contract, which imposed penalties for late completion."

[6] In Agrostruct International, Inc. and Iran State Cereals Organization, Award No. 358-195-1, para. 44, reprinted in 18 Iran-U.S. C.T.R. 180 at 193, this same majority held as follows, in view of the fact that the contract was for a fixed lump-sum amount and that the claimant did not give a timely notice (at the time the extra expenses were incurred):

> Agrostruct should have notified Cereals that it considered the letter of credit late, and that it was incurring damages as a result thereof. There is no evidence in the record that Agrostruct so notified Cereals in a timely manner. Therefore, under the circumstances of this Case, the Claim for these extra expenses is denied.

which the factory was to be built, (2) abnormally heavy rainfall and flooding in the late autumn of 1975 and in the mid-winter of 1976 in Khuzestan, (3) shortages of cement, and delays arising therefrom, in the period from December 1975 to October 1976, (4) a nearly five-month delay in securing a customs release for the construction cranes, (5) port congestion, and (6) increased transportation and warehousing costs.

The second group of claims include (1) expenses arising from additional time needed to complete the Contract, owing to the first group of problems, (2) changes in the dollar-to-rial exchange rate, and (3) an overall escalation of contractual construction costs.

9. By filing documentary evidence contemporaneous with the alleged events or with the date the claims were raised in 1977, APM has conclusively proved -- in a reasoned manner and in reliance on the facts, the law and the Contract -- that each of the Claimant's claims was promptly rejected when raised, and that the Respondent did not concede any of those claims.

First and foremost among its arguments, APM has drawn attention to the fact that owing to its delay in mobilizing and commencing work until October 1975 (when the subcontractor began work), the Claimant itself wasted more than one year of the 22-month term of the Contract, and therefore those points which it later put forth as being factors resulting in increased expenses should on principle be deemed as having arisen from the Contractor's own failures and shortcomings.

From among the contemporaneous evidence filed, attention can be drawn to the report dated 5 April 1977 by the Project Director (Mr. Aliabadi) and to the reports by a third-party expert named R.S. Plummer of Abstech Company

charged with assessing the Contractor's performance, and in particular his report dated 29 March 1977.[7]

10. In rejecting the claims relating to the discovery of subsurface rock under the site, APM has relied on the fact that under the Contract, the Contractor himself was involved in selecting the factory site (Article 2.9), had already carried out geological field studies and investigations, and was also familiar with the structure of the subsurface layers due to having worked at that same site during the latter part of the 1960's (in the course of constructing the 48, 26 and 28-inch plants). Furthermore, since the work on levelling the site had already been carried out before the Contract was executed, namely in June 1974 when TME visited the site, TME knew very well just how much rock it would encounter in the work on the factory foundations and in the soil excavations. The Respondent has also pointed out that for the period between October 1975, when the subcontractor commenced work, and 12 March 1977, there is not a single contemporaneous letter or report showing that either the Claimant or its subcontractor had encountered such a situation and had claimed additional expenses in this connection.

11. With respect to the claim of heavy rainfall and abnormal flooding in autumn (November) 1975 and winter (January) 1976, the Respondent notes, firstly, that the Claimant should have completed its mobilization by autumn 1974 and winter 1975, and commenced its construction work

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[7] After examining the particulars of the work on the Project in his lengthy report, Mr. Plummer attributes the delays and alleged increase in expenses to "[TME's] little experience in heavy construction in the U.S. or abroad and [to little] technical contribution of the agent and his staff," and finally to mismanagement by the Contractor.

in the spring. Therefore, assuming arguendo that the allegation were true, it is clear that TME brought these difficulties upon itself, through its own default and incompetence. Secondly, the Respondent has submitted precise official precipitation statistics which give details of the monthly rainfall in the cities of Khuzestan (including Ahwaz, the site of the factory), which demonstrate that the precipitation levels in 1975 (281.2 mm) and 1976 (265.05mm) were considerably below those for 1974 (354.2 mm), and that there were no abnormally heavy seasonal downpours in those years. The Respondent adds that the Claimant ought to have been familiar with the mid- and late-winter floods on the Karun and Karkheh rivers, given the Claimant's lengthy presence in the region (since 1966).

12. As for the provision and supply of cement for constructing the factory and its related facilities, this task was among the Contractor's own contractual obligations. Moreover, as far as the scarcity or abundance of cement is concerned, the situation was not much different in late 1974 than it was in late 1975 or early 1976. Furthermore, the Contractor could have obtained whatever amounts of cement he needed immediately upon executing the Contract in 1974, or subsequently thereto, from wherever he wished and without any restriction whatsoever, and could even have imported it from outside Iran, in order to avoid being caught in the alleged shortage in late 1975 and early 1976, a time when in fact, the construction works should have been completed and installation commenced. It is very clear from Mr. Plummer's independent report dated 29 March 1977, and from the report of the Project Director, that APM had repeatedly provided TME's subcontractor with significant quantities of cement out of its own Government allocations at TME's request, and Mr. Plummer states that the principal reason for the Contractor's chronic shortages was the fact that he had no warehouse in which to store

cement, so that he had to make periodic purchases of insignificant amounts of cement. It is also clear from those contemporaneous reports that by assigning the work of supplying cement to his subcontractors and sub-subcontractors, the Contractor had totally lost touch with the issues relating to the Project and the progress thereon.

13. Another claim relates to delays in releasing overhead building cranes, which the Claimant alleges entered Iranian waters on 8 December 1975 and yet were not cleared from Customs until 21 May 1976. The point worth noting here is that this claim shows that the work of mobilizing the equipment and materiel needed for constructing and erecting the factory, for which purpose the Contract was executed on 9 September 1974, had still not been completed as of 8 December 1975. Moreover, it is not clear, in view of the delay in commencing any work until October 1975 and the fact that the place to install the machinery was not ready and that work was halted at the soil excavation stage, just what impact the purported delay in obtaining clearances for the cranes needed for the erection could possibly have had upon the overall delay, which arose from the Contractor's own default. The reports and evidence in the Case record demonstrate that even if, arguendo, the Contractor actually was ready to start construction, he could have gotten the work underway with the help of mobile cranes, until the overhead building cranes had been released.

14. Of the Claimant's remaining significant claims under this heading, mention can be made of the claim arising from port congestion and increased transportation and warehousing costs. In bringing its claim for increased transportation and warehousing costs, the Claimant has contented itself with making the unsubstantiated general statement that due to growth resulting from Iran's "Fifth Plan",

"[s]ince the time of execution of the Contract until the time that machinery began to arrive, the cost of transportation has doubled."

It can therefore be concluded that the Contractor would never have had this problem if he had performed on his obligations in accordance with the contractual schedule, i.e., if he had not wasted more than one critical and highly valuable year of the 22-month life of the Contract through his delay in mobilizing and sending the machinery and equipment, as well as in starting the construction work on the Project. The Respondent also made the unrebutted argument that since the city of Ahwaz, the site of the factory, lay along the route of the rail lines of the ports of Khorramshahr and Imam Khomeini (formerly Shahpour), the Claimant could have used the train cars of the national railways, which had fixed prices, in order to ship and move the equipment and machinery. It should be explained that the site where the Ahwaz pipe mill was to be located was only about one hundred twenty kilometers from Imam Khomeini Port and the Port of Khorramshahr, the port where most of the goods under the Contract were to be imported.

The claim relating to port congestion in late 1975 and early 1976 is also an unjustifiable pretext, because just as the Respondent has repeated over and over again throughout its written pleadings, the work of mobilizing and transporting the necessary equipment, machinery and materiel to the site where the Project was to be carried out should have been completed months before December 1975, and through its default by delaying the commencement of the Project, the Claimant has acted to its own detriment. Therefore, it cannot now resort to its own default, resulting from its own acts or omissions, to justify its

claim for the alleged additional costs. [8]

Both the Respondent and the Project Director also pointed out, in their responses when the claim was brought, that APM had, in answering the Contractor's requests, repeatedly made available to it private docks, including those of the Petrochemical Company and the Atomic Energy Organization, for offloading the Project goods. Unfortunately, a further problem arises, in connection with these claims, from the fact that TME had also assigned to subcontractors the task of releasing the goods from customs and transporting them. In view of the nature of their function -- i.e., since they served as agents for dozens of companies, were unfamiliar with the problems besetting the Project, and had nothing to gain or lose by being prompt -- the subcontractors were not particularly interested in expediting the work.

15. The first item of the second category of claims, as the Claimant has explained, includes the expenses which allegedly arose owing to the extension of the term of the Contract as a result of the problems mentioned under the category one claims.

The Claimant has provided neither specifics nor substantiation in order to explain how it can possibly justify the significant amount of its claim, viz. rials 62 million, in view of its having demanded damages under each

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[8] In its Award in Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2, invoking the rule of nullus commodum capere potest de injuria sua propria, and citing B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953), p. 149, the Tribunal has previously noted that "It is a well recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their own wrong, Nullus Commodum Capere De Sua Injuria Propria," reprinted in 6 Iran-U.S. C.T.R. (1984) 219 at 228.

item of the claims, and also in view of the small number (at most eight persons) of its work force in Iran (cf. footnote 43 to the present Opinion). Moreover, the Respondent has founded its defence on the two other valid grounds that the prolongation of the Contract's term either arose from the Contractor's own default, or at most should be deemed to have arisen from factors that fall under the rubric of force majeure (cf. Section A.2, infra). Therefore, this claim was rejected as soon as it was raised in 1977.

Since they are in the nature of issues of law, the remaining arguments relating to the inadmissibility of the first claim and the other two items of the second category of claims shall be taken up, together with the legal exceptions to which they are all subject, in Section A.2, infra.

A. 2. The law and the Contract [9]

16. Even if we were for now to set aside the Contractor's default and omissions in his performance on the Project, it would still be clear, with a little attention, that the Claimant's claims for additional costs either are founded upon a series of factors and events which come under the heading of force majeure (Article 10 of the Contract), or else are based upon alleged increases in the cost indices experienced since the time the Contract was concluded.

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[9] It is not disputed that the Contract is governed by Iranian law, because in this Case, both the Parties and the Tribunal have repeatedly invoked the provisions of Iranian law, inter alia decrees and circulars of the Plan Organization, as being the regulations which govern the Parties' relations. However, in order to remove any possible doubt, Article 15 of the Contract is cited below:

> "The law governing this Agreement shall be the law of Iran."

17. Before addressing the remaining matters in this connection, it is necessary to refer in passing to the Respondent's argument concerning the claim of an increase in the dollar-to-rial exchange rate. Pursuant to the Contract, rials 1,156,000,000/- of the contractual consideration was to be paid in Iran, in rials (for the exact amount, cf. footnote 42, infra). Therefore, it must be supposed, on principle, that the above amount was received in Iran and was spent in expenses there. The dollar portion of the Contract was to be paid to the Contractor in the United States, under three letters of credit.

Under such circumstances, any increase or decrease in the exchange rate could not have had any effect upon the contractual price. In addition, the Contractor has not produced any evidence at any stage whatsoever -- either in the course of the performance on the Contract, or thereafter, or during the present proceedings -- to show that he was obliged at any phase of his performance on the Contract to change a portion of the rial monies under the Contract into dollars, incurring damages on that account. Nor has the Claimant submitted any evidence showing at what stages of the progress of the works (or in other words the progress of the expenses) the dollar exchange rate increased or decreased, and by what amounts, and what impact such increase or decrease had upon its costs.

18. According to well-settled rules of law, losses arising from force majeure events fall on the injured parties,[10]

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[10] In a number of awards, this Tribunal has found that any loss resulting from force majeure must lie where it falls. Electronic Systems International, Inc. and The Ministry of Defense of the Islamic Republic of Iran and Defense Industries Organization, Award No. 430-814-1, para. 59; Queens Office Tower Associates and Iran National Airlines Corp., Award No. 37-172-1, reprinted in 2

(Footnote continues on following page)

and except where an agreement has been made to the contrary and under certain conditions, the losses suffered by one party due to force majeure are not shifted to the other party. No legal system can be found in which the losses suffered by one of the parties as a result of force majeure are imposed upon the other party. [11] To this same end, the Contract between TME and APM provides that any failure or omission arising from force majeure would not be treated as a failure or omission to comply with the Contract (Article 10.1), and the only effect of such events would be, to extend the periods fixed by the Contract by a period of time equal to the length of the delay (Article 10.2).

At the meeting held at 10:30 a.m. on 23 May 1977 to examine TME's claims, which was also attended by Mr. Mossadeghi (the Managing Director), Milton Daniel (the Assistant Managing Director), and Mr. Aliabadi (the Project Director), it was stated by Dr. Abu Sa'idi (Mr.

(Footnote continued)
Iran-U.S. C.T.R. 247; International Schools Services, Inc. and Islamic Republic of Iran et al, Award No. 290-123-1, para. 29, reprinted in 14 Iran-U.S. C.T.R. 65; and International Schools Services, Inc. and National Iranian Copper Industries Company, Award No. 194-111-1, reprinted in 9 Iran-U.S. C.T.R. 187, 197.

[11] Just as under the law of every country in the world, under Iranian law force majeure is one of the factors that relieve an obligor of his liability, and it does not constitute grounds for demanding damages from the other party. In this connection, Articles 227 and 229 of the Civil Code provide as follows:

> Article 227
>
> The party failing to perform on an obligation will be held responsible for payment of damages only when he cannot prove that his nonperformance was due to some outside cause unattributable to him.
>
> Article 229
>
> If the obligor is unable to fulfil his obligation due to some event which he is powerless to prevent, he shall not be held liable for payment of damages.

Mossadeghi's Legal Advisor with APM and NIGC and former Director of NIGC's Legal Affairs Office): [12]

> Losses arising out of force majeure are to be borne by each Party within the limits of his own responsibilities and losses sustained by one Party can not be compensated by the other Party.

19. Another fundamental and basic legal barrier to accepting most of the Claimant's claims is that the Contract was executed as a turnkey, lump-sum contract, and it contains no condition for adjusting the contractual price owing to increased or decreased costs.

The purpose in setting a fixed lump-sum price in the Contract is, "to permit a purchaser to plan its business affairs with knowledge of the full amount of its costs, and where, in essence, the agreement shifts the risk of any price increase to the contractor [and that of a decrease to the employer]." [13]

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[12] Not only has the full text of these minutes been signed by Mr. Mossadeghi, the then Managing Director of APM -- to whose statements prepared in his name by the Claimant's attorney outside of Iran the majority has attached particular weight in reaching its findings -- but the substance thereof has also been fully confirmed by Dr. Abu Sa'idi, who appeared before the Tribunal to give testimony.

[13] See my Dissenting/Concurring Opinion in Agrostruct International, Inc. and Iran State Cereals Organization, and para. 44 of the Award in that same Case, both of which are reprinted in 18 Iran-U.S. C.T.R. 180 and 198, respectively. If "[s]ite conditions... be more adverse ... than available information may have suggested, or else subsequent events, such as... flooding ... render them so ... [the risk] will... be a 'contractor's risk'." See Donald Keating and Peter Gauch, Part III Prices, in Selected Problems of Construction Law: International Approach (1983), published by Peter Gauch and Justin Sweet; and Max W. Abrahamson, Engineering Law and the I.C.E. Contracts (4th ed. 1979), p. 27.

Dr. Abu Sa'idi is further quoted in the minutes of the meeting of 23 May 1977, which were also signed by Mr. Mossadeghi, as stating that:

> [S]ince the contract was a turn key, lump-sum contract, it is presumed that events and hardships which the contractor may have encountered in the course of operations and any expenses thereby incurred by him have been included as a risk factor in the price offered by the contractor. Thus, the contractor is not entitled to any monetary claim.

20. In paragraph 7 of the Award, the majority concedes that "There was no provision [in the Contract] under which TME could claim additional compensation from APM..."

In rejecting TME's representations, at that same meeting, those present noted the newspaper interview with the then Minister of State in charge of the Plan & Budget Organization, who stated that:

> The Plan [and Budget] Organization has issued a directive ordering the executive agencies not to make any adjustment for escalation, where a contract contains no such provision.

21. In paragraphs 57-61 of the Award, the majority purportedly seeks, merely by invoking certain unsigned papers which are allegedly notes made of the meetings of 16 and 24 July 1977 by a certain Mr. Bertman, TME's representative, to justify the conclusion that the Plan and Budget Organization had agreed to pay TME's claims for additional costs. These papers are undated and unsigned, even by Mr. Bertman, who allegedly prepared them. Apart from the Claimant's own assertions in its pleadings, there is no evidence which would indicate that those minutes were ever sent for the information of and/or for signing by the participants at the meetings, or that the participants ever agreed with their contents.

Not only are the contents of Mr. Bertman's notes inconsistent with the substance of the minutes, signed by Mr. Mossadeghi as well, dated 23 May 1977 (a time close to the date on which the meetings in July 1977 were held), and also inconsistent with the contents of the circulars and letters of the Plan Organization which will be cited in the following paragraph, but Mr. Adl, one of the participants at those two meetings and the Secretary at the meetings of the Board of Directors and the Contracts Administrator, has also testified in connection with those notes that:

> These papers are not genuine, nor do they reflect the facts or the views of those present at the meetings, and so far as I know, following the meeting, they never reached those persons from APM who were present at the meeting; the first time that I saw them was when they were appended to TME's memorial... To the best of my recollection, at those two meetings, no issue was finally settled, and there was no final agreement over payment of any extra amount.

22. The Plan and Budget Organization, the legal authority which determined policy on, and the method of, adjusting the unit prices of contracts of which one party was a Government entity, company or organization,[14] expressly ruled as follows in paragraph 7 of its Circular No. 9456/DF/2940 dated 16 October 1976 relating to determining "the method for computing adjustments to the unit prices of contracts in the performance of which delay has occurred":

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[14] The majority cannot take issue with me on the point that the Parties to the Contract agreed that approval of the Plan and Budget Organization was required before additional costs could be paid in such contracts, because it has devoted a considerable part of its arguments, in connection with this claim, to proving that the Plan and Budget Organization did, supposedly, confirm payment of the settlement amount (see, e.g. paras. 60-68 of the majority's Award).

> Contracts entered into after 27 January 1974 and containing no provision for an adjustment clause based on circulars of this Organization, will not be covered by the adjustment regulations.

More important still, the Minister of State in charge of the Plan and Budget Organization stated in a letter dated 8 October 1977 in response to APM, in connection to its contract with TME and in the clearest and most unambiguous terms:

> In reference to letter no.APM 5/1227 dated 21 August 1977 concerning the claim of Torrance Company (TME), I hereby inform you as follows:
>
> 1. The Contract makes no provision for compensation of the expenses claimed by the Contractor.
>
> 2. The critical shortage of materials giving rise to a part of the Contractor's claim is a general, nation-wide problem affecting all contractors, and there is no special, exceptional situation in the case of the Contract at issue.
>
> 3. The Plan and Budget Organization is not authorized to approve additional amounts in excess of the parameters and terms of the Contract.
>
> 4. As for adjusting the unit prices of contracts entered into with foreign contractors prior to 27 January 1974, there are rules and regulations on whose basis the executive units can take action; as for contracts entered into after 27 January 1974, the adjustment rules appended to the Contract are governing.

Only in view of these facts can one understand how incorrect and inapplicable are the statements made in paragraphs 60-61 and 65 to the Award, to the effect that the Plan and Budget Organization approved an additional payment to TME.

B. <u>No enforceable settlement agreement exists</u>

23. Pursuant to Article 13 of the Contract, "No amendments

or modifications of this Agreement may be made except in writing signed by APM [Ahwaz Pipe Mill Company] and TME." According to Article 18 of APM's Articles of Association, "Contracts, undertakings, and any other instruments which give rise to obligations will be valid when signed by the Managing Director and by a member of the Board of Directors chosen and introduced for this purpose by the Board of Directors." Moreover, Article 19 of APM's Articles of Association expressly denies the Managing Director the authority to settle disputes and claims, and makes "their settlement through conciliation conditional upon approval of the Board of Directors." In view of its lengthy record of working with APM (since the 1960's), TME was surely fully aware of these regulations and limits to the Managing Director's authority.

Mr. Adl, who by virtue of his "position as Secretary at the meetings of the Board of Directors" was fully responsible for "preparing agenda, scheduling meetings... compiling and drafting reports and documents that needed to be discussed for approval at meetings, drafting and compiling minutes and having them signed... and distributing minutes and preparing draft notices of decisions for signing by the Managing Director or the Chairman of the Board of Directors, as the case may be," testified under oath that the alleged agreement was never placed at his disposal to be brought for discussion before a meeting of the Board of Directors; moreover, "none of the agenda of the Board of Directors indicates that the alleged agreement was ever taken up. No agreement with TME International for rials 241,200,444 was ever discussed at any meeting of the Board of Directors, and it was not included in the minutes of any meeting signed by all members of the Board of Directors." Not only did APM set forth the statements made in Mr. Adl's affidavit, but it also submitted evidence demonstrating that owing to a pre-existing ailment, Mr. Aghakhan Bakhtyar (the then Chairman of APM's Board of

Directors) did not play an active role in the Company's affairs from August 1978 on, and ultimately left Iran for London on 15 September 1978 in order to seek treatment. That evidence confirms Mr. Adl's testimony that "In essence, the Board of Directors did not hold any meetings from early August 1978 on, because Mr. Aghakhan Bakhtyar... did not come to work from mid-August of that year, due to illness"; and any letters or documents needing to be signed by the Chairman of the Board of Directors were brought by him (Mr. Adl) to Mr. Aghakhan Bakhtyar for signing.

The Respondent concludes that even if a settlement agreement could conceivably have been approved before the date of Mr. Aghakhan Bakhtyar's departure, Mr. Adl should have known about it; and any allegation that such settlement agreement was approved after he left is totally inadmissible, since there were no meetings of the Board of Directors.

24. To remedy such shortcomings, of which it is itself well aware, the Claimant has resorted to the affidavits of Mr. Mossadeghi and Mr. Huget, so as to allege that a settlement agreement for the amount of the remedy sought (rials 241,200,444) was approved "unanimously" by APM's Board of Directors and was sent to TME's representative in Tehran (Jupiter Company) to be signed by TME after having been signed by Mr. Mossadeghi, but the settlement agreement was destroyed in a fire in the office of Jupiter Company (paragraph 70 of the Award)! No copy of such settlement agreement, either with or without Mr. Mossadeghi's signature, has been filed with the Tribunal, and the allegation that a settlement agreement was approved by unanimous vote is totally at variance with the facts, which are supported by evidence, as set forth in paragraph 23 above.

25. In November 1978, Mr. Taghi Mossadeghi, APM's Managing Director, fled from Iran, and never returned thereafter. Nor did Mr. Mossadeghi appear at the Hearing conference, even in order to clarify his affidavit or to answer any possible questions from the Respondents or the Tribunal.

As the record in the Case shows, Mr. Mossadeghi's flight from Iran was motivated by a number of reasons, aside from his close ties to the regime of the deposed Shah. Apart from making unauthorized payments to TME, he also inter alia, abused his position and connections in order to send, illegally, the equivalent of rials 579 million out of Iran, prior to his departure;[15] and through acts which were found "contrary to conventional norms and standards and to sound business practice, and without regard to the national interest," [16] he embezzled huge amounts of money and yet refused to repay the sum of rials 2,720,629 which he had received from NIOC's representative in New York.

Under such circumstances, where the alleged witness has himself been convicted of numerous crimes against a Government and nation and where verdicts have been issued against him by the judicial and administrative courts of that Government, and where he has a proved enmity, vindic-

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15 As certified by the Head of the Office for Enforcement of Verdicts of the Courts of the Islamic Revolution, Department of the Assistant Public Prosecutor for Economic Affairs, the case of Mr. Mossadeghi has resulted in the issuance of a verdict and, "pursuant to Judgment No. 251/527 dated 17 August 1983 of the Court... all [his] property ... has been confiscated."

16 The evidence shows that owing to a whole series of acts that were contrary to the interests and welfare of the nation and to the oil and gas industry in Iran, Mr. Mossadeghi was removed from his position, pursuant to judgments by the Purification Committee.

tiveness and hostility toward -- or at the very least a conflict of interests and dispute with -- that Government, which is the Respondent here, [17] it would be contrary to sound reason, judicial standards and all legal rules and principles and justice, to accord even the slightest weight and value to the definitely tendentious words of such a person, one who did not even appear at the Hearing conference so as to clarify his allegations. [18]

26. Aside from this general and well-settled principle, the Tribunal ought to have set aside Mr. Mossadeghi's testimony altogether, owing to its blatant inconsistency with the facts. Mr. Mossadeghi's affidavit is replete with self-contradictions and inconsistent statements. It has been established that Mr. Mossadeghi's allegation, to the effect that the settlement agreement and the amount involved had been approved by the Plan and Budget Organization and APM's Board of Directors, is untrue (paragraphs 22 and 23, supra). In his affidavit (inter alia paragraphs 6-10) Mr. Mossadeghi himself repeatedly treats the claimed additional expenses as arising from

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17 Even under United States law, which has been stated to have a flexible approach towards accepting affidavits due to that country's record of protecting the claimants before most claims commissions, including this arbitral Tribunal, the courts "must ascertain the witness' relation with, or feeling toward ... or bias or partiality in favor of, the party for whom the witness testifies or as to ill will, unfriendly feelings, or hostility toward, or bias or prejudice against the adverse party..." (Corpus Juris Secundum, V. 9 A, Section 559, p. 499).

18 In systems where affidavits are said to be accorded some weight under certain conditions, an affidavit loses even that limited probative value where the witness relies on unexplained or unexplainable, or contradictory, statements. U.S. Department of State Series No. 6: American and Panamanian General Claims Arbitration (Washington, D.C., 1934), p. 470. And at any rate, even United States law does not regard an affidavit as sufficient evidence for proof of disputed facts (Corpus Juris Secundum V. 2A Section 58, p. 503).

"numerous occurrences of force majeure," yet he does not explain how he can now allege that payment of such a large settlement amount was approved by the relevant officials and authorities, against the terms of the Contract, inter alia Article 10 (paragraph 18, supra), the reminders of Project officials, the Department of Legal Affairs, and even the position of the Plan and Budget Organization (paragraphs 18, 19, and 22, supra).

Mr. Mossadeghi also alleges (in paragraph 19 of his affidavit) that "At the end of August 1978, Milton Daniels and I met with TME's representatives, Howard Huget and Yervon Tounian. We discussed the various elements of TME's claims and Ahwaz Pipe Mill's back charges. An agreement was reached in which TME would receive a net payment of Rls. 241,200,444...". This allegation is not only inconsistent with other evidence, even that submitted by the Claimant itself, but it is contradicted by the statements by Mr. Huget as well, where the latter states that after agreement had been reached on the sum of rials 232,768,000/- at the meeting of 26 August 1978 with Mossadeghi and Daniels, with Yervon Tounian present, Mr. Mossadeghi "told me that Ahwaz Pipe Mill's Head of Finance, Jahanbakhsh Pourturk, had certain 'back charges'... that he believed TME was responsible for. Mossadeghi suggested that I go to Ahwaz and meet with Pourturk to work out a final agreed amount on the back charges..." (paragraphs 23-24 of Mr. Huget's affidavit).

27. Mr. Huget served as TME's Vice-President from July 1972 until July 1978, i.e., from prior to the Contract's execution until the end of the term of performance thereon, and as President of the company during the period of the alleged negotiations for settlement of disputes. Therefore, as the highest-ranking official of the company, he should be regarded as having the primary responsibility for mismanagement and default in timely performance on the

Project, and as being the true beneficiary of the outcome of the negotiations in 1978 and of the proceedings in this Case.[19]

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[19] Although Mr. Huget participated in the Hearing conference as one of the members of the Claimant's team, on the advice of his attorney he refrained from responding to questions, and he left at least two of my questions unanswered. This Tribunal has repeatedly dismissed claims based solely on affidavits from a claimant's own officials and employees, or on the claimant's own internal documents. See, inter alia, Avco Corporation and Iran Aircraft Industries et al, Award No. 377-261-3, paras. 90-99, reprinted in 19 Iran-U.S. C.T.R. 200; Morrison-Knudsen Pacific Limited and The Ministry of Roads and Transportation, Award No. 143-127-3, reprinted in 7 Iran-U.S. C.T.R. 54, 79.

Although the idea of excluding the testimony of interested persons from the evidence in proof of a claim has most frequently been advanced by counsels and judges accustomed to Roman law and to the codified (civil) systems of law, it is not confined to those legal systems, and has precedents in the Common Law as well (cf. D.V. Sandifer, Evidence before International Tribunals, pp. 349-350).

In the Cameron Case, the British-Mexican Claims Commission ruled that "affidavits contain evidence which can be described as secondary evidence and is often of a very defective character," and their contents must "be weighed with the greatest caution and circumspection..." (Mexican City Bombardment Claims (1930) Decisions and Opinions of Commission, pp. 31-33 and 102-103).

See also in this connection, B. Cheng (op cit in footnote 8, supra), pp. 310-311 (1987 ed.).

In its Decision in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), paras. 64-65, the International Court of Justice ascribed special evidentiary weight only to those parts of the statements of Government representatives, in their affidavits, which included facts and actions whose mention was contrary to the interests of the Government invoking those affidavits. Years before this Decision of the International Court of Justice, Judge Flores held in his Dissenting Opinion in the Stacpoole Case that the affidavits of interested parties ought to be regarded only as an admission which relieves the opposing party of the need to present evidence in proof of matters set forth in such affidavits to the claimant's own detriment. (Mexico City Bombardment Claims, id at 103). At any rate, where that Commission lent weight to affidavits, it accepted statements made therein only where they were corroborated by other, independent evidence (see Sandifer, op cit, pp. 353-4).

The first point to be taken into account in connection with the value of affidavits before international fora is, that "since as a rule making of a false statement in an affidavit for use in international proceedings would not be sanctioned by any penalty in the country in which it is made, the dangers of relying upon affidavit evidence are obvious." [20]

Secondly, "Because of the informality and looseness of their drafting and the laxness characterizing the administration of oaths at a nominal fee by the ever ready notary public or justice of the peace [scattered throughout the United States] affidavits have been subject to widespread abuse, not only in matters relating to arbitration, but in their general use for the various purposes permitted or required by law, both in judicial and nonjudicial proceedings." [21]

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[20] See J.L. Simpson & Hazel Fox, International Arbitration, p. 208-209. "The remoteness of the tribunal, however, and indefiniteness of penalties for perjury tend to render abuse much more serious in international judicial proceedings." See Sandifer (op cit, footnote 19, supra), pp. 265, 302. The British-Mexican Claims Commission (1926) ruled that:

> "... in nearly all cases, a false statement [by a witness] will remain without penalty, and, as they [affidavits] are signed by the party most interested in the judgement, they cannot have the value of unbiased and impartial outside evidence." Mexico City Bombardment Claims (1930), Decisions and Opinions of Commission, p. 100 at 102-103. See also B. Cheng (op cit in footnote 8, supra) (1987 ed.), pp. 310-311.

[21] Sandifer, op cit (in footnote 19, supra), same page. On page 267 of that work, the author concludes that so long as there are thousands of readily-accessible notaries public or justices of the peace scattered all over the United States, there can be little hope of an improvement in the quality and value of affidavits.

Thirdly, international fora will "consider ...oral evidence only in so far as it finds corroboration in the documentary evidence dating from the time concerned." [22]

Finally, even where an affidavit manifests sincerity and good faith on the part of an interested party who gives the testimony years after the event occurred, a tribunal should also make allowances for infirmities of memory and for that party's natural sense of grievance emanating from a presumed perception of having suffered a wrong, which at

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22 See: The Kronprins Gustaf Adolf and the Pacific Case (1932), U.S. Department of State, Arbitration between United States and Sweden under Special Agreement of December 17, 1930, Arbitration Decisions and Records of Proceedings: Arbitration Series No. 5, Part 6 (Washington, D.C., 1932).

In the Murphy Case, the U.S.-Chilean Mixed Commission (1892) regarded affidavits as constituting not evidence per se, but rather as collateral and circumstantial elements (secondary evidence) which could be relied upon to support findings based upon other, solid evidence. In that same case, the Commission ruled:

> "[W]e must... take them [affidavits] into consideration not as evidence, but only as elements which in certain cases may contribute to a limited extent, collateral or secondary, to confirm or strengthen a conviction appearing to be based on proof of a more conclusive character." Minutes of Proceedings 123, 127 (1894). See also 3 Moore, Arbitration 2262.

The U.S.-German Mixed Claims Commission (1922) dismissed the claims in both the Hire Case and the Gillenwater Case, since they were based on uncorroborated affidavits or because other witnesses gave testimony against the claims. (Administrative Decisions and Opinions (1926) pp. 648, 798-801).

In the Corfu Channel Case, the International Court of Justice ruled that "personal knowledge [is] not sufficient to prove" a claim (ICJ Reports, 16-17, 68-69).

times amounts to exaggeration and obsession on the part of the witness;[23] and at any event, it should seek contemporaneous evidence that either corroborates or refutes the claims made in the affidavit.

28. In addition to these general principles which the Tribunal must observe in connection with all affidavits, as well as the necessity of taking into account the fact that in reality, Mr. Huget's so-called affidavit merely recounts the allegations made by the Claimant in its Statement of Claim and memorials, [24] Mr. Huget has given incorrect testimony in regard to the claim that a settlement existed, and as to the level of the settlement amount. The matters relating to the settlement amount will be dealt with in the following Part of this Opinion. As for the claim that a settlement agreement did exist, Mr. Huget alleges that a settlement agreement was signed by Mr. Mossadeghi and sent to the office of the Jupiter Company, TME's representative in Tehran, for TME's signature, but was destroyed in a fire at Jupiter Company's office.

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23 See the decision of Eugene Borel in the Pacific Case; also The Kronprins Gustaf Adolf referred to in footnote 22, supra, reprinted in RIAA, Vol. 2, 1246; Adolf C. Studer Claim, Fred K. Nielson, n. 82, p. 548 at 557; and V.S. Mani, International Adjudication, Procedural Aspects (1980), p. 227. The U.S.-Mexican Special Claims Commission (1923) ruled in the Naomi Russel Case that "the frailty of human contingencies is most liable to arouse distrust" in affidavits. (Opinions of Commission (1926-31) p. 44 at p. 184.

24 In The National Paper and Type Co. Case (1928), the U.S.-Mexican General Claims Commission (1923) ruled that it is not justified to accept the view that the statements of one party to a claim might be regarded at once as his pleading and as evidence (Opinions of Commission (1929) p. 3 at p.4). See also B. Cheng, op cit in footnote 8, supra (1987 ed.), pp. 309-310; and the Decision of Judge Asser in the C.H. White Case (U.S. v. Russia), cited in Ralston, Law and Procedure of International Tribunals (1926) p. 218; also the Decision of the British-Mexican Claims Commission in the Odell Case (1931), Further Decisions and Opinions (1933), 61, 62.

(Footnote continues on following page)

Against this mere, unsupported allegation, the Respondent filed a variety of evidence with the Tribunal, including the affidavit of Mr. Mohammad Farr-Mahini Farahani, who swore under oath before a notary public that he has worked for thirty years as the porter in charge of the building located at No. 843 Enghelab (formerly Shah-Reza) Avenue, and that "no fire, whether large or small, has ever occurred in any part of building no. 843, or in the office of Jupiter Company, which is located on the third floor of this building." In corroboration of the testimony of this independent witness, the Respondent submitted a certificate from the Department of Fire and Security Services of the Tehran municipality, which certified, against Mr. Huget's allegation, that "this Department has no record of any fire having occurred in Building No. 843 Enghelab Avenue."

29. The most important so-called independent evidence, aside from the affidavits referred to above, to which the majority has paid great attention in reaching the conclusion that a settlement agreement between APM and TME did exist, is Mr. Huget's letter to Mr. Mossadeghi dated 29 August 1978 (paragraph 78 of the majority's Award).

Apart from the aura of doubt and uncertainty cast over the entire affair by Mr. Mossadeghi's role and by his departure from Iran immediately after issuing the check in

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(Footnote continued from preceding page)

In the Studer Case (1925), the British-United States Claims Arbitration (1910) ruled that:

> Even where absolute sincerity and good faith are not in doubt, the statement of the fact in pleadings by one of the interested parties, being a partial statement drawn up specially to present the case in the best possible light, cannot be considered as evidence and regarded as conclusive. (B. Cheng, op cit in footnote 7, supra (1987 ed.), pp. 309-310; also Nielson's Report, p. 547 at 552).

In this connection, see also Wigmore, On Evidence, Section 576 p. 810.

favor of TME, it is clear from a slight attention to this same letter that TME was in actuality thereby making APM an offer that:

> By receipt [of]... the amount of 241,200,444 Rials [sic] TME will make no further claims against the Ahwaz Pipe Mill company for the contract... dated September 9, 1974...

This letter has no signature to indicate that APM had accepted or even received it, and the Claimant has failed to present any evidence showing that APM ever accepted TME's offer.[25]

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[25] Although it might be asserted that Mr. Mossadeghi's payment of approximately 204 million rials to TME constitutes a sort of acceptance by act, such an argument, supposing that it could be raised, is countered by the objection that the payment of an amount less than that proposed by TME cannot be regarded as an acceptance of the offer set forth in the letter of 29 August 1978; rather, if it cannot confirm the existence of an agreement for a lesser amount, it should at least be deemed to constitute a counter-offer that itself required a further acceptance. Therefore, the Tribunal was still obliged to examine all the issues from every aspect, so as to ascertain whether or not it could determine that an agreement existed between the Parties, since a determination of what sort of agreement, and with what terms, was arrived at between the Parties, has great impact upon the Parties' underlying rights.

In his Dissenting Opinion in the Mexico City Bombardment Claims, Decisions and Opinions (1931), 108, 109, the British Commissioner had to agree that the existence and terms of an agreement cannot be established by means of an affidavit; rather, he expressed his agreement that as a universally admitted principle, both the existence and the terms of an agreement must be established by means of written evidence signed by both parties. In the Pomeroy's El Paso Transport Co. Case, the U.S.-Mexican General Claims Commission ruled, while upholding this same principle, that in establishing the existence of an agreement with the Government, the formalities are requirements more rigorous and exacting than when the contract is between private persons. (Feller, The Mexican Claims Commission (1935), pp. 278-279).

The terms in which this letter is couched, together with the account given of the surrounding events and the payment of a different amount than that proposed by the Claimant, demonstrate clearly that at no time was there a convergence of intentions between the Parties, and that they did not have a meeting of minds (consensus ad idem) in that connection. Moreover, this issue assumes yet greater importance when we learn that the proposal was contrary to the express terms of the Contract and to the provisions of the law governing the Contract (inter alia, the regulations of the Plan and Budget Organization; cf. Part A of this Opinion), and further that APM's Board of Directors never approved the alleged agreement (paragraph 23, supra).

C. The alleged settlement amount has been paid in full to TME

30. In view of the foregoing, it has been established that Mr. Mossadeghi was the sole person active on (and behind) the scene in respect of the payment made to TME. This reasonable deduction is confirmed by the evidence, inter alia the affidavit of Mr. Chitsazan, the accountant on the project for the construction and commissioning of the factories for the production of 22-inch and 56-inch pipe (the 1974 Contract). Mr. Chitsazan has testified that this payment to TME was "beyond Mossadeghi's competence and authority," and was made without the authorization of "the Board of Directors and... approval of the Plan Organization," and solely "at Mr. Mossadeghi's order and insistence."

31. Apart from the issues discussed hereinabove, one specific important question which should be answered at this stage is what sum Mr. Huget and Mr. Mossadeghi agreed upon, and whether the payment of approximately rials 204 million did not constitute full payment of the settlement

amount (assuming, arguendo, that the said settlement existed).

32. The majority has attempted to base its findings on the letter dated 29 August 1978 and on certain handwritten notes by Mr. Huget allegedly written during the negotiations with Mr. Mossadeghi and others, but which are undated and were never brought to APM's attention. On the basis of these documents, the majority in effect concludes in its Award that Mr. Mossadeghi and Mr. Huget had agreed upon the net amount of rials 241,200,444 (net of taxes and Social Security premia).

In order to explain the majority's error, I take as my starting point (as did the Award) the sum of rials 232,768,000, upon which Mr. Huget and Mr. Mossadeghi allegedly agreed in their meeting on 26 August 1978. Mr. Huget himself admits -- and this admission is consistent with Mr. Chitsazan's testimony -- that after the Huget/Mossadeghi agreement upon the sum of rials 232,768,000/-, Mr. Huget flew to Ahwaz at Mr. Mossadeghi's suggestion to resolve the issue of APM's back charges. These claims were for services and expenses which APM had provided to TME during the performance on the Project, or which it had incurred on behalf of the latter.

33. Mr. Chitsazan refers to the fact that the Ahwaz accounting office's only duty was to determine the back charges and TME's debts. Mr. Huget concedes, and Mr. Chitsazan testifies, that at the meeting with APM's officials (in Ahwaz, at which meeting Mr. Chitsazan was also present), it was agreed that the sum of rials 4,053,852 would be deducted, for APM's back charges, from the aforementioned fixed lump-sum amount. Mr. Chitsazan denies that there were any negotiations in connection with

the alleged sum of rials 12,486,296 which, Mr. Huget asserts, was agreed at that meeting to be added to the fixed, lump-sum settlement amount.

The truth or fallacy of this statement is not difficult to discover, for Mr. Chitsazan's statements are confirmed by documents filed by the Claimant itself. Three of the four items making up the sum of rials 12,486,296/- (amounting to rials 7,986,296) relate to TME's invoice No. 13, which were rejected during the normal course of business when raised and were never disputed or argued at any stage after being deducted. The fourth item was from the very outset among the Claimant's claims, and according to documents which it has itself filed as constituting the minutes of the alleged negotiations on 16 July 1977, APM had allegedly agreed to "pay [as] differential between 5.5% and 5.15% contractor's tax equal to Rls. 4,500,000" (see also paragraph 87 of the majority's Award).

Therefore, the Claimant has thereby not only added the previously-rejected claims for rials 7,968,296 [26] to the fixed, lump-sum settlement amount, but by adding rials 4,500,000 to the sum of rials 232,768,000/- for a claim that by the Claimant's own admission had already been disposed of along with the rest of the claimed items and had become a "fait accompli", it has laid claim to that amount once more, and has now made double recover thereon as a result of the majority's open-handed generosity.

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[26] The notes prepared by Mr. Valdez, TME's representative, from the meeting of 28 June 1977 relating to issues concerning invoice No. 13 (the last invoice), show that from the very outset, the point that the sum of rials 7,968,296 deducted was not payable constituted a closed issue.

34. The explanation given by the Respondent and by Mr. Chitsazan in order to prove that the amount paid to TME constituted full satisfaction of the alleged settlement agreement (supposing, arguendo, that it existed) is so very precise and convincing that the majority has been unable to deny its validity, and has circumvented it only by casting the cloak of an interesting but "ex post facto" explanation over the matter. This act by the majority constitutes an extreme disregard for the facts, and an injustice to the Respondent. Nor did the majority need any particular expertise, or any knowledge of the mathematical sciences such as Algebra, to attain the facts. Anyone familiar with the four basic operations could have perceived the validity of the positions taken by the Respondent and of Mr. Chitsazan's comments.

Mr. Chitsazan has explained, in simple language, that after the back charges and TME's debts for the contractor's tax and Social Security premia were deducted from the lump-sum amount, the balance was paid to TME.

Amount agreed upon by Mr. Mossadeghi and Mr. Huget	rials 232,768,000/-
From which was deducted	
1. For back charges	rials 4,053,852/-
2. For 5.5% tax	rials 12,802,240/-
3. For 5% Social Security premia	rials 11,638,400/-
Amount payable to TME	rials 204,273,508/-

In fact, TME concedes -- nor can it deny -- that it has received this amount.[27]

35. An abundance of evidence, which by chance has largely been filed with the Tribunal by the Claimant itself, proves the validity of Mr. Chitsazan's statements. The first piece of evidence is the fact that it was Mr. Mossadeghi who signed the check and paid the settlement amount to TME. There is no evidence in the Case showing that Mr. Mossadeghi intended to pay TME the additional amount, which was relatively insignificant in comparison with the amount paid, at some later date. Mr. Mossadeghi has not explained why -- despite his avowed belief at this time that the settlement amount (rials 241,200,444/-) agreed to constituted a net amount -- he authorized payment of a smaller amount at that time, or else why he did not ask the accounting officers to cancel the check and issue another check for the entirety of the settlement amount. On the other hand, this point demonstrates clearly just how far the majority strays from the truth in its argument in the

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[27] Another mistake by the majority is that in relying upon Mr. Huget's letter dated 10 October 1978, it holds that only 204 million rials was paid to TME in satisfaction of the alleged settlement amount, and can be set off, whereas a slight attention to that same letter makes clear that Mr. Huget has merely rounded off the figure of rials 204,273,508 for the sake of convenience, just as he himself says in that letter: "We wish to thank you for the receipt of approximately 204,000,000/- Rials [sic] which was transferred into our account at the Foreign Trade Bank..." (See also para. 91 of the majority's Award. The emphasis has been added).

Moreover, the majority's finding in accepting the sum of only rials 204 million, instead of rials 204,273,508, is inconsistent with the arguments set forth in para. 83, wherein it accepts the Respondent's account as being an "explanation of the partial payment [of the settlement amount]... [and as reflecting] the internal accounting carried out by APM in Ahwaz," but rejects the claim that the settlement amount had been paid in full, merely on the argument that the deductions were not made "pursuant to an agreement between the Parties."

final sentence of paragraph 81 of the Award, in order to reject Mr. Chitsazan's statements. Paragraph 85 of the Award shows, beyond a shred of doubt or uncertainty, that the lesser amount was paid out on orders from Mr. Mossadeghi.

Standing directly contrary to the present assertion, and conflicting with Mr. Huget's handwritten notes filed by the Claimant in the late stages of the proceedings in this Case (towards the end of 1986), is an altogether legible, typed note, prepared by Mr. Huget as a contemporaneous summary of the results of the negotiations in August 1978, which was filed together with the Statement of Claim on 19 January 1982. This document shows that Mr. Huget agreed at those meetings that the contractual taxes should be deducted from the settlement amount.[28] The majority, which has based its finding on Mr. Huget's dubious handwritten notes, has never addressed this point in the slightest, whereas if it were to act fairly and justly, it should regard the Claimant's change of position toward the end of 1986 (and not the clear explanation of the Respondent) as being an "ex post facto" explanation, and as a change in attorney's pleading tactics at the final stages of the exchange of memorials. There are enough mutually contradictory statements and inconsistencies in the Claimant's evidence for this portion of the claim to be dismissed, in keeping with the Tribunal's practice (see Woodward-Clyde Consultants and The Government of the Islamic Republic of Iran and The Atomic Energy Organization

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[28] This is further evidence in proof of the fact that Mr. Huget's letter dated 29 August 1978, assuming that it really was issued, merely constituted an offer to which APM never agreed, and that what remained between Mr. Mossadeghi and Mr. Huget as a (hypothetical) final agreement, was to pay rials 232,768,000/- after deduction of outstanding debts, and definitely after deduction of taxes and other premia.

of Iran, Award No. 73-67-3, p. 17, reprinted in 3 Iran-U.S. C.T.R. 239, 249; and United Painting Company, presented by The United States of America v. The Islamic Republic of Iran, Award No. 458-11286-3, para. 81.

36. Mr. Huget does not allege that he had a further meeting with Mr. Mossadeghi following his return from Ahwaz; nor does Mr. Mossadeghi allege that there was any such meeting. Therefore, the Claimant fails to explain, and the majority has not bothered to ask itself, how and in what meeting with Mr. Mossadeghi the previous final, lump-sum amount was increased to rials 241,200,444.

Nor does Mr. Huget explain why the issue of APM's supposed underpayment of the settlement amount was forgotten from the time of Mr. Mossadeghi's permanent flight from Iran in November 1978 until 1982, when the Statement of Claim was filed with this Tribunal, and why TME failed at any stage to pursue its alleged claim with the officials and with Mr. Mossadeghi's successors in APM.[29]

37. The underlying Contract and other related agreements, as well as the Parties' conduct over the course of the performance thereon, confirm the fact that out of the payments made to the Contractor, 5.5% was always deducted for taxes, and a further 5% was withheld for ensuring the payment of Social Security premia (see, inter alia, paragraphs 17, 24, 93, 112, and 113 of the Award). Therefore, a further objection which can be made to the

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29 When TME did not receive a reply from APM, it "was under an obligation to attempt, at least, to inform [APM] of [TME's] intention to treat [APM's] non-response as a breach [of the settlement agreement]. This the Claimant did not do. [Therefore], the Tribunal [should have dismissed] this Claim." FMC Corporation and The Ministry of National Defence et al, Award No. 292-353-2, para. 60, reprinted in 14 Iran-U.S. C.T.R. 111, 128.

of Iran, Award No. 73-67-3, p. 17, reprinted in 3 Iran-U.S. C.T.R. 239, 249; and United Painting Company, presented by The United States of America v. The Islamic Republic of Iran, Award No. 458-11286-3, para. 81.

36. Mr. Huget does not allege that he had a further meeting with Mr. Mossadeghi following his return from Ahwaz; nor does Mr. Mossadeghi allege that there was any such meeting. Therefore, the Claimant fails to explain, and the majority has not bothered to ask itself, how and in what meeting with Mr. Mossadeghi the previous final, lump-sum amount was increased to rials 241,200,444.

Nor does Mr. Huget explain why the issue of APM's supposed underpayment of the settlement amount was forgotten from the time of Mr. Mossadeghi's permanent flight from Iran in November 1978 until 1982, when the Statement of Claim was filed with this Tribunal, and why TME failed at any stage to pursue its alleged claim with the officials and with Mr. Mossadeghi's successors in APM.[29]

37. The underlying Contract and other related agreements, as well as the Parties' conduct over the course of the performance thereon, confirm the fact that out of the payments made to the Contractor, 5.5% was always deducted for taxes, and a further 5% was withheld for ensuring the payment of Social Security premia (see, inter alia, paragraphs 17, 24, 93, 112, and 113 of the Award). Therefore, a further objection which can be made to the

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29 When TME did not receive a reply from APM, it "was under an obligation to attempt, at least, to inform [APM] of [TME's] intention to treat [APM's] non-response as a breach [of the settlement agreement]. This the Claimant did not do. [Therefore], the Tribunal [should have dismissed] this Claim." FMC Corporation and The Ministry of National Defence et al, Award No. 292-353-2, para. 60, reprinted in 14 Iran-U.S. C.T.R. 111, 128.

Award -- and in making a passing reference thereto, I shall refrain from mentioning the rest, in order not to unduly prolong the present discussion -- is that in effect, and without any justifiable reason whatsoever, the majority has opened a separate account for this considerable so-called contractual payment on additional expenses, thereby exempting it from contractual deductions for taxes and Social Security premia.

II. DISSENT TO THE AWARD FOR PAYMENT IN DOLLARS, AND TO THE RATE OF EXCHANGE

38. There can be no room for doubt that pursuant to the terms of the underlying Contract and the alleged settlement agreement, the settlement amount was to be paid only in rials, and to the Claimant's banking account in Iran. The majority itself is aware (paragraphs 78-79 of the Award) that TME sent Mr. Mossadeghi a letter requesting that the alleged settlement amount be deposited with TME's Account No. 5154 with the Foreign Trade Bank, Central Branch, located on Saadi Avenue, and that pursuant to another letter dated 31 August 1978, it notified the Foreign Trade Bank that the said amount would likely be deposited with it. The details of the items making up the alleged settlement amount also prove (paragraph 72 of the Award) that with the exception of the sum of $323,330, the remainder thereof (i.e., rials 209,892,403 or rials 218,324,847, depending on whether the settlement amount is regarded as being rials 232,768,000 or 241,200,444) was to be paid to TME in rials, and in Iran. Moreover, the letter dated 31 August 1978 to the Foreign Trade Bank demonstrates that at least rials 40,000,000 out of the alleged settlement amount should have been paid by that Bank to an account in the name of Mr. Tounian with the College Branch of Bank Sepah, to cover the expenses and costs of the Jupiter Company in Iran. Therefore, on the one hand, APM was not obligated, either under the Contract or pursuant to

the alleged settlement agreement, to pay all or at least a major part of the settlement amount in dollars; and on the other hand, the Claimant did not plan to expatriate a sum equal to the remaining balance of the alleged settlement amount out of Iran.[30]

Under such circumstances, by APM's having deposited the settlement amount, or the balance thereof, with TME's account with the Foreign Trade Bank, APM's relationship with the settlement agreement would cease since its obligation would be satisfied, and the issue of converting those monies into foreign currencies and transferring them abroad would become subject to TME's relations with its bank and to the exchange regulations governing those relations.

39. As a well-settled principle of law, where the money of account and of payment under the underlying Contract and the alleged settlement agreement is denominated in rials, and where in particular the law governing the Contract and the obligations thereunder is that of Iran, the debt is satisfied once it is paid in rials. The Tribunal cannot, merely by reason of the fact that provision has been made in the Algiers Declaration for a dollar Security Account, convert debts denominated in rials into their dollar equivalent as at the date when the alleged claim arose, and require Iran to make payment in dollars.

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[30] In such a situation, where "the funds were to be used in Iran or were not to be" paid in "United States" dollars (William L. Periera Associates, Iran and The Islamic Republic of Iran, Award No. 116-1-3, reprinted in 5 Iran-U.S. C.T.R. 198 at 214) and "it was the Parties' intention that payment would be made in [rials, which] is confirmed by the fact that [the Claimant] had [been paid and] received ... payment [through transfer of rials to TME's account with the Foreign Trade Bank]" (Alan Craig and Ministry of Energy of Iran et al, Award No. 71-346-3, reprinted in 3 Iran-U.S. C.T.R. 280 at 288), the Tribunal can not obligate the Respondent to pay United States dollars or, what is more, consider the obligation as having arisen in 1978.

Firstly, the Tribunal has not been authorized to do so by either of the Algiers Declarations (viz. the General Declaration and the Claims Settlement Declaration), and there are no provisions requiring rial-denominated obligations to be paid in dollars, at the rates prevailing when those obligations arose.[31] Secondly, according to the express terms of Paragraph 7 of the General Declaration, the dollar Security Account is "to be used for the sole purpose of securing the payment of, and paying, claims against Iran ..."[32] The provision made for a security

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[31] See McCollough and Company, Inc. and The Ministry of Post, Telegraph and Telephone et al ("McCollough"), Award No. 225-89-3, para. 108, reprinted in 11 Iran-U.S. C.T.R. 3.

In T.C.S.B., Inc. and The Islamic Republic of Iran ("T.C.S.B."), Award No. 114-140-2, pp. 13-14, reprinted in 5 Iran-U.S. C.T.R. 160, 168-169, the Tribunal also ruled, in connection with a contract whereby the respondent was obligated to pay the contractual price in rials, that "The Housing Organization maintains that the rate of exchange should be the rate in effect on the date the award is issued... The Tribunal agrees with the Respondent... the Tribunal believes the better rule is that conversion should be made as of the date of the award. The Claimant assumed under the contract the risk of exchange rate variations. The fact that by virtue of the Algiers Declarations payment of the present award is to be made in U.S. dollars, should not, by itself, relieve him of that risk." This is because it is not the duty of the adjudicating fora to interfere with the parties' rights; rather, they must enforce those rights. Mann, Legal Aspect of Money, 4th ed., pp. 336 and 341-7. Moreover, the courts can in no way "make a new contract for the parties; [instead], [r]elief against changes in monetary value can only be granted by the adoption of protective clauses [in the contract]," which will protect the interested party from fluctuations arising from variations in the exchange rate. (Id. pp. 85, 107, 336).

[32] Both Chamber Two, presided over by Judge Riphagen, and Chamber Three, presided over by the late Judge Virally, dealt with these issues in their Awards in T.C.S.B. and McCollough, respectively (both cited in footnote 30, supra), but half-way along in the course of their sound arguments they went astray, probably since they gave insufficient attention to the fact that the Security Account essentially serves as a guarantee and have mistaken the provision of that account for the "money of payment".

account does not ipso facto change the Iranian Respondent's obligations denominated in currencies other than dollars, into dollar-denominated ones. For example, where Iran wishes to satisfy an obligation from some other source of funds, and in the contractually-stipulated currency (whether French francs, German marks, British pounds, etc.), or where Iran and the American claimant agree that a specific property shall be restored to the owner in lieu of payment of damages, the Tribunal cannot compel Iran to pay awards out of the monies in the Security Account, which stands as security for the satisfaction of obligations arising from awards. Thirdly, the fact that the Security Account essentially constitutes a guarantee leads us to a further logical conclusion, diametrically opposed to the majority's finding here and in other similar awards -- namely that where Iran refuses to satisfy its obligations in the contractually denominated currency, together with accrued interest thereon, calculated as from the date the obligation arose (which constitutes damages for late payment),[33] in that event, since use is made of the Security Account to pay the debt and satisfy the obligation, the judgment sum should be paid to the judgment creditor at the current rate of exchange at the time it is withdrawn from the Security Account.[34]

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[33] The compensation will be limited to the value of the undertaking plus interest from the moment the debt arose to the day of payment, if international law is not breached and the "wrongful act consisted merely in not having paid... the just price." (See Chorzow Factory Case, PCIJ Series A, Vol. 3 N. 3 pp. 46-47 and para. 96 of Amoco Int'l Finance Corporation and The Government of the Islamic Republic of Iran et al, Award No. 310-56-3, reprinted in 15 Iran-U.S. C.T.R. p. 189 at 247.)

[34] See McCollough, para. 109, cited in footnote 31, supra. In connection with other currencies (such as the pound, etc.), it has always been the Tribunal's practice that the judgment sum shall "be converted to U.S. dollars... at the conversion rate then prevailing [at the date of payment of the Award]." See, inter alia, Rexnord, Incorporated and The Islamic Republic of Iran et al, Award No. 21-132-2, reprinted in 2 Iran-U.S. C.T.R. 6, at page 9; (Footnote continues on following page)

40. Aside from the aforementioned objection, converting rial-denominated obligations at the rate prevailing when the obligation arose, and paying it in dollars from the Security Account without regard for the foreign exchange regulations of Iran, which is a member of the International Monetary Fund under Article 14 of the IMF Rules -- and

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(Footnote continued)
and the Award in T.C.S.B., p. 14 (op cit in footnote 31, supra). In view of the fact that the debtor (Respondent) can extinguish his debt by proposing to pay it in foreign nominal currency at any time prior to the filing of the claim or issuance of the award, the United States courts have ruled that "The Plaintiff... acquired no right to a more favorable judgment than she could have obtained had action been brought in France [or Germany]." (Sirie v. Godfrey (1921) 196 App. Div. 529, 188 N.Y. Supp. 52; Metcalf v. Mayer (1925), 213 App. Div. 607, 211 N.Y. Supp. 53; Buxoeden v. Estonia State bank (1951) 106 N.Y.S. (2d) 287). They have also recognized that in the event of a failure to pay a debt, or of a refusal to pay monies in a bank account, the debt of the obligor or bank is not converted into dollars from marks, rials, or any other currency. (See the Decision by the United States Supreme Court in Deutsche Bank Filiale Nurnberg v. Humphreys (1926) 272, U.S. 517-519). Even where a breach or wrong entailing liability occurred in a foreign country, the U.S. courts measured the damages in the currency of that foreign country, and converted them into dollars at the current rate at the date of the judgment (F.A. Mann, The Legal Aspect of Money, 4th ed. pp. 341-7). As for the British courts, they do not, merely by virtue of assuming jurisdiction over a claim, convert a contractual obligation denominated in a foreign currency into pounds, and it has even been recognized that an arbitrator in Great Britain may issue an award expressed in a foreign currency, or that a foreign judgment or award may be enforced in Britain like a British judgment or award, and in the same foreign currency so expressed or converted into pounds at the rate prevailing at the time of payment (F.A. Mann, ibid, pp. 347-352; Dicey and Morris On the Conflict of Laws (10th ed.) vol. 2 pp. 1016-1021; Cheshire and North, Private International Law (10th ed.) pp. 713-718). Moreover, as Mann notes, "the obligation to pay £10 is discharged if the creditor receives what at the time of performance are £10 regardless of both their intrinsic and their functional value"; and in this regard, the place of the payment is of no consequence (ibid, pp. 84-89, 266-282). Nowadays, "it can not be doubted that even after an action has been brought, a debt which is overdue can be paid and discharged" (ibid, p. 67. See also Dicey and Morris, ibid, p. 1017).

given the fact that Iran's foreign exchange regulations are always confirmed by the IMF through their publication in its annual Bulletin -- constitutes a breach of those valid regulations, and a violation of recognized principles of international law.[35]

III. CONCURRING IN DISMISSAL OF THE CLAIM FOR AMOUNTS WITHHELD TO COVER SOCIAL SECURITY PREMIA

41. I concur in this part of the Tribunal's finding, for the reason that the Tribunal has finally recognized that when an obligation, even where it has a basis in law, is imposed upon one of the parties to a contract as a condition thereof, that condition must be respected and the obligation under it satisfied, regardless of whether the obligation arose pursuant to a condition of an all-inclusive contract, or whether it derives from an agreement arrived at through an exchange of instruments and papers. Otherwise, if adjudicating fora had the power to

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[35] I will express my views in connection with the foreign exchange regulations governing contracts in which the obligations have been denominated in rials, in my Dissenting Opinion in The Stanwick Corporation, Stanwick International, Inc. and The Government of the Islamic Republic of Iran et al, Award No. 467-66-1. In this respect, for the time being, I deem it sufficient to draw the reader's attention to the Award in Mark Dallal and The Islamic Republic of Iran et al, Award No. 53-149-1, reprinted in 3 Iran-U.S. C.T.R. 10, 14, wherein it was found that:

> "In this case it has to be kept in mind that according to the Algiers Declaration 'all funds in the security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement.' Consequently, if the Tribunal were to permit the Claimant to obtain payment for the cheques in United States dollars from that account, the Tribunal would in fact enforce the exchange contract. Such an award would in practice circumvent the currency regulations which, if valid, both Iran and the United States as well as all other member States of the IMF are obliged to respect. Strong reasons suggest that also international tribunals should respect the relevant provisions in the IMF Agreement."

disregard a condition involving an obligation, the balance between the mutual considerations (as intended and agreed to by the parties) would be disrupted, and this in turn would be tantamount to rewriting the contract, something which adjudicating fora are forbidden to do.[36]

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[36] Whichever liberal or socialistic principles are applied, and from every perspective, the judge must avoid disrupting the balance between the obligations accepted under the contract by the parties thereto. (A.T. Van Mehren and J.R. Gordley, The Civil Law System (2nd ed. 1977) pp. 786-793).

Furthermore, the courts are barred from rewriting contracts when interpreting and enforcing them. See, e.g., Corbin's one-volume work, On Contracts, 1981 ed., §535 ff (p. 496); L.P. Simpson, On Contracts, p. 210; Williston, On Contracts (1961 ed., Vol. 4), §611, pts. (a) and (b). Just as with the settled rules of the civil law systems (see my Dissenting Opinion (para. 77 and footnote 84) to the Award in Watkins-Johnson Company, Watkins-Johnson Limited and Ministry of Defence of the Islamic Republic of Iran and Bank Saderat Iran, Award No. 429-370-1), under the Common Law as well, all promises or performances on one side are made a consideration for all promises or performances of the other. (Williston, On Contracts §§ 103, 137, pp. 395-396 and 594; Corbin, On Contracts, § 125, p. 535). It is also said that just as "the courts cannot make contracts for the parties," each party must perform under the contract, in order to be able to expect performance by the other party. (Corbin, ibid, §§ 9, 94). Under Iranian law too, "Contracts made according to law are binding on the transacting parties and their substitutes..." (Article 219 of the Civil Code); and "It is a general rule that one is bound by the terms of the contract; [that is, even] an optional and revocable contract binds the parties by its terms, so long as it has not been revoked..." (Dr. Nasser Katoozian, Hoquq-e Madani (Vol. I) - Introduction on Property -- On Contracts in General -- 1356 [1977-8] ed., p. 332). Finally, an obligation which is foreseen in a contract "takes on a close tie and relationship, as a condition (subordinate obligation), with the contract in which it is included (the underlying obligation), and these form a single agreement... Not only does the inclusion of a condition in the contract create a tie and relationship between the subordinate and underlying obligations, but this makes the subordinate obligation, in essence, a cause, or a part of the cause, of the underlying obligation, and it will be to the benefit of one of the parties to the obligation, even if it be for the benefit of a third party." (Dr. Sayyed Hasan Emami, Hoquq-e Madani (Vol. I), 6th ed., pp. 268-271). Under French law too (Article 1134

(Footnote continues on the following page)

In light of the arguments based upon the facts set forth in Part I of this Separate Opinion, I am unable to concur in the majority's finding that there was a settlement agreement. Nonetheless, by applying the terms of the original Contract and the practice of the Parties over the course of the performance on the Project, I would also conclude by dismissing the claim as the Award did. [37]

42. Pursuant to Article 3.5 of the Contract, TME undertook to pay all applicable taxes on the Project, as one of its contractual obligations vis-à-vis APM; and pursuant to the express terms of Article 12, it undertook as well to conform to the provisions of the Labor Law and the Social Insurance Law, including Article 29 thereof. Under Article 29 of the Social Insurance Law passed in 1339 [1960]:

> Payment of the contractor's final instalment, which shall not be less than 5% of the total contract price, is contingent upon presentation of a certificate of clearance from the Organization.
>
> If the employer pays the contractor's final instalment without seeing said receipt and clearance, he shall be personally responsible for payment of the required Social Security premia, and he is entitled to seek

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(Footnote continued)
of the French Civil Code), a contract is deemed to stand as law between the contracting parties; i.e., they are both bound by the obligations they have assumed under the contract.

[37] Obviously, even if I believed, as the majority did, in the existence of a settlement agreement, this would not alter matters in the least, because in that event too, the settlement agreement and the condition accepted by TME as set forth in Mr. Huget's letter dated 29 August 1978 would be further evidence that return of the monies retained to ensure payment of Social Insurance obligations was dependent upon presentation of a final clearance certificate from the Social Insurance Organization, and in the absence thereof, that deposit would have to be paid to the Organization.

> recourse against the contractor and obtain such monies, in order to recover the monies which he has paid to the Organization in this respect.38

43. The Parties' practice over the course of the performance on the Project confirms the existence of such an agreement and obligation as well, because from the very beginning of the works, APM deducted and retained 5% of the amount of each invoice in order to ensure payment of the Social Security premia. As a result of the negotiations conducted at TME's request in October 1975, APM agreed, instead of deducting 5% from each invoice, to retain the final contractual payment, which was to be no less than 5% of the total payments made under the Contract, until presented with a clearance certificate from the Social Insurance Organization. Subsequently, pursuant to a letter dated 29 October 1976, APM once more emphasized that an amount equal to 5% of the total contractual payments had to be deducted; and, attached to that letter it sent TME a letter dated 24 October 1976 from the Social Security Organization, which confirmed this point.

44. Although the Contract and the works thereunder were finally completed in March 1977 after delays, TME and its subcontractor (Montalev-Fassan), which performed most of the work on the Project, failed to obtain a clearance certificate.[39] From the point of view of both law and the

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[38] In June 1975, the new Social Security Law superseded the (former) Social Insurance Law, and Article 38 of the new Law replaced the former Article 29, whose provisions were similar.

[39] In numerous places in the Award, the Claimant is quoted as alleging that it was unable to obtain a final clearance certificate, owing to the existence of force majeure conditions arising out of the Islamic Revolution in Iran. In view of the date (March 1977) on which the Contract was completed, and given that the revolutionary movements in Iran could not have materially affected the operations of organizations, offices and companies until late in 1978, as alleged, it is obvious that such an allegation is absolutely unfounded.

Contract, it was TME's responsibility to obtain a final clearance certificate for the Project as a whole, and it was also its responsibility to require its subcontractors to pay accrued Social Security premia and to obtain clearance certificates.[40]

Aware of these facts, and having accepted its contractual obligation, in its telex dated 8 June 1977 (i.e., more than one year prior to the settlement negotiations and the alleged agreement between Mr. Mossadeghi and Mr. Huget), TME agreed that approximately rials 57,800,000/- had to be withheld until presentation of a final clearance certificate.

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[40] Article 29 of the Social Insurance Act, to which the Claimant had expressly agreed under Article 12 of the Contract to conform, also provided as follows:

> Where the employer assigns work to natural or legal persons by means of a contract, in the contract which he concludes, he must require the contractor to provide [Social] insurance for his workers and for the workers of his subcontractors, in accordance with this Act, and to pay the relevant premia. Payment of the contractor's final instalment... is contingent upon presentation of a clearance certificate from the Organization.

When it agreed to Montalev-Fassan's employment as a subcontractor, APM reminded TME in writing, in 1975, that in its contract with its subcontractor, TME must require the latter to conform to, and apply, the provisions of Iranian law, particularly the provisions of the Labor Law and the Social Insurance Act. In that letter, APM also emphasized that the assignment of any part or parts of the works to the subcontractor would not in any way diminish TME's obligations and responsibilities, or APM's rights, under the Contract. In para. 6 of his affidavit, Valdez (TME's resident representative charged with carrying out the Project on TME's behalf) admitted that pursuant to Article 21 of its contract with TME, Montalev-Fassan was required to pay Social Security premia, and to submit a clearance certificate to TME in order to receive the deductions retained as a security.

45. Therefore, even if there were no special condition in the Contract requiring TME to pay Social Security premia, the Tribunal would still have to respect the practice of the contracting Parties. In its Award in Blount Brothers Corporation and The Government of the Islamic Republic of Iran, Award No. 215-52-1, reprinted in 10 Iran-U.S. C.T.R. 56, 78, this same Chamber ruled that "... although there is no specific provision in the Contract authorising such deductions [g]iven the settled contractual practice of the parties, the Tribunal decides that the same 5.5% deduction should be applied to the amounts awarded for the unpaid price..." As for deduction of Social Security premia, in fact the Tribunal dismissed that claim because "no such settled practice [on making such deductions] existed between the Parties."[41]

46. The evidence on record in the Case and filed by the Claimant itself shows clearly that TME and its subcontractors paid only insignificant amounts for Social Security premia, despite receiving huge amounts of money under the Project.[42]

Firstly, that evidence demonstrates that although the Contract was executed in 1974 and the works on the Project commenced by at least October 1975, payments to the Social Security Organization -- of negligible amounts at that (the first being for a mere 833 rials, for the month of February 1976)-- commenced only in August 1976, and on principle, no

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41 For a consideration of the Parties' practice in connection with deduction of taxes and Social Security premia from the payments under the underlying Contract and its corollary agreements and subcontracts, see, inter alia paras. 17, 24, 112 and 113 of the Award, and footnote 40 hereof.

42 The amounts paid out in Iran in rials under the Contract (without taking into account the alleged settlement amount) equal 1,156,000,000 rials, plus rials 20,863,027/- for certain additional works.

payroll was presented to the Social Security Organization until June 1976.

Secondly, TME has alleged only to have paid a total of rials 626,043 to the Social Security Organization over the entire term of the Contract, and payment of a large part of this amount has not been substantiated in any way.[43] The way in which Montalev-Fassan fulfilled its obligations was even more disappointing, given that it and its subcontractors were to carry out the primary works under the Contract. The Claimant has alleged, simply by submitting unsupported lists prepared by itself for the purpose of advancing this claim, that Montalev-Fassan paid the Organization rials 17,661,869. Therefore, even as at the date of the final Hearing conference, TME and its subcontractors still had a very long way to go before being able to prove that they had satisfied their contractual obligations. In view of these facts, in its letter to Montalev-Fassan dated 5 January 1977, a copy of which was sent to APM, the Social Security Organization cautioned the Employer against "paying 5% of the total price of the work under the Contract... until presented with a clearance certificate from ... the Organization." In another letter, dated 5 June 1978, this time addressed to TME and with a copy sent to Montalev-Fassan, the Organization warned TME against paying the final 5% of the total Contract price until Montalev-Fassan obtained a final clearance certificate.

47. The evidence also shows that ultimately (in 1978), Montalev-Fassan proceeded to forge a clearance certificate in order to recover approximately rials 33 million in

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[43] In para. 18 of the memorial filed on 20 October 1986, and in para. 3 of Mr. Valdez's affidavit, it is stated that "... Montalev-Fassan had over 200 employees on the job in addition to a subcontractor who performed concrete work for them. By contrast, TME had a very small staff on the project -- a total of eight persons on average..."

deductions held by TME as security for payment of Social Security premia (under Article 21 of the [sub]contract and Article 29 of the Social Insurance Act). This forgery was only discovered when TME finally -- more than a year and a half after the Contract had expired and the mill was handed over -- presented that clearance certificate to APM.[44]

In paragraphs 24-26 of his affidavit, Mr. Chitsazan, the then accountant for the 22-inch and 56-inch pipe mill production project, testifies -- and his statements are fully corroborated by Mr. Huget's statements in paragraphs 40-41 of his affidavit -- that in August 1978, he went together with Mr. Huget and Larry Jobe (of TME) to the relevant office of the Social Security Organization in Ahwaz, and in that same meeting the head of that office stated, "after comparing [the clearance certificate] with Montalev-Fassan's file, that the said paper was a forgery and had not been issued by the Organization... After this meeting, Mr. Huget promised to go to Montalev-Fassan and ask that company to obtain a valid clearance certificate..."[45]

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[44] Even if that clearance certificate were taken into account, disregarding the fact that it was forged (and also disregarding the payment of the settlement amount), it would still relate to only rials 761,778,938 of the total amount paid under the Contract. Therefore, it would still not dispose of the issue of the clearance certificate for the remaining rials 415,084,089. Moreover, the clearance certificate presented (even had it been validly issued) had been issued in Montalev-Fassan's name, whereas the final clearance certificate was supposed to be issued in TME's name since it was the primary contractor, and was supposed to cover the entire Project.

[45] Mr. Huget's telex dated 19 September 1978 to Montalev-Fassan clearly shows that TME was fully aware of the forgery and of why it had been considered forged. In that telex, Mr. Huget informed Montalev-Fassan that the file number, signature and amounts stated on the clearance certificate had been forged.

48. The record shows that although TME continued to press Montalev-Fassan to obtain a final clearance certificate, the latter never bothered to go to the Social Security Organization to obtain the clearance certificate. Nor did TME take any action on its own initiative in this regard, in order, by paying the Social Security Organization its own debts together with the 33 million rials which it held as security from Montalev-Fassan, at least to obtain a clearance certificate with respect to that part of the payment.[46]

49. On the basis of the points set forth above in this Part of the present Opinion, the alleged agreement between Mr. Mossadeghi and Mr. Huget, which conditioned the repayment of rials 58,571,000, deducted for securing TME's debts for Social Security premia, to TME's satisfying its obligations set forth in Mr. Huget's letter of 29 August 1978 (paragraphs 71 and 103 of the Award), merely emphasizes TME's contractual obligations as specified in Article 12 of the Contract and as reflected by the Parties' practice over the course of the performance on the Project.

For precisely the same reason that the Tribunal has been unable, in preserving the balance between the mutual considerations in the alleged settlement agreement, to disregard the obligation undertaken by the Claimant to

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[46] As stated in footnote 39 and in para. 48 above, in the absence of any action on the part of Montalev-Fassan (an Iranian/French partnership), which was active in Iran long after the Revolution, and in the absence of any action from TME in order to obtain a clearance certificate in connection with its obligations and for Montalev-Fassan's monies which TME was holding as security for the former's debts, seeking recourse to the alleged existence of force majeure conditions and using it as a pretext for evading the obligation to obtain a clearance certificate constitutes an unfounded and baseless expedient.

present a final clearance certificate, it was precluded as well from disrupting the balance between the considerations in the underlying Contract, even without the settlement agreement. In line with the majority's ruling in paragraph 103 of the Award, the contractual condition set forth in Article 12 "was a specific obligation entered into by the Parties. It was also more than a mere procedural formality which could be waived."

In view of these reasons, I concur in the finding in this Part of the Tribunal's Award, wherein the Claimant's claim for recovery of retentions made to secure its Social Security obligations is dismissed.

IV. COUNTERCLAIMS

D. Damages for delay in delivery of the mill

50. The majority has dismissed this counterclaim on the argument that such costs were taken into account in the settlement agreement arrived at in August 1978, and were resolved pursuant thereto (paragraph 124 of the Award). For the reasons set forth in Part I of this Opinion (paragraph 5-28), I dissent to that finding. I could have concurred in the majority's determination only if the Claimant had been able to prove that APM had waived its contractual right by agreeing in writing to an extension of the contractual deadlines (Article 13 of the Contract). There is no such evidence in the Case file. Therefore, in view of the undeniable delays in completing and commissioning the Project (paragraph 11 of the Award), and in light of the Counterclaimant's evidence and calculations which are based on the reports by the Project Director, an independent auditor (Mr. Plummer, of the Abstech Company) and the provisions of Article 2.10 of the Contract, I

consider the demand for $307,142.86 (for the 56-inch pipe mill) and $47,419.35 (for the 22-inch pipe mill) proper, just, and even conservative, and I believe that the majority should unquestionably have awarded payment thereof in favor of APM.

51. In line with practice in contracts relating to construction and to delivery of machinery, under Sections (1) and (2) of Article 2.10 to the Contract (entitled "Liquidated damages"), the Parties fixed in advance the amount of any damages which might become payable due to delay in commissioning the 56-inch and 22-inch pipe mills, and agreed as follows:

> If TME fails to commission the ... plant... within... months from the date of receipt of the Letters of Credit, TME will pay to APM liquidated damages as follows...

Under Iranian law, which is the governing law of the Contract, the Parties may determine in advance the damages arising from breaches by either Party, and they can arrive at an agreement thereon.[47] Article 230 of the Iranian Civil Code provides that:

> If it is stipulated in a transaction that in the event of a breach, the Party in breach shall pay a certain sum as damages, the judge cannot make a judgment against him for payment of either more or less than that to which he was already bound.

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47 The amount of damages sought by APM and the limitation set forth in Article 2.10 of the Contract clearly show (footnote 5 to this Opinion) that this condition of the Contract was entirely justified and fair. Such justified and fair conditions are accorded respect under the diverse legal systems of various countries, and it has been said that "[s]uch clauses may serve one or more purposes, [inter alia] avoiding the difficulty of assessing damages and the related risks of inadequate compensation, where damage is difficult to establish or hard to evaluate." (A.T. Van Mehren and J.R. Gordley, The Civil Law System (2nd ed. 1977) pp. 815-816). See also Corbin On Contracts, §1072, p. 402; and Dr. Sayyed Hasan Emami, Hoquq-e Madani (Vol. I, 6th ed.) p. 247.

E. Damages for defective or short-landed goods, and for bank charges

52. As noted in paragraphs 5 and 9 of the Award and in paragraph 6 of this Separate Opinion, the Contract between APM and TME was a fixed price, turnkey contract. Therefore, the Contractor was obligated to construct the pipe mills, and to deliver them to APM after they were commissioned. In such a contract, the duty to replace defective or short-landed goods is among the obligations of the contractor. Aside from this general rule, Article 6.1 of the Contract expressly obligates TME to replace defective, damaged or short-landed goods, and Article 2.5 of the Contract requires the Contractor to insure the equipment and machinery under the Contract from the point of origin in the United States to its installation and delivery.

Indeed, TME purchased an insurance policy, under No. 53/194169, in this connection. The Counterclaimant proved, on the basis of evidence, that despite such an obligation, TME made up for the defective, damaged and short-landed goods at APM's expense. As a result of this act by the Counterrespondent, APM was compelled to pay $318,653.66 over and above the fixed contractual price, in order to expedite the work on completing the plant and to avoid any further delays. Not only did TME make no effort to pay this sum, but it also took no action under the insurance policy in order to arrange for payment of damages due to short-landed and defective received goods; or, if it did take such steps, it did not pay APM the proceeds thereof.

Aside from my opinion concerning the alleged settlement agreement, there is no evidence in the Case file which would show that the claims relating to these double payments were ever taken up at the negotiations leading to

the settlement, or that they were waived by APM. Therefore, I cannot in any sense concur with the majority's finding in dismissing this counterclaim.

53. APM has also demanded rials 7,744,877 for banking and order registration charges, customs fees and insurance for the goods mentioned in paragraph 52 above. The available evidence shows that this counterclaim (initially for rials 7,984,338) was an unresolved item pending between APM and TME, and that pursuant to Mr. Huget's letter dated 29 August 1978, TME undertook to negotiate with APM in order to resolve the dispute relating thereto. The majority has dismissed this counterclaim on the excuse of lack of evidence. I feel that such broad statements are unjust, since readers of awards are deprived of access to the available evidence. Contrary to the majority's assertion, APM was able to prove rials 7,744,877 of its expenses by submitting banking documents reflecting that payment, and for that reason it sought this lower amount rather than rials 7,984,338. TME did not present any evidence whatsoever in rebuttal of the Counterclaimant's evidence; therefore, the majority should have had no alternative other than to award against TME for payment of the sum of rials 7,744,877. For this reason, I dissent to the dismissal of this counterclaim, and I hold the majority's decision to be a blatant instance of violation of the principles of justice and equity.

F. Cost of pipe sold to TME

54. This counterclaim is for the sale to TME of a quantity of pipe worth rials 288,749. TME does not deny that it purchased and received such pipe from APM, nor does it allege that the amount sought is incorrect or that it has paid it. The Counterrespondent's sole argument on the merits is that the Tribunal should dismiss this claim in

light of the alleged settlement; and the Tribunal has indeed dismissed this claim for this very reason (paragraph 129 of the Award). None of the available evidence in the Case, including that filed by the Counterrespondent itself and the alleged minutes of the meetings of 16 and 24 July 1977 (paragraphs 57-63 of the Award, and paragraphs 21-22 of this Opinion), shows that any negotiations were held to resolve and settle such an item, or that any agreement was reached therein.

It is ironic to note that the majority has adopted an inconsistent policy and a double standard in connection with the claims of the Parties to the alleged settlement agreement, in that although it accepts the assertion that Mr. Huget and Mr. Mossadeghi reached agreement at their meeting in August 1978 on a total lump sum of rials 232,768,000 for the settlement amount, and that only TME's debts were to be deducted from this fixed amount, yet the Tribunal adds to that sum the items deducted from invoice no. 13 (amounting to rials 7,986,296) and the sum of rials 4,500,000/- for a differential in the contractor's tax, whereas all of those items were negotiated between the Parties prior to the agreement on the fixed, lump-sum settlement amount, and the sum pertaining to the differential in the contractor's tax even formed one of the items allegedly accepted leading up to the fixed settlement amount (paragraph 33 of this Opinion). Against this position, the majority dismisses this counterclaim and the sum of rials 7,744,877 mentioned in paragraph 53, supra, solely on the presumption that they may have been discussed in the course of the settlement of the disputes, and included in the settlement amount!

G. Claim for refund of the settlement amount

55. In view of what I have set forth in Part I of this Opinion ("Dissent to Award for the Balance of the Alleged Settlement Amount"), and in particular under Sections A and B of that Part, I hold that the majority should have awarded against TME for refund of the sum of rials 204,273,508 which it received, since the Tribunal has failed to determine convincingly that the settlement agreement did exist, and since in principle it is impossible to believe, in the face of those facts, that such a binding settlement agreement actually did come into being.

H. Debts for taxes and Social Security premia

56. Under this Contract, TME undertook to pay the taxes and Social Security premia accruing on and arising from the Contract (Articles 3.5 and 12 of the Contract). In such a situation where the Contractor has undertaken to pay these taxes and premia as a part of its contractual obligations, a percentage of the contractual consideration will remain unfulfilled, if there is no award in favor of payment and satisfaction of those debts and obligations. This is because the contractual consideration would, obviously, have been considerably less if the Contract contained no express provisions for those obligations (the obligations under Articles 3.5 and 12).[48]

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[48] In synallagmatic contracts, the mutuality of considerations is valued in terms of benefit or detriment resulting from the contract (Trietel, Contracts, 1987 ed., p. 53; Simpson, Contracts, p. 91). On page 723 of his work Contracts, Trietel states that:

> The plaintiff is entitled to be compensated for the loss of his bargain, so that his expectations arising out of or created by the contract are protected.

(Footnote continues on following page)

Therefore, for the same reasons that I have previously given in connection with this group of counterclaims, I am totally unable to concur in the majority's unfounded and unreasoned argument set forth in a single line in paragraph 130 of the Award (see paragraphs 55-58 of my Dissenting/Concurring Opinion in the Award in Agrostruct International, Inc. and National Cereals Organization, The Islamic Republic of Iran, Award No. 358-195-1, reprinted in 18 Iran-U.S. C.T.R. 180).

57. The baselessness of the majority's reasoning in paragraph 130 of the Award becomes yet more palpable when we observe that in this same Case, the Tribunal has agreed that under the terms of the Contract (at least under the terms of the alleged settlement agreement), TME was obligated, vis-à-vis APM, to submit to the latter a final clearance certificate, upon payment of Social Security premia. This being the case, the Tribunal should at least have noted that it could not simply repeat the flimsy arguments of other awards and thereby dismiss the counterclaim in this Case as well, on the pretext of lack of jurisdiction since "[t]hese obligations arise out of Iranian municipal law".

At most, the majority could have resorted to the argument that since it has awarded in favor of the retention of amounts deducted to ensure payment of debts under this counterclaim and since APM's debt presumbly goes no

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(Footnote continued from preceding page)

Just as the courts may not make contracts for parties, they may not absolve them of their contractual obligations (see Corbin, On Contracts, § 632, p. 24; Mann (op cit in footnote 31 above, loc cit); and the matters and sources cited in footnote 36, supra).

further than this retention,[49] it cannot award for payment of debts which go beyond the Counterrespondent's contractual obligation vis-à-vis the Counterclaimant. Nor can the majority resort, in order to dismiss the counterclaim, to the argument that it lacks the necessary expertise to determine the actual amount of TME's debt (paragraph 106 of the Award), because this arbitral Tribunal indubitably lacks financial and technical expertise in many areas, in view of its composition and its Members' areas of specialization, but such a lack of expertise should not and cannot prevent this arbitral body from administering justice and redressing rights by determining the amount of the counterclaim through the appointment of experienced and specialized experts, and then making an award for payment thereof.

V. DISSENT TO AWARD OF INTEREST

58. I have previously stated my principal objection to the awarding of interest, as well as to the method by which such interest is computed, in Cases heard by this Tribunal, and I therefore do not intend to reiterate my reasons in the instant Case as well. See paragraphs 44-45 of my Dissenting/Concurring Opinion in Agrostruct International, Inc. and National Cereals Organization, The Islamic Republic of Iran (cited in paragraph 56, supra).

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[49] Although this obligation may perhaps be compatible with the majority's finding that there was a settlement agreement involving a net settlement amount, yet the monies retained do not include the settlement amount and other additional payments under the Contract, and I must therefore dissent thereto as well, from this point of view. In my opinion, the Tribunal could have determined the exact amount of the Claimant's debt by making use of the evidence in the Case and the opinions of the Parties' experts, and it should have awarded for payment of that amount or for setting it off against the retentions (according to how much the debt was determined to be).

VI. DISSENT TO AWARD OF COSTS OF ARBITRATION

59. In paragraph 133 of its Award, the majority awards against the Respondent for payment of $30,000 for the Claimant's costs. I dissent to the awarding of such costs on principle, and I especially dissent to the assessment of costs of arbitration in the present Case, whatever the amount.

60. I have previously set forth my basic reasons for dissenting to the awarding of costs of adjudication to United States claimants, in paragraph 97 of my Dissenting Opinion to Watkins-Johnson Company, Watkins-Johnson Limited and The Ministry of Defence of the Islamic Republic of Iran, Bank Saderat Iran (Award No. 429-370-1); therefore, I do not consider it necessary to reiterate those arguments here.

61. In this particular Case where the Claimant has only succeeded (according to the majority) in proving approximately 25% of its claims -- or in other words, where the Chamber has dismissed roughly 75% of the claims against the Respondent, and where the filing of those claims has caused the Respondents to incur enormous unnecessary legal costs -- the majority should have not only refrained from awarding the Claimant $30,000, [50] but awarded against the

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[50] In a Case wherein it asserted that the claimant had proved approximately 85% of its claims, and where all of the counterclaims against it had been dismissed, this same Chamber awarded $30,000 in costs of adjudication (Award No. 429-370-1, para. 134, in Watkins-Johnson Company, Watkins-Johnson Limited and The Ministry of Defence of the Islamic Republic of Iran, Bank Saderat Iran). Therefore, the award for payment of $30,000 in a Case where most of the Claimant's claims have been dismissed illustrates the baselessness of the majority's decision.

Claimant for payment of the Respondent's costs of adjudication as well, in keeping with its own previous practice (cf. the Award in the Case brought by the United States of America for and on behalf of Leonard and Mavis Daley v. The Islamic Republic of Iran, Award No. 360-10514-1, reprinted in 18 Iran-U.S. C.T.R. 232, 243; and Electronic Systems International, Inc. and The Ministry of Defence of the Islamic Republic of Iran, Defence Industries Organization, Award No. 430-814-1, paragraph 63).

Dated The Hague,

23 April 1990 ... / 3 Ordibehsht 1369

Assadollah Noori