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IRAN-UNITED STATES CLAIMS TRIBUNAL

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[redacted]

DISSENTING OPINION OF MR. M. JAHANGIR SANI

IN CASE NO. 40

BETWEEN

R.N. POMEROY, K.S. POMEROY AND R.M. POMEROY

v.

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN
AND THE NAVY OF THE ISLAMIC REPUBLIC OF IRAN

IN HIS EXALTED NAME

I dissent from the majority's Award in the present case, finding it to be not only manifestly unjust to the Respondents but also riddled with faulty legal arguments and conclusions.

If, as we are told, the decisions of this Tribunal are destined to be studied carefully in the future and will likely influence the course of international law, then I cannot but wonder how awards like the present one will stand up to scrutiny. I am of course aware of the argument, repeatedly advanced, that the Tribunal's heavy workload must be disposed of expeditiously. Yet, if in this haste all recognized legal principles are sacrificed, the resulting decisions, such as the present one, will necessarily be so flawed and insupportable as to damage the reputation and standing of a tribunal enjoying a certain international status.

1. THE FACTS OF THE CASE

The facts of the case, which have been set forth in the majority's Award, need not be repeated here. It will, however, be necessary briefly to outline the Parties' legal relationship in order better to demonstrate the points which shall be hereinafter discussed.

1.1: The present dispute arises out of a contract which the Parties allegedly entered into on 1st July 1978, effective immediately. Therein, Pomeroy Corporation, whose sole shareholders constitute the present Claimants, undertook to supply an organization of qualified and skilled experts to the Iranian Navy (present Respondents), ranging from 20 to 75 persons, as and when authorized by the Navy, for the continued planning, development and administration of the Projects.(1) It was to be the duty of this organization to ensure that there were no defects in the works of the contractors and the consulting engineers under contract to the Navy on the project.(2) To achieve this end, Pomeroy Corporation undertook to point out defects if any to the Navy in the work of such contractors and consulting engineers. Pomeroy, however, "shall have no responsibility or liability in this respect and the contractors and consulting engineers shall be responsible for their own performance."(3)

"For the above services," Article 2 states, "/the Navy/ will pay Contractor /Pomeroy/ at agreed rates as provided by Article 3.... and referenced schedules."

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(1) Article 1.

(2) Article 7

(3) Ibid.

Under Article 3,

> "For the above specified services, Contractor shall be paid at the rates and conditions outlined as follows:
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> (a) For the furnishing of personnel at each of the project sites, Contractor shall be paid in accordance with the schedule of rates.... contained in Schedule I....
>
> (b) For the services of the Corporation and corporate office operations, Contractor shall be paid an annual fee in accordance with the provisions of Schedule II....."

Schedule I specified the man-month salaries of the personnel provided by Pomeroy:

Category	Tehran Staff	Chahbahar Staff	Bandar Abbas Staff
I	$18,500-	- - - - -	- - - - -
II	$15,500-	$13,000-	$15,500-
III	$13,000-	$10,400-	$13,500-
IV	$10,200-	$8,200-	$10,000-
V	$8,800-	- - - - -	- - - - -

The Schedule goes on to state that "(r)ates are firm and all inclusive and shall be valid for two years from date of Notice to Proceed."(4)

Schedule II, entitled "Corporate Services," provides that "(f)or the Services of the Corporation, including corporate support offices, Contractor shall be paid a fee of $1,631,795.00 for each year of the Contract."

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(4) Unless otherwise indicated, all emphasis here and hereinafter has been added.

The fee, according to the Schedule, "shall be firm for two years from date of Notice to Proceed," and it is against "the furnishing of a minimum of 20 staff members and a maximum of 75."

Two further points in this respect merit attention. First, the duration of the Contract was two years, "from July 1st 1978 to June 30, 1980"; and second, no provision was made for dealing with the consequences of a possible termination by either party.

1.2: There seems to be no dispute concerning the first four months of the two-year contract; Pomeroy Corporation was paid for the services it rendered during July, August, September and October of 1978. Invoices for November and December of 1978 and for January and February of 1979, however, were allegedly submitted to the Navy but never paid.

The Navy asserts that during the last four months of the said period Pomeroy Corporation made an offer, which the Navy accepted, first gradually to reduce the number of staff assigned to the projects, and later, when the number of such staff had by mutual consent fallen below the minimum of 20 members-- so that under the terms of the Contract Pomeroy was no longer entitled to receive the Corporate Services fees-- to adjust the terms of the Contract in order that it reflect the new situation. On 10 March 1979, the Navy wrote to inform Pomeroy Corporation that the Contract had been terminated.

1.3: On the basis of these facts, the Claimants have filed claim against the Navy before this Tribunal, seeking compensation for the four invoices which the Navy allegedly failed to pay, plus a much larger sum consisting of the Corporate Services fee for the two-year period of the Contract, two instalments of which fee were included in the unpaid invoices for November and December 1978 and the remainder of which fee covers the nearly eighteen months subsequent to Pomeroy's departure from Iran and the termination of the Contract.

1.4: Through an Award which shall be examined below, the majority has found that the Claimants' demand for indemnification should be sustained.

2. THE PROCEEDINGS

During the proceedings the Respondents requested that the present case be consolidated with Case No. 432 (Brown and Root Inc. et al v. The Iranian Navy et al), so that the two cases could be heard jointly. There was a simple and compelling reason justifying that request. It will be recalled that pursuant to Article 7 of the Contract,[5] Pomeroy Corporation undertook "to ensure that there are no defects in the works of the contractors and the consulting engineers under contract to the /Navy/ on the project," and to "point out defects if any to the /Navy/ in the work of such contractors and consulting engineers." Brown and Root, the Respondents argue, was just one such contractor whose work was defective

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(5) Supra, p.2.

and which thereby caused the Navy enormous damages. The Navy may or may not, of course, prevail in the argument which it apparently intends to put forth in its counter-claim against Brown and Root. But the mere existence of such a claim makes it natural, and indeed essential, to hear and weigh the Navy's intended argument in the latter case first, for only then will it become possible to advance any opinion as to whether the present Claimants have performed their obligations under Article 7 of the Contract. If, for instance, the Tribunal finds after hearing the Navy's arguments that there have in fact been defects in the work of Brown and Root, then the Tribunal must as a consequence hold in the present case that Pomeroy has failed to carry out its contractual under-takings, for it is an admitted fact that Pomeroy has reported no defect in that contractor's work.

Simple and logical as it is, this argument did not find favour with the majority, primarily because, I think, of another stipulation in the same Article 7, to the effect that the Contractor was to bear no responsibility or liability for defects in the work of the contractors and consulting engineers, who would be responsible for their own performance.(6) Yet the fact is that this very sensible stipulation, which is entirely compatible with the other provisions of the Contract, does not detract from the Navy's position in the least. Indeed, it would

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(6) Supra, p.2.

have been very strange had the Parties not so stipulated. It is true, of course, that Pomeroy Corporation was to bear no responsibility for possible damages caused by defects in the work of the contractors or consulting engineers if such were reported. If so, damages of this sort were to be compensated for by the contractors and consulting engineers themselves. Nor does the Navy seek compensation from Pomeroy on that basis. But the essential point to note is that Pomeroy was employed and paid to watch for and report any defects which might exist in such works. Pomeroy's failure to report would therefore constitute a failure to perform on its own express contractual obligations, and if found against on that basis it would be liable for all direct consequential damages, as would any other contractor which failed to perform satisfactorily upon its contractual undertakings. And it is precisely for this reason that the Navy proposed that the two cases be consolidated: In order to ascertain whether Pomeroy did comply with its own undertakings under a contract out of which the original claim arose, the Tribunal would have had first to render a decision in Case No. 432.(7)

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(7) The Claimants' misunderstanding of this simple point, too, is reflected throughout their Memorials. See, for example, p.7 to Claimants' Reply to the Counter-claim, dated 3 June 1982:

> "... Article 7 of Contract... expressly provides that Pomeroy Corporation has no responsibility or liability for the performance by other contractors and consulting engineers. Thus even had there been any fault on the part of Brown and Root, Pomeroy Corporation, which completely performed its duties under the Contract, is not responsible."

In refusing the Navy's logical request, the majority has resorted to certain shaky excuses: namely, that the motion to consolidate the two cases was not made until the date of the Hearing, that the Navy had not submitted its statement of defence or counterclaim in the other case even as of the date of the present Award, and that nothing precluded the Navy from submitting evidence and presenting arguments at the hearing or thereafter in relation to Pomeroy's performance.(8)

That these excuses are not very convincing is evident enough. With respect to the first excuse, it must be emphasized, first, that neither in the Tribunal Rules nor in any other pertinent rules, is there any time limitation for the submission of such a consolidation proposal. In fact, since this issue, like any other jurisdictional issue, is not limited to the rights of the parties but concerns the manner in which the Tribunal conducts its affairs, there cannot, on principle, be any such limitation. If the Navy is correct in asserting that the only logical way to adjudicate the issue of Pomeroy's conduct is to make a preliminary examination of Brown & Root's conduct, then out of concern for justice, it is incumbent upon the Tribunal to consolidate the cases on its own initiative, or at least to accept the Navy's proposal without regard for the date of its submission. Secondly, and assuming that there has been a delay by the Navy, the blame for that rests not with the Navy, but with this Tribunal, which has exerted

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(8) The majority's Award, pp. 15-16.

unprecedented and unjudicial pressure in this and other cases, whereby it has effectively deprived Iranian respondents of the ability to enter any meaningful or orderly defence. Despite repeated protests, the Tribunal has so systematically and persistently violated Iran's right of defence, that Iran has been compelled in many cases to make repeated requests for postponement of hearings in her own claims. It should not be surprising, then, that she has also on occasion been unable to make timely submission of motions in the hundreds of claims lodged against her. Details of the unfortunate results of this undue pressure cannot, of course, be dealt with in this brief Dissenting Opinion and must be left to a more convenient opportunity. Suffice it to say here that while it takes courts all over the world years to adjudicate simple and uncomplicated cases, this Tribunal has taken the position that it must reject the Respondents' motion, even though it represents the only feasible legal course for adjudicating a complex and monetarily important dispute, simply because the Claimants might not appreciate a few months' delay.

The answer to the second excuse is simple enough: Case No. 432 has its own schedule for submissions, and so the Navy could hardly be expected to rush the preparation and submission of its defence and counterclaim in advance of the time set for this purpose by the relevant Chamber. As for the third excuse, it has been implicitly refuted by the majority on its own admission. The

Respondents' motion, the majority Award states, was made at the Hearing and rejected in the Award. The Respondents were hence given no opportunity whatever to present their intended arguments on asserted deficiencies in the work of Brown and Root -- and therefore in the performance of Pomeroy Corporation -- after learning that their motion had been denied. In other words, the Respondents were informed of the rejection of their motion at the same time that they learned that they had been awarded against. Clearly, then, the Respondents had no means of knowing that they were obliged to marshal their arguments and evidence relating to the deficiencies in the work of Brown and Root quickly, and to submit them as memorials in the present case.

3. THE JURISDICTION OF THE TRIBUNAL

3.1: The majority Award takes a highly confused position regarding the jurisdiction of this Tribunal over some of the Respondents' counterclaims. "The Claimants," it states, "have argued that they are not, as a matter of law, liable under the counterclaims according to the universally recognized general principle of law that shareholders of a corporation are not liable for the obligations of the corporation."(9)

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(9) Page 13 of the Award.

It must be emphasized at the outset that nothing can be found in the Claimants' written submissions [10] or oral arguments, which might either constitute or warrant such a strongly stated position. Still, in good faith I shall attribute this overstatement to the majority's innocent desire to buttress the Claimants' argument, rather than to any attempt by the majority to lay the foundation for a future position.

Be that as it may, the fact is that the Algiers Declarations have, to the sole advantage of the American claimants, chosen to disregard the said "universally recognized principle" by permitting the shareholders in a legal entity, under certain conditions, to pursue the claims of that entity as their own indirect claims.[11] It is a natural consequence of this permission, however, that the same shareholders must also be answerable for counterclaims arising out of their claims. This position finds further confirmation in the unambiguous wording of Article II, paragraph 1 of the Claims Settlement Declaration, which states that

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(10) See, for instance, p. 2 of the Claimants' Reply to Counterclaim, dated 3 June 1982.

(11) The "universally recognized principle" is, of course, that legal entities are independent of their shareholders. The shareholders cannot therefore, claim or be held responsible for the rights and obligations of such entities. To suggest that the principle does not allow the shareholders to be sued for the wrongs of their legal entities is to tell less than the whole truth.

> "An international arbitral tribunal... is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim..."

Article VII, paragraph 2, defines "the claims of nationals" as "claims owned continuously... by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in judicial persons..."

There should be no difficulty in correctly interpreting the two Articles cited above, if two points expressly made therein are kept in mind. First, indirect claims are included within the definition of claims of nationals.(12) Hence, any reference in the Algiers Declarations to claims covers both direct and indirect claims. Second, the Tribunal's jurisdiction over counterclaims is to be determined-- and this is important-- not by reference to the type of a given claimant, so as to enable him to argue that he is only an indirect claimant, but by reference to his claim,(13) which covers direct and indirect claims alike.

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(12) Article VII, paragraph 2.

(13) "... and any counterclaim which arises out of the same contract... that constitutes the subject matter of that national's claim..." (Article II, paragraph 1).

In the present case, the sole shareholders of Pomeroy Corporation have brought a claim before this Tribunal as a "claim of nationals" of the United States. Said claim, they argue, stems from a contract concluded between the Navy of the Islamic Republic of Iran on the one hand, and Pomeroy Corporation on the other. Now, in respect of the counterclaim of the Navy, in accordance with the explicit terms of the Claims Settlement Declaration this Tribunal is to inquire only into whether the said counterclaim is related to the submitted claim as stipulated by the Declaration, without considering in the least who, and in what capacity, has brought the above-mentioned claim. That is, it is to inquire into whether this counterclaim arises out of the same contract that constitutes the subject matter of the Claimants' claim. If the answer is in the affirmative, this Tribunal must hear and adjudicate the Navy's counterclaim as part of its adjudication of the claim submitted, and it will have to do so irrespective of whether the original claim is directly or indirectly owned by the present Claimants, and irrespective of the limitations, if any, of their liabilities. In other words, under the Algiers Declaration any counterclaim is to be considered solely in connection with the original claim, and not with the type of claimant. The reason for that is clear enough. As noted above, under the Algiers Declaration indirect claims have, to the sole advantage of the American claimants, been treated as claims in exactly the same manner as direct claims. The owner of an indirect claim who has been permitted to pursue that claim

shall also quite naturally be answerable for the consequences of that claim.

Any other mechanism in the Declarations other than to delimit the Tribunal's inquiry to the relation between the counterclaim and the original claim, would have led to a completely illogical and unacceptable situation in which the indirect owner of a claim would be allowed to assert that claim but then, when faced by a counterclaim, to evade his reciprocal liabilities related to that same original claim, on the pretext that the direct owner of the claim is a legal personality other than himself. The mechanism of relating any counterclaim solely to the original claim, and not to its owner, is therefore one that the Declarations (by virtue of which the principle of the legal independence of companies has been, under certain conditions, set aside) have intended in order to ensure that the person bringing a claim shall at least also be answerable for any counterclaims related to it.

This is the simple answer provided by the Algiers Declarations to the objection raised by the Claimants with respect to the Tribunal's jurisdiction. Although the Claimants allege that as shareholders they are not legally liable, their defence is, in fact, a jurisdictional one, as they themselves have correctly characterized it, because what has been asserted is that neither this Tribunal nor any other forum is competent to entertain or to go into the merits of

a claim brought against the owners of a legal personality on the basis of the obligations of the latter. However, even if the above objection is to be regarded as a defence on the merits, the Tribunal should first-- and before assessing the documents relied upon by the Respondents in support of their counterclaims-- have subjected the Claimants' objection to examination, and have taken up the merits of the counterclaims and the documents relied upon by the Respondents in this regard, only in the event that it rejected the aforementioned objection; because the liability of the shareholders has therein been completely denied and it has been stated that by virtue of the principle relied upon by them, the Claimants have no liability whatever as against counterclaims, even counterclaims which are valid on the merits and supported by proof. Nonetheless, in conformity to a method which seems not only logically but also legally impossible to justify, the majority has, after discussing the Claimants' objection in the part of the Award dealing with the issue of the Tribunal's jurisdiction, not only held, without adducing any grounds, that the objection is unrelated to the issue of the Tribunal's jurisdiction, but has not even deemed it necessary for it to comment upon that preliminary objection, arguing that in its examination thereafter of the documents relied upon by the Respondents, it has not found those documents to be sufficient for demonstrating the validity of the counterclaims on the merits. Just how the majority has managed to take up and assess the documents submitted by the Respondents in

connection with the six counterclaims on meritorious grounds, without first rejecting the Claimants' objection to jurisdiction or, in arguendo, the general objection by the Claimants to their general liability, is an insoluble riddle.

In his Dissenting Opinion in Case No. 149,[14] one of the American arbitrators has described a portion of the award by Chamber One as "acrobatic," a term which appeared to be inappropriate to the award in question, in light of the facts in that case. But perhaps a more appropriate place to use this term is the instant portion of the present majority Award, in which the documents submitted by the Respondents in connection with their six counterclaims have been taken up and assessed on the merits, without the Claimants' objection to jurisdiction having been rejected and without, in arguendo, the general objection by the latter to their liability with respect to the merits having been rejected as well; and in which, after those documents were characterized as being insufficient for establishing those counterclaims submitted, it was not felt necessary either to accept or to reject the Claimants' position that this Tribunal is not entitled to entertain and assess the submitted documents on the merits.

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(14) Mark Dallal - Claimant
and
Bank Mellat - Respondent.

3.2 The majority's decision reveals a similar, if not greater, confusion in respect to the Navy's counterclaims based on the Claimants' alleged failure to pay social security premiums and contract taxes. "It has been alleged," the majority states, "that these counterclaims are outside the jurisdiction of the Tribunal even to the extent that they are related to the performance of the 1978 contract, because the obligation to pay social security premiums and company taxes [15] is created by law and not by any contractual provisions, and the counterclaims may thus be said not to arise out of the same subject-matter as that out of which the claim arises."[16]

There is much to be said regarding the fallaciousness of this argument. Before, that, however, two points of a general nature must be set forth.

First, whenever the jurisdiction of this Tribunal over the various types of claims by nationals of the United States is at issue, arguments are made to the effect that it was the intention of the parties to the Algiers Declarations to grant the Tribunal an all-inclusive jurisdiction;

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(15) These are not, of course, company taxes but taxes levied against the income derived from the contract. The given title is misleading insofar as it tends to suggest that such taxes are imposed, not on the basis of the contract but for some other reason.

(16) Pages 14 and 15 of the award. The emphasis is in the original.

that this Tribunal was established in order to determine all disputes between the parties to the said Declarations; and that it would be most undesirable for those parties to be compelled to pursue their claims before other municipal and international fora. Apparently, however, the same arguments do not apply to cases in which "Iran" is the claimant. For, not only have hundreds of claims instituted by "Iran" been summarily dismissed on jurisdictional grounds, but grounds are apparently being prepared for a very strange, indeed extraordinary, situation in which disputes between specific parties, and related to single events, are to be arbitrarily divided such that parts of them might be heard by this Tribunal but other parts would have to be settled by other fora.

Second, whatever might have been suggested recently by jurists concerning alienation of law from morality, the sheer absurdity of this immoral proposition is to be marvelled at. What is advocated, in short, is that American nationals who presumably made large profits on the basis of contracts which they concluded, in full awareness that such contracts and the profits derived therefrom were subject to taxation, should now be permitted to argue that they wish to collect the profits but at the same time to evade these relatively trafling taxes which they had originally undertaken to pay.[17] Whether this Tribunal would ever wish to lend its support to such an immoral position remains to be seen.

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(17) The Claimants' reliance on the Tribunal's alleged lack of jurisdiction is, of course, merely an excuse for achieving that end, for I am unaware of any other convincing reason why the Claimants should not want to settle the issues of taxation and social security premiums together with their main claims before this Tribunal.

General and moral considerations aside, the Claimants' argument suffers from two major legal deficiencies.

First, the argument fails to take into account the fact that even though the Respondents are of necessity pursuing their claims for taxes and social security premiums in the form of counterclaims, these are in reality defences to the very claims submitted by the Claimants. That is to say, where a respondent sets out to demonstrate that a claimant has failed to pay the required taxes or social security premiums, he is in fact attempting to show that the claimant has inflated his claims, for the latter is entitled only to the net value of his contract, not to the gross value. That this is a correct legal position is borne out by the experience of every civil servant, or indeed by any other individual who has had an employment contract with a governmental or, indeed, private agency. He is not given the gross amount of his salary and asked to return taxes or other dues; rather, he is given what he is entitled to-- that is, only the net amount of his salary.

Second, the argument clearly appears to be based on a misreading of the text of Article II, paragraph 1 of the Claims Settlement Declaration. That Article, on which the jurisdiction of this Tribunal over counterclaims is basically founded, requires that a counterclaim arise out of a contract, transaction or occurrence. It does not require that a counterclaim be based upon a provision of the contract... that constitutes the subject matter of the claim, or that it stem from an issue specifically mentioned

in the contract, etc. There is, of course, a world of difference between the above-cited requirement and such untenable interpretations, and it is surely the failure to recognize this distinction that leads to the mistaken belief, if belief it is, that taxes or social security premiums fall outside the jurisdiction of this Tribunal on the grounds that it is the provisions of the law, and not the contract itself, which impose taxes on the income derived from the contract,or require a contractor to pay premiums for his employees. Yet the question is not whether the claim is based upon a specific provision in the contract, but whether the claim arises in connection with the existence of the contract. Apart from the clear wording of Article II, paragraph 1, the latter position finds confirmation, should it be required, in the fact that if the alternative position were valid, the Tribunal would be compelled to declare its non-jurisdiction over all claims and counterclaims demanding damages for breach or termination of contract, or seeking interest or legal fees, etc., where these were not specifically mentioned in the contracts at issue. And yet this Tribunal has often awarded interest in the past, for example, even in the absence of any reference to liability for interest in the relevant contract.(18) Indeed, in so doing the Tribunal has sought to invoke international judicial precedents and Iranian law as grounds for the claimants' entitlement to such awards. There was no question, on those occasions, of declining jurisdiction on the ground

(18) Such awards are, however, objectionable on other grounds. See, for instance, my "Dissenting Opinion" in Case No. 132.

that claims for interest arose, not out of the provisions of the contracts at issue, but out of the law. There should equally, therefore, be no objection raised here in connection with imposition of taxes and social security premiums.

Having set forth the Claimants' contention, the majority once again evades the only reasonable legal answer, lamely asserting that "/i/n the present case the Tribunal does not have to reach this jurisdictional issue for reasons stated.... at V(3)." That section, however, deals with the merits of the two counterclaims based on demands for taxes and social security premiums, both of which it rejects on the gounds that the evidence submitted does not sufficiently support the counterclaims. The question of whether this finding of facts is justifiable will be dealt with below. Suffice it here to say that once again the majority has, after first putting forth the Claimants' contentions, attempted to avoid reaching the obvious conclusions by asserting that a jurisdictional objection need not be determined if the claim is itself finally rejected on the merits. Yet, in order to assess the mertis of the counterclaims submitted in this case, the Tribunal has naturally had to reject the Claimants' argument that this Tribunal lacks jurisdiction over claims based on taxes and social security premiums. Indeed, in effect it has done so in the present case.

4. THE MERITS

4.1 The Validity of the Contract in Dispute

The Respondents in the present case have argued that the contract on which the claims rest is not valid, on the grounds, inter alia, that it was executed without proper authority and in violation of the relevant Iranian laws, particularly by virtue of having been concluded without approval by the Council of Ministers as required by law with respect to this type of contract. The majority lightly rejects this defence by asserting that:

> "even if the Navy's assertions of the invalidity of the Contract were correct, the Navy conducted itself in a maner which indicates that it considered the Contract to be valid, by making substantial payments under the Contract, by making facilities available to Pomeroy Corporation and by accepting services."(19)

I do not know the cause of a misunderstanding which has been with us in this respect for a very long time. The point which a number of Iranian respondents and counterclaimants, including those in the present case, have endeavored in vain to bring to the attention of this Tribunal is that some of the officials formerly in power in Iran at times abused the authority vested in them; that, in violation of the pertinent Iranian laws and regulations, they misappropriated Iran's wealth by illegally awarding contracts to foreign companies in exchange for bribes and questionable payments or on the basis of favouritism and the like. By signing the Algiers Declarations, the present

(19) Page 17 of the majority's Award.

Government of Iran has accepted its just debts. Yet, that does not mean that by doing so, the Government of Iran has also waived its rights. It is entitled to question the validity of any claim based upon such illegal and fraudulent activities.

This was the argument before the Tribunal, and the majority was entitled, of course, either to accept or reject it, both on point of law and on point of fact. But what the majority was not entitled to was to reject this argument by relying (as it has done here) on the subsequent conduct of the same officials who are alleged to have illegally concluded the contract, as confirming the validity of said contract!

"Even if," the majority states, "the Navy's assertions of the invalidity of the contract were correct, the Navy conducted itself in a manner which indicates that it considered the contract to be valid by making substantial payments..." Yet, who was it that made, or ordered, these substantial payments? Was it not the very individuals whose conduct in awarding the contract is in question? The majority finds it appropriate here to further draw attention to the provisions of Iranian law, wherein it is stated that "a party may not deny the validity of a contract entered into on its behalf by another if, by its conduct, it later consents to the contract."(20) Yet, by relying for this purpose on the quoted provisions, the majority

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(20) P. 17 of the Award, referring to Article 247 and 248 of the Iranian Civil Code.

demonstrates, perhaps more conspicuously than anywhere else, that it has entirely missed the point. The two cited Articles of the Iranian Civil Code, which embody the well-known principle of subsequent ratification, quite logically provide that the owner of a property may not challenge the validity of a contract of sale made on his behalf if he himself later implicitly ratifies the contract by virtue of his conduct. But one fails to see the relevance of that principle to the issue at hand. For here, if the Navy's contention is to be accepted, there is, first, no question of agent-principal relationship or of subsequent ratification and, second, even assuming that such relationship is in question, the present illegal contract has been ratified not by the principal, but by the conduct of the same individuals who made the contract "on behalf of" the Navy in the first place.(21)

By its final reason for concluding that the contract is valid, the majority offers yet more evidence that it has missed the point. "Furthermore," the majority's Award states, "the Claimants have presented uncontradictory written testimony from the two principal Navy officers involved that the contract was specifically approved by the then Commander-in-Chief of the Navy and that the signatory had fully delegated powers to execute the contract."(22) It will be observed that the majority once again lends credibility to certain testimony which has been given by the very individuals who, the Navy contends,

(21) There has been no allegation, of course, that the contract was ratified by the present officials of the Navy, for performance on the contract ceased prior to the Revolution.

(22) Page 17 of the majority's Award.

were principally involved in unlawfully awarding the contract and in ordering payments to Pomeroy on its basis !

To sum up the preceding discussion in a nutshell: The Navy seeks to respond to the present claims by arguing that it is not legally bound to meet obligations incurred under a contract which the Claimants won by bribing certain high officials of the former regime. The majority rejects this defence on the grounds that even if unlawfully won, the contract is valid because the high officials who granted it subsequently conducted themselves in such a manner as to indicate that the contract was valid; and because these same officials have certified before this Tribunal that they believe the contract was validly concluded.[23] It would be a matter of much concern if an argument made by a party were understood but unjustifiably rejected; it is a matter of even greater concern that such an argument has been rejected by virtue of not being understood at all.

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(23) The same misunderstanding appears in that part of the Award where the majority rejects the Respondents' contention that the contract's remuneration provisions were exorbitant. The majority replied to this contention that "/i/t is apparent that the Navy was in a position to be fully award of rates of compensation paid for comparable services and... was particularly familiar with the rates /paid under the Stanwick contract../"

But the fact is that the Navy never asserted that it was unaware of the normal rates for similar services. Indeed, in order to prove its point, the Navy provided the Tribunal with the rates offered by other consultants for similar services. What the Navy did assert was that the agreement to pay much higher rates to Pomeroy was yet further evidence that the contract had been fraudulently obtained.

4.2 The Corporate Office Services Fee

The most erroneous part of the Award is that which deals with the Corporate Office Services Fee. In monetary terms, it is also by far the largest part of the award.

As stated earlier, under Article 1 of the contract in dispute, "Contractor will supply an organization of qualified and skilled experts to /the Navy.../ ranging from 20 to 75 persons, as and when authorized by the /Navy/." Article 2 of the same contract stipulates that "/f/or the above services, the /Navy/ will pay Contractor at agreed rates as provided by Article 3... and referenced schedules."

Article 3 deals with the fees: "For the above specified services, Contractor shall be paid at the rates and conditions outlined as follows:

> "(a) For the furnishing of personnel at each of the project sites, Contractor shall be paid in accordance with the schedule of rates... contained in Schedule I...
>
> "(b) For the services of the Corporation and corporate office operations, Contractor shall be paid an annual fee in accordance with the provisions of Schedule II..."

Schedule I specifies the salaries to be paid the contractor's personnel assigned to the various project

sites:

Category	Tehran Staff	Chahbahar Staff	Bandar Abbas Staff
I	$18,500-	- - - - - -	- - - - -
II	15,500-	$13,000-	$15,500-
III	13,000-	10,400-	13,500-
IV	10,200-	8,200-	10,000-
V	8,800-	- - - - -	- - - - -

The Schedule further provides that "/r/ates are firm and all inclusive and shall be valid for two years from date of Notice to Proceed."

Schedule II sets forth the fee for Corporate Office Services. It states that "/f/or the Services of the Corporation, including corporate support offices, Contractor shall be paid a fee of $1,631,795.00 for each year of the Contract." It further specifies that "/t/he fee shall be firm for two years from date of Notice to Proceed," and that "/t/he fee shall provide for the furnishing of a minimum of 20 staff members and a maximum of 75."

These are the relevant contractual provisions for remuneration, on the basis of which the Claimants have asserted that they are entitled to receive, not only the allegedly unpaid personnel and corporate office services fees for the period prior to termination of contract, but also the whole of the corporate office services fee, minus overhead costs, for the entire two-year period of the contract, even though they admit to having halted performance on the contract a mere six months after the date of

commencement. The majority has by its Award indemnified the Claimants as requested, adducing the above contractual provisions. Before dealing with this part of the Award, however, two points of general nature must be mentioned.

First, as mentioned before, the contract makes no provisions for termination and the consequences thereof. In the absence of such a provision, it would have been for the Claimants to prove their entitlement to the corporate office services fee by demonstrating (a) that this was a "committed fee," or "fixed consideration," in the sense that by virtue of the contract itself they were entitled to the amount of the corporate office services fee[24] for the entire duration of the contract if they satisfied their own contractual obligations or were at least prepared to do so, and (b) that they did satisfy these obligations, or were prepared to satisfy them but were prevented by the Respondents from doing so.

It must be emphasized at the outset that even a cursory review of the contract and the Schedules thereto will clearly demonstrate that Section (a) of Schedule II,

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(24) For reasons which are self-evident, the majority has insisted on using the phrase "firm fee" (as against "personnel salaries"), in place of the term "corporate office services fee" even though the latter is the term employed in the contract itself. In the absence of any such term in the contract, the majority presumably relies on Section (a) of Schedule II, wherein it is stated that the fee "shall be firm for two years...." But then an identical passage in Schedule I, as we have seen, affirms that the personnel salaries shall also remain firm for two years.

wherein it is stated that the corporate office services fee shall be firm for two years, does not mean that the parties have agreed upon a committed fee-- that is, a fixed consideration-- but rather only that the agreed fee shall not be subject to increase or decrease for a period of two years. Aside from the clear meaning of the terms employed by the parties themselves, the latter interpretation finds direct confirmation in Section (i) of Schedule I, wherein it is stated that "the quoted fee... shall remain firm for the furnishing of a minimum of 20 men and a maximum of 75 men... If the staff exceeds 75 men then the fee shall be increased proportionately...." Moreover, as pointed out earlier, precisely the same provision appears in that part of the contract wherein personnel salaries are laid down: "Rates are firm and... shall be valid for two years..." Yet, not even the Claimants have thought it proper to argue that the Respondents should be directed to pay the salaries of Pomeroy's personnel for the eighteen-month period between the date of termination of the contract and the end of its intended two-years' duration. How, then, can the majority justify its different interpretation of a single term employed in two exactly identical contractual provisions in a single contract? The fact is that the only consistent interpretation would have been to hold that the corporate office services fee, like the personnel salaries, was not a lump-sum consideration guaranteed for the entire duration of the contract, but rather a fee to which the Claimants would become entitled as and when

certain specified services were rendered. Of course such a fee, like the personnel salaries, would remain firm for the two-year period of the contract, in the sense that it could not be unilaterally increased or decreased.

The second, and more important point is that even if the above argument is rejected, the Claimants, in order to prove their entitlement to the corporate office services fee for the unperformed portion of the contract, ought to have shown that the termination of the contract, or its premature ending, was the Navy's fault. For it is self-evident that even if there were a fixed consideration for services, the Navy would not be required by law to compensate the Claimants for unperformed services if the Claimants failed to render them through their own fault or because of some other intervening cause beyond the Navy's power to prevent. Here, then, rests the crux of the issue, and it is with a view to find out whether the Navy was at fault in that regard, that the relevant facts and documents will now be examined.

It is to be recalled that the contract was signed on 1st July 1978, and that the services in question were allegedly rendered immediately thereafter. Invoices were submitted to the Navy, and admittedly paid upon, for the first four months of July, August, September and October 1978. The November invoice, amounting to $434,593, was presented to the Navy but was allegedly not paid upon. Said invoice reveals that in the month of November, 23

men were employed on the related projects. The sum of $135,982.91 is included in the invoice and constitutes an instalment on the corporate office services fee.

The Claimants assert in their Statement of Claim that "/o/n December 18, 1978... the Iranian Navy directed a reduction in the staff of Pomeroy Corporation (Document No. 30). Pomeroy Corporation complied with this direction."(25) This statement is false, and it constitutes the first of a whole chain of false statements designed to mislead the Tribunal into believing that it was the Navy that unilaterally and without cause decided to renege on its contractual obligations. Regrettably, the majority fell victim to this design. For not only does Document No. 30, on which the Claimants rely in this connection, fail to support the Claimants' assertion, but it shows, instead, that quite the opposite is the case. That Document reads as follows:

> "We hereby concur with your request concerning technical staff reduction by 5 or 6 positions without effecting project support activities. Arrangements regarding staff rebuild up by you requires pre-authorization from IIN
> (the Navy)."

It is to be noted from this document, which was submitted by the Claimants themselves, that it was Pomeroy Corporation, by its letter of 13 December 1978, that first requested a reduction of its staff by 5 or 6 positions,(26)

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(25) Page 6 of the English version.

(26) It is immaterial whether Pomeroy made this request of its own volition or as a result of other causes unrelated to the Navy, such as force majeure conditions prevailing in Iran at that time. In either case, the Navy would be exonerated from responsibility to pay for these unperformed services.

a request which the Navy merely concurred with. For further clarification, Pomeroy's letter of 13 December 1978 may be cited in full:

> "We have at present a total staff of 21 engineers including the Bandar Abbas and Chahbahar sites, which have been actively engaged in support of the Imperial Iranian Navy management and supervision of the project. Collectively considering all prevailing circumstances, both directly and indirectly related to the project, we find that our staff in the interest of economy to the IIN could be reduced without effecting our support activities. Our evaluations indicate that we could reduce our Technical Staff by 5 or 6 positions until certain elements of the project are more clearly delineated such as the Stage II harbour elements. Additionally such a staff reduction would aid our cash flow activities in view of the present uncertainty of banking transactions.
>
> With your approval we would like to implement the staff reduction as soon as possible if you concur. We would propose to build up again sometime around Now Ruz at which time it is believed that the project and related elements may be more clearly delineated."

A short time later, Pomeroy submitted its invoice for December 1978, in the amount of $371,624, but it too was allegedly not paid. The December invoice reflected the fact that the parties had gradually implemented their earlier agreement to reduce the number of Pomeroy's staff by 5 positions, inasmuch as the invoice requests payment on the basis of 19 man-months. This invoice, too, includes the sum of $135,982.91 for the December instalment on the corporate office services fee.

The Claimants next assert [27] that "Pomeroy Corporation was directed to make further staff reductions in January and February of 1979 (Document Nos. 31 and 36), and it complied with these requests." This statement is again false, for Document No. 36, a letter by the Navy to Pomeroy's staff in Houston (the subject of Claim No. 41, before this Chamber), pertains exclusively to the Houston office and is totally irrelevant to the present case. As for Document No. 31, quoted below, it clearly indicates that it was Pomeroy, once again, that initiated the proposal further to reduce the number of staff:

> "We have proceeded to reduce our staff in accordance with your prior approval. On completion of these actions, the staff remaining are 7 engineers, including one each at Chahbahar and Bandar Abbas. Considering the current situation it is prudent that we should make a further reduction.
>
> "It is believed that we can meet all IIN site needs by retaining an engineer at Chahbahar and Bandar Abbas.
>
> "With your approval we would like to reduce the Tehran staff to three engineers for a short interim period of time. These would be Mr. Earl Van Geem, George Homolka, and W.F. Petrovic. Additionally we would terminate all supporting office personnel except one secretary, one personnel and file clerk and necessary car services.
>
> "The above interim staff would be disbanded sometime in February and necessary support provided from Houston. Reassembly of a staff, its members and location would be determined by the needs of the IIN and after detailed discussion with you before any implementary actions would be taken."

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(27) Page 6 of the Statement of Claim.

Some 18 days leter, on 16 February 1979, Pomeroy Corporation again wrote to the Navy to inform it that

> "Pomeroy Corporation.... have for security and welfare of our employees removed our expatriate staff completely from Iran starting in early January, and during the next few weeks..../ shall/ remove our Chahbahar and Bandar Abbas staff. In order to continue to be of technical and management assistance... we provide herewith our step by step program.
>
> 1. Effective 1 January 1979, in compliance with your letter of 18 December 1978 (28).... and in consideration of the circumstances we have undertaken and now completed a total staff reduction in the Tehran office...
>
> 2. In your best interest we have however retained on our corporate payrolls... key staff personnel... pending your formal approval of this program...
>
> 3. We propose that the foregoing staff report to the CED /the Navy/ Houston representative... so as to continue to carry out those responsibilities and functions previously carried out on your behalf in Tehran.
>
> * * * *
>
> 7. At such time as it is mutually agreed that security for the staff can be assured and appropriate work permits can be obtained we are prepared to return the staff to Tehran, if the operational needs warrant reestablishment of a Tehran OICC support office..."

The incontrovertible fact, then, is that as of December 1978, the number of Pomeroy's staff in Iran by its own request fell well below 20, the minimum number which Pomeroy was required under the terms of the contract

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(28) This statement too is misleading, for it will be recalled that in the letter here referred to, the Navy merely approved Pomeroy's proposal to reduce the number of its staff.

to supply the Navy in order to remain qualified to receive the corporate office services fee.[29] In order to adjust to the new situation brought about by the parties' agreement, Pomeroy wrote the Navy on 28 December 1978 to propose certain changes in the contract. It is most telling that the Claimants have conveniently omitted this highly relevant piece of evidence.[30] The attempt to omit this evidence was, however, rather unskillful, for careful examination of other documents sufficiently reveals the contents of that proposal, to which the Navy, as will be seen below, ultimately agreed.

In its letter of 16 February 1979, large portions of which have been quoted above, Pomeroy states that:

> "We will submit under separate letter our commercial proposal encompassing the contract changes resulting from this revised program.
>
> We respectfully request an early approval of this program and the companion commercial proposal...."

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(29) Articles 1 through 3 of the Contract and Schedules I and II.

(30) The majority notes this omission but blames it on "the difficulties parties have in producing all of the evidence (p.25 of the Award). Possibly, just possibly, this was the case. However, the point is that the majority never even bothered, in its haste to issue the award, at least to ask the Claimants whether this document was available to them. The Claimants do not seem to have encountered any difficulty in producing all of those documents which support their claim. It would be strange then, to say the least, if a document which directly contradicts their claims for the corporate support services fee were an exception!

The companion "commercial proposal", which according to Pomeroy is the same as that which it had suggested on 28 December 1978, is simple enough: since the number of Pomeroy's personnel had fallen below the minimum level of 20, and since Pomeroy was therefore no longer contractually entitled to receive the corporate office services fee, Pomeroy thereby requested that the Navy agree to increase the salaries of Pomeroy's personnel, then ranging from $8000 to $18,000 per month, to a flat rate of $20,000 per month, so as to cover the overhead costs incurred by Pomeroy. In turn, Pomeroy would not demand or be entitled to any corporate office services fees. The following is the outline of Pomeroy's proposal:

> "We have under separate communication presented our program for compliance with your instruction letter of 4 February 1979... Through this letter we present herewith our commercial proposal covering the furnishing of the technical staff to conform with the subject program as presented.
>
> Contract No. 1401-10/862 - In Country Services
>
> a. During the month of January while reducing our staff in accordance with your letter of 19 December 1978... our staff level fell below the Contract minimum of 20 persons. In accordance with our proposal of 28 December 1977, we propose to invoice for all technicians effective 1 January 1979, at the rate of $20,000.00 per man month for those staff employees actively employed on the project and resident in Iran.
>
> b. For the security and safety of our expatriate staff, we have gradually reduced our staff, completely removing from Tehran all employees assigned to the OICC-Tehran office... Under the circumstances, we propose to invoice for these employees (a total of three) in accordance with the provision of Contract Article 1 Schedule SCHEDULE OF RATES Paragraph h, effective 1 February 1979."

Although no document has been submitted to the Tribunal demonstrating the Navy's express approval of Pomeroy's proposal, such approval can be conclusively deduced from a perusal of correspondence later exchanged by the parties. Among this pertinent correspondence is Pomeroy's letter of 22 February 1979, in which Pomeroy explicitly refers to the contract as "modified by subsequent correspondence":

> "Enclosed please find our Invoice No. P/L -007 dated 01 February 1979 covering services furnished by our staff in Tehran for the month of January 1979, all in accordance with Contract No. 1401-10/862 dated 1 July 1978 as modified by subsequent correspondence."

More to the point still, is Pomeroy's invoice for January 1979. The invoice is prefaced by a statement that it had been submitted "in accordance with Contract dated July 1, 1978, and proposal letter of December 28, 1978...." Naturally enough, in this invoice Pomeroy has increased the man-month salary requests to $20,000 and omitted any demand for the corporate office services fee which appeared in all previous invoices. Because of its direct relevance to the point under discussion, the invoice may be quoted in full:

> For the furnishing of Contract Services for the Chahbahar Naval Base and Bandar Abbas Interim Maintenance Facilities in accordance with Contract dated July 1, 1978, and proposal letter of December 28, 1977 /sic/ for the month of January as follows:

Basic Staff - Tehran	No. of Months	Rate	Total
Category I	.48		
II	3.14		
III	5.29		
IV	1.45		
	10.36	20,000.00	$207,200.00

Basic Staff - Chahbahar	No. of Months	Rate	Total
Category II	1.00		
III	.55		
	1.55	20,000.00	$ 31,000.00
Basic Staff - Bandar Abbas			
Category II	1.00		
III	.55		
	1.55	20,000.00	$ 31,000.00
Special Staff			
Librarian		--0--	--0--
		Total	$269,200.00
		Less 5.5% Corporate Iranian Taxes	14,806.00
		NET AMOUNT DUE	$254,394.00

Please make payable to POMEROY CORPORATION in United States Dollars.

POMEROY CORPORATION (Liberia)

Document No. 20"

The same reference to the modification of the contract, and a corresponding increase in personnel salaries and omission of any demand for the corporate office services fee, can be observed in Pomeroy's letter of 15 March 1979 and the accompanying invoice for the month of February 1979.(31)

This was the background against which the Navy wrote to Pomeroy, on 10 March 1979, that the contract had been terminated; and this was the status of the contract, which the majority nonetheless takes as the basis of its order that the Navy pay, not only the amount of the invoices (including the $20,000 per man-month personnel salaries as

(31) The Claimants' own accountants have approved all four allegedly unpaid invoices, the first two of which were drawn up in accordance with the terms of the original contract and the latter two of which were instead drawn up in accordance with the above- mentioned modifications. These accountants, too, were therefore aware of the changes and of the basis upon which they were made.

mentioned by agreement of the parties)[32], but also a further $1 million [33] against the unperformed corporate office services fee through the entire period of the contract, even though the parties had very expressly agreed to abandon that fee and Pomeroy had ceased to demand it in its later invoices.

On what grounds has the majority disregarded the parties' agreement made prior to termination of contract? Indeed, on what grounds has it gone further by accepting to enforce only those provisions of the agreement which redound to the advantage of Pomeroy, so that the Navy is ordered to make double payment? The majority offers the following reasoning:

> "...although... Pomeroy Corporation reduced its staff in Iran from December 1978, as a result of the events in Iran, there is no evidence that Pomeroy Corporation or the Navy regarded the Contract as terminated prior to the notice of 12 /sic/ March 1979; on the contrary, on several occasions in the correspondence between the contracting parties in December 1978 and the following months, the possibility of resuming full contract performance was mentioned."(34)

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(32) By way of example, if the invoice for January 1979 had been calculated on the basis of the original contract, it would have amounted to $172,755. Pomeroy, however, rightfully calculated the invoice on the basis of its new agreement with the Navy, and as a result the figure rose to $269,200. By its Award, the majority has ordered the Navy to pay the latter sum.

(33) This amount, together with interest thereon, greatly exceeds the total amount of the other damages awarded. The Award limits damages on this claim to $1 million, as against the $1,821,922 originally demanded by the Claimants, in order to reflect the reductions in overhead costs which Pomeroy would have incurred if the original contract had been continued and performed upon.

(34) Page 22 of the English version of the Award.

However, there is a simple, two-fold answer to this reasoning. First, in light of the facts of the case, the determination of the issue of the corporate office services fee has nothing to do with whether the Navy's letter of 10 March 1979 constituted a termination of contract; on the contrary, the issue is rather whether the parties mutually agreed to amend the pertinent provisions of the contract. Second, although Pomeroy did refer in its letter of 13 December 1978 to the possibility of building up again sometime around March 1979, the parties' subsequent correspondence makes it absolutely clear that they agreed that any such rebuilding was contingent upon fulfillment of certain conditions, detailed negotiations and future mutual agreements. In its reply to Pomeroy's letter of 13 December 1978, the Navy makes this clear, stating that "arrangements regarding staff rebuild up by you requires /sic/ pre-authorization from IIN /the Navy/." (35) Pomeroy agreed to this stipulation: "Reassembly of a staff, its members and location would be determined by the needs of the (Navy) and after detailed discussion with you before any implementary actions would be taken." (36) In a later letter Pomeroy repeats its acceptance of this stipulation: "At such time as it is mutually agreed that security for the staff can be assured and appropriate work permits can be obtained we are prepared to return the staff to Tehran, if

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(35) The Navy's letter of 18 December 1978, quoted in full at page 31 above.

(36) Pomeroy's letter of 28 January 1979, quoted in full at page 37 above.

the operational needs warrant reestablishment of a Tehran OICC support office." (37) On the basis of the preceding, is it not most strange that a judicial body should allow itself to disregard the parties' arrangements in force at the time of termination, on the excuse that the parties had not discarded the possibility of making mutually agreeable arrangements in the future should certain conditions, (none of which has, incidentally, materialized) present themselves?

The best demonstration that the majority has completely failed to understand the points at issue here comes from its concluding paragraph on the subject of the so-called "firm fee":

> "The Navy having terminated the Contract for no fault of Pomeroy Corporation, the Tribunal finds that the Claimants are entitled to compensation for their losses..."(38)

As was mentioned above, the essential issue with respect to the corporate office services fee is not whether the Navy terminated the July 1, 1978 contract, but whether the Navy, which terminated the amended contract, should be held responsible for a cancelled provision of the old contract. Further, and still more important, the possibility that Pomeroy was at fault in respect of termination is not at issue. No one has suggested that Pomeroy was at fault.

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(37) Pomeroy's letter of 16 February 1979, quoted in full at page 34 above.

(38) Page 22 of the English version of the Award.

The question is, whether the Navy, which has been ordered to compensate Pomeroy for the consequences of termination, was at fault.[39] For common sense, equity, and the law of every nation of which I am aware dictate that where neither party is at fault, neither is required to indemnify the other. And it must be noted in this regard that not even the Claimants themselves seem to have suggested that the Navy or any of the Respondents had anything to do with the changes in circumstances in Iran that allegedly caused the termination of the contract.

* * * *

The majority rejects the Navy's argument that the contract was null and void ab initio. It is, of course, the majority's right to do so, provided however that it at least correctly understands the argument first, which regretably was not the case here. The majority further rejects the navy's argument that the purported letter of termination lacked all legal significance inasmuch as the contract had in effect been terminated some months earlier by the departure of Pomeroy's personnel from Iran. Here too, it is the majority's right to reject the argument, although in light of the facts presented one utterly fails to comprehend how such a rejection can be legally supported. But what the majority had no right to do at all was to hold that in determining the consequences of termination-- if

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(39) I need not elaborate on the important differences in the consequences of these two types of inquiry. Suffice it to say that the majority's inquiry would leave no room for many recognized defences, including that of force majeure to which Pomeroy itself repeatedly refers in relation to its reasons for reducing the number of its personnel prior to termination of contract.

indeed there was a termination-- the existing agreements between the parties could be disregarded, simply because the parties had not renounced the possibility of different arrangements in the future on the basis of different circumstances, detailed negotiations and mutual consent. Unfortunately, the majority in the present case not only has done so, but has gone much further and, through a method which is difficult even to imagine, has arbitrarily discriminated between the provisions of the parties' agreements, upholding those provisions which increase the Claimants' compensation, while rejecting those provisions which correspondingly decrease the Claimants' entitlements. In short, it has, on the basis of this convoluted line of argumentation, ordered the Navy to pay $1 million in reference to a deleted article in the parties' agreement for services which were never performed.

This is the type of justice to which Iran has been subjected in this case; and this is the quality of the legal reasoning which typically forms the basis of awards that are expected to set international legal precedent.[40]

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(40) There is also much to be said concerning the majority's confusion of the two different issues of "contractual obligations" and "loss of profits." However, in light of what has been said above regarding the corporate office services fee itself, it does not seem necessary to embark on the former issue here.

THE NAVY'S COUNTERCLAIMS FOR TAXES AND SOCIAL SECURITY PREMIUMS

Finally, a few words must be said about the majority's rejection, on the merits, of the Respondents' counterclaims for taxes and social security premiums. It has already been noted how the majority in effect proceeded, after having put forth the Claimants' objection to the Tribunal's jurisdiction over these issues, and having asserted that the Tribunal need not decide these issues in the present case, to rule in effect in favour of its jurisdiction by considering the counterclaims on their merits. In so doing, however, the majority rejected the counterclaims on the ground that the Respondents' evidence (consisting of two letters to the Iranian navy from the General Department of Taxes and the Social Insurance Organization, showing the amounts of taxes and social security premiums owed) cannot ipso facto be regarded as sufficient evidence of the Claimants' liability. Such letters, the majority states, are not accompanied by any supporting materials and so do not satisfactorily explain the bases of calculation of Pomeroy's liability.(41)

The reason why a certificate by organizations-- indeed, the only organizations-- competent to determine the amount of Pomeroy's obligations owing should be considered insufficient, is not clear at all. But be that as it may, the fact remains that in accordance with a widely recognized legal principle, wherever the courts establish that a liability exists but are unable because of lack of evidence to determine

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(41) Page 26 of the English version of the Award.

its amount, they cannot reject the related claim altogether but must award an amount by (first) ordering the parties to produce more satisfactory evidence, (second) appointing experts, and (third) drawing their own inferences as to what is reasonable under the circumstances. Indeed, the majority has actually taken this last step in that part of the Award where in treating the Claimants' failure to produce the highly relevant letter of 28 December 1978, it holds that "Because of the gaps in the evidence and the difficulties in quantifying the actual amount... the Tribunal is justified in estimating such amount... the Tribunal notes that when there are unexplained gaps in the evidence the Tribunal has no choice but to rely on inferences it can make from the known circumstances."(42)

The interesting point to note is that the majority proposes this solution for cases in which the very existence, or lack,of liability is at issue. It goes without saying that where, as here, the existence of liability with regard to the Navy's counterclaim, is accepted and the only issue to be determined is the basis of calculation, such a solution must, a priori, be adopted. The difference between the two is, of course, that in the first one the majority is concerned with the failure of certain American Claimants to produce evidence in support of their claims, and in the second, with the failure of Iranian respondents; it seems that what is sauce for the goose is not always sauce for the gander!

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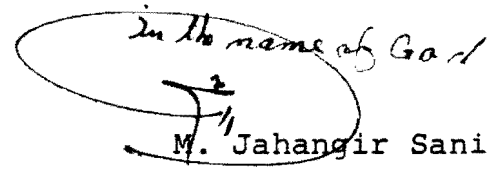
(42) Pages 24-5 of the English version of the Award.

The present Award is extremely unjust to the Respondents, legally untenable, and unbefitting of an international tribunal. I must therefore dissent from it.



M. Jahangir Sani