IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 89
CHAMBER THREE
AWARD NO. 225-89-3

226

MCCOLLOUGH & COMPANY, INC.,
Claimant,

and

THE MINISTRY OF POST, TELEGRAPH AND TELEPHONE, THE NATIONAL IRANIAN OIL COMPANY and BANK MARKAZI,
Respondents.

AWARD

Appearances:

For the Claimant:
Mr. Jeremiah D. Lambert
Mr. William D. Coston
Attorneys
Mr. E.C. McCollough
President of McCollough & Company Inc.

For the Respondent:
Mr. Mohammad K. Eshragh
Agent of the Government of the Islamic Republic of Iran
Mr. Khosrow Tabassi
Legal Advisor to the Agent of the Islamic Republic of Iran
Mr. Majid Herischi
Mr. Ahmad Ansari
Representatives of the Ministry of Post, Telegraph and Telephone
Mr. Roostam Moaid Baharloo
Representative of the National Iranian Oil Company
Mr. Mohammad Ekhterai
Representative of Bank Markazi

Also Present:
Mr. John R. Crook
Agent of the Government of the United States of America

I

INTRODUCTORY ISSUES

1. The Claimant in the present Case, McCOLLOUGH & COMPANY INC. ("McCollough"), submitted its Statement of Claim on 17 November 1981. McCollough raised claims against three Respondents, the MINISTRY OF POST, TELEGRAPH and TELEPHONE ("PTT"), the NATIONAL IRANIAN OIL COMPANY ("NIOC") and BANK MARKAZI. The claims are based on certain contracts for consultancy services to be provided by McCollough in Iran. Substantial counterclaims were raised by PTT and NIOC, arising out of the Claimant's activities in Iran.

2. At the time of filing the Statement of Claim , the claims against the Respondent PTT were received and accepted for filing. The claims against the Respondents NIOC and Bank Markazi were initially not filed but "lodged" with the Tribunal on the ground that they were claims in amounts below US$250,000. At its 24th Meeting, on 18 December 1981, the Full Tribunal decided to accept the filing of aggregated claims as one case.[1] Following a requested amendment, the claims against the Respondent PTT were "aggregated" with the claims against the Respondents NIOC and Bank Markazi into one case, the present Case, thereby rendering all claims submitted by McCollough acceptable for filing.

3. The Parties submitted extensive Memorials on all issues of the Case. A Pre-Hearing Conference was held on 2 May 1984.

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[1] See Ford Aerospace & Communication Corp. and The Air Force of the Islamic Republic of Iran, Interim Award No. 39-159-3 at 10 (4 June 1984). In this Award the Tribunal further specified that "aggregation" of claims "concerns the propriety of the claims [...] being heard in a consolidated fashion rather than separately, and does not address the jurisdiction of the Tribunal per se."

4. At the Pre-Hearing Conference the Claimant indicated that it wished to withdraw its claim against Bank Markazi. Bank Markazi filed a further Statement of Interest on 7 February 1985 requesting "the Tribunal to render an award rejecting Claimant's Statement of Claim ... and compelling Claimant to pay all related damages." At the Hearing the Respondent Bank Markazi stated no objection to the Claimant's requested withdrawal of the claim against Bank Markazi. In view of the foregoing, the Tribunal hereby terminates the proceedings as far as they relate to the Respondent Bank Markazi.

5. A Hearing on all issues was scheduled for 9 September 1985. The Parties appeared, but the Respondent PTT requested an adjournment of the Hearing in respect of the merits of the claims (and counterclaims) raised against (and by) the Respondent PTT. The ground invoked was that a representative of the PTT, Mr. Bakshi, had not yet arrived in The Hague due to problems with flight reservations. The Claimant objected to the requested adjournment. In view of this objection the Respondent proposed, and the Claimant agreed, that the Hearing on all issues be adjourned until the following day. In view of the foregoing, the Tribunal decided to adjourn the Hearing on all issues in the Case to 10 September 1985 at 9.30 a.m. The Hearing was held on 10 September 1985. The Parties appeared and presented oral argument.

6. At the Hearing in this Case the Respondents sought to submit certain evidentiary material not previously filed in this Case. The Respondents further requested, in the event the Tribunal would not accept this evidentiary material for filing at the Hearing, that the Parties be allowed to submit a Post-Hearing Memorial on the issues in question. The Claimant objected to the filing of the evidentiary material on the ground of untimeliness, and also objected to the submission of any Post-Hearing Memorial. The Tribunal

decided, in view of the requirements of equality between, and fairness to, the Parties, that no further filings could be accepted at such stage of the proceedings. On 20 September 1985 the Respondent PTT submitted a document entitled "Post Hearing Memorial of Ministry of Posts, Telephone and Telegraph "PTT"." In consequence of the decision at the Hearing, the Tribunal, by Order of 10 October 1985, decided to disregard this unauthorized submission by the Respondent PTT.

7. The Respondents PTT and NIOC have requested that the Tribunal appoint experts, for the purpose of auditing invoices and determining the accuracy of the counterclaims (in the case of PTT), and for the purpose of evaluating the extent of the alleged damages counterclaimed by NIOC. The Claimant has opposed the appointment of experts, contending that the issues involved do not require expertise. The Tribunal finds that the issues in question do not warrant the appointment of experts in this Case.

II

JURISDICTION

8. The Tribunal notes that no objections have been raised as to the propriety of the Respondents named in this Case. Accordingly, and as no doubt has been raised in this respect, the Tribunal finds that each Respondent in this Case is included within the definition of "Iran" in Article VII, paragraph 3 of the Claims Settlement Declaration.

9. The Claims asserted here are all for payment for services rendered or for breach of contract prior to 19 January 1981; hence the claims all have arisen out of a debt

or contract within the terms of the Claims Settlement Declaration.

10. In the following, the claims (and counterclaims) raised against (and by) each of the two remaining Respondents will be dealt with separately, as the claims (and their related counterclaims) bear no relationship to each other beyond the fact that they are owned by (or raised against) the Claimant in this Case. Particular jurisdictional issues in respect of any of the claims (and counterclaims) are treated separately in connection with the merits of the claims (and counterclaims).

III

THE CLAIMS AGAINST THE RESPONDENT PTT

THE FACTUAL BACKGROUND

11. In 1969 the Government of Iran decided to develop and establish a comprehensive domestic telecommunications system providing telephone, telegraph, television and telex services through the use of microwave communication systems. This system became known as the Integrated National Telecommunications System ("INTS"). The services of an international consortium of telecommunications contractors were procured to implement this decision. The consortium was comprised of General Telephone and Electronics International, Inc., Nippon Electric Company Limited, Page Communication Engineers Inc. and Siemens A.G. ("GNPS Consortium"). Due to the scope of the project it was decided to set up a "separate semi-autonomous Program Management Organization" ("PMO") to supervise the GNPS Consortium's activities and performance and that the PMO would avail itself of the assistance of a telecommunications consultant. Negotiations were undertaken with McCollough as the prospective consultant and on 7 October 1970 PTT and McCollough signed a

contract ("Contract"). Under the Contract McCollough agreed to "plan, monitor, coordinate, and manage the development of Iran's Integrated National Telecommunications System". The Contract was subsequently amended, supplemented or extended on seven different occasions, and on 4 February 1979 the Parties executed a "Procès Verbal", according to which, inter alia, the Contract was suspended. On 21 March 1979 the Contract expired by its own terms.

JURISDICTION

Nationality and Continuous Ownership of the Claim

12. The Respondent PTT contends that the Claimant has not proven its United States' nationality or its continuous ownership of the claims.

13. The Claimant has submitted evidence of nationality and continuous ownership of the claims in the form of (a) copies of a Certificate of the Corporation Division of the District of Columbia, U.S.A., attesting that as of 18 February 1971 the Claimant was incorporated there and that as of 3 August 1983 it "is duly incorporated and existing ... and authorized to transact business"; (b) affidavits of Mr. E. C. McCollough, as President of McCollough, and Mr. Robert S. Cook, the auditor of McCollough, attesting to the continuous ownership by McCollough of the claims asserted in this Case and to the fact that from February 1979 to February 1984 Mr. McCollough held at least 58.5 % of the shares in McCollough as an individual and as trustee for members of his family; and (c) certificates evidencing the birth as American citizens of Mr. McCollough and those members of his family.

14. Based on the aforesaid evidence the Tribunal finds that the Claimant is a national of the United States of America, and has continuously owned the claims asserted here, thereby satisfying the jurisdictional requirements of the Claims Settlement Declaration.

Forum Selection Clause

15. The Respondent PTT asserts and the Claimant disputes that, in accordance with Article II (1) of the Claims Settlement Declaration, the claims asserted against PTT are excluded because Article XII of the Contract specifically provides that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts.

16. The Claimant has submitted, and the Respondent has conceded to be authentic, executed copies of both the English and Farsi texts of the Contract, which texts the Parties agree are equally authentic and binding, in accordance with Article XVI of the Contract, which provides as follows:

> LEGALITY OF THE CONTRACT
> This Contract was made and signed in five copies and are in [P]ersian and English versions, both versions having the same validity....

17. The Parties acknowledge that the English and Farsi texts of Article XII of the Contract contain dispute settlement provisions which differ in substance. The English text provides as follows:

> SETTLEMENT OF DISPUTES AND ARBITRATION
> All disputes which might possibly arise under this contract or through different interpretation of its clauses between parties to this contract and which cannot be settled through negotiation or correspondence in a friendly manner will first be brought up in a committee consisting of representatives of the Ministry of PTT, plan Organization and the Consultant for the settlement of disputes[.] [S]hould no agreement be reached or one

> of the parties to this contract object to the decisions of the committee, the subject matter of the dispute shall be decided and settled in accordance with the Iranian laws.

The Parties further agree that first sentence of the Farsi text is identical in substance to the English text, but that the second sentence reads as follows, in an agreed translation:

> Should not settlement be reached in the committee the issues of the disputes shall be settled in accordance with the Laws of the Government of Iran and by the competent courts of Iran. (Emphasis added).

18. When there is an apparent difference of meaning between two equally authentic texts of a contract, drawn up in two languages, one first should try, in accordance with general principles of contract interpretation, to construe the contract in such a way as to reconcile the two texts. This conforms to the principle, applicable to contracts as well as to treaties, contained in Article 33 (3) of the Vienna Convention on the Law of Treaties[2], that "the terms of the treaty are presumed to have the same meaning in each authentic text".

19. There is no doubt that, under Article II(1) of the Claims Settlement Declaration, reliance on the Farsi text of Article XII would oust the Tribunal of jurisdiction. It is equally clear that reliance on the English text of Article XII leads to the opposite conclusion of that drawn from the Farsi text, namely that the Tribunal's jurisdiction is not impaired. This is in accordance with what this Tribunal in pleno stated in T.C.S.B., Inc. and The Islamic Republic of Iran, Award No. ITL-5-140-FT (5 November 1982), reprinted in

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[2] U.N. Doc. A/Conf.39/27, 23 May 1969, entered into force 27 January 1980, reprinted in 8 Int'l Legal Mat'ls 679 (1969) ("Vienna Convention").

1 Iran-U.S. C.T.R. at 261. The Tribunal concludes that this construction does not reconcile the two equally authentic texts.

20. In its attempt to reconcile the two texts the Tribunal also has resorted to another principle of contract interpretation restated in the Vienna Convention, i.e., Article 33 (4), which states that one should adopt "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty". Both texts are compatible with the object and the purpose of the Contract, however, as they both provide for a method of settlement of disputes. Thus the incompatibility of the two survives application of this principle as well.

21. In this situation the Tribunal is compelled to examine the preparatory works, as well as other circumstances surrounding the drafting of the Contract, in order to find indications of an interpretation which best translates the common intent of the Parties. Three circumstances invoked by the Parties warrant examination.

22. The first circumstance, invoked by the Claimant, is the existence of an earlier "draft agreement" dated 9 September 1970 (the "September Draft"). The September Draft contains a dispute settlement provision the first sentence of which is virtually identical to the first sentence in Article XII of the Contract. The second sentence of that provision, however, states that in the absence of agreement between the Parties in respect of a dispute, or should a Party reject the decision of the "committee":

> the subject matter of the dispute shall be decided and settled in accordance with the Iranian laws through arbitration or by the competent tribunals if necessary. (Emphasis added.)

The Claimant's President, Mr. McCollough, asserts that this language, which would allow the Tribunal to exercise

jurisdiction, "was inserted in the draft agreement, in English, by Mr. Abhari" of the Iranian Plan Organization ("Plan Organization"), one of the persons with whom he "initially negotiated, ... without use of translation into Farsi ... solely in the English language". Mr. McCollough further states that to the best of his knowledge "there was no draft in the Farsi language prepared contemporaneously to parallel the September draft contract", which "is the only version of a draft contract of which I am aware". Undoubtedly, the Claimant's intended implication is that the English text of Article XII of the Contract more nearly conforms to the Parties' common intent. During the Hearing, the Claimant even contended that the September Draft was still a valid agreement, since the first of the seven supplemental agreements, on which Claimant also relies, is described as "a supplemental agreement to the contract signed September 9, 1970 between" the Claimant and the Respondent PTT. For its part, the Respondent PTT denies the very existence of the September Draft, and contends that in any event it has been superseded by the Contract. It is a fact, at any rate, that all six of the succeeding supplemental agreements refer only to the Contract.

23. The Tribunal finds that the existence of a draft agreement has been established by the submission of the September Draft. Although initially there was some confusion in the contractual relations between the Parties no doubt exists today, however, that both Parties subsequently considered their relations governed by the October Contract and the successive agreements which supplemented it. In the view of the Tribunal it is more doubtful what inference can be drawn from the quoted version of the dispute settlement provision in the September Draft. The absence of a contemporaneous draft agreement in Farsi and the absence of any evidence of a changed intent of the Parties after the September Draft lends credence to the contention of the Claimant that the September Draft accurately translates the

common intent of the Parties. It is the Contract, however, and not the September Draft, which expresses the last intent of the Parties. The Tribunal therefore finds that the mere existence of the September Draft with the quoted provision is not conclusive in establishing a common intent of the Parties.

24. The Respondent PTT asserts the relevance of a second circumstance, namely the fact that according to Article XVI the Contract was to "become effective," and hence binding on the Parties, only "upon approval of the plan Organization". In all probability, the approval by the Plan Organization was given on the basis of the Farsi text. According to the Respondent PTT, therefore, the intent of the Iranian party would have been perfected only on the basis of the Farsi text, and the Respondent PTT would be only obligated by this text. The Tribunal finds that this argument runs against the clear meaning of Article XVI of the Contract, according which the English and Farsi texts have the same validity and hence are equally binding on the Parties. Furthermore, as the Farsi text, approved by the Plan Organization, was not identical to the English text, it was the duty of the Iranian negotiator to notify Claimant to this effect and to urge the latter to revise the English text so that the two texts would be in conformity with each other. This was not done.

25. This failure is even more significant when the third relevant circumstance is considered. The Claimant's President asserts that the Contract "was not prepared by [Mr. McCollough] or any of [his] representatives", that it was "first executed in the English language by [himself] and [the Minister of Respondent PTT]...[and that he] was told by Mr. Abhari that the Farsi interpretation was identical to the English language agreement." There is little doubt that Mr. McCollough, who negotiated the Contract, neither reads nor understands the Farsi language, but that, on the

contrary, the Iranian negotiator was able to express himself in English and that the negotiations in fact were conducted in English. Under such circumstances, the common intent of the Parties could not be established in any language other than English and the negotiator who was able to read both texts of the Contract had the duty, in good faith, to ensure the conformity between the two texts. This was not done.

26. In conclusion, the Tribunal is satisfied that the circumstances surrounding the negotiation of the Contract demonstrate that there was no common intent of the Parties to provide that any dispute arising under the Contract should be within the sole jurisdiction of the competent Iranian courts. Consequently the Tribunal has jurisdiction over the claims asserted against the Respondent PTT arising out of the Contract.

THE MERITS

27. The Claimant seeks payment for invoices for services performed under the Contract, the return of funds retained under the Contract "as guarantee for good performance of the work," compensation for certain services performed in relation to the Contract, as well as interest and its costs of arbitration. In addition the Claimant seeks payment of the rial amount due in dollars at a conversion rate of 70.35 rials/dollar, i.e., the rate allegedly applicable at the time of suspension and expiration of the Contract. The issues of interest, costs and currency of payment are dealt with subsequently in this Award.

Invoices

28. The Claimant seeks payment of 34 separate invoices outstanding at the time of Contract termination for 32,588,574 rials and US$354,476.37, plus interest.

29. The Respondent PTT contests all of the invoices. It further objects to the conversion of the rial portion of the invoices to dollars, as well as to the conversion rate applied.

30. The invoices, which are discussed immediately below, can be divided into three categories.

31. A first category consists of three invoices[3] which are "half paid" invoices. Each of these invoices states a dollar amount divided into two equal demands for payment, one in dollars and one in the rial equivalent of the same number of dollars. The rial portions of these invoices have been paid. Mr. Don S. Farrens, who from May 1976 until July 1979 was employed by the Claimant in connection with the subject matter of this dispute, states in an affidavit submitted to the Tribunal that he was informed by representatives of the Respondent PTT that these three invoices "were proper" and "approved" but that the dollar portion remained unpaid only because Iran "lacked sufficient foreign currency." This is confirmed by a statement in the above-mentioned Procès Verbal to the effect that the Respondent PTT was "temporarily without adequate funds to meet its obligations" including those owed to the Claimant. Finally, at the Hearing the representatives of the Respondent PTT conceded that the validity of these invoices was no longer contested. The Tribunal therefore accepts these invoices as valid and payable.

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[3] Invoices Nos. 7807-SDR-074, 7808-SDR-077 and 7809-SDR-082.

32. A second category of invoices are the "revised" invoices. The Respondent PTT itself indirectly has suggested the validity of a number of invoices bearing the designation "Revised". In its Memorial the Respondent PTT refers to "Invoice No. 7607-OR/003" dated 8 July 1976. As an exhibit to the Memorial the Respondent PTT produced a heavily marked up invoice of the Claimant, bearing that number and date, which appears originally to have demanded a sum approaching three million rials and indicates a handwritten revised total of 2,359,220 rials. In its Memorial the Respondent PTT notes that this invoice was "reviewed and due to recurrent errors, such as duplications and accounting mistakes, was returned as normal procedure to the offices of [the Claimant who] returned the invoice to the Ministry on 11 May 1978, marked 'revised' having accepted the modifications." The Memorial of the Respondent PTT then exhibits a clean invoice of the Claimant bearing the same number and containing the same information, but marked "Revised 11th May, 1978" and demanding the revised sum of 2,359,220 rials. This revised invoice is identical to the invoice of the same number indicated by the Claimant among the 34 invoices on which it claims. The unavoidable inference is that the "revised" invoice was in fact accepted by the Respondent PTT. The Respondent PTT possibly intended simply to point out what apparently was an example of past errors made, in its view, by the Claimant in rendering invoices, but in doing so it inferentially confirmed that an invoice of the Claimant which indicates on its face that it is a "revised" invoice probably represents a sum in fact "accepted" by the Respondent PTT. Indeed, at the Hearing the representatives of the Respondent PTT agreed that this was the practice of the Parties. Of the 34 invoices presented to the Tribunal by the Claimant ten are such "revised" invoices (including two

of the "half paid" invoices referred to above).[4] The Tribunal accepts these ten invoices as valid and payable as claimed.

33. The third category of invoices are the "unquestioned" invoices. It appears that the Respondent PTT continued evaluating the Claimant's demands following the termination of the Parties' contractual relations, and on 21 April 1981 the Minister of the Respondent PTT requested the Claimant in writing to provide "all the back ups and relevant documents ... to ease the auditing" and listed only eleven of the 34 invoices.[5] That list included two of the "half paid" (and "revised") invoices and three additional "revised" invoices referred to above. This action effectively left unquestioned seventeen invoices not previously "half paid" or "revised".[6] In addition, the fact that five of the eleven invoices questioned were already "half paid" or "revised" suggests a strong possibility that the other six invoices questioned were correct too. This tends to be confirmed by the fact that after the Claimant's President explained the questioned invoices in writing, and after the Respondent PTT advised the Claimant on 3 June 1981 that the requested backup had been received but that it may "not satisfy the auditor and finance authorities [and] [d]etailed information will be followed," the Claimant heard nothing further.

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[4] Invoices Nos. 44-R, 7607-OR-003, 7711-OR-047, 7805-SR-070, 7807-SDR-074, 7808-SDR-077, 7808-OR-080, 7810-SDR-086, 7811-SDR-088 and 7811-OR-090.

[5] Invoices Nos. 44-R, 76-R, 96-R, 7807-SDR-074, 7808-SDR-077, 7808-OR-080, 7809-SR-083, 7810-OR-084, 7811-OR-090, 7901-SDR-100 and 7901-OR-102.

[6] Invoices Nos. 014-R, 015-R, 7610-OR-021, 7808-SR-078, 7810-SR-085, 7811-OR-087, 7812-SDR-091, 7901-SDR-093, 7902-OR-095, 7901-SR-096, 7901-DR-097, 7902-SR-098, 7901-SDR-099, 7901-OR-101, 7901-SR-103, 7901-SR-104 and 7901-SR-105.

34. All of the invoices also must be seen in the light of the Procès Verbal of 4 February 1979, which while admitting there were "substantial sums due and payable to" the Claimant by the Respondent PTT, gave as the only reason for nonpayment the fact that the Respondent PTT "is temporarily without adequate funds to meet its obligations." Prior to the Hearing, the Respondent PTT had made only general objections to the invoices, notwithstanding that it had for a long period of time been in the possession of substantial documentation. As noted above, the Respondent PTT apparently was provided all it demanded by way of "backup" material prior to the middle of 1981. Its possession of detailed information is further documented by its discussion of "revised" invoices as indicated above. Furthermore, on 18 July 1984 the Claimant submitted to the Respondent and the Tribunal a substantial amount of material concerning the 34 invoices, yet the Respondent PTT's Memorial filed 6 December 1984 makes no specific or detailed objection to any item of the invoices.

35. At the Hearing the Respondent PTT for the first time sought to submit, and the Tribunal declined to accept as evidence, certain documents purportedly casting doubt on various invoices and which the Respondent had had in its possession since 1979 or before. With one exception, however, none of the invoices specifically addressed by the Respondent PTT at the Hearing was among the eleven previously questioned. The Respondent PTT offered no reasonable excuse for its failure to have raised specific issues about individual invoices before.

36. Under these circumstances the Tribunal concludes that the Claimant's demands based on the 34 invoices in the amount of 32,588,574 rials and US$354,476.37 are justified.

Retentions

37. It is undisputed between the Parties that pursuant to Article "Fifth" of Supplemental Agreement No. 2 to the Contract 5% of certain payments due to the Claimant was withheld by the Respondent PTT "as guarantee for good performance of the work", and that the Article further provided that " [i]mmediately upon completion or termination of the Contract (for any reason other than the default of the [Claimant]), the full amount withheld ... shall be paid ..." The Claimant maintains that the Contract terminated by its own terms on 21 March 1979, that it fully performed its obligations under the Contract, and that therefore the retained funds should have been returned to the Claimant immediately after 21 March 1979. Accordingly the Claimant seeks payment of US$67,347.59 and 36,553,871 rials. As stated by the Claimant, this is the total amount retained by the Respondent PTT pursuant to the above-mentioned contractual provision.

38. The Respondent disputes any obligation to repay the retained funds. The Respondent further disputes the amount sought by the Claimant, as well as the conversion of a rial claim to a dollar claim.

39. As to the objection to any repayment, the Respondent argues basically that the funds retained "as guarantee for good performance of the work" need not be returned to the Claimant because of defects in the Claimant's performance under the Contract. The Respondent alleges that the Claimant has been deficient in performing virtually every obligation incumbent upon it under the Contract.

40. More specifically, the Respondent PTT maintains that it was exposed to substantial claims from the GNPS Consortium and that "[t]hese claims ... are predominantly for alleged damages suffered by the [GNPS] Consortium as a result of the [Respondent's] lack of timely and proper performance of its contractual obligations, a deficiency which, with view to

[the Claimant's] overall responsibility to the PMO, is directly attributable to [the Claimant's] negligence". The submission of the Respondent in this respect refers to arbitral proceedings under the auspices of the International Chamber of Commerce (the "ICC") in a case between the GNPS Consortium and the PTT (ICC Case No. 4209/AS). The Respondent maintains that its allegations related to the Claimant's performance "are fully supported by the claims and allegations made by the GNPS Consortium's management and technical officials in their witness statements and testimonies related to the P.T.T.- G.N.P.S. dispute ...." According to a statement by the Respondent at the Hearing, the ICC proceedings were concluded, in or about February 1985, by a settlement agreement between the parties.

41. Finally, the Respondent maintains that the defects in the Claimant's performance referred to above render the "stipulation of default in the contractual provision [Article Fifth of Supplemental Agreement No. 2] ... rightly applicable". In another submission, however, the Respondent states that "[the] contract (...) had been suspended in 3 February '79 and had expired on its own terms in 21 March '79 (...)."

42. The Tribunal finds as an initial matter that, as the Parties have presented the Case, it is undisputed that the Contract terminated by its own terms on 21 March 1979, and not due to any default on the part of the Claimant. The Tribunal further finds, in view of the unambiguous terms of Article Fifth of Supplemental Agreement No. 2, that it must make a finding as to the performance of the Claimant under the Contract.

43. The Respondent's contention is, as the Tribunal understands it, that certain alleged deficiencies in the Claimant's performance under the Contract have caused the Respondent to suffer damages, and that these damages have

been established and evidenced by the arbitral proceedings between the GNPS Consortium and the Respondent under the auspices of the ICC. The Tribunal notes that the Respondent has asserted that it has suffered damages in relation to the INTS project, and that the performance of the parties involved in the INTS project has been at issue in the ICC proceedings. The Tribunal finds, however, that in the absence of supporting evidence, the mere assertion by the Respondent is not sufficient to establish a causal relationship between the damage allegedly suffered by the Respondent and the alleged inadequate performance of the Claimant. The Tribunal further considers that the Respondent has not given proof of any other ground for denying the Claimant repayment of the retained funds.

44. In support of its objection to the amount sought, the Respondent relies on a document signed by its "Comptroller and Director General, Finance Department". This document records that the retention balance is 40,385,133 rials. The Claimant has not submitted any evidence in rebuttal to this document. The Tribunal notes that the document invoked by the Respondent is undated. From the text of the document, however, it can be inferred that it was undoubtedly written after 1 September 1984. In view thereof, the Tribunal finds that according to the evidence submitted the retention amounts total 40,385,133 rials. This amount appears to include the amounts withheld both from the US dollar and from the Iranian rial invoices. Based on the evidence submitted, however, it is not possible to determine with accuracy which amounts have been withheld from the US dollar and Iranian rial invoices, respectively. From the Statement of Claim it can be inferred that the amounts due in dollars represent 11.5% of the total amounts due. In the absence of any other ground for allocation, the Tribunal determines that in this Case 11.5% of the retention, or 4,644,290 rials, is payable in US dollars and the remaining amount, 35,740,843, is payable in rials. In converting the rial

amount found payable in US dollars the Tribunal applies the conversion rate of 70.35, which rate the Claimant contends was prevailing at the time of termination of the PTT Contract. Consequently the amounts due are US$66,016.92 and 35,740,843 rials.

Post-Contract Expenses

45. The Claimant further seeks payment of five invoices dated 15 March 1983 for sums totalling US$238,605 in respect of expenses incurred or services rendered subsequent to the termination of the Contract. As ground for payment in respect of one invoice[7] the Claimant invokes only Supplemental Agreement No. 5, Article TENTH (A). In respect of all the remaining four invoices the Claimant invokes the doctrine of quantum meruit. In addition, the Claimant invokes the Procès Verbal in respect of one such invoice[8], and the Supplemental Agreement No.5, Article TENTH (A) in respect of another one.[9]

46. The Tribunal notes that the Claimant asserted this part of the claim before the Tribunal for the first time on 18 July 1984 by the submission of certain exhibits. The Tribunal does not deem this amendment of the Claim to be "inappropriate," however, within the terms of Article 20 of

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[7] Invoice No. MAC-PTT-4-83 for "[a]irfare and airfreight of expatriate personnel" amounting to US$40,499.

[8] Invoice No. MAC-PTT-1-83 for "[e]xpenses of claimant's office staff following expiration of contract in providing services to PTT to assist it in claim against GNPS Consortium" amounting to US$70,856.

[9] Invoice No. MAC-PTT-2-83 for "[r]oundtrip airfare and per diem expenses of Bruce McNeill to windup contract and to negotiate final payment of invoices" amounting to US$ 68,250.

the Tribunal Rules, as, in the absence of any allegation to that effect, this amendment does not appear to have prejudiced the Respondent.

47. The Respondent disputes any obligation for payment of these invoices. It contends that the Contract cannot constitute a ground for payment after its termination. With respect to the doctrine of quantum meruit the Respondent asserts that it neither requested nor received any assistance from the Claimant, and that in any case if any assistance was rendered it was not beneficial to the Respondent.

48. With respect to Invoice No. MAC-PTT-4-83, the Tribunal finds that these expenses were incurred on the basis of a contractual obligation. In accordance with Supplemental Agreement No.1, Article III (A) (5) these expenses incurred are payable in dollars. Consequently, the Tribunal accepts this invoice as due and payable in the amount of US$40,499, as claimed.

49. As to the remaining four invoices, the Tribunal agrees with the Respondent that there is no contractual basis constituting an obligation for payment of any of these invoices. Further, with respect to the doctrine of quantum meruit, the Tribunal considers that in light of the nature of the objections raised by the Respondent, and the lack of rebutting evidence, the doctrine cannot constitute a ground for compensating the Claimant for the invoiced amounts. Consequently, the Tribunal disallows the claim in this part.

Consequential Damages

50. In its Reply to the Statement of Defense of the Respondent PTT, filed 6 July 1982, the Claimant introduced a claim for "[d]amages caused to the financial health of" McCollough. It was later specified that the damage for the

"virtual ruin of [McCollough]" was estimated to "exceed $1 million". The Claimant has asserted that the failure of the Respondent timely to remit the sums due to the Claimant made it impossible for the Claimant to assemble adequate working capital and thus it could not continue profitable activity in the field of its endeavor.

51. The Respondent maintains that the claim for consequential damages should be dismissed as its submission was untimely. The Respondent further contends that even if the Tribunal finds the claim to be admissible, the cause of the "virtual" ruin of the Claimant has to be sought elsewhere than in the non-remittance of the funds in question.

52. Although the Tribunal does not find sufficient cause to declare this amendment to the Claim inadmissible, the Tribunal notes the utter lack of evidence submitted in support of the contentions of the Claimant on this issue. In particular the Tribunal notes the absence of any evidence of causation between the non-payment of the debts and the damages allegedly caused to the Claimant. Under such circumstances the Tribunal considers that the mere non-payment of debts cannot give rise to consequential damages as claimed. This claim is therefore rejected.

IV

THE COUNTERCLAIMS OF THE RESPONDENT PTT

53. The Respondent PTT has raised several counterclaims against the Claimant.

54. First, the Respondent claims that the Claimant's performance of the Contract was defective in numerous respects, resulting in damages of not less than US$10

million. The Claimant maintains, as noted earlier, that it fully performed the Contract. The Tribunal's previous ruling (see paragraph 43 above) rejecting the Respondent's allegations of inadequate performance is dispositive of this counterclaim as well.

55. Secondly, the Respondent PTT claims that two automobiles owned by the PTT, "Car No. 53985" and "Car No. 94471", were "available" to or "used by" the Claimant's personnel and that these cars were never returned to the Respondent PTT but instead were "abandoned" or "left" in a "street in Tehran" resulting in damages totalling 750,000 rials. The Respondent PTT relies on internal memoranda which report the loss of one of the cars and the damaged state in which the other car was found. The Claimant denies that it ever had or assumed any responsibility in respect of automobiles belonging to the Respondent PTT. In light of the evidence submitted, the Tribunal finds that the damage allegedly incurred cannot with a sufficient degree of certainty be attributable to the Claimant. Consequently, the Tribunal disallows this counterclaim.

56. Thirdly, the Respondent PTT contends that certain advance charges, in the amount of US$155,000, have not been duly credited or repaid to the Respondent PTT, and repayment of the same is claimed. The Claimant denies this counterclaim, maintaining that all advance payments have been credited to the Respondent PTT. The Tribunal finds that the evidence submitted indicates that the Claimant's practice was to credit the Respondent PTT with such advance payments. In light thereof, and in the absence of any evidence that this practice has not been followed with respect to the instant claimed amounts, the Tribunal rejects the Respondent PTT's counterclaim in this regard.

57. Fourthly, in its Statement of Defense, and without any subsequent specification, the Respondent PTT requests that

"the documents, reports, drawings and plans prepared by" the Claimant belong to the Respondent PTT and shall be "returned" or "made available" to the Respondent PTT. Apparently related to the latter request the Respondent PTT asserts that the Claimant has not "fulfilled its obligations in undertaking it's company's book keeping in an orderly and acceptable fashion as far as the tax authorities in Iran are concerned", and that this has caused great difficulties for the Respondent PTT in dealing with the relevant tax authorities. The Claimant rejects these counterclaims as well.

58. The Tribunal already has rejected the allegations that the Claimant has not performed the Contract. Although the Tribunal would deem it desirable to recommend that the Claimant cooperate with the Respondent PTT, to the extent it is deemed possible, by rendering relevant documentation available to the Respondent PTT, the Tribunal does not find cause to oblige the Claimant to do so, in view of the absence of any contractual provision to that effect.

V

THE CLAIMS AGAINST THE RESPONDENT NIOC

THE FACTUAL BACKGROUND

59. On 28 August 1977 the Claimant and NIOC entered into Contract No. DC-210 ("NIOC Contract"), pursuant to which the Claimant served as a consultant in relation to the NIOC "Seven Pipelines Telecommunications Project". The Claimant's services related, inter alia, to the construction of roads to the telecommunication sites in question. The Parties agree that the NIOC Contract was in force until 19 October 1979, at which time the Claimant confirmed by letter to NIOC the "suspension" of the NIOC Contract.

JURISDICTION

60. The Respondent NIOC raised certain jurisdictional objections in the pleadings. At the Hearing, however, the Respondent stated that these objections were no longer maintained.

61. As previously stated, the Tribunal has found that the Claimant has evidenced its United States nationality and continuous ownership of claims as required by the Claims Settlement Declaration and that the other jurisdictional requirements of the Claims Settlement Declaration have been satisfied.

THE MERITS

62. The Claimant seeks payment of invoices for services performed and for funds retained, as well as interest and its costs of arbitration. The issues of interest, costs and currency of payment are dealt with subsequently in this Award.

Invoices

63. The Claimant contends that six invoices remain unpaid.[10] The claim based on these invoices amounts in total to 1,535,529 rials (after deduction of contractual retention and taxes due). In addition the Claimant seeks payment of the rial amount due in dollars at a conversion rate of 70.35

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[10] Invoices Nos. DC210/14/0/04/78, DC210/15/0/04/78, DC210/46/S/02/58, DC210/47/R/02/58, DC210/48/S/04/58 and DC210/49/S/05/58 (for convenience here referred to as Invoices Nos. 14, 15, 46, 47, 48 and 49).

rials/dollar, i.e., the rate allegedly applicable at the time of suspension and expiration of the Contract.

64. The Respondent denies the claim in its entirety. The Respondent specifically maintains that Invoice No. 46 has been paid, that Invoices Nos. 14 and 15 were never received, and that although Invoices Nos. 47, 48 and 49 were approved in whole or in part, payment properly was withheld because the Claimant had seriously defaulted in its performance under the NIOC Contract. NIOC alleges, too, that the Claimant has failed to submit a "Clearance Certificate" related to the Claimant's contributions to the Social Security Organization ("SSO").

65. With respect to Invoice No. 46, the Tribunal notes that the Respondent has submitted documents which appear to constitute proof of payment, and that the Claimant in rebuttal only reiterates that it has no record of payment as most of its records remain in Tehran. The Tribunal concludes that in all probability this invoice has in fact been paid to the Claimant.

66. As to Invoices Nos. 14 and 15, the Respondent has stated that these invoices have never been received by the Respondent and the Claimant still has failed to submit copies of the invoices in question. The Tribunal therefore rejects the claim on these invoices.

67. The Tribunal notes that the Respondent has stated that Invoices Nos. 47, 48 and 49 were approved (Invoice No. 48 in the amount of 268,800 rials rather than the claimed 323,400 rials). The Tribunal finds that the alleged inadequate contractual performance of the Claimant cannot successfully be invoked as a ground for non-payment of these invoices. Consequently, the Tribunal accepts Invoices Nos. 47 and 49 totalling 668,180 rials as claimed. The Tribunal accepts Invoice No. 48 in the amount of 268,800 rials.

Consequently, after applicable contractual deductions, a total amount of 811,505 rials is due and owing to the Claimant.

Retentions

68. The Claimant contends that in accordance with the NIOC Contract (Article 11.2 of the General Conditions) the Respondent retained funds in the amount of 7,017,490 rials. (This includes hypothetical retentions on unpaid invoices which are the subject of the invoice claims just discussed.) Of the retention amount, half was payable to the Claimant on the date of "Handing Over" and the other half at a date most likely to be twelve months after completion. As the Respondent NIOC ordered "stoppage of work" effective as of 21 May 1979, before any formal "Handing Over" could have occurred, the first half necessarily fell due on 21 May 1979. Consequently, the other half fell due on 21 May 1980.

69. The Respondent NIOC contends that in accordance with the terms of the NIOC Contract the retention served as security for the good performance of the Claimant. NIOC argues that as the Claimant has not performed in accordance with its contractual obligations, particularly with respect to its supervision of the construction of the road to a certain "Repeater Station", the retention is not repayable.

70. In view of the relation between this part of the claim and the counterclaims raised by NIOC, this will be discussed further below.

VI

THE COUNTERCLAIMS OF THE RESPONDENT NIOC

71. The Respondent NIOC counterclaims against the Claimant alleging inadequate performance constituting a breach of the NIOC Contract. NIOC asserts that it therefore was justified in not paying certain invoices, that it has a right to continue to withhold the contractual retentions and, finally, that the Claimant is liable to pay damages caused to NIOC in a total amount of 55,867,269 rials. NIOC further counterclaims for allegedly unpaid SSO premia in the amount of 17,696,514 rials and taxes in the amount of 180,185,837 rials.

72. The Claimant denies all the counterclaims raised. With respect to the alleged breach of contract the Claimant contends that it fully performed all its duties in accordance with the NIOC Contract. With respect to the counterclaims for taxes and SSO contributions the Claimant raises certain jurisdictional objections and also denies any outstanding liability.

Breach of Contract

73. The Parties agree generally as to the factual background. The Claimant was engaged to act as a consultant to NIOC in relation, inter alia, to the construction of an access road on the side of a mountain generally referred to as the "Mountain of Mud" leading to a telecommunications repeater station, Repeater No. 5 (the "Road). The construction of the Road had not been completed as of 19 October 1979 when the contractual relationship between the Parties terminated. Some time after the termination of the Contract the Road was partially destroyed. In order to make it usable reconstruction and repair of the Road was undertaken at NIOC's expense. (These expenses constitute the damage claim raised by NIOC.) Under Article 6.1.7 of Part

II of the NIOC Contract, the Claimant agreed to provide the following services:

> Design and Drawing Review/Approval
>
> Responsible to review and comment on [replacing the word "approve"] all Contractor submitted drawings, specifications, and plans. Specific, though not all inclusive, items which must be reviewed and approved are:
>
> a. Tower/passive foundation design and drawings. This includes review and approval of the soils survey data.
> b. Contractor's requirements for power, space, etc., in existing facilities.
> c. Access road design and layout.
> d. Requirements for acquisition of site area and access road right-of-way.
> e. Frequency plans. (After coordination with the Ministry of PTT).
> f. All drawings including as-built.
> g. Factory and field test program.
> h. Path performance calculations.
> i. Design of all project subsystems.
> j. Contractor plans and design for rehab of existing towers and foundations.
> k. Installation practices, plans and drawings.
> l. Other data/drawings as required.
>
> (Emphasis added)

74. The dispute between the Parties is as to who is to be held liable for the damage incurred. NIOC contends that the Claimant is liable as the Claimant performed its duties as a consultant in an inadequate and negligent way. NIOC specifically contends, and submits extensive evidence in support of its contention, that the site chosen for the construction of the Road was inappropriate, and that the technical design, especially in relation to the drainage system and maintenance requirements, was inadequate for a road on such a site.

75. The Claimant alleges that it is not responsible for the damages claimed by NIOC because as a consultant the Claimant had a limited contractual obligation to "review and comment on" the drawings, specifications and plans submitted

relating to the Road. Furthermore, as the word "approval" was crossed out of the text of the NIOC Contract and replaced by the words "comment on", NIOC itself retained the final authority to approve the drawings, specifications and plans submitted by the contractor. The Claimant states that it did not actually inspect the Road site as it already had been chosen by NIOC prior to the execution of the NIOC Contract. Finally, the Claimant asserts that the technical design was appropriate for the construction and maintenance of the Road and that the ensuing damage to the Road was due to inadequate maintenance.

76. Upon examining the evidence submitted the Tribunal finds that some error was committed either in relation to the selection of the Road site, or in relation to the technical design for the construction and maintenance of the Road, or in respect of the maintenance of the Road.

77. As to the site selection the Tribunal disagrees with the limitative construction of the NIOC Contract urged by the Claimant. In the Tribunal's view the contractual requirement to "review and comment on" cannot be construed in such a narrow way as to relieve the Claimant of the professional responsibility it undertook as a consultant to NIOC under the NIOC Contract. As a consultant the Claimant had obligations which included, at a minimum, a duty to advise NIOC, inter alia, on the appropriateness of the site chosen for the construction of the Road.

78. The Tribunal considers that the precise manner in which a consultant chooses to carry out its duties, such as the duty to "review and comment on" the site selection, is within its own discretion. When charged with improperly discharging these duties, however, the Claimant cannot successfully invoke as a defense its failure to inspect the site, or the fact that the site was not chosen by the Claimant. The Claimant's responsibility is not diminished

by the manner in which the Claimant chose to carry out its duties.

79. Further, in the view of the Tribunal, the fact that the word "approval" was deleted from the text of the NIOC Contract does not relieve the Claimant of its responsibility. The deletion of the word "approval" simply signifies that had NIOC acted contrary to the Claimant's recommendations and comments the Claimant would have been relieved of its liability. In this case the Tribunal finds it determinative that the Claimant has at no stage even alleged that it expressed the slightest reservation to NIOC as to the choice of the Road site in question.

80. With respect to the technical design, specifically in relation to the drainage system and maintenance requirements, the Tribunal finds it undisputed that the ground conditions at the Road site chosen were such as to require certain special measures of precaution. In this respect the Tribunal considers it particularly important that the Claimant has not alleged, nor does the evidence submitted suggest, that the technical design for the Road contained any such special precautionary measures or that such measures were even suggested by the Claimant.

81. Based on the foregoing the Tribunal finds that the Claimant did not adequately discharge its duties as a consultant as required by the NIOC Contract.

82. The Tribunal next must examine whether the damage was caused by the Claimant's inadequate performance. In this respect the Tribunal notes that due to the early termination of the Contract on 19 October 1979 the Claimant was not in a position to complete its duties and at this time the construction of the Road had not been finished. Furthermore, on the basis of the evidence submitted, the Tribunal finds that it cannot be excluded that other factors, such as

possible inadequate maintenance of the existing drainage system, contributed to the damage to the Road. The Tribunal therefore cannot with any reasonable degree of certainty establish either that the Claimant's inadequate performance has been the sole determinative cause of the damage incurred or the degree in which it may have contributed to such damage. The Tribunal therefore rejects NIOC's claimed damages based on liability of the Claimant for the expenses incurred by NIOC in relation to the reconstruction and repair of the Road.

83. The Tribunal considers, however, that the Claimant cannot be exonerated from liability for its inadequate performance. In assessing the damages due to NIOC on this ground the Tribunal notes that in accordance with Article 11.2 of the NIOC Contract NIOC has retained a portion of the sums due under invoices paid to the Claimant. Although this provision in the NIOC Contract does not by its terms vest in NIOC the right to keep such retentions in case of inadequate performance, the Tribunal determines that, in this Case, the amount of damages to NIOC can be satisfied by its continued retention of the sums withheld.

84. Finally, the Respondent has invoked the Claimant's inadequate performance as an alternative ground for non-payment of the invoices the Tribunal has found outstanding and otherwise payable (see paragraphs 63-67). The Tribunal notes that the inadequate performance for which the Claimant has incurred liability relates specifically to the services rendered in relation to the siting and technical design of the Road. Neither Party has alleged, and the evidence submitted does not contain any indication to lead the Tribunal to believe, that the invoices in question were for such services. The Tribunal therefore rejects this ground for non-payment of the invoices and affirms that the invoices in question are payable.

SSO Contributions and Taxes

85. The Respondent NIOC has raised counterclaims for "tax dues" and "indebtedness to SSO". On account of taxes NIOC seeks 163,070,845 rials, to which it adds a claim for "damages related to non-payment" in amounts not specified. On account of contributions allegedly due to the SSO, NIOC seeks 17,696,514 rials, to which it adds a claim for "delayed payment" damages in the amount of 4,927 rials per day as of 21 March 1982.

86. The Claimant denies these counterclaims in their entirety. In addition to raising jurisdictional objections to these counterclaims, the Claimant contends that all taxes and SSO contributions due to be paid by the Claimant have in fact been paid.

87. The Tribunal notes that the Respondent's counterclaims are not supported by any kind of evidence, not even in the form of a specification of the basis for calculation of the amounts in question. Consequently, the counterclaims raised rely solely on very brief assertions made by the Respondent. In view of the foregoing, the Tribunal finds that the Respondent has failed to substantiate counterclaims for taxes and SSO contributions. In view of this finding, the Tribunal does not have to address the issue of jurisdiction.

VII

INTEREST

88. The Claimant seeks 12% simple interest per annum until February 1979 on the invoice claims against the Respondent PTT, and thereafter, 15% interest compounded annually on outstanding indebtedness. On the claims against the

Respondent NIOC the Claimant seeks interest calculated at a rate of 10% simple interest per annum.

89. The Respondent objects to the payment of any interest at all, contending that according to the choice of law provisions contained in the contracts Iranian law is applicable, and that according to Iranian law interest is not payable on the indebtedness here at issue.

90. Like any other decisions of the Tribunal, a decision to award interest must be made on the basis of respect for law, and in this field as in any other, the applicable law is to be determined by the Tribunal in accordance with the guidelines contained in Article V of the Claims Settlement Declaration.

91. In determining the applicable law in this field the Tribunal must rely on the practice followed by relevant judicial institutions. The task of determining the applicable law is, however, a difficult one due to the uncertainties and contradictions which can be observed both in different domestic legal systems and in international law, as well as in trade usages.

92. In most, if not all, legal systems, when interest is awarded as an element of compensation for damage incurred due to a breach of contract, the applicable rates of interest are determined by reference to statutory rates, unless there are particular circumstances. The rates thus determined are of a great variety in various legal systems, however. The same variety appears in the determination of the date from which interest is awarded. Depending on the legal system in question and the circumstances, this date can be either the date on which the damage occurred, the date of a formal notice to pay, the date of the court judgment, or still another date. This variety is particularly well illustrated by the fact that since the

Islamic Revolution, Iranian law, like the law in other countries applying Islamic principles, prohibits the award of any interest, whereas in the American legal system interest is usually awarded, and, although the rates vary quite considerably depending on the applicable statute, the trend appears to be towards the application of rates comparable to commercial rates of interest.

93. The practice of international tribunals demonstrates perhaps an even greater variety in this respect. The international awards which do not allocate interest or which fix very low rates are rather dated or concern non-commercial disputes between governments. For these reasons they have a limited authority. In any event it is noteworthy that no general rule can be derived from them. The often quoted judgment of the Permanent Court of International Justice in the Wimbledon Case[11], which awarded interest only from the date of the judgment at a "fair" rate of 6%, having regard to the conditions then prevailing for public loans, did not purport to establish such a rule.

94. As to more recent practice, in cases between governments (or their instrumentalities or agencies) and foreign corporations directly submitted by the parties to transnational arbitration by international tribunals, or referred to arbitration through diplomatic protection, a large variety of rates of interest have been awarded. A few examples from among the best known awards show rates varying from 5 or 6%[12] to 14½%[13] through 7½%[14], 8%[15] 9%[16],

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[11] P.C.I.J., Ser. A, No. 1, at 32 (1923).

[12] Libyan American Oil Co. (LIAMCO) v. The Government of the Libyan Arab Republic, 20 Int'l Legal Mat'ls 82-83 (1981); Amco Asia Corp. v. Indonesia, 24 Int'l Legal Mat'ls 1038 (1985); Revere Copper and Brass, Inc. v. Overseas Private Investment Company, 17 Int'l Legal Mat'ls 1367 (1978);
(Footnote Continued)

10%[17], and 12%.[18]

95. The same diversity appears in relation to the date from which interest is calculated. In some cases, the starting point is fixed at the time when the awarded amounts were due, or, at least, in direct relation with the time when the damage occurred[19]. In yet other cases, the date of the award or of its notification[20], or a specific date after the award, is determinative.[21] A few awards make reference to the law recognized as applicable to the contract which is

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(Footnote Continued)
S.P.P. and others v. A. R. E. and Egyptian General Company for Tourism and Hotels, 22 Int'l Legal Mat'ls 783 (1983).

[13] Stellar Chartering & Brokerage, Inc. Time-chartered owners of the M/V Continental Trader (USA) v. Rijn, Maas en Zee Scheepvaartkantoor, Charterers (Netherlands), VII Y.B. Commercial Arbitration 147 (1982).

[14] American Independent Oil Co. (Aminoil) v. Kuwait, 21 Int'l Legal Mat'ls 1042 (1982).

[15] Mechema Ltd. (England) v. S.A. Mines, Minérais et Métaux (Belgium), VII Y.B. Commercial Arbitration 80 (1982); Société GTM v. East Pakistan Industrial Development Corporation, V Y.B. Commercial Arbitration 179 (1980).

[16] Norwegian Agent v. Belgian Shipowner, VIII Y.B. Commercial Arbitration 94 (1983).

[17] Ltd. Benvenuti et Bonfant slr v. The Government of the People's Republic of the Congo, 21 Int'l Legal Mat'ls 762 (1982); Saudi Arabian Hotel Company v. Insurance Company of a European Country, X Y.B. Commercial Arbitration 41 (1985); A.B. Götaverken v. General Maritime Transport Company (GMTC), as legal successor of Libyan General Maritime Transport Organization (GMTO) (Libyan), VI Y.B. Commercial Arbitration 139 (1981).

[18] Stellar Chartering & Brokerage.

[19] Agip Co. v. The Government of the People's Republic of the Congo, 21 Int'l Legal Mat'ls 738-739 (1982); Benvenuti et Bonfant; Stellar Chartering and Brokerage.

[20] LIAMCO; A.B. Götaverken.

[21] Revere Copper and Brass; Mechema.

the subject matter of the case[22]. Other cases do not refer to any particular system of law or expressly cite the discretion of the arbitrator[23].

96. Most awards allocate only simple interest, but occasionally compound interest has been awarded[24] and sometimes a percentage is added to the interest in consideration of the rate of inflation[25].

97. It is difficult to draw any distinct conclusions from so diverse a practice. The Tribunal can conclude, however, that no uniform rule of law relating to interest has emerged from the practice in transnational arbitration, in contrast to the well developed rules regarding the determination of the standard of compensation for damages resulting from a breach of contract, where the rule of full compensation usually is applied. No comparable rule has taken form governing the rate of interest or the time from which interest is to be computed. This is illustrated by the frequent use of the word "fair" to qualify the rate chosen, or by the equally frequent references to the "discretion of the arbitrator". The absence of a uniform rule does not, however, imply the absence of general principles. On the contrary, two principles or guidelines, of general import, albeit of delicate implementation, can be deduced from the international practice briefly described above.

98. The first principle is that under normal circumstances, and especially in commercial cases, interest is allocated on

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[22] Amco Asia Corp.; S.P.P. and others; LIAMCO; Saudi Arabian Hotel.

[23] LIAMCO; Revere Copper and Brass.

[24] Aminoil.

[25] Aminoil.

the amounts awarded as damages in order to compensate for the delay with which the payment to the successful party is made. This delay, however, varies in relation to the date determined to be the time when the obligation to pay arose. This date can be the date when the underlying damage occurred, the date when the debt was liquidated, the date of a formal notice to pay, the date of the beginning of the arbitral or judicial proceedings, the date of the award or of the judgment determining the amount due, or the date when the judicial or arbitral decision reasonably should have been executed.

99. The second principle is that the rate of interest must be reasonable, taking due account of all pertinent circumstances, which the Tribunal is entitled to consider by virtue of the discretion it is empowered to exercise in this field.

100. The circumstances to take into consideration in view of determining a "reasonable", or "fair" rate, which would award to the successful party an appropriate compensation without submitting the losing party to an excessive burden, are many and, in fact, unlimited. Given their number, their complexity, the necessity of attributing to each the relative weight it deserves, international or transnational Tribunals usually decline to list them in each case, presumably in order to avoid overly lengthy explanations. Still referring to the scarce guidance given by the practice, it is possible to cite among them: (i) any pertinent contractual stipulations (which, when they exist, are usually followed for the determination of the rates); (ii) the rules and principles of the law applicable to the contract; (iii) the nature of the facts generating the damage; (iv) the nature or level of the compensation awarded, particularly if it extends to the lost profit or includes a profit in the costs to be reimbursed; (v) the knowledge that the defaulting party could have had of the

financial consequences of its default for the other party; (vi) the rates in effect on the markets concerned; and (vii) the rates of inflation, etc.

101. These two principles, drawn from the international practice, are principles of commercial and international law, within the meaning of Article V of the Claims Settlement Declaration. By virtue of the nature of the arbitral tribunals which apply them and of the cases involved, they qualify as general usages of trade. They are particularly relevant to this Tribunal.

102. The Tribunal must, however, in the implementation of these principles, take into account its own specific features. Undoubtedly, the most important of these is the fact that it was set up by international treaty, from which it derives a jurisdiction extending actually to a great number of cases, and not by a contractual stipulation, as is usual for transnational tribunals established for the settlement of commercial disputes. Consequently, as noted earlier, the law to be applied must be determined by the Tribunal in conformity with the terms of Article V of the Claims Settlement Declaration. Besides, with the present composition of the Tribunal, the delay between the initial statement of claim and the notification of the corresponding award may be rather lengthy, in many cases exceeding the usual delays in international arbitration or domestic litigation. By contrast no delay and no procedure is needed for the execution of the awards rendered in favor of United States nationals, who benefit from the full guarantee of execution resulting from the Security Account established under paragraph 7 of the General Declaration.

103. So far, the principles enunciated above have actually been applied by the Tribunal, which usually has fixed a moderate rate, labelled as "fair", or "reasonable", and, in some cases, supported by express reference to the discretion

of the arbitrator[26]. In the exercise of this discretion recognised by international law, the Chambers have not always reached identical results, as was noticed in the Sylvania Award.[27] To the extent that the diversity of rates applied by the different Chambers is not traceable to the varying circumstances of each case, a higher degree of uniformity is certainly desirable. On the other hand, the diversity of the cases submitted to the Tribunal renders difficult the application of an inflexibly determined interest rate in all cases. For the same reason, the date from which the interest will be calculated is best determined on a case by case approach, taking due account of all relevant factors.

104. As to the determination of the applicable rate of interest to be awarded in the present Case, the Tribunal initially notes that the Claimant has not submitted any specific reasons for the higher rate of interest claimed

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[26] Cf. Schering Corporation and Iran, Award No. 122-38-3 at 12 (16 April 1984), reprinted in 5 Iran-U.S. C.T.R. 361, 367; T.C.S.B. Inc. and Iran, Award No. 114-140-2 at 16 (16 March 1984), reprinted in 5 Iran-U.S. C.T.R. 160, 169; American International Group Inc. and Iran, Award No. 93-2-3 at 22 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 110; Woodward-Clyde Consultants and Iran, Award No. 73-67-3 at 19 (2 Sept. 1983), reprinted in 3 Iran-U.S. C.T.R. 239, 251; John Carl Warnecke and Associates and Bank Mellat, Award No. 72-124-3 at 22 (2 Sept. 1983), reprinted in 3 Iran-U.S. C.T.R. 256, 267; Chas. T. Main International Inc. and Mahab Consulting Engineers Inc., Award No. 70-185-3 at 10 (2 Sept. 1983), reprinted in 3 Iran-U.S. C.T.R. 270, 275; Intrend International Inc. and Imperial Iranian Air Force, Award No. 59-220-2 at 13 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 110, 117; Pomeroy Corp. and Iran, Award No. 51-41-3 at 18 (8 June 1983), reprinted in 2 Iran-U.S. C.T.R. 372, 385; Kimberly Clark Co. and Iran, Award No. 46-57-2 at 16 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334, 342; Granite State Machine Company and Iran, Award No. 18-30-3 at 9 (15 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 442, 447.

[27] Sylvania Technical Systems, Inc., and Iran, Award No. 180-64-1 at 3 (27 June 1985).

against the Respondent PTT. The Tribunal has further taken into account that at issue in this Case are ordinary contracts of a commercial nature, governed by Iranian law, without any provisions for applicable rates of interest in case of delayed payments, and that the breaches of contract at issue relate largely to non-payment of invoices. On the basis of the foregoing the Tribunal determines that a fair rate of interest to be awarded on all the amounts determined to be due and owing to the Claimant is 10% per annum. As to the Contract between PTT and the Claimant, interest shall be calculated from the date of the expiry of the Contract, i.e., 21 March 1979, on all the amounts due with the exception of the amount of US$40,499, due under Invoice No. MAC-PTT-4-83, where interest shall be calculated from the date of its submission, i.e., 18 July 1984. As to the NIOC Contract, interest shall be calculated from the date of the suspension of the NIOC Contract, i.e., 19 October 1979.

VIII

CURRENCY OF PAYMENT

105. In the present Case all claims for payment have been expressed in United States dollars. To the extent that the contracts have provided for payment in Iranian rials, the Claimant has requested that such sums be converted to US dollars at a rate of 70.35 rials/dollar. According to the Claimant, this conversion rate is appropriate as it was the rate prevailing at the time of suspension of the NIOC Contract and termination of the PTT Contract.

106. The Respondents object both to the claim for conversion into US dollars of amounts contractually payable in Iranian rials and to the conversion rate applied. The Respondents

argue that the provisions related to the currency of payment constitute a contractual obligation which should be applied.

107. Initially the Tribunal notes that the practice of international arbitral tribunals, in comparable situations, is that awards rendered usually provide for payment in convertible currency. In the case of this Tribunal, the issue as to the currency in which payment ultimately is to be made is not at its discretion. Under the Algiers Accords, the provisions for the establishment of the Security Account, containing funds only in United States dollars, has the effect that awards rendered by this Tribunal which are to be satisfied by payment out of this account are only payable in United States dollars.

108. The Tribunal finds it, however, more doubtful to conclude that obligations established by awards rendered, which are to be satisfied by payment out of the Security Account, necessarily should be expressed in US dollars. The Algiers Accords contain no provision supporting such a conclusion. In the present Case, valid and enforceable contracts are at issue. Both contracts contain express provisions to the effect that the amounts due to the Claimant are payable partially in US dollars and partially in Iranian rials. Having established that the Claimant is entitled to certain payments by application of valid and enforceable contracts, the Tribunal cannot but give effect to equally valid and enforceable provisions by awarding these payments in the currency provided for in the same contracts.

109. If an award is rendered providing for payment of an obligation in Iranian rials, and in the absence of any provisions to the contrary, the Iranian rial amounts would be converted to US dollars at the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account, at the conversion rate then

prevailing. Since the time of the breaches of contract in this Case, however, the conversion rate between the Iranian rial and the US dollar has been subject to fluctuations in excess of what reasonably could have been foreseeable. The Tribunal finds that general principles of law require the Tribunal to give certain consideration to the effect which the relative value of the Iranian rials to the US dollars may have on the satisfaction awarded the Claimant. This is all the more imperative as the Tribunal is required by Article V of the Claims Settlement Declaration to take into consideration changed circumstances.

110. The Tribunal notes that the average Iranian rial/US dollar conversion rate for the years 1977 - 1979, covering the years when approximately 90 % of the obligations arose, was approximately 70.52 Iranian rials/US dollar, whereas the present conversion rate, according to the latest published rate[28] available prior to the issuance of this Award, is 80.70 Iranian rials/US dollar. The Tribunal finds that it would be inequitable to oblige the Claimant now to suffer the full extent of such a depreciation when the payments it should have received were delayed as a consequence of breaches of contract by the Respondents.

111. In view of the foregoing the Tribunal determines that, in the present Case, a reasonable adjustment to the satisfaction awarded the Claimant will be obtained by adding thereto an amount constituting 12.5% of the Iranian rial amounts due. The Tribunal further finds that this adjustment, by its very nature, cannot be given retroactive effect. Consequently, as to the PTT Contract, the Claimant is awarded an adjustment in the amount of 8,541,177 Iranian rials in addition to the principal total Iranian rial

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[28] As of 16 April 1986, published on 18 April 1986 in The Financial Times, London.

amounts awarded with interest and, as to the NIOC Contract the Claimant is awarded an adjustment amounting to 101,438 Iranian rials in addition to the principal Iranian rial amount awarded with interest.

112. The Tribunal further determines that as to all the amounts thus awarded in Iranian rials, the same shall be converted into US dollars at the present conversion rate, according to the latest published rate prior to the issuance of this Award (see paragraph 110 above), i.e 80.70 Iranian rials/US dollar.

IX

COSTS

113. In view of the circumstances of this Case, the Tribunal determines it appropriate that the Respondent PTT shall compensate the Claimant for its costs of arbitration in the amount of US$20,000.

X

AWARD

114. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a. The MINISTRY OF POST, TELEGRAPH AND TELEPHONE is obligated to pay to McCOLLOUGH & COMPANY, INC.:

i) the sum of 68,329,417 (sixty-eight million three hundred twenty-nine thousand four hundred and seventeen) Iranian rials, plus simple interest due at the rate of ten percent (10%) per annum (365 day basis) from 21 March 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

ii) the sum of 8,541,177 (eight million five hundred forty-one thousand one hundred and seventy-seven) Iranian rials as adjustment;

iii) the sum of US$40,499 (forty thousand four hundred and ninety-nine United States dollars), plus simple interest due at the rate of ten percent (10%) per annum (365 day basis) from 18 July 1984 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

iv) the sum of US$420,493.29 (four hundred twenty thousand four hundred ninety-three United States dollars and twenty-nine cents) plus simple interest due at the rate of ten percent (10%) per annum (365 day

basis) from 21 March 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; and

v) the sum of US$20,000 (twenty thousand United States dollars) as costs of arbitration.

b. The NATIONAL IRANIAN OIL COMPANY is obligated to pay to McCOLLOUGH & COMPANY, INC.:

i) the sum of 811,505 (eight hundred eleven thousand five hundred and five) Iranian rials plus simple interest due at the rate of ten percent (10%) per annum (365 day basis) from 19 October 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; and

ii) the sum of 101,438 (one hundred one thousand four hundred and thirty-eight) Iranian rials as adjustment.

c. All of the above obligations shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981. As to all the amounts (including interest amounts) awarded in Iranian rials, the Escrow Agent is hereby instructed to pay such amounts in United States dollars after conversion of these amounts by application of the conversion rate of 80.70 Iranian rials/US dollar.

d. The Counterclaims of the NATIONAL IRANIAN OIL COMPANY are accepted to the extent that the NATIONAL IRANIAN OIL COMPANY may retain all funds of McCOLLOUGH & COMPANY, INC.

heretofore withheld from it pursuant to Article 11.2 of the General Conditions of Contract No. DC-210 signed 28 August 1977 and not heretofore returned.

e. The Counterclaims of the MINISTRY OF POST, TELEGRAPH and TELEPHONE are dismissed.

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

Dated, The Hague
22 April 1986

Michel Virally
Chairman
Chamber Three

In the Name of God

Charles N. Brower
Concurring and
Dissenting Opinion

Parviz Ansari Moin
Concurring and
Dissenting Opinion