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S CLAIMS TRIBUNAL

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In His Exalted Name

CASE NO. 18
CHAMBER ONE
AWARD NO. 260-18-1

PEPSICO, INC.,
Claimant,
and
THE GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN,
FOUNDATION FOR THE OPPRESSED,
ZAMZAM BOTTLING COMPANY AZARBAIJAN,
ZAMZAM BOTTLING COMPANY EAST TEHRAN,
ZAMZAM BOTTLING COMPANY ESFAHAN,
ZAMZAM BOTTLING COMPANY GORGAN,
ZAMZAM BOTTLING COMPANY KERMAN,
ZAMZAM BOTTLING COMPANY KERMANSHAH,
ZAMZAM BOTTLING COMPANY KHUZESTAN,
ZAMZAM BOTTLING COMPANY MASHHAD,
ZAMZAM BOTTLING COMPANY RASHT,
ZAMZAM BOTTLING COMPANY SHIRAZ,
ZAMZAM BOTTLING COMPANY TEHRAN,
Respondents.

DISSENTING OPINION OF MR. AMELI

I. INTRODUCTION

1. I disagree with the opinion of the Majority in this Case on the grounds set out below in relation to the relevant headings of the Award. My views on various

other aspects of the Award, principally on the impropriety of paying the amounts awarded against the Zamzam Companies from the funds of the Government of the Islamic Republic of Iran, when the Government itself was not held liable in any respect, and also when the assets of the Respondent Companies could not be anywhere near the amounts awarded against them, were set out in my Declaration of 27 October 1986 in this Case.

II. REASONS FOR AWARD

2. Jurisdiction

e. Claim for repayment of the loans

2. The Tribunal's jurisdiction over these claims depended on whether they were outstanding as at 19 January 1981, the date of the Claims Settlement Declaration (per Article II, paragraph 1 of the Declaration). This thus depended on the validity of the acceleration of the Promissory Notes by the Claimant on 20 April 1979, since the original due date of the Promissory Notes was 15 May 1982. Without such valid acceleration, the claims in respect of the Promissory Notes would obviously not have matured or existed as at 19 January 1981. According to the Majority, the validity of the acceleration, in turn, depended on the question as to whether the purchasing Zamzam Companies had defaulted on payment for concentrate shipments by not making such payments within 180 days of the arrival of the concentrates at the Iranian port of destination.

3. Rather than the non-payment of the prices for the purchased concentrate, the alleged breaches that the Claimant had pleaded as the basis for the acceleration were set out in the Statement of Claim (pp. 9-10) and summarized in the Memorandum (pp. 22-24) as follows:

1) using Pepsi-Cola crowns on bottles containing other beverages and using other crowns on bottles containing Pepsi-Cola;
2) producing the beverage with defective equipment;
3) contaminating the beverage with a high proportion of particles;
4) failing to supervise production thereby resulting in an inferior product;
5) failing to use proper sanitization and testing procedures thereby causing the production of a beverage with such defects as erratic brix, high pH, low titratable acidity, microbiological spoilage, off-taste, water alkilinity, chlorine carry-over and caustic carryover;
6) using bottles deceptive to consumers;
7) neglecting to fill the bottles to the proper height;
8) maintaining unsanitary production conditions in violation of local laws;
9) incurring an indebtedness in the amount of $1.5 million without notifying PepsiCo or receiving its approval; and
10) failing to provide PepsiCo with balance sheets and statements of income and retained earnings as required by the Main Agreement;
and numerous other violations, especially of the quality control standards imposed by the Appointments and by these Agreements.

4. The first eight items of these alleged breaches were in respect of quality-control and other production requirements. The last two items related to a $1.5 million loan from the First National City Bank to Gulf Associates, Inc. (rather than to the Zamzam Companies) that had apparently been entered into the books of the Zamzams without notifying PepsiCo or receiving its approval, and to the provision of balance sheets and other financial information. It may be noted here that Gulf Associates was one of the companies owned by the Sabets which had received a portion of the $6.5 million loan that the Claimant sought to enforce against Zamzam (See paragraph 3, subparagraph d(1) of the Main Agreement). Gulf Associates, Inc. is in fact a Claimant in

another case before the Tribunal (Case No. 385) against the Islamic Republic of Iran. The concluding phrase referred to "numerous other violations", which was too general to satisfy the requirements of specificity, followed by a final emphasis on the alleged breaches of quality-control requirements. None of these items mentioned non-payment for concentrate shipments as a basis for the acceleration.

5. But in relation to the question of payment for concentrate shipments, paragraph 4 of the Main Agreement had provided as follows:

> 4. Increased Concentrate Pricing. Only for the duration of this Agreement the price of Pepsi-Cola concentrate shall be increased in accordance with the program established herein.
>
> The price of concentrate shall be increased during the term of this Agreement at each time that the average wholesale price increases. The first such increase shall be in an amount determined by multiplying the percentage of the wholesale price increase by .75 and then multiplying the product of that multiplication by the existing concentrate price. Subsequent concentrate price increases shall be of the same percentage as the corresponding wholesale price increase. All payments for concentrate during the terms of this Agreement shall be made not more than one hundred eighty (180) days after arrival at the port of destination.

6. Paragraph 3(f) of the Main Agreement made paragraph 4 (quoted above) a condition of performance. The Majority was therefore of the view that a violation of paragraph 4 entitled the Claimant to accelerate the loans. This was after holding that the Claimant's original argument basing the acceleration on alleged breaches of quality-control and sanitary requirements was without substance (Award, pp. 25-26). I disagree with the

Majority's reliance on the 180-day default argument as the basis of the acceleration. This is because, first of all, that argument, even if made, had not been pursued by the Claimant in the proceedings. Aside from its Statement of Claim, the Claimant did not pursue its default-payment argument in any of its later pleadings whether written or oral.[1] Secondly, even if that argument was admissible, it was crucial that in order to establish the 180-day default and hence the validity of the acceleration, the arrival dates of the concentrates in Iran should be proven. This, in my opinion, had not been proved on the record before us.

7. The Claimant had offered as due dates for payment for the concentrates the maturity date of each draft for payment per each shipment. If in fixing the maturity dates the 180 days were computed from the dates the drafts were issued, this would not satisfy the contractual stipulation of "one hundred eighty (180) days after arrival at the port of destination." If the deliveries were to have taken place in the fall of 1978 or spring of 1979 they certainly would have been faced with the closure of the Iranian ports due to labor strikes or ensuing port congestion which existed from September 1978

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[1] I principally believe that it is improper for the Tribunal ex officio to determine that a party did not pursue an allegation it had made while that party has not formally and specifically withdrawn or retracted or modified such allegation in the course of the proceedings. The reason is that otherwise the whole pleadings of the Parties become superfluous and at the behest of the Tribunal. But if a Tribunal nevertheless takes such an approach in a Case, in my view it must at least do so consistently and evenly between the Parties. See, my critisism of that approach and its misapplication by the Tribunal to the Respondents' allegation of the Zamzam Companies negative value and insolvency in my Declaration in this Case, dated 27 October 1986, pp. 3-4.

to August 1979 — as was recognized in our Award in the Sea-Land Case.[2]

8. In that Case dismissing a United States claimant's allegation of expropriation of its port facility by the Government of the Islamic Republic at the Persian Gulf, the Tribunal stated:

> From September 1978 onwards, Sea-Land claims, the system began to break down. Increasingly frequently, Sea-Land encountered the unexplained absence of immigration or health officials to perform on-board inspections; pilots or tugboats to enable the Sea Bridge to berth; and customs officials to clear the cargo for onward transportation. The absence of even one key official could prevent the ship from berthing. Such officials as were present often performed their duties only after considerable delay. The disruptive effect on the flow of containers was immediate, [and this in turn is said to have affected Sea-Land's worldwide service, leading to its suspension of inbound services in November 1978 and its eventual termination of all operations on 1 August 1979.] (Emphasis added.)

The Tribunal further stated:

> The Tribunal is mindful of the fact that the events of which Sea-Land complains all took place before 1 August 1979, during the very period of foment and disorder which preceded and accompanied the Revolution, and not as a result of the implementation of post-revolutionary policies. (See, also, Gould Marketing, Inc. v. Ministry of National Defence of Iran (Award No. 24-49-2) at pages 11-14; Starrett Housing Corporation et al. v. The Government of the Islamic Republic of Iran et al. (Award No. ITL 32-24-1) at page 54.)

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[2] Sea-Land Services, Inc. and The Islamic Republic of Iran, et al., Award No. 135-33-1 (20 June 1984), p. 33, reprinted in 6 Iran-U.S. C.T.R. 149, 164-66.

9. The determination of the delivery dates was thus impossible on the basis of the Claimant's evidence, which was limited to shipping documents. The record also lacked evidence as to the dates the shipping documents were released to the Zamzam Companies by the local banks, who were to do so upon arrival of the shipments and receipt of the Zamzam Companies' acceptance of the drafts — all of which the Zamzam Companies specifically denied. The only evidence of receipt of the shipments was the Zamzam Companies' admission in the Pre-Hearing Conference, which lacked the needed specificity as to the date of each delivery.

10. Furthermore, a closer look at the Claimant's letter of 7 June 1978 reveals the parties practice and previous course of dealing of

- rescheduling a number of payments due for concentrate shipments;
- giving a further extension of 70 days prior to a warning;
- giving a warning for acceleration (rather than abruptly accelerating the loans three years prior to the fixed date for maturity); and
- giving a 15-day notice for compliance.

11. Significantly, the only instance in which this practice was ignored was the Claimant's letter of acceleration dated 20 April 1979, which was not even mailed to the Zamzam Companies but rather to addresses in Paris and New York alleged to have been those of Iradj Sabet. In fact, a similar practice of allowing time for rectification of alleged breaches was followed by the Parties with regard to the quality control violations, as to which the Claimant's letters of 1 August 1977, 28 April 1978 and 24 July 1978, in addition to that of 7 June 1978, are descriptive.

12. In the present Case, the evidence was overwhelming that the parties had established a course of performance or dealing of not exercising the acceleration clause but allowing time for rectification of alleged breaches. The Claimant in its pleadings alleged instances of violations of sanitary requirements although the Respondents denied this. Secondly, the Claimant alluded to late payments of concentrate prices and outstanding debts. In none of these instances did the Claimant exercise the acceleration clause, thereby clearly establishing by its conduct a course of dealing amounting to waiver. The Claimant by its letter of 20 April 1979, purportedly attempted to accelerate but then again its subsequent conduct in accepting orders for concentrate and fulfilling them clearly contradicted any intention to accelerate.

13. If the Claimant really considered the non-payment of concentrate sold as a basis for acceleration of the loans, it would have stopped further sales, and not continued sales until September 1981. Under the laws of the Claimant's own country, let alone under the United Nations Convention on Contracts for the International Sale of Goods or under the general contract law, stopping further sales in the face of non-payment for shipments already made is the primary duty of the seller to mitigate its losses.[3] Moreover, as recognized by the

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[3] Section 2-703 of the Uniform Commercial Code of the American Law Institute-National Conference of Commissioners on Uniform State Laws enacted by the State of New York as well as 48 other states of the United States reads:

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if

(Footnote Continued)

Tribunal in another case the seller's duty to mitigate his damages is also "required by general contract law."[4]

14. Even if it intended to accelerate the loans due to non-payment of the concentrate prices, the Claimant's conduct subsequent to the purported notice undermined the validity of its exercise of the acceleration clause. After it allegedly invoked the acceleration clause, the Claimant nonetheless performed under the Bottling Appointments with the Zamzam Companies as if nothing had happened and continued to sell concentrate to them admittedly up until September 1981. The American law is clear that an aggrieved party, by continuing performance after giving notice of an acceleration clause to the defaulting party, could waive and discharge any rights consequent to the notice, retract the notice or indicate the aggrieved party's lack of original intent really to invoke or thereafter to enforce the consequent rights, aside from his right to repayment of the loan at the

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(Footnote Continued)
the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may

a) withhold delivery of such goods;
b) stop delivery by any bailee as hereafter provided (Section 2-705);
c) proceed under the next section respecting goods still unidentified to the contract;
d) resell and recover damages as hereafter provided (Section 2-706);
e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709);
f) cancel.

See also, the American Law Institute's Restatement of the Law, Contracts §336(1).

4 Questech, Inc. and The Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1 (25 September 1985), p. 30.

originally fixed date and to payment of the price of the goods sold and delivered. See e.g., 5 A.L.R. 2d 968, 974-75 and 977.

15. The American law just cited is also the same where there is a prior course of dealing regarding waiver of the right to invoke an acceleration clause, that is, in cases of previous delays on payment of concentrate price or defaults of other terms of the transaction where the aggrieved party did not exercise the acceleration clause. Both common law and statutory law in the United States are clear that a course of performance could serve to interpret and also modify an agreement or waive enforcement of a right thereof. Restatement of the Law, Contracts §235(e) and Comment h; 4 Williston on Contracts §623. Also, under U.C.C. Section 2-208(1) "any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement" and official Comment 2 thereto states that "a course of performance is always relevant to determine the meaning of the agreement" and "this would appear to be so even if it has been "carefully negated." J. Calamari and P. Perillo, Contracts, p. 130 (2d ed. 1977). "[S]imilarly" U.C.C. §2-202, Comment 2 states in relevant part that "the course of actual performance by the parties is considered the best indication of what they intended the writing to mean."

16. More appropriately in this context, the U.C.C. §2-208(3) provides that "such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance." A modification or waiver may result in a cutting down or subtraction of express terms altogether. J. White and R. Summers, Uniform Commercial Code §3-3 (2d ed. 1980). Consequently the continued performance and sales by the Claimant until September 1981 are a clear indication that

it had waived enforcement of the acceleration clause despite its purported invocation more than two years earlier.

17. In a recent case, Dunn v. General Equities of Iowa, Ltd., the Iowa Supreme Court had the occasion to confirm that "[o]ther [American] courts that have considered the issue have reached a similar conclusion," that acceleration-clause options can be waived by a course of dealing of accepting late payments in cases prior to the instant default.[5] That case involved a holder who having accepted late payments on the note on three prior occasions turned round to enforce an acceleration clause. The Supreme Court of Iowa affirmed the trial court in holding that the claimant had in effect waived his right to exercise the acceleration clause.

18. The Claimant's unsupported "explanation" that its continued sales after the acceleration notice were only through confirmed letters of credit also does not change the waiver discussion made above. In fact, the Claimant's continued sales to the Zamzam Companies, in spite of the difficulties of the time, reinforce the waiver argument. The change from collection drafts to confirmed letters of credit could well have been because of the 50% reduction in the concentrate price, the post-revolution chaos or the United States' trade embargo of Iran, which extended to the Claimant's wholly-owned Irish subsidiary company, Pepsi-Cola Manufacturing (Ireland) Ltd.[6] I am

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[5] Iowa, 319 N.W. 2d 515, 517 (1982), and other cases cited therein.

[6] U.S. President Executive Order No. 12170 of 14 November 1979, 44 Fed. Reg. 65729 and its Iranian Assets Control Regulation of 15 November 1979, especially (Footnote Continued)

aware of the unenforceability of such trade embargoes by courts of foreign states and particularly by international arbitral tribunals,[7] but the United States trade embargo of Iran, supported by that of the Western European allies of the United States could also sufficiently have caused the Claimant to ask for confirmed letters of credit. Even so, the evidence does not suggest that the confirming bank was non-Iranian and located outside of Iran.

19. Moreover, the schedule of due dates that the Claimant provided for calculation of interest remains problematic even for the purpose it was offered. The Claimant revised the schedule in five instances by its last pleading. (Memorandum, page 27, note 35.) Yet, if one were to accept the due dates written on the specimen drafts supplied, which in fact are missing with regard to all shipments from the Irish subsidiary of PepsiCo, the due date of 1 October 1978 for Draft No. RAS (Ireland) in the amount of $62,000 is unsubstantiated; and the due date for SHI (Ireland) in the amount of $62,000 must be 15 March 1979 rather than 16 September 1978.

20. The Claimant's documentation on receivables contains correspondence between the collecting bank and the seller

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(Footnote Continued)
subparts B, C and G on Prohibitions, General Definitions and Penalties, respectively.

[7] See e.g., Societe Fruehauf Corporation v. Massardy, (Paris Court of Appeals 22 May 1965) 1968 D.S. Jur. 147, 1965 J.C.P. II 14, 274 bis and 5 I.L.M. 476 (1966); American President Lines, Ltd. v. China Mutual Trading Co., Ltd., (Hong Kong Supreme Court) 1953 Am. Mar. Cas. 1510; ICC Arbitral Award No. 1664 (1972) by Pierre Lalive between Indian and Pakistani companies cited in J. Lew, Applicable Law in International Commercial Arbitration, Para. 419 (1978); ICC Arbitral Award No. 1399 (1966) cited in Lew, Paras. 422 and 436.

particularly in respect of the Irish invoices indicating that the shipping documents, including the bills of lading, were not received by the bank and that some drafts were due 180 days from sight rather than reflecting a fixed date. The pre- and post-revolution United States-Iranian mail service problem with regard to shipping documents, in addition to port congestion, may explain why in practice a number of extensions were usually granted beyond the 180-day period.

21. Apart from these difficulties which should have warned the Tribunal against relying on the Claimant's inflexible application of the alleged 180-day default for the acceleration, the Majority acknowledged that "the Claimant did not offer evidence which showed the exact date of arrival at the port of destination of each shipment of concentrate...." (Award, p. 28). In fact, the Claimant offered no evidence relating to any date of arrival for any of the concentrate shipments. The problem with the assertion that "during the oral proceedings the representative of the Zamzam Companies confirmed that there was no dispute about receipt, but only about the price to be paid" (Award, pp. 6 and 32) is that the said oral proceeding was a pre-hearing conference and statements by the Parties in such conferences are principally provisional in our Tribunal, which also does not make a stenographic record or tape-recording of its proceedings. Moreover, the Respondents in several subsequent written and oral pleadings denied such admission and the Claimant did not invoke such a pre-hearing conference statement as an admission by the Respondents. In fact in order to demonstrate the disputed conclusion of the concentrate sales agreements and their shipment and receipt by the Parties rather than their arrival at the port of destination, the Claimant provided a bundle of shipping documents. However, contrary to Note 2 to Article 2 and Note 3 to Article 17 of the Tribunal Rules

the Claimant submitted these documents only in English and in 4 copies, rather than in both English and Farsi and in 20 copies plus an additional 12 copies to permit service on all the arbitrating parties in the Case. Thus, none of the Zamzam Companies received a copy of the documents and did not, as they were not in a position to, comment on them. This violation of the Tribunal Rules was nevertheless tolerated only because throughout the proceedings neither the Parties nor the Tribunal conceived or alleged any relationship between these documents and the acceleration of the loans. Consequently it was highly inappropriate for the Tribunal to resolve a problem, which was neither examined by the Tribunal in the hearing nor raised by the Parties, in favour of the Claimant so onesidedly.

22. Now, even if one were to rely on the admission by the Respondent companies at the pre-hearing conference about having received some shipments of concentrate, none of these amounted to proof of the dates of arrival, which remained an evidential burden that the Claimant had to discharge. And on this, the Tribunal must be cognizant of Article 24, paragraph 1, of the Tribunal Rules, which states:

> 1. Each party shall have the burden of proving the facts relied on to support his claim or defence.

23. In the light of this provision, there was no question that the Claimant had to prove the dates of arrival of the concentrate shipments or else fail to establish that there had been default on payment within 180 days of those dates. Not having provided evidence regarding the dates of arrival, as the Majority itself noted in the Award, the logical conclusion should have been that the Claimant had not discharged its burden of proof and that,

therefore, the validity of the acceleration had not been established.

24. In substitution of such proof, the Majority relied on the "billing data sheets" and other documents and invoices submitted by the Claimant indicating the dates of shipment of the concentrate. But these documents obviously could not prove the dates of arrival and the Majority in fact recognized this deficiency. However, the Majority sought to remedy this defect, gratuitously on behalf of the Claimant and to the detriment of Respondents, by basing its decision on the following assumptions:

> Assuming that the concentrate arrived at its port of destination in Iran 30 days after its date of shipment, then each invoice involved in this Case was unpaid for more than 180 days after its arrival at its port of destination as of 20 April 1979. Indeed, even assuming that the concentrate arrived at its port of destination in Iran 60 days after its date of shipment, then all but four invoices were unpaid for more than 180 days as of 20 April 1979. Thus, the Tribunal finds that when the Claimant demanded acceleration on 20 April 1979, the Zamzam Companies were in breach of Paragraphs 3(f) and 4 of the Main Agreement, thereby entitling the Claimant to accelerate. (Award, page 28).

25. This intervention by the Majority on behalf of the Claimant and to the grave detriment of the Respondents was in direct violation of Article 24(1) of the Tribunal Rules, quoted above. It was also in violation of ordinary rules of evidence regarding discharge of the burden of proof. Since New York law was considered applicable to the transaction, it is significant to note that the basic rules regarding the burden of proof even in the United States support my dissent on this issue. A leading text on the law of evidence in the United States

explains that the burden of proof encompasses two separate burdens:

> One burden is that of producing evidence, satisfactory to the judge, of a particular fact in issue. The second is the burden of persuading the trier of fact that the alleged fact is true.[8]

26. In submitting invoices and other documents pertaining to dates of shipment, the Claimant could only be considered as having discharged its burden of producing evidence as to the shipments. But none of these items related to the dates of arrival, these dates being the material facts "relied on to support his claim" (Tribunal Rules, Article 24(1)). Thus, the relevant evidence was not submitted even to approach the threshold towards "persuading the trier of fact that the alleged fact is true". The Claimant had thus clearly failed to discharge its burden of producing evidence and of persuasion, and it was improper for the Majority to persuade itself on the basis of its own assumptions.

27. Apart from disregarding the rules of evidence, these assumptions also failed to take account of realities prevailing in Iran at the time, with regard to port congestion and other shipping and communications interruptions both before and after the Revolution. And yet, as noted above, this Tribunal has previously recognized these same facts. In the previously-cited Sea-Land Case, the Claimant attested as follows in the affidavit of one of its witnesses, Mr. Scott Palen (Exhibit 1 to Claimant's Memorial, para. 49):

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[8] McCormick on Evidence, 783-4, (E. Cleary ed., 2d ed., 1972, updated 1978).

> 49. ... By late November, 1978, the delays in Bandar Abbas meant that over 1000 container loads bound for Iran could not be delivered. Based solely on the capacity of the Sea-Land vessel that called at Bandar Abbas and the number of monthly calls that the vessel generally made, this amounted to more than a two month backup of containers. In fact, it would have taken three full months to clear such a backup because of new cargo coming into the system. (Emphasis added.)

28. In that same Case, the Claimant attested in the affidavit of Mr. Roel Bos (Exhibit 4), as follows:

> 7. . . . PSO employees, as well as customs, immigration and health officials, became increasingly unavailable, thereby preventing Sea-Land from obtaining the necessary clearances in a timely manner and completely disrupting Sea-Land's operations in Bandar Abbas. As a result, by December, 1978, the Sea Bridge was able to carry cargo into Iran at only 26% of its monthly capacity. Moreover, the disruptions interfered with Sea-Land's operations world-wide by depriving Sea-Land of access to substantial numbers of containers. To prevent further delays and get the use of its containers, Sea-Land was forced to temporarily suspend its inbound service to Iran in late November, 1978.
>
> 8. . . . Although through extraordinary efforts Sea-Land was able to continue its operations through July, 1979, from January through July, 1979 the Sea Bridge was able to carry cargo into Iran, on the average, at only 11.2% of its monthly capacity....

29. Furthermore, another American Claimant in Flexi-Van Leasing, Inc. and The Government of the Islamic Republic of Iran, Award No. 259-36-1 (11 October 1986) had attested in the affidavit of Mr. Richard Maass as follows:

> 8. In the fall of 1978, the situation in Iran changed dramatically. There were many strikes and demonstrations occurring all over the country, including Tehran and the main seaport cities of Bandar Shahpour, Khorramshahr,

> Bushere and Bandar Abbas. The strikes severely hampered port activity and disrupted shipping businesses. For example, when the customs workers went on strike, containerized cargo being brought into Iran could not clear customs and it would sit on the dock. When the port authority employees went on strike, ships could not be cleared into the harbor or into the docks. When the stevedores went on strike, ships could not be loaded or unloaded.
>
> 9. By the end of 1979, shipping activity had ground to a standstill. Ships en route to Iranian ports had to be rerouted. Most went to other ports in the Mideast where they attempted to discharge their cargo.... (Emphases added.)

30. In that same Case, which was decided concurrently with the present Case, the Claimant had filed in evidence (Doc. 102, Exhibit 1) the minutes of a meeting of 23 international container leasing companies operating at Iranian ports with major Iranian shipping companies and the Iranian Chamber of Commerce for three days ending on 2 May 1979. The minutes state the object of the meeting as follows:

> "to reach an agreement in principle on a formula whereby
>
> A. the empty containers then under control of Star Line in Iran might be returned and
>
> B. containers loaded with cargo for Iran then lying in the ports of Sharjah be released into the control of Star Line for onward shipment to Iran...."

31. In the record of that Case there was also a message, dated 18 February 1980 (Doc. 102, Exhibit 16), from Flexivan to Star Line (Tehran), Star Line (Dubai), Iran Marisco, Islamic Shipping Co. (Ali Paksima) and others expressing disappointment for nonrecovery of empty containers and that Flexivan thus found it "necessary again to place an embargo on all Flexi-Van equipment now in UAE [and elsewhere] and prohibit the removal of these

units for movement to Iran."[9] This other type of lien was put on cargoes destined for Iran during the Islamic Revolution whose starting point was marked by widespread demonstrations all over the country throughout Ramadan of 1398 AH (Mordad 1356, August 1978) which was intensified by the tragic fire of Cinema Rex of the port city of Abadan on 18 August 1978 and followed by dismissal of Prime Minister Amouzegar, his replacement by Sharif Imami, the arrest of former Prime Minister Hoveida, and on 17 September 1978 the declaration of Martial Law in all major Iranian cities.

32. In the light of the foregoing and other evidence that the Tribunal was aware of on this issue, I maintain

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[9] This message in pertinent part was as follows:

> In view of these events and our continued frustration in our efforts to remove our equipment from Iran, we find i[t] necessary again to place an embargo on all Flexi Van equipment now in the UAE and prohibit the removal of these units for movement to Iran.
>
> This restriction apples as well to those Flexi Van units loaded with telecommunications equipment which are currently in the U A E and A those units now in Antwerp, Belgium loaded with the telephone cargo.
>
> Flexi Van equipment will only be released upon delivery of all MTY Flexi Van equipment now in Iran, primarily those units in the Star Line terminal in Bandar Khomeini, as well as others scattered throughout the other parts of the country.
>
> We estimate there are approximately 596 TEU's empty available for lifting from Iran which we fully expected to lift on the vessel M/S 'Good Hope' and now are very limited as to our ability to repatriate this equipment.

that the Majority was mistaken in making the assumptions that it made regarding the supposed arrival dates of the concentrate shipments to Iran.

33. But some may argue here that the rules of municipal law on the burden of proof are not strictly binding on international tribunals. However, while international tribunals are supposed to have a wider degree of discretion than national courts in the admission and evaluation of evidence, this arose from the jurisprudence of tribunals dealing with cases between States, out of necessary deference to the sovereign interests of States and the impropriety of limiting full consideration of State claims by technical rules of evidence. It is thus less pertinent to other international tribunals such as ours which deal with claims of private parties as well. Moreover, the view expressed by a leading author on the subject, that "international tribunals have generally assumed the prerogative of determining without restrictions the weight of all evidence submitted to them" is specifically qualified as being subject to "express limitations in the arbitral agreement"[10], as it should indeed be. It is thus not appropriate in any case for an international tribunal or any adjudicatory body to decide a case or an issue merely on the basis of an "impression of truth". In fact, in one famous case the Government of the United States of America renounced an arbitral award of the United States-Mexican Mixed Claims Commission which had been given on the basis of such an impression as follows:

> The evidence on the part of the claimants is, in the Umpire's opinion of great weight; the

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10 D. Sandifer, Evidence Before International Tribunals 16 (1975).

witnesses are for the most part highly respectable men of intelligence, and their testimony bears the impress of truth."[11]

34. It turned out, after the Government of Mexico had repeatedly protested against enforcement of the Award despite its "final and conclusive character" under the governing Convention, and after the United States had eventually and reluctantly investigated the matter, that the testimony in question had been based on forged evidence. The amounts of money already paid under that Award were consequently repaid to the Government of Mexico. In fact a similar mechanism exists for returning to Bank Markazi Iran or the Depositary, the funds transferred from the Security Account to a United States claimant pursuant to an award of this Tribunal in case of "any subsequent challenge, revocation, setting aside or modification of... [that] award."[12]

35. Some may also argue that a necessary synthesis of civil law and common law principles on the burden of proof — particularly since the civil law tends to be rather less stringent than the common law on evidentiary matters — would dictate a more flexible approach than that obtaining under the common law, or under New York law which was applied by the Majority in this Case. Nevertheless, it is quite clear from the past practice of international tribunals, utilizing principles from both

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11 La Abra Silver Mining Co. Case (United States v. Mexico) H.R. Exec. Doc. No. 103, 48th Cong. 1st. Sess. 42 (1868), quoted and discussed in Sandifer, supra n. 10, p. 19, n. 48 and pp. 430-35.

12 Clauses 1(e) (iii) and (v) of the Technical Agreement of 17 August 1981 among the Escrow Agent, Depositary, Federal Reserve Bank as Fiscal Agent of the United States and Bank Markazi Iran, reprinted in 1 Iran-U.S. C.T.R. 38, 41-42.

the common law and the civil law systems, that "[i]n the absence of a specific provision in the arbitral agreement... a tribunal is under no obligation to supplement the evidence submitted. A party who fails to come forward with adequate proof of an affirmative allegation does so at his own peril."[13] The Majority was therefore not entitled to rectify the Claimant's failure to discharge its burden of proof by supplementing the inadequate evidence offered by the Claimant with its own assumptions.

36. I also disagree with the Majority in holding that the notice requirement with regard to the acceleration had been satisfied. That position was not in tune with American or for that matter New York law. As noted by the Majority, each Loan Agreement contained an acceleration clause which was conditional rather than automatic, with the following notice requirement: "after [having] been sent in writing by Registered Mail to the other party and confirmed by telex." As the Majority also noted, in case of acceleration each Loan Agreement provided for a penalty interest rate, which was actually about 17% more than where no acceleration is made. Even in case of an automatic acceleration clause some affirmative action is necessary to set in motion the clause's provisions. The American federal district court in a recent case with regard to such clauses summarized the American law as follows :

> While this clause appears to be of the automatic variety, rather than at the option of the holder, the majority of jurisdictions hold that an acceleration clause absolute in form is not self-operative, but leaves the option to the

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13 Sandifer, supra n. 10, pp. 131-2 (emphasis added).

> holder whether he will take advantage of the provision, and that without some action on his part to set the clause's provisions in motion, the full amount will not become immediately due merely on the happening of a default.
>
> * * *
>
> Stated generally, the rule is that the exercise of the option must be made in a manner so clear and unequivocal as to leave no doubt as to the holder's intention and to appraise the maker effectively of the fact that the option has been exercised. (Emphasis added.) American Jet Leasing v. Flight American Inc., 537 F. supp. 745, 748-49 (W.D. Virginia 1982).

37. As to the case of optional acceleration clauses, the American Law Reports, Annotated[14] recognizes the above statement as "well settled" in American law and cites numerous cases in support of it from various states of the United States, including New York.[15] It states that the giving of written notice of the exercise of the option is an affirmative action to constitute the acceleration but it also adds that (1) "[h]owever such notice to be effective must reach the maker.... A mere deposit in the mails [would] not, therefore, constitute a completed declaration of the maturity of the principal. The

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[14] What Is Essential to Exercise of Option to Accelerate Maturity of Bill or Note, 5 A.L.R. 2d 968-977 and 984-985.

[15] As to New York cases A.L.R. 2d cites: Quackenbush v. Mapes (1907) 54 Misc. 124, 105 N.Y.S. 654 (Mod. (1908) 123 App. Div. 242, 250, 107 N.Y.S. 1047, 1052); Candee, S. & H. Co. v. Bendish Contracting Co. (1933) 148 Misc 262, 265 N.Y.S. 737; Re Steinway (1940) 174 Misc. 554, 21 N.Y.S.2d 31; Wurzler v. Clifford (1942) 36 N.Y.S.2d 516; Duval v. Skouras (1943) 181 Misc. 651, 44 N.Y.S.2d 107 (affd. without op. (1944) 267 App. Div. 811, 46 N.Y.S.2d 888, and (1946) 270 App. Div. 841, 61 N.Y.S.2d 379). Thompson v. Willson (1944) 183 Misc. 949, Div. 829, 56 N.Y.S.2d 415, which has app. den. (1945) 269 App. Div. 937, 58 N.Y.S.2d 352).

declaration [would] not [be] complete until the notice reached the maker." (2) A mere declaration that the whole obligation was due would not be a valid exercise of an option to accelerate payment on a note. The intention to mature may be evidenced by declarations, but this declaration also does not amount to an election, for, to be effective as such, it must be followed by affirmative action towards enforcing the declared intention. While the acceleration clause is for the creditor's protection he should not be permitted to divert it to another purpose. It is to enable him to take steps to enforce payment or prevent further default, not to impose an additional interest burden upon an already distressed debtor, as the underlying loan agreements in the present Case do by providing for a highly increased interest rate at maturity.

38. The notice requirement becomes even more essential to the acceleration where the holder after his purported acceleration does not sue the maker even where the threat of suit has been made, since such declaration must be followed by affirmative action toward enforcing the declared intention. Consequently, where no suit against the maker was brought until the instant Case was filed, the circumstances would show a clear abandonment or waiver of any declared intention to take advantage of the acceleration provision.

39. As noted previously, the Claimant only sent a letter to Iradj Sabet in care of an address in Paris where he allegedly stayed at the time, not to the Iranian address, and the only place of business, of the Zamzam Company concerned. That letter stated that PepsiCo "has elected to accelerate the maturity of the Promissory Note... as a result of one or more breaches of the Main Agreement,... respective Loan Agreements..., related Promissory Notes,

and personal guarantees executed by Habib Sabet, Hormoz Sabet and yourself."

40. The Promissory Note, the Loan Agreement, the Main Agreement and the Bottling Appointment in each instance stated the place of registration and registration number of each Zamzam Company concerned, followed by the phrase "an Iranian corporation having its principal place of business in [particular Iranian city], Iran". Moreover, paragraph 26 of each Bottling Appointment provided as follows:

> 26. All notices required by the terms hereof to be in writing shall be sent by registered mail, return receipt requested, to the addresses of the respective parties hereto as set forth herein.

Needless to say that Paragraph 1 of each Bottling Appointment provided the address and number of the Zamzam Company concerned in the particular Iranian city in which it operated.

41. Clearly, the Claimant's letter was not a paragon of clarity or unequivocal language. It did not identify any particular breach and gave no details thereof. Furthermore, by sending the notice to one of the guarantors and not the maker of the note and to a wrong address even outside the corporate residence of the Zamzam Company concerned, it left grave doubt as to the "effectiveness" of the notice.

42. As to the requirement of telex confirmation of the notice, the Claimant submitted a totally non-corresponding telegram addressed to Iradj Sabet, 30 Rockefeller Plaza, New York, New York, "Re: Demand for Payment of Personal Guarantee." Obviously this telegram was neither an acceleration notice nor a confirmatory telex thereof.

As the Respondents argued, it is not implausible that the notice provision requiring confirmation by telex was intended to be communicated by Zamzam to acknowledge receipt of the notice rather than to be sent by the sender of the letter similar to tested telexes in bank transfers, given the huge amount of money involved. Even if, as the Claimant argued, the problem of postal service between the United States and Iran in April 1979 was a real difficulty, the Zamzam telex equipment worked and could easily receive the notice or its confirmation in case it had been sent via telex as provided by the acceleration provision itself.

43. Moreover, 30 Rockefeller Plaza is a huge office building of about 20 stories, each floor containing more than 100 offices. That building is not the address of one but hundreds of companies and firms. Iradj Sabet has no independent office there. Rather, Gulf Associates, Inc. in which he has certain shares maintains its offices in that building. But none of the agreements, notes or even the guarantees provided for such address or for that matter any address other than those of the Zamzam Companies in Iran, and if as alleged, the Claimant had learned that Iradj Sabet was at that time in Paris, he could not also have been in New York.

44. Paragraph 8 of each Loan Agreement stated that if the borrowing Zamzam Company or any other Zamzam Company violated any condition of the Loan Agreement:

> [T]hen, in any such event, the unpaid principal amount of the Promissory Note shall then, immediately after written notice by registered mail to the [borrowing Zamzam Company] and confirmed by telex, become due and payable, without presentment demand, protest or other notice of any kind, all of which are hereby expressly waived . . . .

Also, Paragraph 6 of each Loan Agreement provided that:

> Notices relating to the loan will be effective within ten (10) days after they have been sent in writing by Registered Mail to the other party and confirmed by telex.

45. The Claimant knew that the Zamzam Companies did not exist anywhere else but in Iran. So did the Tribunal. Nor did the Zamzam Companies conduct business anywhere else but in Iran. In fact, in the Exclusive Bottling Appointments between the Claimant and each of the Zamzam Companies, entered into in 1977, the Claimant had specifically restricted the operations of each of the companies to designated regions of Iran, and none of those companies could sell their products outside their designated territories nor export to other countries. They thus did not carry on business in any other country so as to constitute any kind of "presence", and certainly not in Paris nor in New York. Furthermore, in the long history of the business relationship between the Claimant and the Zamzam Companies, dating back to 1955 with the first Exclusive Bottling Appointment with the Zamzam Bottling Company of Iran, the Claimant's correspondence with the Iranian companies had always been addressed to their business addresses in Iran. It therefore followed by necessary implication, and considering the prior practice (course of dealing)[16] of the parties, that the contractual provisions quoted above required such notice to be sent to the Zamzam Companies in Iran.

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[16] As recognized to be applicable by the Tribunal in Economy Forms Corporation and The Government of the Islamic Republic of Iran, et al., Award No. 55-165-1 (13 June 1983) p. 14 , reprinted in 3 Iran-U.S. C.T.R. 42, 49.

46. In their desire to avoid this obvious conclusion, and in their haste to give an award, the Majority relied on one case decided in New York, without even indicating its relevance to the point at issue or producing it for evaluation in the deliberation. The Majority had "noted" that "under New York law, which governed the Loan Agreements, notice to a high-ranking corporate officer is effective notice to the corporation. See, e.g., Schoenbaum v. Firstbrook, 405 F. 2d 200 (2d Cir. 1968); N.Y. Civ. Prac. Law § 311.1." (Award, p. 30). But that was an erroneous interpretation and application of the Schoenbaum Case, which did not involve the serving of notice at all nor lay down an inflexible rule of imputability of notice that is applicable to all situations. It was likewise erroneously applied in respect of the Chairman of the Board of the Zamzam Companies, for such a person is not considered an officer of the Company under Iranian law.

47. The Schoenbaum Case was a shareholder action to invalidate sales of treasury stock of a corporation by its directors at a low price, on the grounds of fraud and deception in violation of the United States Securities and Exchange Act of 1934, in view of the directors' insider knowledge of the valuable oil properties of the corporation. The point at issue was whether the intimate knowledge of the directors, as agents of the corporation, was attributable to the corporation itself in order to make their act a corporate act and thus validate the sale. The United States Court of Appeal for the Second Circuit affirmed the decision of the lower court in upholding the sale, on the ground that the knowledge of the directors was attributable to the corporation itself. But in making that ruling, the Court also stated that "knowledge of the corporation's officers and agents is not imputed to it when there is a conflict between the interests of the officers and agents and the interests of

the corporate principal". (p. 211) Furthermore, the Court stated that "a corporation may be defrauded in a stock transaction even when all of its directors know all of the material facts, if the conflict between the interests of one or more of the directors and the interests of the corporation prevents effective transmission of material information to the corporation". (pp. 211-2, emphasis added).

48. Thus, the Schoenbaum Case does not support the proposition for which the Majority cited it. Indeed, on closer examination of that Case in relation to the facts of this Case, Schoenbaum is susceptible of a contrary proposition, namely, that where a conflict between one or more directors (in this Case, Iradj Sabet), and the particular corporation "prevents effective transmission of material information to the corporation", then the corporation can be held to have been defrauded by the act of the director in undertaking the transaction in question.

49. This alternative and, in my opinion, more accurate interpretation of Schoenbaum is also in accord with New York law on the imputability of an agent's notice or knowledge to his principal. The general rule that the knowledge of an agent is that of his principal is subject to recognized limitations and exceptions. One obvious limitation is that the rule does not apply unless the notice to, or knowledge of, the agent relates to matters within the scope of his authority. A further limitation of direct significance to this Case is expressed as follows:

> [A]s the rule is intended to protect those who exercise good faith, and not as a shield for unfair dealing or to enable third persons to use the agent to further their own frauds upon the principal, it will not apply in favour of

> one acquainted with circumstances plainly indicating that the agent would not advise his principal, as where the agent is known to be acting adversely to the principal, or where the third person seeking to charge the principal is in collusion with the agent.[17]

50. On the basis of this reasoning, there is a well-established exception to the general rule, to the effect that where the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, the notice or knowledge in question cannot be attributed to the principal.[18] The circumstances of the present Case show that Iradj Sabet had fled from Iran with no immediate prospect of his return; the Claimant was clearly aware of this, hence their mailing of the alleged notice to his alleged addresses in Paris and New York instead of the known addresses of the Zamzam Companies themselves in Iran. In these circumstances, a clear presumption certainly arose that Iradj Sabet would not communicate this alleged notice to the Zamzam Companies in Iran even if he received such notice himself.

51. Moreover, this presumption was actually borne out by the facts. First of all, it was clear that Iradj Sabet never received the alleged notice and was unaware that the Claimant had allegedly accelerated the loans on 20 April 1979. This is shown in three Claims filed by him before this Tribunal on 19 January 1982 (Case Nos. 815, 816 and 817), on behalf of his minor children Aram, Karim

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17 New York Jurisprudence 2d, § 263 (1980).

18 Carlisle v. Norris (1915) 215 N.Y. 400, 109 N.E. 564; Bertran Packing, Inc. v. Transworld Fabricators, Inc. (1975, 1st Dept.) 50 A.D. 2d 542, 375 N.Y.S. 2d 335.

and Reja Sabet, allegedly nationals of the United States, in which he seeks to recover various sums of money from the Government of the Islamic Republic of Iran, including the alleged loans made by PepsiCo to the Zamzam Companies, in indemnity for any claims PepsiCo may bring against him as guarantor of the loans. Iradj Sabet alleges as follows in paragraph 1 of Schedules 31(a) to 31(j) of each of the Statements of Claim in the three Cases, in respect of each of the borrowing Zamzam Companies:

> It is anticipated that on May 15, 1982 [the original maturity date of the loans], Borrower will default on the loan for failure to make the scheduled payment of principal. Notice of default would be given to Borrower and Claimant pursuant to the Loan Agreement. The principal of the loan, US$650,000.00, will become due and payable. If Lender is unable to collect from Borrower the amounts owed, Lender will turn to Claimant for payment of the principal, together with interest to be owed at the date of payment.

52. If Iradj Sabet had received PepsiCo's acceleration notice of 20 April 1979, either on that date or at any time in the intervening period of three years before he filed his own case on 19 January 1982, he would certainly have reflected this information in his own claim and would not have formulated the claim in the terms quoted above.

53. The other indication that the Claimant's alleged acceleration notice was never received by Iradj Sabet nor transmitted to the Zamzam Companies is the letter from the Zamzam Companies to the Claimant, dated 15 January 1980 — nine months from the date of the alleged acceleration — which stated as follows:

> In regards to the loan of $6.5 million made to the Sabets due on May 15, 1982, we advise

> PepsiCo International to accept responsibility in recovering the said loan from Sabets....

54. The notorious difficulties pertaining to service of process in New York should also have warned the Majority against coming to its quick conclusion that Iradj Sabet had in fact received the alleged notice. These difficulties are attested to, for instance, in the following extract from the Statement of Claim (pages 5-6), in Case No. A-11 before the Tribunal:

> In November of 1979, attorneys for the Islamic Republic of Iran commenced a lawsuit against the former Shah and Farah Diba Pahlavi in New York State Supreme Court, in an effort to obtain the return of the billions of dollars which had been stolen and misappropriated by the Pahlavis. To commence a lawsuit in New York State, a summons and complaint are served on the defendants in accordance with the New York Practice Law and Rules ("CPLR"), section 308.
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> At the time of the service of process, the former Shah was in New York Hospital. Despite his knowledge of the complaint and summons against him, he prevented the attorneys from delivering the summons to him through the guards and security men that he had employed to protect him.
>
> Due to the refusal of the former Shah to accept personal, in-hand service, the attorneys for the Islamic Republic of Iran were forced to apply to the New York State Supreme Court for an Order permitting "expedient service" on the former Shah pursuant to the Civil Practice Law and Rules of New York, Section 308(5). Under that section, the Court permitted to fashion any method of service which is reasonably calculated under the circumstances to [apprise] the defendants of the action brought against them. Judge Kassal of the New York State Supreme Court found that the usual method of service [was] impracticable and ordered service on the former Shah either personally at the hospital, or upon the administrator of the hospital, "in the manner as prescribed in CPLR Section 308(2) or (4)", together with certified mail delivery to Cyrus Vance, then Secretary of

State of the United States, Henry Kissinger, former Secretary of State, David Rockefeller, of the Chase Manhattan Bank, and the District Director of Immigration and Naturalization in New York.

Attorneys for Iran attempted to serve the former Shah personally at the hospital to satisfy the Order, but were once again denied access to him. Consequently, on November 30, 1979, in accordance with the Court Order, personal, in-hand service was made on the night Administrator at New York Hospital. The summons and complaint were then sent by certified mail to Cyrus Vance, Henry Kissinger, David Rockefeller, and the District Director of Immigration and Naturalization as required by the Court Order, and mailed to Mohammad Reza Pahlavi, care of New York Hospital. As an extra precaution, the papers were also mailed to the former Shah at 29 and 31 Beekman Place, where Ashraf Pahlavi, the former Shah's twin sister, and Farah Diba Pahlavi, the former Shah's wife, were living at the time....

In addition, the attorneys for the Islamic Republic of Iran also served the former Shah's personal representatives, Richard and Robert Armao, when they were at New York Hospital visiting and working for the former Shah, and mailed a copy of the summons and complaint to the place of business of the Armao's in New York City.

Farah Diba Pahlavi was served the summons and complaint by personal service to her personal guard at the dwellings owned by Ashraf Pahlavi at 29 and 31 Beekman Place, where Farah Diba Pahlavi had been living for over forty days since her arrival in the United States.

On January 10, 1980, the attorneys for the defendants Mohammad Reza Pahlavi and Farah Diba Pahlavi duly appeared and submitted a motion to dismiss the complaint. The Islamic Republic of Iran in turn submitted an Affidavit and Memorandum in Opposition to the Defendants' Motion to Dismiss on February 8, 1980. Before the Court came to a decision, the U.S. Attorney General for the Southern District of New York submitted, on behalf of the U.S. Government a request for a stay of the litigation until the Americans held in Iran were released. The Court granted the stay.

55. I would therefore maintain, on the basis of the foregoing, that the Majority's decision imputing constructive notice of the alleged acceleration to the borrowing Zamzam Companies was erroneous in point of law.

56. There is yet another ground on which this decision must be considered erroneous. In addition to the Schoenbaum Case the Majority also cited Section 311.1 of the New York Civil Practice Law and Rules to support its imputation of constructive notice to the Zamzam Companies. But here again, this rule of New York civil procedure was not relevant to the point at issue. First of all, that provision only deals with service of court process, such as writ of summons or court pleadings; it is not a substantive rule of contract or agency law. Secondly, even in relation to court process, the rule applies only to entities or corporations that are subject to the jurisdiction of the courts of New York. A leading text on the subject states as follows:

57. [T]his statute is not a jurisdiction-conferring statute, but merely directs the mode of service upon a corporation which is subject to jurisdiction in New York under one of the recognized jurisdictional predicates, e. g. defendant is a foreign corporation doing business in New York. (Emphasis added).[19]

It is therefore quite clear that the New York CPLR was inapplicable to the issue. What was involved in the notice of acceleration was not service of court process, but rather a notice invoking a substantive contractual right, as alleged. Moreover, the Zamzam Companies could not by any stretch of the imagination be said to have

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[19] McKinney's Consolidated Laws of New York Annotated, Book 7B, 214 (1972).

been doing business in New York so as to make them amenable to the jurisdictional rules of the courts of New York, such as CPLR § 311.1. Finally, it is a well-established principle of Conflict of Laws that contractual choice of law provisions relate only to the substantive law of the particular jurisdiction chosen by the parties, rather than to its rules of procedure — the latter being always the law of the forum.[20] The civil procedure rules of any country or jurisdiction whose laws are chosen as governing the contract of the parties are therefore not binding on an arbitral Tribunal.

58. Furthermore, Mr. Iradj Sabet, as Chairman of the Board of Directors of the Zamzam Companies under Iranian corporate law was not an officer of those Companies. Under Article 134 of the 1969 Commercial Code of Iran, a company director could become an officer of the company only where he is additionally commissioned to carry out the affairs of the company; otherwise he is considered as non-commissioned director and is prohibited to receive salaries although he may be paid fees for attending the Board and Shareholders Meetings.

59. Obviously, a Chairman of the Board is not the same as the President or Managing Director, although at times an individual may hold both positions. Mr. Sabet was the President of only one of the Companies. Moreover, under

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[20] See 2 Dicey and Morris on the Conflict of Laws 1175 (1980):

> "The principle that procedure is governed by the lex fori is of general application and universally admitted.... While procedure is governed by the lex fori, matters of substance are governed by the law to which the court is directed by its choice of law rule (lex causae)."

aforesaid Code Article 126 he could not concurrently occupy the presidency of more than one company. It is also axiomatic that the knowledge of one company is not imputable to another in particular where they are neither in a parent-subsidiary or other affiliation relationship but only have certain common shareholders.

60. I therefore maintain that, on the facts of this Case, and even considering New York law or the law of the United States, the Claimant's alleged notice to Iradj Sabet did not constitute a good faith demand, this notice not having been transmitted to the companies either by the Claimant or by Iradj Sabet.

3. Merits

a) The claim for accounts receivable

61. The Claimant sought the sum of $3,348,000 with interest, from the Respondents as accounts receivable on sales of concentrate to the Zamzam Companies for which they were never paid. To prove its claim, the Claimant pieced together copies of specimen collection drafts drawn by PepsiCo Puerto Rico or PepsiCo Ireland against Zamzam Companies as drawees with dates of issue. The originals of these drafts allegedly had been sent for collection to Bank Saderat Iran who more appropriately must have been the sole respondent. Recognizing the weaknesses of the evidence, the Claimant ascribed to these drafts a subordinate evidentiary role of only proving the amounts claimed and the due dates. It is difficult to imagine how the drafts could fulfill even such a modified role because none of them could be taken as proving that the amounts of concentrate written on them were actually received by the Respondents.

62. The Respondents maintained throughout the proceedings before the Tribunal that they never accepted the said drafts and that the drafts were moreover drawn in violation of the formalities required by the Geneva Convention of 1930.

63. The Claimant's attempt to bolster its weak evidence by basing its claim not "on the drafts, but rather on the purchase orders and the shipment" of the concentrate in C and F sales destination Iranian port was hardly satisfactory. The Claimant did not offer any evidence of the delivery nor receipt of the concentrate by the Zamzam Companies. Rather they turned to the same letter of 15 January 1980, written by Mr. Tabatabaie, then managing director of the Zamzam Company, Tehran, in which he indicated the preparedness of the purchasing Zamzam Companies to pay for the unpaid concentrate sold by PepsiCo, Inc. The Majority further relied on the alleged admission by an official of the Zamzam Companies at the pre-hearing conference that "there was no dispute about receipt but only about the price to be paid".

64. As to the first, Respondents explained that no reliance could be placed on that letter because it was transmitted during settlement negotiations between the parties. In a circular and conclusory manner and with no justification the Majority considered the letter as a normal business communication thereby dismissing the objection. The Majority did not state the factors on the basis of which it found that the letter was a normal business communication acknowledging the current status of outstanding accounts. In January 1980, at the height of the crisis between the two countries, coupled with the blocking of all Iranian assets in the United States and abroad and imposition of the severest trade embargo against Iran, no prudent businessman in charge of an expropriated company would have so acknowledged $3.5

million in debt to a creditor. As a matter of fact the negotiating character of the statement is clear from its use of the phrases: "Following our discussions," "I acknowledge in principle," and "concentrate portion of the debts", in the following statement quoted by the Majority (Award, p.33):

> "Following our discussions pertaining to the outstanding debts between PepsiCo Inc, and Zam Zam Bottling Companies. In my capacity as Managing Director of ZZBCo, I acknowledge, in principle, Zam Zam's obligation to repay the concentrate portion of the debts, amounting to approx. $3.5 MM."

65. A closer look at the entirety of the above quotation indicates that the letter was part of the negotiation of other claims of PepsiCo, namely the loans which it was expected to forgo by the acknowledgement and payment of the concentrate claim. This was evidenced by the Minutes of a meeting of 6 September 1981 between the Parties, and the Claimant's letter of 14 October 1981 which stated that "our Company would be prepared to withdraw these [concentrate and loan] claims [plus interest] if ZZBC were to remit $3.5 million (in hard currency) prior to December 31, 1981."

66. The Tribunal should have accepted all three documents because there exists neither a rule of international law nor a general principle of law recognized by civilized nations to exclude the documents. The Majority did not even contend that any such rule or principle exists, let alone substantiating such assertion. Even if one were to accept that an international arbitral tribunal must exclude statements and documents produced during settlement negotiation one has to do so even-handedly. Quite unfairly however, the Majority excluded the Minutes of 6 September 1981 and the Claimant's letter of 14 October 1981 as reflecting negotiation of

settlement terms while the same Majority admitted Mr. Tabatabaie's letter of 15 July 1980 as it is not an offer of settlement. These two criteria are contradictory in many instances including the one at issue here.

67. International law lacks any particular rule on this delicate issue and municipal law is quite divergent even in the few countries having definite rules or practices on it. If it could have been demonstrated that an international law rule exists that requires exclusion of evidence of negotiation of settlement, the Tribunal should have applied it to all statements made in settlement negotiation rather than having involved itself in examining each statement and to exclude only the offers of compromise. The latter approach, which the Tribunal apparently adopted here, has serious drawbacks and tends to discourage freedom of communication in attempting a compromise or settlement and involves difficulties of application. As a result, even under American law, "the trend is to extend the protection [i.e. exclusion] to all statements in compromise negotiations."[21]

68. As to the second, it is surprising that the Majority opinion is built on a chance remark uttered during an oral pre-hearing conference in a context in which the speaker seemed more intent on building up the Respondents' counterclaim than on anything else. The Claimant never invoked this chance remark in its later written pleadings or the final hearing, needless to note that at any rate the Respondents completely denied receipt of the concentrates in their written pleadings subsequent to the pre-hearing conference.

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[21] McCormick On Evidence, supra n. 8, p. 664, citing the United States Federal Rules of Evidence, §408.

69. Clearly, in this Tribunal, as in any international arbitral tribunal, the elementary principles of evidence must be respected. As explained above in relation to the acceleration of the loans, there is no doubt, and it is in fact axiomatic, that in the claim for accounts receivable, the Claimant must satisfy the burden of proving its claim. By no stretch of imagination can one accept the pieces of evidence adduced by the Claimant in this Case as supporting its claim for $3,348,000. In the circumstances, the claim should have been rejected for lack of proof. At the least, as explained in my Declaration filed on 27 October 1986 in this Case, the Majority should have acceded to the request made by the Respondents for appointment of an expert and for submission of further documents by the Claimants.

70. Moreover, under the same subsection 3(a) the Majority dismissed as not sufficiently explained or substantiated, the Zamzam Companies' assertion of inability to pay at the time, due to the force majeure conditions the United States blockade of Iranian dollar assets and other properties created with respect to the availability of dollars. Since this issue had also been raised with respect to payment of the loans and interest thereon, it will be treated below, under subsection 3(b)(i).

i) The price of the concentrate

71. The Respondents had raised questions regarding the validity of the pricing provisions in the Bottling Appointments, under which Pepsi-Cola concentrate was sold to the companies "at a price established by the seller from time to time." The Claimant had fixed a price of $310 per unit which had governed all the concentrate sales until it reduced the price by 50% after September 1980, rather than after the Islamic Revolution in February 1979 that the Majority intends to convey.

72. In dealing with this issue, the Majority began with a summary statement that it "found no evidence in the record that would establish any overcharging by the Claimant." (Award, p. 33). This is completely unacceptable, because the Respondents had in their pleadings submitted a large amount of documentary evidence showing that the $310 per unit of concentrate charged by PepsiCo was far in excess of the price charged for comparable cola concentrate by Austrian, Belgian, and Japanese suppliers.

73. In addition to many PepsiCo invoices of cola concentrate sold to Zamzam Companies for $155 unit price from September 1980 to September 1981, the evidence included the following samples of invoices for sales to Zamzam and other Iranian bottling companies of comparable units of cola concentrate, including necessary adjustments to make each unit equivalent to that of PepsiCo involved in this Case, i.e., for producing 1500 cases of 24 bottles of 10 Imperial ounzes each:

Universal Flavors (Belgium)	FOB	BF	3243.8	= US$65
Perlarom (Belgium)	FOB	DM	206	= US$86
Akras (Austria)	C&F	OS	1460	= US$97
Coca Cola (West Germany)	C&F	DM	310	= US$146
Tagazago (Japan, Pepsi-Cola)	FOB	Y	35580	= US$149.30
Tama (Japan, Pepsi-Cola)	FOB	Y	35580	= US$149.30

74. A comparison of the price of Pepsi-Cola concentrate formerly sold to the Zamzam Companies at C&F $310 per unit, FOB $302, with above prices results in more than 100% overpricing by Pepsico. Since Zamzam Companies bought $6,000,000 of concentrate annually, even a 20% price reduction would amount to $1,200,000 savings for the Zamzams, under much better credit terms than payment in 180 days from delivery at the Iranian part of entry. In fact, by the end of June 1978 the Sabets themselves

were becoming suspicious of their being overcharged by PepsiCo, as they began to collect price quotations from Universal Flavors, I.F.F. and Naden of Holland. The Sabets were also realizing why PepsiCo was anxious to sell them more and more concentrate and was pushing them to put in more capital in the Zamzams enabling PepsiCo to increase its sales whether or not it was beneficial to the Zamzam Companies. But the onset of the Islamic Revolution which affected the Sabets and Zamzam Companies earlier and more severly than others did not allow them to complete their price survey.

75. This evidence together with the many PepsiCo invoices for $155 unit price clearly demonstrates that there was considerable overcharging by the Claimant and that the Tribunal was blind to the record where it stated that it "found no evidence on the record." If the determination of the exact market price and thus the exact quantum of the whole overcharge for the relevant period was a question for it, the Tribunal must have appointed an accounting expert to advise it of the matter under Article 27 of the Tribunal Rules. Moreover, the Zamzam Companies had also requested the appointment of an expert on this point.

76. The Majority's sweeping statement as to lack of evidence for the Respondents' allegation of overcharging is even more objectionable when compared to the Tribunal's thorough examination of the Claimant's allegation of quality control violations. (Award, pp. 25-26.) It is expected of the Tribunal to examine the allegations of both parties with equal care and diligence.

77. The summary dismissal of the counterclaim was thus erroneous even in light of the laws of the United States, which the Majority apparently applied to this part of the

Case as well. It is established doctrine in this area of the law that:

> When a party asserts unconscionability of a clause or of the whole contract, this claim raises an issue which is to be tried by the court. This is an issue of law on which the court must take evidence; it may not be decided on summary judgment but only on a hearing at which each party is given a reasonable opportunity to present evidence bearing on the question.[22]

78. The Tribunal thus had the obligation as a matter of law to examine the issue and to give each party a reasonable opportunity to present evidence on the issue. But while it ignored the Respondents' evidence on the issue, the Majority also denied the Respondents' request that the Claimant be ordered to produce evidence on the concentrate prices used in its other transactions, which would also have shown that the Claimant charged the Respondents more than twice its usual price for such concentrates.

79. It is also clear that under Iranian law, Civil Code Articles 416 to 421, entitled Option of Loss, a party to a transaction has the option to cancel the transaction or to claim refund of the difference in price, if he suffers a gross loss from such transaction. Article 417 defines gross loss as "one which amounts to one fifth of the consideration or more; if the loss is less than this in amount, it is still 'gross' if in accordance with common usage it is not susceptible of being overlooked." PepsiCo's overcharging for the concentrate sales, to the

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[22] See, Vener, Unconscionable Terms and Penalty Clauses: A Review of Cases under Article 2 of the Uniform Commercial Code, Commercial Law Journal 403, 408 (October 1984), and cases cited therein.

extent of over 100% is clearly more than enough to bring it within the definition of "gross loss."

80. The Claimant is wrong in arguing that the option to rescind the transaction due to overcharging is the only remedy and that such option must be exercised within one year. Article 421 of the Civil Code is in fact based on the buyer's option to maintain the sale and to seek refund for the price difference where an overpricing occurs. That Article states: "If the [seller]...pays the price difference, the option of loss does not extinguish unless the [buyer]... agrees to receive the price difference."

81. The one year limitation also runs not from the transaction date but from the date the buyer becomes aware that he has been overcharged. Where the plea of overcharging is raised it is on the seller to establish the earlier date of the buyer's knowledge of the market price.[23] Moreover, such time limitation does not operate where the remedy is sought by Way of counterclaim. Article 744 of the Iranian Civil Procedure Code provides: "In counterclaims, if the statute of limitation period has expired, the counterclaimant is entitled to raise the counterclaim within the period allowed for instituting counterclaims."

82. The majority is wrong in stating that only when the Zamzam Companies came under new management following the Islamic Revolution was there insistence that the price be reduced to $155 per unit, that the Claimant's subsequent price reduction did not demonstrate that the earlier

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[23] Dr. S. H. Emami, I Civil Law 498 (6th ed. 1978).

price was not a fair market price, and that the statements on the $155 invoices that they represented the "actual export market value price" were accurate and reflected the changed market conditions at the time of those sales.

83. As demonstrated above, since July 1978 the Sabets were attempting a market survey as they suspected PepsiCo of overchanging. The $155 per unit sales only started in September 1980 although the Majority found that Zamzam Companies came under new management in May 1979. The time difference together with the Sabets' earlier suspicion of overcharging and compeletion of their market survey by the new management are sufficient reasons that the principal, if not the only, factor for the price reduction was as much the Zamzam Companies' business judgment as that of PepsiCo's in view of the real fair market price for comparable cola concentrate. Bargaining on the basis of equal knowledge as to real market price is no change in market conditions.

84. The statements on the invoices that the unit price charged represented the "actual export market value price" were not limited to the $155 unit price invoice but also indicated in the $310 invoice. Nor were such statements casual but began with "I" or "We hereby swear and declare". They were also followed by "and accept full responsibility for any inaccuracies or errors therein."

85. The Majority did not grasp the significance of these statements carried on both types of the invoices as it felt that they reflected only on the $155 invoices. Under Iranian law in addition to the Civil Code, overcharging and transfer pricing are prohibited and punishable pursuant to the General Penal Code and a

number of other penal acts.[24] The 1925 General Penal Code Article 242, as amended, states:

> 242. Any person who.... by purchasing of goods at a price higher than that prevailing among sellers, or by conspiracy and combination among owners increases or decreases the price of goods, merchandise, drafts, shares and the like above the fair market price shall be condemned to [manslaughter] imprisonment from [61 days to 3 years] and to payment of fine from Rials [5001] to Rials [30,000] or to either of these two punishments.[25]

86. The reliance of Zamzam Companies on the Claimant's attestation was therefore of considerable significance and the Majority should not have dismissed it so precipitatiously.

87. Instead of examining the Respondents' evidence, or ordering the Claimant to disclose the prices from their other transactions, the Majority stated that if found "no evidence in the record that would establish any over-charging by the Claimant" and emphasized that "the price

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- 1971 Organization of Guilds Act
- 1973 Act for the punishment of violators of the Organization of Guilds Act
- 1973 Act and Executive Regulation for Oraganizing the Distribution of Public Necessity Goods and Punishment of Hoarders and Overchargers.
- 1943 Act for the Punishment of Merchants and Sellers hoarding or overcharging their Goods
- 1942 Prevention of Hoarding Act

25 Pursuant to Articles 9 and 11 of the 1973 amendments to the General Penal Code.

of $310 per unit was accepted by the Zamzam Companies for a number of years". (Award, p. 34). But this in itself does not preclude the possibility of overcharging, for in all situations where such unconscionability through overcharging is asserted, the contract or provision in question had previously been "accepted" by the party questioning it. In spite of such supposed acceptance, the law of New York and the United States, which was in the Majority's view apparently applicable here, nevertheless entitles the party to contest the validity of the contract or provision. Besides, given the fact that the Sabets and their companies relied so heavily on the Claimant to carry out their business ventures, one could not really attach much weight to their "acceptance" of the terms dictated by the Claimant.

88. The Majority was also persuaded by the Claimant's explanation, in respect of the subsequent price reduction, that "it made a business decision to sell for the time being at the lower price since the alternative in the prevailing circumstances was to give up a market it had developed over a long period." (Award, p. 34). The Majority therefore summarily dismissed the Respondents' assertions regarding the unconscionable nature of the pricing provisions.

89. Why the Majority adopted this attitude to such a fundamental issue is open to conjecture. It is said that "a practice that disregards available means of resolving hotly contested questions of facts is not one calculated to inspire the confidence of prospective litigants in international tribunals".[26]

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[26] Sandifer, Supra n. 10, p. 335.

90. Having dismissed the Respondent's counterclaim in the above circumstances — a position that I find objectionable — the Tribunal did not therefore consider the jurisdictional objections raised by the Claimant. However, it is fundamental that the jurisdictional issue should be examined and decided upon first, because otherwise not only would there have been no basis for ruling on the merits but also by dismissal of the counterclaim the Tribunal would have wrongly prejudiced adjudication of the counterclaim before competent fora. But this is exactly what the Tribunal did in this Case.

91. Firstly, the Claimant was wrong in arguing that the counterclaim related only to the delivery of concentrate prior to mid 1978 for which it was paid, and that the claim was for the delivery of unpaid concentrate. The counterclaim covered all concentrate sold at $310 per unit from 1974 to mid 1980, including for the unpaid units. Understandably the counterclaim for the unpaid units was purely a defence on the quantum of the compensation payable in the event the Claimant was successful. However, as far as jurisdiction was concerned, it is axiomatic that the Tribunal had jurisdiction over the counterclaim for sales from 1 March 1977 to mid-1980, as such sales were based on the Exclusive Bottling Appointments concluded on 1 March 1977.

92. Secondly, with regard to the pre-1 March 1977 sales, it should be noted at the outset that all the concentrate sales were based on the same franchise arrangement between PepsiCo and Zamzam Companies. The 1 March 1977 modifications did not change the nature of the relationship that began since 1954. (See Award, pp. 5 and 6). The Zamzam Companies chose 1974 since from that date the Claimant charged $310 under virtually the same arrangements as those subsequent to 1 March 1977. If one was of the view that despite the Claimant's admission the

pre-March 1977 arrangement had not been sufficiently established, at least one would readily agree to the assertion of jurisdiction for the post-March 1977 period. But the Majority was ready to do none of these for no justifiable reason other than that the counterclaim failed on the merits in any event. This is most unacceptable. Moreover, as the Tribunal stated in an earlier Case, "it can doubtless be argued that, in a case where a prolonged or complex business transaction results in several contracts, a counterclaim should be within our jurisdiction even if it arises from a different one of those contracts than the one on which the claim was based, because both arise from the same transaction."[27]

93. Furthermore, an examination of the judicial approach in the Claimant's own legal system points clearly to the conclusion that there was no merit to the Claimant's jurisdictional objections. These objections should therefore have been dismissed. A significant source of guidance in construing the "same contract, transaction or occurrence" language in the Claims Settlement Declaration is the Federal Rules of Civil Procedure of the United States, which contains similar language in its Rule 13(a). That provision reads:

> Rule 13. Counterclaim and Cross-Claim
> "(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim...."

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[27] Owens-Corning Fiberglass Corp. and The Government of Iran, et al., ITL 18-113-2 (13 May 1983) p. 5, reprinted in 2 Iran-U.S. C.T.R. 322, 324.

This language is nearly identical to that used in the Claims Settlement Declaration. The similarity suggests that the counterclaim provision in the Declaration was intentionally patterned after the Federal Rules, and that it should be interpreted similarly.

94. Of course it is within a Party's discretion to decide whether to bring any particular counterclaim before this Tribunal or to pursue it elsewhere. But once it was brought before the Tribunal, there are established legal principles which govern the treatment of the counterclaim. Under the American law, there are counterclaims which are compulsory because they are so closely related to the main claim that they cannot be treated separately, while others are considered to be permissive only. Likewise in this Tribunal, jurisdiction over counterclaims may be compulsory or exclusive in some cases, but permissive or non-exclusive in others. But even where the Tribunal has considered its jurisdiction over a counterclaim to be non-exclusive, it has still restrained the party concerned from pursuing a counterclaim in a different forum until the main claim brought before it was decided. See the E-Systems Case.[28] In that Case, in which the American claimant sought to prevent the Respondents from pursuing their own claim in Iran on the basis of the same contract that the claimant had sued upon before the Tribunal, the Full Tribunal addressed the Tribunal's jurisdiction over counterclaims as follows:

> "The provision in Article VII, paragraph 2, of the Claims Settlement Declaration that claims referred to the Tribunal shall, as of

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[28] E-Systems, Inc., and The Islamic Republic of Iran, et al., Award No. ITM 13-388-FT (4 February 1983), p. 9, reprinted in 2 Iran-U.S. C.T.R. 51, 56.

> the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court, is in accordance with its wording applicable only to claims that are already before the Tribunal. Consequently, it follows from this provision that once a counterclaim has been initiated before the Tribunal such claim is excluded from the jurisdiction of any other court, but it cannot be deduced from this provision that the Tribunal's jurisdiction over any counterclaim is of an exclusive nature.
>
> Consequently, the wording of the Algiers Declarations does not support the argument that the Tribunal's jurisdiction over Iran's counterclaims is exclusive. No other evidence has been submitted to demonstrate that the two Governments intended to confer on the Tribunal exclusive jurisdiction over counterclaims.
>
> In support of the argument that litigation before other fora on the merits of claims before the Tribunal would be inconsistent with the 'final and binding' character of the Tribunal's decisions E-Systems has referred to Article IV, paragraph 1, of the Claims Settlement Declaration, which provides that '(a)ll decisions and awards of the Tribunal shall be final and binding'. Furthermore, E-Systems has also referred to paragraph 3 of the same Article which provides that '(a)ny award which the Tribunal may render against either Government shall be enforceable against such Government in the courts of any nation...'
>
> However, none of these provisions indicate necessarily that the two Governments intended to confer on the Tribunal exclusive jurisdiction over counterclaims."

95. In the United States, the courts have generally read the Rule 13(a) language liberally. See generally 6 Wright & Miller §1410 at p. 40; 3 Moore's Federal Practice §13.13 at p. 13-303. For example, in the leading compulsory counterclaim decision, Moore v. New York Cotton Exchange, 270 U.S. 593 (1926), the president of the "Odd-Lot Cotton Exchange" brought an antitrust claim based on the defendant's refusal to provide him with the

same ticker tape service as defendent provided for others. The defendant counterclaimed for an injunction against the plaintiff's alleged use of exchange quotations without permission. The United States Supreme Court held, under a predecessor to Rule 13(a), that the counterclaim was compulsory, noting that:

> "Transaction is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraced additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule [compulsory counterclaim provision of Rule 13's predecessor] of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim." Id., at 610.

96. The rule under which the Moore Case was decided made compulsory any counterclaim "arising out of the transaction which is the subject matter of the suit." The phrase "transaction or occurrence" suggests that rule 13(a), if anything, is broader in scope than the rule prevailing when Moore was decided. See 3 Moore's Federal Practice §13.13 at 13-298. Similarly, the phrase "contract, transaction or occurrence" suggests that the Claims Settlement Declaration is even broader still.

97. The lower federal courts in the United States have found counterclaims to be compulsory in a variety of circumstances, including the following examples. In a shipper's claim for freight charges, a counterclaim for damages to the goods shipped is compulsory. See, e.g., Eastern Transp. Co. v. United States, 159 F. 2d 349 (2d Cir. 1947). In an action for wrongful ouster by the purported owner of certain mining claims, the assertion of adverse claims to the property has been treated as setting forth a compulsory counterclaim. Arizona Lead Mines, Inc. v. Sullivan Mining Co., 3 F.R.D. 135 (D.C. Idaho 1943). In a client's suit for an accounting, an attorney's counterclaim for fees above the money already withheld is compulsory. Ake v. Chancey, 149 F. 2d 310 (5th Cir. 1945). In a default action for nonpayment of rent, a lessee's claim for damages based on breach of the lease and fraud in its inducement is compulsory. National Equip. Rental, Ltd. v. Fowler, 287 F.2d. 43 (2d Cir. 1961). In seller's action to recover on a note and to foreclose a mortgage, a counterclaim to rescind the note and mortgage on the ground of fraudulent inducement is compulsory. A.D. Smith Corp. v. Applewhite, 225 F. Supp. 785 (D.C. Tex. 1965), aff'd on other grounds sub nom.; H.L.Peterson Co. v. Applewhite, 383 F. 2d 430 (5th Cir. 1967). In a breach of contract action, a counterclaim for overpayment or for return of money paid is compulsory. Stiers Bros. Constr. Co., v. Broderick, 60 F. Supp. 792 (D.C. Kan. 1945); Audi Vision Inc. v. RCA Mfg. Co., 136 F. 2d 621 (2d Cir. 1943).

98. It may also be noted that cases failing the same transaction/occurrence test are the exception rather than the rule, and are often easily distinguishable from more favorable authority. For example, there are some patent infringement cases in which courts have found counterclaims under the antitrust laws to be permissive rather than compulsory. See generally 3 Moore's Federal

Practice §13.13 n. 22. But these cases all stem from one unfortunate and much criticized dicta in an old, but not yet expressly limited Supreme Court case, Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944). For criticism, see 6 Wright & Miller §1412, especially at pp. 63-64.

99. Under American law a second and related point concerns the posture of the case in which "compulsoriness" (i.e. "transaction or occurrence") is at issue. Basically, there are two types of Rule 13(a) cases. In one, the defendant asserts a counterclaim in the same case in which plaintiff brings a claim. "Compulsoriness" becomes an issue when the counterclaim is not of a type that an American federal court could hear standing alone. If the counterclaim is found to be sufficiently related to the plaintiff's claim to be "compulsory", however, then it is within the court's "ancillary" jurisdiction and may be heard along with the plaintiff's claim. In these cases, defendants want to have their counterclaims treated as compulsory; the economy of adjudicating related claims in a single action favors treating them as such; and courts usually read the "transaction or occurrence" language broadly enough to do so.

100. In the second type of Rule 13(a) cases, the defendant in a prior action did not assert a counterclaim he might have had against the plaintiff. When he tries to bring it against the original plaintiff in a later action, the plaintiff argues that the claim was compulsory in the first action and therefore cannot be brought in the second. Loss of the claim in this way is precisely the sanction Rule 13(a) was designed to attach to a defendant's unexcused failure to assert it in the first action. See 6 Wright & Miller §1409 at 37. Nevertheless, it is almost an unwritten rule that courts will construe the transaction/occurrence language more

narrowly in this context because they do not want to see people lose valid claims for technical reasons. See 6 Wright & Miller §1410 at 54. Many of the cases which may be used to support a narrow reading of the Rule 13(a) language are likely to arise in this context. However, the more persuasive cases are those arising in the other context — namely, cases where the consequence of meeting the transaction/occurrence test is that the court hears rather than dismisses the claim. Indeed, the very tendency of U.S. courts to construe the test narrowly in the subsequent action setting, which reflects a desire not to foreclose substantively valid claims, itself argues for a liberal reading of the Declaration's counterclaim provision.

101. Third, a number of attempts have been made to reformulate the "transaction or occurrence" language into more functional "tests" of what is and what is not a compulsory counterclaim. The Wright & Miller treatise singles out four of these: (1) the similarity of the factual and legal issues raised by the claim and counterclaim; (2) the applicability of "res judicata" doctrines to bar a subsequently asserted "counterclaim" absent Rule 13; (3) the similarity of evidence needed to establish or rebut the claim and counterclaim; and (4) the existence of a "logical relation" between the claim and the counterclaim. 6 Wright & Miller §1410 at 42. The treatise criticizes the first three tests, and implies that the fourth, because of its flexibility, is the most satisfactory. "In any event," the treatise observes, "the logical relation test has by far the widest acceptance among the courts." 6 Wright & Miller §1410 at 48.

102. It is hardly surprising that the "logical relation" test is the most flexible of the four tests, since it is — like the language it seeks to interpret — the most vague. The treatise and some of the cases suggest that

this test makes compulsory "any counterclaim that from an economy or efficiency perspective could be profitably tried with the main claim." 6 Wright & Miller §1410 at 47. In United Artists Corp. v. Masterpiece Productions, Inc., 221 F. 2d 213, 216 (2d Cir. 1955), the court stated:

> "The phrase 'logical relationship' is given meaning by the purpose of the rule which it was designed to implement. Thus, a counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Where multiple claims involve many of the same factual issues, or the same factual and legal issues, or where they are off-shoots of the same basic controversy between the parties, fairness and considerations of convenience and economy require that the counterclaimant be permitted to maintain his cause of action."

103. I believe that this policy of economy coupled with fairness in view of the operation of the Security Account in favor of U.S. claimants should be even stronger in this Tribunal than in U.S. federal courts, because denial of a counterclaim would force the Iranian party concerned virtually to forgo its claim due to difficulty of bringing a separate action in another legal system at a time of war and civil strife. When a U.S. court denies a counterclaim the defendant is forced to bring a second action in the same legal system. Rule 13(a)'s basic purpose is to encourage the litigation of related claims in a single forum to minimize the costs to litigants and tribunals of resolving disputes. These goals suggest that Article II, para. 1 of Claims Settlement Declarations, much like Rule 13(a), should be read properly when a party seeks to assert a counterclaim.

104. Apart from the above, counterclaims could be adopted by the Tribunal as part of a party's defence, since neither the Claims Settlement Declaration nor the Tribunal Rules involve any restriction for a defence as compared with counterclaims.[29]

105. In addition to the price-fixing and overcharging aspect of the Case, the Tribunal should also have dealt with the Claimant's unfair trade practices and violation of the anti-trust laws of the United States through several restrictions including the territorial restrictions and division of markets it had imposed on the Zamzam Companies. In the Exclusive Bottling Appointments with each of the Zamzam Companies, the Claimant had divided up Iranian territory into particular marketing areas and allocated each area to each of the Zamzam Companies. The Claimant also restricted the operations of each of the Companies to its allocated area, and prohibited them from selling their products outside such areas and from exporting to other countries, including the United States. This division of markets arguably constituted a violation of the anti-trust laws of the United States, which must be deemed to apply as well since the Majority apparently considered United States law as applicable. Apart from these restrictions, one of the significant tying arrangements was the provision for

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[29] Although I distinguish between a defence and a claim for set-off even the interpretation of Tribunal Rules Article 19, paragraph 3 by Chamber One in its new composition does not appose the above view. It stated that it had jurisdiction over the counterclaim, although not based on the same contract, but rather the same transaction or occurrence. However it found that as the issue was a tax matter that could not be applied extraterritorially it lacked jurisdiction over the tax counterclaim. Computer Science Corporation and The Government of the Islamic Republic of Iran, et al., Award No. 221-65-1 (16 April 1986) pp. 54-55.

the acceleration of the loans with a burdensome penalty interest clause in the event of any violation of the Exclusive Bottling Appointments by any of the Zamzam Companies.

106. As to the unfair trade practices and division of markets, it is well established under U.S. anti-trust law that a division of markets cannot be justified by the monopoly rights conferred by patents or trademarks.[30] In one leading case decided by the U.S. Supreme Court in this area, the defendant had sought to justify the division of U.S. and foreign markets for anti-friction bearings amongst its affiliates, on the argument that this was an ancillary right to the licensing of its trademark. The Supreme Court rejected this argument, and held that "while a trade mark merely affords protection to a name, the agreement in the present case went far beyond protection of the name 'Timken' and provided for control of the manufacture and sale of anti-friction bearings whether carrying the mark or not," and further that "a trademark cannot be legally used as a device for Sherman Act violation." See U.S. v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), modified and aff'd, 341 U.S. 593, at 598-599; 71 S.Ct. 971; 95 L.Ed. 1199 (1951).

107. This decision has been followed in many anti-cartel and market-allocation cases, such as U.S. v. Bayer & Co. Inc., 135 F. Supp. 645 (S.D.N.Y. 1955), in which the District Court for the Southern District of New York held that a division of world markets could not be justified by trademark licences, and that the provisions for a

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[30] See generally, W. Fugate, Foreign Commerce and the Antitrust Laws (1982, updated 1984), especially volume II, chapters 8 &9.

division of market territories were not severable from the trademark and royalty provisions of the licensing agreements. See also, American Saf. Equip. Corp. v. J.P. McGuire & Co., 391 F. 2d 821 (2d Cir. 1968); Redd v. Shell Oil Co., 524 F. 2d 1054 (10th Cir. 1975), cert. denied, 425 U.S. 912 (1975). Similarly, in the present Case, the Claimant's unfair trade practices, division of markets in Iran, and its restrictions on the Zamzam Companies' freedom to export their products, went far beyond the Claimant's trademark and licensing rights and were in violation of U.S. anti-trust laws.

108. As to the tying arrangements, it is to be noted that, apart from forcing the Zamzams to use bottling machines from PepsiCo and to buy PepsiCo concentrate at highly inflated prices which were more than 100% higher than normal, the Zamzams were forced to continue purchases of PepsiCo concentrate and to pay those highly inflated prices against their will because of the tying condition which enabled PepsiCo to accelerate the loans if they defaulted in paying those prices. Thus even though the Sabets themselves realized that the prices were too high, they could not avoid paying them because of the threat that the loans would be accelerated. This kind of tying arrangement is even more objectionable than some other kinds which have been held to be in violation of U.S. antitrust laws.[31]

109. Thus, in a number of patent-infringement cases the U.S. Supreme Court has refused to allow recovery where the lessor of patented salt-dispensing machines leased the machines for use only with salt purchased from the

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[31] See Fugate, §4.17, 8.16 and 13.6 supra n.30; see also, L. Sullivan, Antitrust, §152 at 434 (1977).

lessor: International Salt Co. v. U.S., 332 U.S. 392, 68 S.Ct. 12, 92 L. Ed. 20 (1947). Another case is Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 37 S.Ct. 416, 61 L. Ed. 871 (1917), where movie projectors were licensed on condition that the licensor's films be used. Similarly, in U.S. v. Loew's Inc., 371 U.S. 38, 83 S. Ct. 97, 9 L.Ed. 2d 11 (1962), the Supreme Court invalidated tying arrangements under which copyrighted movies were licenced to television stations only in packages, thus restricting the licencees' right to choose. Also, in Fortner Enterprises, Inc., v. U.S. Steel Corp., 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969), cert. denied 406 U.S. 919, 92 S. Ct. 1773, 32 L. Ed. 2d 119 (1972), the Supreme Court reversed a summary judgment of a lower court which had upheld the defendant's use of loan arrangements as a tying device to sell its prefabricated houses. In franchise arrangements in foreign countries, such as those involved in the present Case, these precedents would govern where substantial trading outlets were closed to other U.S. competitors.

b) The claim for repayment of the loans

110. In addition to disputing the acceleration of the loans, as discussed above, the Respondents had questioned the corporate nature of the loans, arguing that they were instead personal loans to the Sabet family. For instance, in the letter from Mr. Tabatabaie to the Claimant dated 15 January 1980, the point was raised that:

> In regards to the loan of $6.5m made to the Sabets due on May 15, 1982, we advise PepsiCo International to accept responsibility in recovering the said loan from Sabets. In case PepsiCo International thinks otherwise, kindly provide us with the necessary evidences and reasons for our involvement.

111. This letter does not only explicitly negate the existence of any corporate loans, but it also indicates that as at 15 January 1980 the Zamzam Companies had no information that the maturity of the loans had allegedly been accelerated on 20 April 1979. The features of the loan agreements that indicated that they were personal loans to the Sabets, rather than corporate loans to the Zamzam Companies, included:

1) The fact that they were signed in the first instance by the Sabets themselves, although allegedly as "Guarantors" rather than principals;

2) The fact that the additional signatures of the Sabets, allegedly on behalf of the companies did not conform to the requirements of Iranian corporate law;

3) The fact that the additional signatures of the shareholders, mainly members of the Sabet family, could not be binding on the companies since, not being officers of the companies, shareholders cannot act on behalf of the companies except with specific authorization (which was lacking here);

4) The fact that the security for the loans were the shares of the companies, these shares being the personal property of the shareholders rather than the property of the companies — the normal practice in respect of corporate loans being to encumber the assets of the company rather than the property of its shareholders;

5) The fact that the board authorizations specifically made a condition precedent to the companies being bound (under paragraph 2 of the Main Loan Agreement) were never produced in evidence by the Claimants in spite of the thorough documentation of their other claims;

6) The fact that the loans were not entered in the books of the Zamzam companies; and finally,

7) The fact that the loan proceeds were never received by them but were instead used by other companies owned by the Sabets.

112. Thus, there were serious questions as to the nature of the loans which had to be answered before the companies could be attached with any obligations for their repayment. But, despite the seriousness of these questions, the Majority pronounced itself satisfied, on the basis of inconclusive evidence, that the loans were corporate loans made by the Claimant to each of the borrowing Zamzam Companies. In coming to this conclusion, the Majority relied, on telexes between the Claimant and its own attorneys and officers in Iran that the required board authorizations had been procured from the Zamzam Companies, but that they had been left behind in a safe in Iran. Although the Majority accepted this evidence, it did not prove that any such board authorizations existed, and I find it unbelievable in view of the fact that the Claimant had kept the originals of the Promissory Notes and other documents relating to the loans in New York rather than in a safe in Tehran. It would have been quite natural to have the originals of the board authorizations, or at least copies of them sent to New York, if they existed. In any event, the Majority was wrong to decide on the basis of evidence which it had not seen.

113. The Majority further relied on an affidavit by the former managing director of Coopers & Lybrand, Iran that the loan was reflected on the books of one Zamzam company whose accounts it had audited, and that "he was aware" that a similar loan had been made to other Zamzam companies amounting to $6.5m in total. But this affidavit was rebutted by another affidavit submitted by

Respondents from the Agahan Auditing Firm, formerly known as Coopers & Lybrand, Iran, that the loans were not reflected in the books of the one Zamzam Company audited and that there were no records, documents or written notes indicating that Coopers & Lybrand could have known that a loan of $6.5m had been made by the Claimant to the Zamzam Companies. But here again, the Majority chose to accept the evidence of the Claimant and ignored the evidence provided by the Respondents, which at least had equal weight, without justifying its preference for the former.

114. The Claimant had relied on the choice of New York law as the law governing the loan agreements to discount the Respondents arguments on non-compliance with Iranian law regarding corporate authorization of the loan. On this issue as well, the Majority failed to give due consideration to the Respondent's arguments. Apart from the choice of "Applicable Law" in paragraph 10 of the loan agreements, paragraph 7 of each of the agreements also provided as follows, under the heading "Laws and Policies":

> The Borrower shall conform to and be in compliance with all laws and policies of the Federal Republic of Germany and/or the Empire of Iran so far as such laws pertain to this loan or any other segment of this transaction.

115. Apparently the reference to the laws and policies of the Federal Republic of Germany was in view of the involvement of Dresden Bank as the conduit for the transfer of the loan funds. However, the specific reference to Iranian law showed that the parties were aware of the need to comply with the laws of the home country of the alleged borrower. Thus, this specific provision must be read as having precedence over the general choice of New York law as the applicable law, on

issues where Iranian law is pertinent: generalia specialibus non derogant.[32]

116. Article 42(a) of the Monetary and Banking Law of Iran (1972) provides:

> Unless regulations to be drawn up by Bank Markazi Iran under Article 11 of this Act are complied with any purchase or sale of foreign exchange, any banking operation resulting in foreign exchange transfers or commitments, and transfers of Iranian or foreign currency into or out of the country shall be prohibited. Violators shall be liable for payment of cash fines of up to 50% of the amount involved. (Emphasis added.)

117. Certainly, the loan agreements involved or contemplated "transfers of ... foreign currency" into Iran, and also contemplated transfers of Iranian currency out of Iran in the event of repayment of the loans. They are thus precisely the type of agreements or transactions that are specifically prohibited under the Act, that is, unless the relevant regulations were complied with. Moreover, this provision is expressed in such imperative terms that the Tribunal would still have been obliged to apply it even if the parties had not specifically included a requirement to observe pertinent provisions of Iranian law.

118. Here again, in similar circumstances, the Tribunal has considered itself obliged to enforce or observe relevant foreign exchange regulations in cases before it where failure to do so would amount to circumvention of "currency regulations which, if valid, both Iran and the

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[32] This principle has been recognized by the Full Tribunal in Decision 1- A/2-FT, (13 January 1982) p. 4, reprinted in 1 Iran-U.S. C.T.R. 101, 104.

United States as well as other member States of the IMF are obliged to respect".[33]

i) Interest

119. Finally, it was improper for the Majority to have awarded interest on the loans from the alleged date of acceleration, i.e., 30 April 1979, rather than from the original due date of 15 May 1982. (Award, pp. 40-41) Considering the circumstances of the acceleration and its problems the Majority attempted to resolve, with all the shortcomings explained in paras. 2-60 of this Opinion, it would have been appropriate to award the interest from 15 May 1982. In fact a similar approach was taken in the American Jet Leasing Case, 537 F. Supp. 745, 749 (1982), discussed in para. 36, supra. This Tribunal also exercised a similar discretion with regard to the running of interest from the filing date of a claim for handling and storage charges rather than from the date the claim arose, although this was due to inability to ascertain those charges from the contracts themselves.[34] Thus if not rejecting the penalty interest so imposed by the Claimant, the Tribunal should at least have allowed interest only on the basis of the original maturity date of the loans, rather than starting from a date almost three years earlier.

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33 Dallal and The Islamic Republic of Iran etal., Award No. 53-149-1 (10 June 1983), p.8, reprinted in 3 Iran-U.S. C.T.R. 10, 14; see also, Hood Corporation and The Islamic Republic of Iran, et al., Award No. 142-100-3 (13 July 1984) pp. 14-15, reprinted in 7 Iran-U.S. C.T.R. 36, 45-46.

34 See, Economy Forms Corporation and The Government of the Islamic Republic of Iran, et al., Award No. 55-165-1 (13 June 1983) p. 22, reprinted in 3 Iran-U.S. C.T.R. 42, 53.

120. The Majority is also in error in stating that the Zamzam Companies had not sufficiently explained or substantiated their assertions that, in any event, they could not pay because Executive Order No. 12170 of the President of the United States created force majeure conditions with respect to the availability of United States dollars. The veracity of this assertion could exonerate the Respondents from the payment of interest on both the concentrate and loan claims for the period 14 November 1979 - 19 January 1981 during which the Iranian dollar assets were blocked by the United States. In my opinion, the blocking of such assets created force majeure or hardship conditions for the Islamic Republic forcing it to give priority to the survival of the country in view also of the war of aggression by Iraq and economic strife following the Revolution rather than to the repayment of such "debts".

121. The Iranian Assets Control Regulations of the United States following the Executive Orders Nos. 12170, 12205 and 12211 dated 14 November 1979, 7 april 1980 and 17 April 1980 respectively in effect made it impossible for Iranian entities to pay their debts on due dates or seek postponement on them. President Carter in his Executive Order No. 12170 stated:

> "I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States."

122. True, the subsequent Regulations allowed payment of debts due to United States persons from blocked accounts but only if those accounts were not attached by other United States persons. In fact each of the blocked accounts was also attached by several other United States

persons. Thus the Iranian entitycould not remit any funds to an intended United States person. Moreover the blocked and attached dollar assets of Iran were not minor but billions of dollars, which were according to United States sources $8 billion and according to Iranian sources an additional $8 billion and $12 billion.[35]

123. Although the Iranian Assets Control Regulations of the United States extended to foreign persons under the control of United States persons in foreign countries,[36] such United States persons in order to avoid penalties for violating the Regulations dishonored Iranian demands to remit their dollar deposits. This compelled Iranian parties, in particular, the Iran Central Bank, to institute court actions in several European countries, which proceedings, with the pressure of the United States banks, European governments and courts prolonged to 19 January 1981 when the Algerian Declarations were adhered to. Major Iranian non-dollar assets were also attached by United States persons in European countries.

124. The cooperation of the Western European allies of the United States on implementation of these and other sanctions are manifest by their adoption of the 10 January 1980 United States draft Security Council Resolution after it was rejected by the Security Council. The United States draft Resolution stated that the Security Council:

> "2. Decides that, until such time as the hostages are released and have safely departed from Iran, all States Members of the United Nations:

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35 See my Opinion pp. 51-52 in INA Coperation and The Government of The Islamic Republic of Iran, Award No. 184-161-1, reprinted in 8 Iran U.S. C.T.R. 403, 438-39.

36 See passim, Edwards, Exteraterritorial Application of the U.S. Iranian Assets Control Regulations, 75 Am.J. Int'l L. 870 (1981).

(a) shall prevent the sale or supply, by their nationals or from their territories, whether or not originating in their territories, to or destined for Iranian governmental entities in Iran or any other person or body in Iran, or to or destined for any other person or body for the purposes of any enterprise carried on in Iran, of all items, commodities, or products, except food, medicine, and supplies intended strictly for medical purposes;

(b) shall prevent the shipment by vessel, aircraft, railway, or other land transport of their registration or owned by or under charter to their nationals, or the carriage whether or not in bond by land transport facilities across their territories of any of the items, commodities, and products covered by subparagraph (a) which are consigned to or destined for Iranian governmental entities or any person or body in Iran, or to any enterprise carried on in Iran;

(c) shall not make available to the Iranian authorities or to any person in Iran or to any enterprise controlled by any Iranian governmental entity any new credits or loans; shall not, with respect to such persons or enterprises, make available any new deposit facilities or allow substantial increases in existing non-dollar deposits or allow more favourable terms of payment than customarily used in international commercial transactions; and shall act in a businesslike manner in exercising any rights when payments due on existing credits or loans are not made on time and shall require any persons or entities within their jurisdiction to do likewise;

(d) shall prevent the shipment from their territories on vessels or aircraft registered in Iran of products and commodities covered by subparagraph (a) above;

(e) shall reduce to a minimum the personnel of Iranian diplomatic missions accredited to them;

(f) shall prevent their nationals, or firms located in their territories, from engaging in new service contracts in support of industrial projects in Iran, other than those concerned with medical care;

(g) shall prevent their nationals or any person or body in their territories from engaging in any activity which evades or has

Consequently, this force majeure or considerable hardship should have been sufficient to exonerate the Respondents from being charged interest for the period the Iranian dollar assets had been blocked or attached and the Tribunal was erroneous in denying such request.

The Hague,
14 Aban 1366 / 5 November 1987

Koorosh H. Ameli

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(Footnote Continued)
A. Lowenfeld, Trade Controls for Political Ends pp. DS-784 to DS-790 (2d ed. 1983).