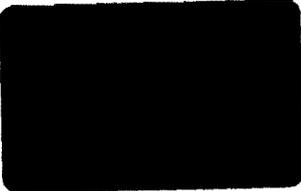


ORIGINAL DOCUMENTS IN SAFE



283

Case No. 167

Date of filing: 29 Oct '92

** AWARD - Type of Award Final
- Date of Award 29 Oct '92
66 pages in English pages in Farsi

** DECISION - Date of Decision
 pages in English pages in Farsi

** CONCURRING OPINION of
- Date
 pages in English pages in Farsi

** SEPARATE OPINION of
- Date
 pages in English pages in Farsi

** DISSENTING OPINION of
- Date
 pages in English pages in Farsi

** OTHER; Nature of document:

- Date
 pages in English pages in Farsi

DUPLICATE
ORIGINAL
دو نسخه برابر اصل

CASE NO. 167
CHAMBER THREE
AWARD NO. 539-167-3

ANACONDA-IRAN, INC.,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN and THE NATIONAL
IRANIAN COPPER INDUSTRIES COMPANY,
Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان دآوری دعوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	29 OCT 1992
	تاریخ ۱۳۷۱ / ۸ / ۷

FINAL AWARD

Appearances:

For the Claimant:

- Mr. P.J. Brophy,
Attorney and Representative of
Anaconda-Iran, Inc.;
- Mr. Charles Torem,
- Mr. William Krisel,
- Mr. Eric Lafrity,
- Mr. Frank McCormack,
- Mr. Henry Paige,
Attorneys;
- Mr. David Rosenswag,
Assistant-Attorney;
- Mr. Ted Witcomb,
- Mr. Robert Temps,
- Mr. Steve Vick,
Witnesses.

For the Respondents:

- Mr. Mohammad K. Eshragh,
Agent of the Government of the
Islamic Republic of Iran;
- Dr. N. Mokhtari,
- Mr. A. Aghighi,
Legal Advisors to the Agent of the
Government of the Islamic Republic
of Iran;
- Mr. M. Rouhipour,
Assistant to the Legal Advisors to
the Agent of the Government of the
Islamic Republic of Iran;
- Dr. H. Safai,
Attorney and Representative of The
National Iranian Copper Industries
Company;
- Mr. M. Shiri,
- Mr. D. Daneshgar,
- Mr. M.J. Homayoonfar,
- Mr. B. Fathali,
Representatives of The National
Iranian Copper Industries Company;
- Dr. M. Ashtari,
- Dr. Amir Moini,
Attorneys for The National Iranian
Copper Industries Company;
- Dr. M.A. Mahdaviani,
- Dr. M.R. Asskari,
- Mr. Gh. Nabavi Alamdari,
- Mr. S. Biangardi, Dipl. Ing.,
- Mr. H.M. Fabrizi,
- Mr. M.T. Naeeni,
Witnesses.

Also present:

- Mr. Timothy Ramish,
Agent of the Government of the
United States of America.

TABLE OF CONTENTS

	<u>Para. No.</u>
I. INTRODUCTION	1
II. PROCEDURE	
(a) History	6
(b) The Respondent's Post-Hearing Submission	10
III. JURISDICTION	
(a) Subject Matter of Counterclaims ...	14
(b) Indispensable Parties	19
(c) Conclusion	22
IV. THE MERITS	
(a) Facts and Contentions	
(i) The Technical Assistance Agreement	23
(ii) The Respondent	29
(iii) The Claimant	43
(b) The Tribunal's Findings	57
V. PAYMENT	120
VI. COSTS	122
VII. AWARD	125

I. INTRODUCTION

1. On 26 September 1972 the Claimant, ANACONDA-IRAN, INC. ("AI"), entered into an agreement, entitled "Technical Assistance Agreement" ("TAA"), with the Sar Cheshmeh Copper Mining Company of Kerman, the predecessor in interest of the Respondent THE NATIONAL IRANIAN COPPER INDUSTRIES COMPANY ("NICIC," "SC" or the "Respondent"). Pursuant to the TAA, AI was to provide NICIC with certain technical assistance in connection with the development, construction and operation of an opencast copper mine and related plant and smelter in Sar Cheshmeh in Iran. In consideration therefor AI was entitled to reimbursement of expenses and payment of fees.

2. On 18 December 1981 AI filed a Statement of Claim against NICIC and The Government of the Islamic Republic of Iran ("Iran") seeking U.S.\$11,190,768.50 plus interest and costs on the grounds that NICIC had failed to make certain payments due under the TAA. On 1 September 1982 NICIC asserted counterclaims for U.S.\$1,140,132,875 in damages based on the alleged breach by AI of its obligations pursuant to the TAA. On 22 August 1983 NICIC increased the amount sought to U.S.\$2,065,865,229. On 4 February 1985 NICIC raised a further counterclaim for unpaid taxes and social security premia in the amount of U.S.\$6,814,463.08.

3. On 10 December 1986 the Tribunal issued an Interlocutory Award in this Case, Anaconda-Iran, Inc. and The Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 65-167-3 (10 Dec. 1986), reprinted in 13 Iran-U.S. C.T.R. 199 (the "Interlocutory Award"). The Tribunal found that AI's withdrawal of its personnel in January 1979 was excused by the force majeure conditions then prevailing in Iran. The Tribunal further decided that the termination of the TAA by AI on 31 May 1979 was justified by NICIC's failure to pay certain amounts to AI. Finding that this failure constituted a material breach of the TAA, the Tribunal awarded the Claimant the sum of U.S.\$10,316,313.07 plus interest on its claim. Any payment

obligation on the part of NICIC was deferred, however, until the Tribunal's final disposition of the counterclaims.

4. This disposition constitutes the purpose of the present Final Award. The Interlocutory Award already contains a number of findings with respect to the counterclaims, mainly on issues of jurisdiction and admissibility. The Tribunal found that the admissibility of the counterclaims is determined pursuant to the terms of the Claims Settlement Declaration irrespective of the existence of contractual provisions limiting the right of the Parties to raise counterclaims. It further held that no portion of the counterclaims was inadmissible on the ground that its amount exceeds the claim asserted in this Case. The Tribunal also decided that the counterclaims had been timely raised, with the exception of NICIC's claim for payment of taxes and premia, which the Tribunal declared untimely and thus inadmissible. Finally, the Tribunal joined the consideration of the remaining objections raised against the admissibility of the counterclaims to its consideration of the merits thereof.

5. Accordingly, in the present Final Award the Tribunal addresses these remaining objections in the context of its analysis of the merits of the counterclaims. As was also determined in the Interlocutory Award, the Tribunal shall apply relevant usages of trade and take into account principles of commercial and international law.

II. PROCEDURE

(a) History

6. Following its issuance of the Interlocutory Award, the Tribunal by Order of 10 March 1987 set the schedule for the

submission by the Parties of pleadings on all issues not decided by the Interlocutory Award. NICIC submitted its Memorial on 16 June 1987. On 27 August 1987 AI filed its Memorial. On 6 November 1987 the Parties submitted their Rebuttal Memorials.

7. A Hearing took place on 23 November 1987.

8. On 23 December 1987 NICIC submitted a copy of a feasibility study that had been prepared by AI (the "Feasibility Study"). See paragraph 25, *infra*. On 13 January 1988 the Claimant petitioned the Tribunal to reject this post-Hearing submission. By Order of 4 February 1988 the Tribunal notified the Parties that it would rule on the admissibility of this document at a later stage. See paragraphs 10 through 13, *infra*.

9. On 7 February 1989 a Communication to the Parties was filed, informing the Parties that effective 1 January 1989 Judge Arangio-Ruiz, successor to the late Judge Virally as Chairman of Chamber Three, would preside over all matters relating to this Case. By Order of 25 April 1989 the Tribunal informed the Parties that Chamber Three had determined pursuant to Article 14 of the Tribunal Rules that the Hearing held in this Case need not be repeated.

(b) The Respondent's Post-Hearing Submission

10. In explanation of its late submission of the Feasibility Study, NICIC argues that Judge Brower had pointed out at the Hearing that it had not been introduced into the record; that AI "has never ... denied" this document, and in fact summarizes and invokes it in its pleadings; and that there had been no need to produce the Feasibility Study previously because the Tribunal had never requested it.

11. The Claimant points out that NICIC's late submission violates the deadline set by the Tribunal Order for the filing

of the Parties' Memorials, "including all evidence upon which they wish to rely," and that NICIC has not provided a valid explanation for this delay. AI further points out that it has commented extensively on those selections of the Feasibility Study that the Respondent had properly introduced into the record. Accordingly, the Claimant argues, "[i]f NICIC is now permitted to introduce all other portions of the Feasibility Study in violation of the Tribunal Rules, Anaconda-Iran will have no possibility of commenting on those new portions or summoning as witnesses the persons who prepared those sections."

12. As the Tribunal has observed previously, considerations of equality of treatment, prejudice, and disruption of the arbitral process have led it to refuse to admit unauthorized post-hearing submissions. Although the Tribunal has, on occasion, authorized a party to file a post-hearing submission in response to new evidence introduced by the other party shortly before or at the hearing, it has emphasized that exceptional circumstances are required to justify the unusual step of permitting post-hearing filings. Harris International Telecommunications, Inc. and The Islamic Republic of Iran, et al., Partial Award No. 323-409-1, para. 67 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 31, 49, and cases cited therein.

13. In the Tribunal's opinion, the reasons advanced by the Respondent do not constitute such exceptional circumstances. Nothing would have prevented NICIC from submitting the entire Feasibility Study in accordance with the time schedule set by the Tribunal. Its failure to do so deprived the Claimant of the opportunity to respond. Consequently, in conformity with its practice, the Tribunal declares NICIC's late submission inadmissible. The Tribunal adds that this decision does not prevent it from taking into account the Parties' comments on the Feasibility Study as contained in their pleadings.

III. JURISDICTION

(a) Subject Matter of Counterclaims

14. Article II, paragraph 1, of the Claims Settlement Declaration provides, inter alia, that the Tribunal is empowered to decide "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of [the] claim." According to the Claimant, NICIC's counterclaims fail this jurisdictional test.

15. The TAA required AI to render technical assistance in connection with the development, construction and operation of the Sar Cheshmeh copper project. As part of this task, AI was to study the technical and economic feasibility of the project. The Claimant points out that the actual construction of the project was undertaken by another company, Parsons-Jurden International Corporation ("PJ"), which as prime contractor operated pursuant to a separate contract with NICIC, secured by a guarantee provided by PJ's parent company. In addition, the Claimant asserts, several Iranian independent contractors were involved. The Claimant further notes that the TAA required AI to produce its Feasibility Study on the basis of prior data made available by the Respondent, in particular a lengthy feasibility study that had been prepared by Selection Trust ("ST"), a United Kingdom mining corporation.

16. Considering the involvement of these third parties, the Claimant argues that the true object of NICIC's counterclaims is not the TAA concluded with AI, but rather the feasibility study contract with ST, the construction agreements with PJ and the independent Iranian contractors, and, finally, the guarantee provided by PJ's parent. The counterclaims relate to all damages allegedly sustained by NICIC in a complicated multi-party transaction, in which AI was but one party. Accordingly, the Claimant reasons, NICIC's counterclaims cannot possibly arise from the particular and limited contract it had with the Claimant. By contrast, AI's claim in this Case is based

exclusively on the TAA; see the Interlocutory Award, para. 12. Consequently, the Claimant argues that the counterclaims raised against it fail to meet the requirement set out in Article II, paragraph 1, of the Claims Settlement Declaration.

17. The Respondent replies that its counterclaims are solely based on AI's performance under the TAA. It further argues that the Feasibility Study forms an integral part of that Agreement. Moreover, NICIC argues, its counterclaims in any case arise out of the same general transaction as the claim filed by AI. Consequently, they meet the jurisdictional test laid down in the Claims Settlement Declaration.

18. The Tribunal finds that the Claimant's argument focuses on issues of causation and attribution, rather than jurisdiction. Whether or not third parties are liable for the damages asserted by the Respondent is a question to be considered in the context of the merits of the counterclaims. Considering the scope of AI's duties under the TAA, including the TAA provision with respect to the Feasibility Study, the Tribunal is satisfied that the relationship between NICIC's counterclaims and the transaction contemplated by the TAA does not warrant the conclusion that the counterclaims must fail for lack of jurisdiction.

(b) Indispensable Parties

19. The Claimant argues that in order for the Tribunal to determine whether AI breached any supervisory duties under the TAA -- assuming the TAA in fact did encompass such duties -- it will be necessary to determine whether PJ and the Iranian contractors performed their tasks properly. Similarly, the Claimant argues, to the extent NICIC seeks to hold AI liable for damages allegedly resulting from AI's updating of the feasibility study prepared by ST, the Tribunal must resolve to what extent such damages were caused by the work performed by ST since NICIC directed the Claimant to rely on that work. As these entities are not parties to the counterclaims, however, the necessary

burden of defending the quality of their performance would fall entirely on AI. Asserting that this would be manifestly unfair to it, the Claimant contends that the absence of indispensable parties should lead the Tribunal to dismiss the counterclaims.

20. NICIC argues that there is no need for the presence of third parties in order to examine its counterclaims. It contends that ST had prepared its study for a private company, the Kerman Copper Company, with which NICIC enjoyed no legal relationship. The Respondent further contends that the subject matter, duration and conditions of its contract with PJ were entirely different from the terms of the TAA. According to NICIC, its counterclaims exclusively regard AI's performance under the TAA, of which AI's Feasibility Study forms an integral part.

21. Even if AI, PJ, the Iranian contractors and ST operated under the individual terms of separate contracts concluded by NICIC, it is obvious that their tasks in this complex multi-party transaction were interrelated. Considering the fact that the Feasibility Study and the technical assistance to be provided by AI related to the project as a whole, the Tribunal considers it reasonable to require AI to defend itself against allegations that its duties were not carried out properly. Having undertaken generally to assist with respect to a wide variety of work carried out by third parties, AI may reasonably be deemed capable of discussing that work as it relates to the allegations regarding AI's performance. Thus, while the absence of other entities involved in the project may be a factor in the analysis of unresolved issues of fact, in the Tribunal's view it does not warrant a denial of jurisdiction.

(c) Conclusion

22. In conclusion, based on the considerations expressed in the Interlocutory Award and in the present Final Award, the Tribunal holds that it has jurisdiction over the counterclaims. As previously decided, the Tribunal will consider all other relevant objections raised by AI in the context of the merits of

the counterclaims. See the Interlocutory Award, Interlocutory Award No. ITL 65-167-3 at paras. 90, 120, reprinted in 13 Iran-U.S. C.T.R. at 221, 229.

IV. THE MERITS

(a) Facts and Contentions¹

(i) The Technical Assistance Agreement

23. Article 2 of the TAA sets forth the obligations AI undertook to perform in return for the payment of fees and reimbursement of costs. AI's principal duty was to furnish "[t]echnical data and technical assistance ... for the design, construction, placement into commercial operation and operation and maintenance of the Project with the objective that the Project will be constructed and operated substantially in accordance with the Feasibility Study." AI also was to develop a training program for Iranian personnel to operate the facilities. The TAA further required the Claimant to provide a staff as may be from time to time requested by, and subject to approval of, SC. Such staff was to be engaged full-time in the project and was to represent all appropriate disciplines, ranging from technical to administrative fields.

24. Pursuant to Article 3 of the TAA, the highest member of the seconded staff designated by AI was the General Manager. His responsibilities included the obligations to be performed by the seconded staff. The General Manager furthermore was to make recommendations for the purpose of securing the approval of SC's Managing Director with respect to the selection of contractors and subcontractors, the issuance of final acceptance certificates to the general contractor and the final release of and payment to that contractor.

¹Reference is made also to Sections IV. A. and B. of the Interlocutory Award.

25. Article 2 required AI also to furnish, "[p]rior to commencement of construction of the Facilities, a Feasibility Study, based on AI's examination, review and evaluation of all prior data made available to AI by SC and such other data as AI deems appropriate to its analysis of the feasibility of the Project." The Feasibility Study was to be prepared and submitted to SC without unreasonable delay, and was to include "a technical and economic evaluation of the Project." The article lists a series of elements to be considered in the Study, including "[e]stimates of the production, design capacity, quality and costs of construction and operation of the Facilities in sufficient detail to provide information for the preparation of an estimated profit and loss statement," as well as "[s]uch other matters as may be reasonably required for the type of project contemplated by this Agreement." Article 2 further provided that "AI will utilize prior data made available to it by SC in connection with the Feasibility Study and will not, unless it deems it necessary, repeat work previously performed for SC the results of which SC has furnished to AI."

26. Pursuant to the same article, AI undertook to perform its obligations under the TAA "in a prudent and sound manner and to apply the same degree of diligence it would apply if it were the sole owner of the Property and the Facilities to be developed in connection therewith." The Claimant was to be "mindful of the interest of SC and to use the best copper industry practice known to AI which is applicable to this Agreement and the Project." At the same time, Article 2 specified that AI did not make any representation or warranty with regard to "the Property, completion dates, efficacy or efficiency of equipment, machinery, plant or processes, production quotas, mine yield or other results of the operation of the Facilities."

27. As provided by Article 3, "[t]he General Meeting and the Board of Directors of SC, acting through its Managing Director, shall have full power, authority and responsibility for the Project and other affairs of SC." The article further provides that "[t]he General Manager shall report to and be subject to the

direction of the Managing Director." SC agreed, however, to delegate to the General Manager "such powers and authorities as will be necessary to enable the General Manager to perform his duties in an efficient, effective and expeditious manner in accordance with sound and generally accepted business practices." Pursuant to Article 8, which itemizes all services to be provided by SC, the Respondent was further to provide "[a]ll other adequate means and facilities as otherwise may be required in connection with the Project or AI's performance of this Agreement, and to enable AI and Staff to perform their respective duties." Should any obligation of AI be adversely affected in any material respect by the failure of SC to follow AI's reasonable recommendations, then, according to Article 2, AI would be relieved of such obligation to the extent and for the period thus affected.

28. Pursuant to Article 9, which specifies the conditions for and consequences of termination of the TAA, if the TAA was breached by either party, the parties were in good faith to endeavor to remedy the breach. If a party believed, however, that a material breach had continued unremedied for a period of 90 days following notice to the other party specifying such breach, either party was entitled to have recourse to the arbitration procedure provided for in the article. See also the Interlocutory Award, Interlocutory Award No. ITL 65-167-3 at para. 31, reprinted in 13 Iran-U.S. C.T.R. at 207-08.

(ii) The Respondent

29. The Respondent contends that AI has been grossly negligent in the performance of its obligations under the TAA, thus inflicting heavy losses on NICIC. The nature of the alleged breach is twofold: AI has committed errors in the preparation of the Feasibility Study and has failed properly to supervise the contractors involved in the project. Consequently, NICIC argues that AI is liable for all damages the Respondent has incurred.

30. According to NICIC, the Feasibility Study was the basis upon which the whole project was implemented; the Respondent made its investment "merely relying on [t]echnical & economical estimates of Anaconda who has always claimed to be one of the best in the world." NICIC points out that the TAA required AI to perform "in a prudent and sound manner" and with "the same degree of diligence it would apply if it were the sole owner." In the Respondent's view, AI clearly has failed to meet this standard. Even if AI was to use the study performed by ST, it was to scrutinize that information and to use all other data as it deemed appropriate. The most important faults alleged by the Respondent concern the selection of the reveratory smelter system rather than the flash smelter, deficient research with respect to the surface water drainage system, mistakes relating to the construction and location of the tailings dam, incorrect seismological estimates, and miscalculation of the anticipated project costs.

31. NICIC advances several arguments in support of its contention that AI had a duty to supervise the work of the contractors. The Respondent alleges that pursuant to Article 2.01, paragraph (vi) of the TAA, AI had undertaken "such other matters as may be reasonably required for the type of project contemplated by this Agreement." NICIC further points out that Article 3 of the TAA made the General Manager seconded by AI responsible for the performance of AI's obligations and put him in a position to make recommendations for the selection of and payment to contractors. Accordingly, NICIC argues, the AI General Manager played a decisive role in the project. Finally, the Respondent contends that as the employer it lacked any skill and experience in the copper industry. The foregoing considerations, according to NICIC, "prove that Anaconda was in a very strong position to administer the project and supervise [PJ's] work."

32. It is the Claimant's negligent preparation of the Feasibility Study and inadequate supervision of the contractors, the Respondent contends, that prevented the project from being

completed on schedule, pushed up its cost from U.S.\$431 million to more than U.S.\$1 billion², and caused numerous technical problems to occur. The Respondent does not present contemporaneous evidence in support of this contention. Instead, it has submitted five expert reports, prepared at its request between 1981 and 1984, mainly identifying the alleged defects and their causes.

33. The first such report is by engineers M. Clement and E. Kloessel.³ It analyzes the situation with respect to the ore body and open pit; the concentrator; water supply and tailings disposal; the smelter; and the condition of buildings. As to the first issue, the report finds that insufficient exploration of the geological conditions and the mineralization of the ore body has been conducted. In particular, the report perceives omissions with respect to the composition and hydrological state of the reserves. On the subject of the concentrator, while the report acknowledges that the crushing method chosen conforms to the state of the art, the design and construction of the individual elements are said to contain serious flaws. Similarly, the authors question certain choices made with respect to grinding, copper flotation, the molybdenum plant, thickening and dewatering and lime burning.

34. The report states that the impact of water removal on the surrounding agricultural and residential areas had not been investigated. The tailings dam as originally designed allegedly presents a considerable danger to the settlement immediately downstream, and the tailings basin is said to have been planned without consideration of the effects of precipitation. Clement and Kloessel note the absence of a detailed explanation of the

²The Respondent's initial pleadings mentioned a total of U.S.\$671 million.

³The report was originally written in the German language. Claiming that the English translation submitted by the Respondent contains a considerable amount of subjective translation so as to appear more favorable to NICIC, AI has submitted an alternative translation of this document.

choice for the reverbatory smelter over the flash furnace system, and state that no measures were taken against environmental damage caused by the emission of SO₂ gas. Finally, strong criticism is voiced with respect to the planning of the buildings on the site. The authors conclude that "[i]t is incomprehensible that the stability and feasibility of the foundations were not at all or only superficially investigated."

35. The second study submitted by the Respondent, entitled "Report on improper technical assistance, supervision and decisions," has been prepared by the engineer S. Biangardi. In his opinion, the routine sampling to estimate the ore reserve was too limited in scope; rock mechanics technology was ignored in the design of the pit; no measures were taken to control the effect of groundwater, resulting in damage to pit slopes and building foundations; failure to drain the slope has reduced the efficiency of the excavation process; the exploitation of the ore was commenced before the concentrator was ready, exposing a large quantity of ore to oxidation; the forecast of metallurgical performances has never been achieved; due to rain water flow, "[i]mproper design and supervision of the contractors on disposal dam construction has caused water penetration through the dam;" the selection of the reverbatory furnace was improper; and, finally, "with [the] exception of a few who have been trained during the construction period of the complex, no further training has been given to the Iranian employees."

36. Based on the foregoing, engineer Biangardi concludes that "unfortunately a hardly appreciable amount of improper events, achievements, improper supervision and also improper assistance of the Anaconda-Iran Inc. staff occurred. In consequence, NICIC is suffering huge losses due to improper activities of Anaconda-Iran, Inc. and also due to the delayed commencing of commercial production."

37. Sazeh Consultants, the authors of the third report submitted, state that since May 1980 they have paid frequent visits to the Sar Cheshmeh site to report on the defects observed

at the complex. The design and supervision of remedial schemes for some of those defects were in fact assigned to Sazeh, they report. Accompanied by photographic material, the Sazeh study concludes that "the main causes of failures are due to improper design, incorrect execution and negligence in supervision of construction work."

38. Specifically, this report identifies the following problems: settlement of earth fills and foundations on fills; failure and movement of earth fill slopes; erosion of fill slopes; various types of cracks in concrete structures; falling of stones off the cut slopes; buckling of compression members and failure in connections of tensile members in steel structures; infiltration of water into buildings at below grade levels and into underground cable conduits and their manholes; and clogging of culverts and collection of water on the site.

39. The fourth report has been prepared by Iran International Engineering Company "IRITEC." Although entitled "Technical evaluation," it purports to quantify the financial damages allegedly suffered by the Respondent as a result of AI's assertedly improper performance under the TAA. The starting point for IRITEC's calculation is its view that AI has "failed to implement the pledges made regarding: Amount of the capital sum expended; Period of execution of the project; Starding [sic] date of production; [and] Final production capacity." On this basis, without further documentation, the report estimates that the Respondent has incurred additional expenses and lost profits in the total amount of U.S.\$2,065,865,229.

40. IRITEC states that the costs from the beginning of the project up to 20 March 1983 total U.S.\$1,355,045,670. Thus, IRITEC notes, compared to the initial estimate of U.S.\$445,250,000, NICIC's expenses have risen by U.S.\$909,795,670. According to the report, U.S.\$833,097,960 thereof were attributable to the concentrator and the smelter, shops, offices and roads. To be added to this estimate of actual expenses are the costs to be incurred for the completion of the

project, which IRITEC assesses to be U.S.\$46,776,316. By far the largest component of this sum -- U.S.\$40,789,474 -- is reserved for the modification of one reverbatory furnace to a flash smelter. Another U.S.\$61,842,105 are added for the improvement of various sections of the complex. The measures so budgeted relate mainly to stabilization of foundations and implementation of a water drainage system with upstream barrages.

41. The largest component of NICIC's counterclaims regards lost profits. According to IRITEC, delays incurred in the completion of the project and disappointing production capacity caused NICIC to forego net profits in the amount of U.S.\$1,077,434,008. This figure is stated to have been calculated on the difference between the actual and the projected quantities of copper produced for each year since the scheduled date of completion, multiplied by the actual annual average copper price at the London Metal Exchange, from which total NICIC's costs are deducted. Roughly one-third of those costs are allocated to depreciation. IRITEC further adjusts the total thus derived for the value of the ore unused due to NICIC's loss of production, which IRITEC estimates to be U.S.\$32,604,000. Finally, the report mentions a loss of U.S.\$2,621,130 due to oxidation of the ore explored before the start-up of the concentrator.

42. The fifth expert opinion, rendered by Bandab Consultant Engineers, expands on the issue of the seismicity of the area in which the tailings dam is located. According to this report, research has revealed the existence of an important regional fault, leading Bandab to conclude that the dam was constructed prior to the collection of full information; AI's design allegedly should have incorporated a higher horizontal acceleration figure.

(iii) The Claimant

43. The Claimant considers NICIC's counterclaims "an absurd tactical ploy which is not supported by the slightest

justification" and "willful abuse of the legal process afforded by the Claims Settlement Declaration." Its arguments in defense against the counterclaims may broadly be summarized as follows. AI first raises a series of arguments of a preliminary nature yet intrinsically related to the merits. Essentially, it argues that NICIC is estopped from asserting its counterclaims because it failed to raise any contemporaneous objection against AI's performance. Second, asserting that the Respondent completely mischaracterizes AI's obligations under the TAA, AI addresses the responsibilities of the various parties involved in the project. Focusing on the issue of causation, the Claimant argues that "[t]he fact that the project is incomplete and over budget does not mean that Anaconda-Iran failed properly to provide technical data and technical assistance." Finally, submitting expert reports and documentary evidence, AI contends that its performance fully met the terms of the TAA. In this connection, AI suggests that most of the problems were attributable to NICIC.

44. The Claimant points out that, while the thrust of the counterclaims intimates that AI breached the TAA from its execution in 1972, the record is entirely void of evidence of any contemporaneous complaints. NICIC allegedly for the first time summarily raised AI's "contractual obligations" in 1979, and then only after NICIC had defaulted on its payment obligations and had received notice of termination. AI further submits letters from NICIC actually lauding AI's contribution to the project. Likewise, the Claimant argues, while Article 7 of NICIC's agreement with prime contractor PJ makes clear that NICIC anticipated cost overruns and reserved the right to hold PJ, and not AI, responsible, the Respondent did approve every cost estimate revision proposed by PJ. Not only does this failure to object in a timely fashion affect the credibility of NICIC's allegations, the Claimant concludes, but it also precludes it from bringing counterclaims years later. Similarly, since NICIC's monthly payment obligation under the TAA gave it ample opportunity to withhold payment in objection to the quality of AI's work, its payment to AI should constitute a conclusive presumption of satisfaction with the Claimant's performance.

45. AI further notes that Article 9 of the TAA required a party alleging breach to notify the other party in order to enable it to endeavor to cure its breach. In the event the breach continued unremedied, the parties were entitled to have recourse to an arbitration procedure for the termination of the TAA and payment of damages. AI argues that the Respondent's failure to give formal notice specifying the existence of any of the breaches now alleged deprived it of the opportunity to remedy those putative complaints. Moreover, the Respondent, having induced AI to continue performance, has thus failed in its equitable duty to mitigate its damages. NICIC should not be permitted, the Claimant contends, to assert counterclaims based on objections which, if true, would have been more than sufficient for it to seek termination of the TAA at the time they first arose.

46. AI further argues that the fact that the Tribunal is not bound by any formal statute of limitations does not reduce the relevance of the principles underlying this concept: to encourage parties to seek timely remedy of their grievances; to ensure that the evidence presented is not unreliable because of its age; and to prevent a "judicial Sword of Damocles from hanging indefinitely over the head of the opposing party." In the Claimant's view, there has been an unreasonable delay between the time at which the Respondent should have become aware of the alleged problems and the time of filing of its counterclaims. Accordingly, AI submits that the Respondent's cause of action, which arose in 1973, should be barred from consideration.

47. According to the Claimant, NICIC has counterclaimed against AI for the alleged breach of duties that are not those of AI, but rather those of other parties. The Claimant points out that PJ was the prime contractor responsible for the design, implementation and completion of the concentrator-smelter complex, and that its parent, The Ralph M. Parsons Company, was the guarantor of PJ's performance. Other construction contracts were awarded to Iranian general contractors to design and construct the town site, tailings dam, power station and other

functions. Its own role, AI emphasizes, was of a purely advisory nature; it was neither required nor in a position to supervise the contractors or to manage the project.

48. Citing PJ's contract with NICIC, AI notes that PJ undertook "to perform all work necessary for the design, engineering, procurement, construction and coordination of the Project." As part of these duties, the contract required the prime contractor to "maintain full and detailed account of all costs of the Project;" to "perform such mechanical tests as it may deem appropriate ... to determine that the Work meets all the requirements of the Contract;" to "use its best efforts to coordinate the Work, including work by ... other contractors ... and S-C, so that the Work will proceed and be concluded on the schedule established therefor under the Contract;" to inform NICIC about "P-J's estimates of the times required for completion" and "any event which in P-J's view will significantly advance, delay or otherwise affect completion;" to "furnish to S-C, at the end of each Accounting Period during the performance of the Work, a progress report;" and to "submit to S-C an estimate of the total cost to S-C of the Project," including "separate amounts for reasonable contingencies and escalation." The General Conditions forming part of PJ's contract further required PJ to "give efficient supervision to the Work" and to "keep at the Sites during the progress of the Work a competent resident manager and any necessary assistants."

49. AI also calls attention to Article 10 of PJ's contract, captioned "Performance Guarantee," through which PJ guaranteed "that the facilities provided for this Project will, when properly operated and maintained, be capable of producing blister (or anode) copper at the rate of 145,000 metric tons per year." The article further provided that if "it is demonstrated that any Equipment, Material or combination thereof installed as part of the Project fails to have the capacity required ... then if such failure is attributable to P-J, P-J shall ... make such changes in the Project ... necessary to correct the deficiency."

50. AI argues that NICIC's counterclaims thus distort the fundamental contractual relationship between the parties. AI was neither the prime contractor nor a guarantor, and it had neither management nor supervisory responsibility. Pursuant to the terms of the TAA, AI was to provide data and render technical assistance, not to implement or complete the project. As confirmed by the parties' conduct and consistent with trade usage, AI's contractual obligations were those of an assistant, not those of a decision-maker. AI argues that NICIC has completely mischaracterized these obligations.

51. AI observes that it was to render its assistance within the hierarchy structured by the TAA. Thus, AI's General Manager was expressly subject to the direction of NICIC's Managing Director, who had "full power, authority and responsibility for the Project." The General Manager was to make recommendations for the Managing Director's approval, and the absence of such recommendations contractually did not preclude the latter from "taking any action he deems appropriate." Consistent with this position, as the Claimant notes, while the contractors did give guarantees with respect to the project, the TAA specifically provided that AI made "no representation or warranty with regard to the Property, completion dates, efficacy or efficiency of equipment, machinery, plant or processes, production quotas, mine yield or other results of the operation of the Facilities." Similarly, AI points out, the issue of possible cost overruns was a subject precisely addressed in PJ's contract and not in the TAA. Consequently, the Claimant argues, not only did AI have no responsibility with respect to budgetary overruns, but any increases incurred were the direct result of NICIC's own approval of revised estimates submitted by PJ in accordance with its contract.

52. In AI's opinion, NICIC illogically jumps from a recital of alleged damages to the conclusion that the Claimant is liable. The Claimant observes that, while the counterclaims go to great lengths to establish that NICIC has been unable to operate the complex to its full design capacity, the Respondent devotes

meager attention to the question whether AI legally is responsible for these difficulties; in other words, whether AI failed properly to provide technical data and assistance. On this fundamental issue of causation, the Claimant submits, NICIC has completely failed to discharge its burden of proof. As AI sees it, "NICIC merely argues that something went wrong with the project and that [AI], for want of a better scapegoat, should be liable without regard to its lack of fault."

53. The Claimant contends that the evidence irrefutably establishes that AI has properly discharged its duties, both with respect to the Feasibility Study and with respect to technical assistance. According to AI, NICIC attacks the Feasibility Study not in terms of the professional quality of its preparation, but rather as a guarantee of the results of the project as a whole. However, AI notes, such a study is not an assurance of success. A well-prepared study will have determined whether a project is technically and economically feasible, but that is not to say that all aspects will have been completely engineered or that there will be no potential problems. Indeed, AI notes, independent research has indicated that very substantial cost overruns are incurred in the vast majority of mining projects. The overriding requirement for AI was to set forth a technically and economically feasible approach to developing and operating a mine at Sar Cheshmeh capable of meeting the production goals set by NICIC's management.

54. In support of AI's contention that its Feasibility Study fulfilled this requirement, the Claimant has submitted, in addition to affidavits of managers and engineers involved in the project, several voluminous expert reports. The first one, entitled "Due diligence examination of Anaconda-Iran, Inc.'s involvement with the Sar Cheshmeh Copper Project," has been prepared by Behre Dolbaer-Riverside, Inc. consultants. Generally confirming the Claimant's contentions, this report contains a review of AI's Feasibility Study; a comparison of the Sar Cheshmeh project with similar international mining projects; technical comments on the overall design approach; and a critical

analysis of the consulting reports submitted by the Respondent. The second study submitted by the Claimant has been prepared by Mountain States Mineral Enterprises, Inc. Commenting favorably on AI's performance, it contains a detailed technical review under the headings Feasibility Study, geology, hydrology and tailings dam, concentrator, smelter and construction. Furthermore, after the Tribunal had ordered the Respondent to deliver to AI a set of the photographs accompanying the Sazeh report, the Claimant's experts each submitted a supplemental report containing a highly critical evaluation of Sazeh's conclusions.

55. The Claimant contends that its technical assistance was as professional as its Feasibility Study. AI submits documentary evidence to substantiate that it "never hesitated to level strong complaints as to the performance of P/J, the Iranian prime contractors, and indeed NICIC itself." According to the Claimant, its monthly reports are full of criticism, complaints and recommendations for NICIC to hold the contractors responsible for their shortcomings. With respect to the problem of cracks in the concrete and settlement of foundations, for example, the record allegedly bears out that AI repeatedly warned NICIC that there were grounds to suspect that PJ's compaction work had been improperly completed. The Claimant concludes that it is incomprehensible that NICIC could seek to hold AI liable for the allegedly deficient performance of third parties when AI had no contractual responsibility for their performance, but in fact faithfully counselled NICIC with respect to the very complaints asserted in its counterclaims.

56. Finally, the Claimant suggests that the problems at Sar Cheshmeh may primarily be due to the Respondent itself. AI notes that in early 1979 mining of ore was already in successful operation, the concentrator/smelter facility was substantially completed, trial use of the concentrator had begun, and the smelter was projected to begin receiving concentrate in March of that year. AI contends that, when the force majeure conditions forced PJ and AI to withdraw from the site in January 1979, they

gave NICIC detailed instructions for the "mothballing" of the facilities, emphasizing the critical importance of proper maintenance during the potentially damaging shutdown. Furthermore, a "debugging" period of at least one year is needed after start-up to bring any copper facility to full design capacity -- a period that in AI's opinion could have been expected to be the most important period of AI's involvement in the project. Similarly, the Claimant notes, PJ was never able to fulfill its contractual duties to repair defects and to assist NICIC in applying its design concepts on the operational level. The Claimant contends that the evidence indicates that the most likely explanation for NICIC's inability to operate the complex at full capacity is its own poor maintenance and its operational shortcomings during the debugging and subsequent operation of the facility.

(b) The Tribunal's Findings

57. The counterclaims seek to hold AI liable for the damages allegedly caused by the performance of its obligations under the TAA. As an initial matter the Tribunal notes that the Parties not only disagree about the quality of AI's performance and its relationship with the damages asserted, but also about the scope of those obligations. While the terms of the TAA leave some room for interpretation, the Tribunal finds that the Parties' pleadings in part misstate the Claimant's position under that agreement. Where the Respondent suggests that AI had "absolute authority over the project," that the Claimant was "to implement and complete the project," and that AI was required "to deliver" the complex, NICIC overstates the responsibility assigned to AI. Likewise, NICIC's sweeping assertion that the TAA required the Claimant to undertake "such other matters as may be reasonably required for the type of project contemplated by this Agreement" misinterprets the record: as indicated in paragraph 25, supra, the contract provision in question solely itemizes the subjects to be addressed in the Feasibility Study. At the same time, the Tribunal notes that the Claimant's pleadings tend to downplay AI's responsibility under the TAA.

58. AI's main obligations as set forth in the TAA were the preparation of the Feasibility Study containing a technical and economic evaluation of the project, including where necessary a review of all prior data made available to AI; the provision of technical data and technical assistance for the design, construction and operation of the project, with the objective that it would be realized substantially in accordance with the Feasibility Study; the development of a training program for Iranian personnel; and the seconding of personnel. Broadly speaking, as stated in a letter by AI's General Manager King to NICIC's Managing Director Tavakoli of 14 October 1976 (the "King letter"), AI's task consisted of "assisting, managing [and] advising in such a manner as to have the desired impact on completing this project in its most economical and efficient way." As the employer, NICIC was in need of know-how to help bring this complex multi-party operation to a successful end, and the TAA was designed to fill that need. As stated by the Claimant, "while NICIC made all the decisions, it looked to A-I for information and input."

59. While the TAA thus assigned a key staff role to AI, the actual design, implementation and completion of the smelter-concentrator complex were the responsibility of PJ. In addition to this prime contractor, the project involved numerous other, mostly Iranian, contractors.⁴ The terms of the TAA and of PJ's contract indicate that AI's duties did not include actual on-site supervision of these contractors. AI's obligation to keep its employer informed did require it, however, to monitor their general performance. Indeed, the Claimant acknowledges that it "did have a good faith duty as a technical assistant to observe the construction of the project and to report any observations to NICIC." As part of this duty, AI could be expected to monitor PJ's progress, assist NICIC in its relations with PJ, assess the overall quality of the work, observe problems relating to delays

⁴For example, the feasibility study for the tailings dam had been prepared by Binnie and Partners consulting engineers, while the Iranian firm of Taleghani- Daftary was responsible for its design and supervision.

and coordination, and help NICIC deal with payment and procurement requests.

60. It appears that, in the execution of these duties, AI had to operate within clearly defined limitations. Pursuant to NICIC's instructions, AI's assistance was neither to interfere with PJ's responsibility nor to detract from NICIC's authority. As AI's President Witcomb observed in a letter of 18 December 1973,

[t]he Management of the Sar Cheshmeh Company are making it a matter of policy that the engineering design of the Sar Cheshmeh metallurgical plant is the exclusive responsibility of the Parsons-Jurden International Corporation. The Sar Cheshmeh Company do not wish Anaconda-Iran or its seconded personnel to be in a position to make decisions on the conceptual layout, equipment selection, or process design which would result in a weakening of Parsons' responsibility.

A status report of 2 May 1974 sent a similar signal:

In accordance with the directive issued to Anaconda-Iran from [managing director Tavakoli's predecessor] Niazmand of Sar Cheshmeh, Anaconda-Iran will not issue instructions nor give direction to Parsons-Jurden on plant design. Permission occasionally has been given to Anaconda-Iran to audit or review design of the plant with recommendations or suggestions to be submitted to Sar Cheshmeh only.

NICIC's directive not only applied to design, but encompassed construction as well. By letter of 31 May 1974 President Witcomb informed General Manager Woodbridge⁵ that "[t]he Plant construction is the major responsibility of Parsons-Jurden and the water system of Binnie and Partners, and is not such a direct responsibility of yours as the Mining operation is, at this time." In a memorandum dated 1 March 1976, Managing Director Tavakoli reminded AI's General Manager "that 'Change Orders' may be issued to Parsons-Jurden only with the prior approval of the Managing Director and Chairman of the Board of the Sar-Cheshmeh

⁵Mr. King's predecessor as General Manager.

Copper Mining Company.... It is essential that you make your subordinate staff aware of this instruction."

61. AI's contractual exclusion of any representation or warranty with regard to the project is consistent with the limitations thus imposed on its staff position. In Richard D. Harza, et al. and The Islamic Republic of Iran, et al., Award No. 232-97-2, para. 87 (2 May 1986), reprinted in 11 Iran-U.S. C.T.R. 76, 110-11 ("Harza"), the Tribunal addressed the impact of such exclusion on the standard of liability. Noting the absence in that case of contractual warranties against defects in construction, the Tribunal held that "the mere existence of a defect or problem in any of the projects for which [the claimant] served as consulting engineer does not ipso facto compel the conclusion that [it] is liable for such defect or problem. Indeed," the Tribunal noted, "warranties against such defects are normally included in contracts with construction contractors, not in contracts with consulting engineers." Accordingly, the Tribunal concluded, the consulting engineer can be held liable for its contractual performance only if it demonstrably failed to meet the standard set out in its contract.

62. In the present Case, that standard is laid down in Article 2.03 of the TAA. Pursuant to this provision, AI undertook to perform its obligations "in a prudent and sound manner and to apply the same degree of diligence it would apply if it were the sole owner of the Property and the Facilities to be developed." The article further required AI "to be mindful of the interest of SC and to use the best copper industry practice known to AI."

63. The Respondent's counterclaims presume that AI has failed to meet this standard. In fact, NICIC contends, AI has breached the TAA to such a degree that it is guilty of "total recklessness" and "fraudulent misrepresentation." The Respondent suggests that if AI's breach was not deliberate, it constituted at least gross negligence. In NICIC's view, AI "acted as if trying to maximise costs and minimise the quality; it appears

that A-I's intention has been to increase the costs and expenses, without bothering at all about the quality of the end-result." NICIC finds AI's failure to perform properly "so evident that it needs no discussion and argument."

64. Nevertheless, AI's asserted failure did not lead the Respondent to raise any material objection against AI's performance during the period of the TAA until its termination in 1979. As already noted in the Interlocutory Award, nothing in the record before the Tribunal suggests that NICIC made any contemporaneous assertion of breach on the part of AI. Interlocutory Award No. ITL 65-167-3 at para. 61, reprinted in 13 Iran-U.S. C.T.R at 216. The Respondent not only has not submitted any evidence to the contrary, but in fact acknowledges that, prior to raising counterclaims in excess of U.S.\$2 billion, it never voiced a serious complaint.

65. Similarly, NICIC's payment behavior since 1972 does not bespeak any material dissatisfaction. NICIC paid AI's reimbursable expenses, salaries and benefits up to the spring of 1978, and continued to pay its technical service fee through October of that year. See the Interlocutory Award, Interlocutory Award No. ITL 65-167-3 at para. 32, reprinted in 13 Iran-U.S. C.T.R. at 208. The commercial dispute that subsequently arose between the Parties concerned the amounts that were due, not AI's entitlement to payment as such. Indeed, as noted in the Interlocutory Award, NICIC appeared to admit liability for employee salaries and fringe benefits as well as for the technical service fee up to February 1979. Id. at para. 35, reprinted in 13 Iran-U.S. C.T.R. at 210.

66. For the reasons set out in paragraphs 44 through 46, supra, the Claimant argues that this failure to object during the period of the TAA precludes NICIC from raising its counterclaims. The Tribunal indeed has often found that such failure seriously affects the viability of a later asserted claim. Various precedents elucidate the governing principles.

67. In DIC of Delaware, Inc., et al. and Tehran Redevelopment Corporation, et al., Award No. 176-255-3 (26 Apr. 1985), reprinted in 8 Iran-U.S. C.T.R. 144, a counterclaim was filed alleging defective performance under construction contracts entered into between July 1975 and September 1977. The claimants' task was to render supervisory and consultative services and to supply technical advice and know-how. The Tribunal observed as follows:

[W]ith respect to alleged defects in the work, it was not until April of 1978, when the Contractors alleged that [the respondent] was in default and suggested the termination of the contracts, that TRC mentioned any alleged defects. This is long after the work was being done and completed. For years [the parties'] representatives met at the job site. Buildings were being completed. Yet there was no evidence of any reference to the alleged defects during that period. The failure to object to alleged defects in the work by the Contractors in a timely fashion raises serious doubts as to the existence of such defects. Moreover [the respondent] never gave the Contractors the contractually-required notice of defaults to terminate the contracts, which would have given the Contractors a period to cure any such defaults.

Id. at p. 43, reprinted in 8 Iran-U.S. C.T.R. at 176.

68. In the Harza case, the Tribunal dealt with claims and counterclaims under a contract between the respondent and a consulting engineer whose duties included the preparation of a feasibility study and of construction drawings as well as the provision of engineering services during construction. Noting that it had paid substantial amounts in response to the claimant's invoices, the Tribunal observed that the respondent

raised the defense of inadequate preliminary exploration for the first time during the present proceedings. The credibility of [the respondent's] defense is impeached by its prior conduct. Moreover, it would be grossly unfair to permit an employer, like [the respondent], to induce an engineer to work for five years on the promise of compensation, supported by periodic partial payments and reassurances and then, at the end, to deny that any compensation was due. Article 13 of the Contract provided a remedy for [the respondent] in the form of notice, termination and recovery of damages if [the claimant] failed to rectify defects in its work. Moreover, [the respondent]

was free to terminate [the claimant's] services at any time. Under the Contract ..., if [the respondent] believed that [the claimant's] work ... was not properly compensable ..., it had a duty to say so at that time.

Award No. 232-97-2 at para. 61, reprinted in 11 Iran-U.S. C.T.R. at 101. Addressing the respondent's counterclaims, the Tribunal further held that the respondent's "failure to complain to [the claimant] about the quality of its work contemporaneously as the problem arose undermines the credibility of its complaint in this proceeding." Referring to the contractual termination provision, the Tribunal further held that "the Contract at least limits [the claimant's] potential liability, if not barring the counterclaim outright." Id. at para. 99, reprinted in 11 Iran-U.S. C.T.R. at 114. Finally, as to a feasibility study performed by the claimant, the Tribunal found that, as the respondent "did not raise any contemporaneous objections to the report ... it must be deemed to have been accepted under Article 4(2) of the Contract." Id. at para. 169, reprinted in 11 Iran-U.S. C.T.R. at 135.

69. Another case confirming the Tribunal's practice with regard to the present issue is Harnischfeger Corporation and Ministry of Roads and Transportation, et al., Partial Award No. 144-180-3 (13 July 1984), reprinted in 7 Iran-U.S. C.T.R. 90, in which the Tribunal held, inter alia:

Having failed to notify [the claimant] of any defects or delays with regard to the equipment covered by these agreements until this claim was filed at the Tribunal, some five to six years after the equipment was received by [the respondent, it] is precluded from asserting this defence. In this respect it should be noted that [the respondent] has made partial payment for the equipment and parts. Such partial payment indicates that [it] was satisfied with the condition of the equipment.

Id. at p. 23, reprinted in 7 Iran-U.S. C.T.R. at 103. Noting that the respondent never invoked its contractual right to terminate the contract for breach, the Tribunal further held that, although not bound by local statutes of limitations, the

Tribunal has the discretion to determine whether there has been an unreasonable delay in presenting a claim to a competent forum. Considering the age of the counterclaims and the effect of the contract, the Tribunal ruled that the counterclaims were in effect barred. Id. at p. 46, reprinted in 7 Iran-U.S. C.T.R. at 116.

70. The Tribunal has reached similar conclusions on many other occasions. See, e.g., Seismograph Service Corporation, et al. and National Iranian Oil Company, Award No. 420-443-3, paras. 193, 320 (31 Mar. 1989), reprinted in 22 Iran-U.S. C.T.R. 3, 54, 83; John Carl Warnecke & Associates and Bank Mellat, Award No. 72-124-3, p. 11 (2 Sept. 1983), reprinted in 3 Iran-U.S. C.T.R. 256, 261; T.C.S.B., Inc. and Iran, Award No. 114-140-2, p. 23 (16 Mar. 1984), reprinted in 5 Iran-U.S. C.T.R. 160, 173; McLaughlin Enterprises, Ltd. and The Government of the Islamic Republic of Iran, et al., Award No. 253-289-1, para. 16 (16 Sept. 1986), reprinted in 12 Iran-U.S. C.T.R. 146, 150-51; General Dynamics Telephone Systems Center, Inc., et al. and The Islamic Republic of Iran, et al., Award No. 192-285-2, pp. 11, 15 (4 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 153, 159-60, 161-62; American Bell International Inc. and The Islamic Republic of Iran, et al., Award No. 255-48-3, paras. 164, 168, 177 and 196 (19 Sept. 1986), reprinted in 12 Iran-U.S. C.T.R. 170, 219-21, 223, 228; Kimberly-Clark Corp. and Bank Markazi Iran, et al., Award No. 46-57-2, p. 15 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334, 341-42; and Logos Development Corporation and Information Systems Iran of the Islamic Republic of Iran, et al., Award No. 228-487-3, paras. 43, 50 and 53 (30 Apr. 1986), reprinted in 11 Iran-U.S. C.T.R. 53, 64-66.

71. Thus, the failure to notify a party about alleged defects in its work may have serious consequences for a later asserted claim based on those defects. Nevertheless, as the Tribunal observed in the Interlocutory Award, the absence of contemporaneous objections does not per se preclude a finding of liability. Interlocutory Award No. ITL 65-167-3 at para. 61, reprinted in 13 Iran-U.S. C.T.R. at 216. As the Tribunal found

in American Bell International Inc. and The Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 41-48-3, p. 25 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. 74, 88, a respondent that has failed to invoke its contractual remedies relating to alleged defects in the other party's performance is precluded from asserting a counterclaim, "unless there is evidence of circumstances constituting a valid, legal excuse for not availing [itself] of such remedies."

72. NICIC argues that the circumstances of the present Case constitute such an excuse. It acknowledges that "if any defect would be seen during the work, NICC could give a notice to Anaconda and demand the latter to repair the same within certain period specified in the contract. If Anaconda would fail to repair, then NICIC could terminate the contract." However, NICIC argues, notice of breach is merely a condition for termination of the TAA. Thus, the Respondent concludes, "if termination of contract in spite of material breach is not intended, one could not say that untimely submission of notice estoppes [sic] the party asking for compensation who is not at fault." Moreover, NICIC points out that pursuant to Article 14.06 of the TAA a party's failure to enforce any provision of the TAA shall not be deemed a waiver thereof and shall not affect the right to enforce such provision later.

73. On a factual level, the Respondent claims that "the absolute authority of Anaconda over the Project until the time of its departure from Iran ... made virtually impossible any sort of expression of opinion concerning the performance of work by the contractor." Likewise, the Respondent explains that its payment of AI's fees cannot be construed as approval of AI's performance, "because at the time, NICC paid in good faith due to [the] importance of the project and for [the] purpose of expediting the work and to avoid giving Anaconda a pretext to evade ... its responsibilities."

74. NICIC's main defense is that it cannot be expected to have raised any contemporaneous objection because it did not

become aware of any defects until after the termination of the TAA. The Respondent explains its alleged ignorance as follows. First, NICIC argues that it lacked the expertise necessary to identify potential problems. "Had NICIC and its predecessor SC had any experience in [the] copper industry," the Respondent asserts, "they would have taken some action prior to the Revolution despite the particular way of the United States over Iran, even though it was beyond the capability of Iran in those days." Second, the Respondent contends that in a project as huge as the Sar Cheshmeh project the evaluation of the technical assistant's performance only becomes possible after the complex has been delivered. According to NICIC, the nature of AI's obligations was such that the results of its efforts only became known after a long period. In conclusion, the Respondent states that it was "totally ignorant of the defects in the project before staff of Anaconda left Iran." By contrast, "Anaconda itself was adequately aware of the shortcomings and defects in the performance of its tasks," NICIC contends.

75. While the Respondent accuses the Claimant of gross negligence in its performance of the TAA, its argument described in paragraph 72, supra, appears to presume that NICIC would have continued the contractual relationship. However this may be, the Tribunal disagrees with the Respondent's argument that a party was only required to give notice of breach if it intended to terminate the TAA. As the precedents cited previously reflect, to seek compensation from a party without prior notification of breach may unfairly deprive that party of the opportunity to cure the breach, or at least to limit the damages incurred as a result. Thus, it is clear that the notification duty contained in Article 9.02 of the TAA serves a broader purpose than NICIC suggests.

76. As to the waiver provision invoked by the Respondent, the Tribunal finds that this clause, a standard feature of most commercial contracts, does not affect the substantive relevance of the considerations cited in paragraphs 67 through 69, supra. The intention of such a clause is to ensure that a party is not

punished for each failure immediately to enforce a contractual right. It is clear, however, that the scope of its protection is not unlimited. For example, a deliberate failure to alert a breaching party, causing that party to incur damages, could not be excused by mere reference to this boiler-plate waiver provision. Thus, the impact of such a clause will vary according to the circumstances of the case.

77. The Respondent has not introduced any evidence supporting its statement that AI's "absolute authority" over the project made it impossible for NICIC to express its opinion about AI's performance. As noted in paragraph 57, supra, NICIC's contention overstates AI's responsibility under the TAA. Moreover, there is no indication that it has any basis in fact. In this regard, reference is further made to paragraphs 79 through 81 and 111 through 117, infra. While the Respondent's contention thus must fail for lack of proof, the Tribunal also notes that this contention does suggest that, even if NICIC allegedly was not in a position to raise its voice, it knew of the existence of problems. The Respondent's statement that it paid AI "to avoid giving Anaconda a pretext to evade ... its responsibilities" lends further support to this suggestion.

78. The explanation offered by NICIC thus casts doubt on its contention that it was totally ignorant of any defects until AI terminated the TAA. Nevertheless, as stated in paragraph 74, supra, the Respondent maintains that it was impossible to detect any problems before the complex had become operational. Indeed, the Tribunal previously has held that the absence of prior notice of alleged defects "does not exclude the possibility that the defects may have been latent, or of such a nature as would only come to light once the plant had been in use for some time." Henry F. Teichmann, Inc., et al. and Hamadan Glass Company, Award No. 264-264-1, para. 68 (12 Nov. 1986), reprinted in 13 Iran-U.S. C.T.R. 124, 143. Clearly, however, many of the defects now alleged must have been more apparent than the Respondent suggests. It is unlikely, for example, that the cracking of walls, settlement of foundations and oxidation of ore would have

gone unnoticed until AI's departure. Moreover, as noted in paragraph 41, supra, NICIC's counterclaims are based in large part on delays incurred in the completion of the project. Obviously, the complex need not have been commissioned for NICIC to have knowledge of such delays. NICIC's argument furthermore appears to be inconsistent with its claim that AI itself was well aware of shortcomings in its performance.

79. In explanation of its own asserted failure to recognize these shortcomings, NICIC also argues that it lacked the expertise required for this purpose. It is clear from the TAA that NICIC needed assistance to help guide it through the process. As the Claimant put it, NICIC looked to AI for information and input. See paragraph 58, supra. At the same time, as paragraph 27, supra, discusses, NICIC retained a prominent position under the TAA. The Claimant's General Manager contractually was required to report to and be subject to the direction of NICIC's Managing Director, who had "full power, authority and responsibility for the Project."

80. The record suggests that the prominent role the TAA reserved for NICIC was not a mere formality. Pursuant to the directive issued by NICIC referred to in paragraph 60, supra, when AI was given permission to review aspects of design, its "recommendations or suggestions [were] to be submitted to Sar Cheshmeh only." As noted in the same paragraph, Managing Director Tavakoli on 1 March 1976 reminded AI that all change orders were subject to his prior approval. The King letter observes that "all jobsite contractors and sub-contractors are drawn to Sar Cheshmeh's Tehran office or the Assistant Managing Director's office, to seek approvals or make changes they feel important to their interests."

81. The record further contains an Anaconda memorandum of 22 February 1977 complaining that "NICICO retains all authority for approval type decisions which are necessary to assure that orderly and timely progress can be made." As General Manager King observed in a letter of 8 February 1978, NICIC's Managing

Director "has indicated by his actions that it is his desire to totally manage the project from Tehran." According to Mr. King, as recorded in the minutes of a meeting held on 23 and 24 August 1976 between representatives of NICIC, AI and PJ at the latter's Pasadena, California headquarters, "you had to have work orders approved by Mr. Tavakoli." During the same meeting, Mr. Tavakoli pointed out that he had "had experience; we've had other contractors; we've had [other] foreign companies working for us and with us."

82. Based on the foregoing, the Tribunal finds that the claimed causes of NICIC's alleged ignorance are not persuasive. The more important question, however, is whether NICIC was aware of the problems. There is ample evidence that it was. The record is replete with letters, reports and memoranda informing the Respondent, often in no uncertain terms, about delays, cost overruns, technical difficulties and logistical issues. The Tribunal notes that most of this information actually emanated from AI. Many of the problems encountered in the project are further recorded in minutes of meetings, references to conversations, and even in communications issued by NICIC itself. In the following paragraphs the Tribunal describes a number of these documents.

83. One of the earliest communications identifying problem areas is a general status report of 2 May 1974. Referring to a visit to the site by Managing Director Niazmand, the report clarifies that "[m]any of the problems expressed in this report were aired during the visitation." A memorandum of 22 July 1974 bears out that the Claimant foresaw "irregular completion dates, duplication of effort, unplanned development between interdependent projects, and no affirmative knowledge of the overall Sar Cheshmeh completion date." According to the memo, AI's President therefore told NICIC's Managing Director "that he did not think that Niazmand was getting enough information to properly assess the overall progress of the project." Noting that Mr. Niazmand "showed great interest in this," the report

further stated that AI "had found questionable credibility in the Parson-Jurdens [sic] material."

84. The King letter, a highly critical eight-page personal message to Managing Director Tavakoli, warns about serious deficiencies in "contract administration, transportation, purchasing, port operations, financing, cost accounting, security, industrial relations, recruiting, [and] training." While these issues are not of a technical nature, it is clear, in the words of the letter, "that [they] have [a] heavy impact on the successful completion of this total engineering and construction program." Emphasizing "the serious nature of many of the problems involved in developing, constructing, operating and servicing this complex project," the letter perceives "a serious crippling effect on the efficiency of supervising this project."

85. The record indicates that Mr. King's warnings were not isolated incidents. As he himself noted in a report of 8 February 1978, "[m]uch correspondence and many conversations have taken place between responsible parties concerning the complexities and frustrations in attempting to manage this operation." A letter to PJ of 30 March 1977, a copy of which was sent to Mr. Tavakoli, draws attention to "the serious state of the concentrator/smelter complex progress and productivity at this date." Referring to "the many complex problems associated with the construction of this project," the letter concludes that the program "remains in very serious trouble, as it has from its very inception."

86. The progress reports submitted by AI identify a wide range of deficiencies. Its report for June 1976, for example, discusses "P-J's inability to attain compaction to the required density." Noting that "previously undetected underground water seepage was adversely affecting the fill compaction results," the report cautioned that "[s]erious ground water conditions may warrant some design changes and cause delays and cost over-runs." AI's next report noted, inter alia, that "[c]racks have appeared

in the walls of the concrete Tunnel." Following up on the reported defects, the Claimant's report for November 1976 warned that "[n]o corrective action has been taken in areas previously found to be poorly compacted." According to the report, the cracks "are so erratic that further monitoring will be needed to identify any definite trend. P-J has been alerted by letter to watch this tunnel carefully."

87. The problems reported to NICIC concern the work of the prime contractor and that of the other contractors. For example, AI's November 1976 report contains a critical analysis of the progress attained during that month, adding that "[t]he P-J Project Director has been requested to prepare a report explaining fully the reasons for the low progress." The same report provides an example of AI's evaluation of the performance of other entities involved in the project:

The Yassa contract work on the Water Recovery System has not in any way improved since last month's report. The field work is almost only of a token nature with practically no supervision. The project management in Tehran at best consists of one owner part time. In the meantime of course, the project slips further and farther behind schedule.

In relation to both the Arikan and Yassa work, we see little action on the part of the consulting engineers, Taleghani- Daftary in Tehran. They do not furnish energetic direction or support, in the way of project management, out of their Tehran Office. In fact at times they do not even appear interested.... If T-D is not somehow forced into firm and positive action, particularly on the Yassa work, this project could well adversely affect the Mine production complex.

Similarly, in August 1976 AI reported, inter alia, that "[t]he earth work by Arikan/Esco has dragged throughout the month with only 25% of the required fill being placed. Mr. Aalam and his representatives have been repeatedly informed that progress is completely unacceptable." Listing "areas of major concern," the report also warned about the "[l]ack of up to date cost data at the site."

88. The record is full of such assessments by AI. It is hardly surprising, therefore, that it also includes expressions of concern by NICIC. On 18 January 1977 Mr. Tavakoli telexed AI's President about the current status of the concentrator/smelter complex, "in particular the difficulty we are experiencing in maintaining our projected [completion] schedules." As NICIC's Managing Director stated, "presently we are very much concerned that our scheduled start-up dates are in serious jeopardy and that we could be faced with unwarranted cost overruns." By letter to PJ of 31 January 1976 NICIC requested "further clarification on state of design work." Complaining that a "lack of drawings has created confusion, delay and subsequently increase in construction and design cost," NICIC wished to be advised "about the cause of such long delay, state of design work at present, and the expected date for completion of design work."

89. Several communications issued by PJ reflect the concerns thus voiced. Addressing various comments received from NICIC, an internal PJ telex of 21 June 1976 states, inter alia: "Client very concerned that drainage installation in tailings area may be marginal. Discuss with client and forward as soon as possible. Client suggested drains along tunnels." A letter of 11 August 1975, in which PJ's Chairman Mr. Wilbur Jurden informed NICIC's Mr. Tavakoli about "the major deterrents which have been instrumental in retarding progress," begins as follows: "From information reported to me from Tehran, I understand that you are very much concerned about the delay in the scheduled completion of the Sar Cheshmeh mill and smelter."

90. The delay in completion in fact was the main reason why NICIC, AI and PJ held their meeting of 23 and 24 August 1976. In the presence of Mr. Tavakoli, AI sharply criticized the performance of the contractors. Following an extended recitation of complaints -- the minutes of the meeting cover 104 pages -- Mr. King urged PJ "to make some real essential changes down there, something very meaningful and something that's going to change the whole thing around." "I told Mr. Tavakoli here," Mr.

King further stated, "that I would recommend that P.J. be removed from the job if the thing didn't improve within a short time. And that's how serious that I feel about it."

91. The minutes bear out that NICIC's Managing Director took active part in the discussion. With respect to costs, for example, he told PJ: "First estimate for this project was to be about 207 million dollars; then it came to 275 million dollars. After that you suggested 475 million dollars. Now we just argued about if it was to be around 440 million dollars." Noting that "if it progresses like this, this project may cost another few hundred million dollars more," Mr. Tavakoli instructed PJ "to look for the reason why the cost is increasing. I mean, I cannot sit in my office in Tehran day after day or month after month. I receive a letter or paper with the estimate from Jurden from Pasadena in order to see some increasing cost." In reply to a specific explanation offered by PJ, NICIC's Managing Director stated: "I think you should look back to the more important things now. Steel structure, purchases, management, Tehran office man[a]gement. I've been complai[n]ing about the Tehran office since I took this office.... Yes, there were [a] lot of wrongdoings at the site and also in Tehran."

92. Considering the foregoing, the Respondent's claim that it was "totally ignorant of the defects in the project before staff of Anaconda left Iran" is disingenuous. There is overwhelming evidence that, as early as 1974, NICIC was fully aware that the project was running into problems. Indeed, as the Tribunal further notes, it was AI that brought most of these difficulties to the Respondent's attention.

93. NICIC's contemporaneous knowledge of the complications affecting the project thus suggests that its failure to express any material dissatisfaction about AI's performance during the period of the contract was deliberate. Clearly the Respondent never considered AI to be the cause of its problems. A closer examination of the record sheds further light on the position taken by the Respondent. As an initial matter, the Tribunal

notes that NICIC not only failed to complain about AI's work, but actually expressed appreciation for the Claimant's contributions. By contrast, as the record further reveals, the Respondent did hold PJ liable. Indeed, to a considerable degree the prime contractor accepted the blame. Furthermore, the evidence suggests a series of other factors, many of them attributable to the Respondent itself, that must have contributed significantly to the project's problems. Finally, the Tribunal observes that the record contains strong indications that NICIC actually hindered the Claimant in the performance of its obligations under the TAA.

94. It is probably realistic to assume, as the Respondent does in its pleadings, that some of the compliments NICIC paid to AI may have been no more than token expressions of gratitude in the context of a business relationship. An example might be the letter that AI's President received from Mr. Tavakoli on the occasion of the latter's appointment as NICIC's Managing Director. Mr. Tavakoli's letter includes the following passage: "I would like to take this opportunity to express my appreciation for all the close cooperation that you and your associates have rendered in the past and I wish the same will continue in the future in the best interests and for the success of the Sar-Cheshmeh Project." Other such examples may be the telex message of 18 January 1977 in which Mr. Tavakoli informed AI, inter alia, that "we in Iran have always solicited and valued the advice and response of the Anaconda company in matters pertaining to [the] technical and economic welfare of this project," and his successor Dr. Zarghamee's statement of 31 October 1977 that Anaconda's "contribution to this enterprise shall never be forgotton [sic]."

95. On other occasions, NICIC's apparent satisfaction with AI's work showed in more subtle ways. A case in point is the parties' conference at PJ's headquarters of 23 and 24 August 1976. Operating side-by-side with the Claimant throughout the meeting, Mr. Tavakoli assured the prime contractor that "our people and the Sar Cheshmeh people, from Anaconda or from

anyplace, they will do the best cooperation as possible." In response to a plea by PJ that "we've still got to have your cooperation," Mr. Tavakoli stated: "Always have.... I think we were cooperating very closely. We always ... cooperate." NICIC's favorable comments are mirrored in contemporaneous communications issued by the Claimant. The status report of 2 May 1974, for example, noted that "Messrs. Place and Niazmand expressed general satisfaction with the way the project was progressing." Likewise, in a letter to AI's President of 25 December 1977, Mr. King wrote that AI's employees were "highly qualified personnel and have been of great and beneficial value to this project as can be verified by Mr. T. Tavakoli." In sum, as Mr. King confirmed in an affidavit submitted by the Claimant, "[t]he Managing Director on many, many occasions was very complimentary about the way we handled and reported on that project."⁶

96. More important than its praise for AI, however, is the fact that the Respondent did hold PJ responsible for the problems at the project. The correspondence in the record between NICIC and PJ clearly indicates that NICIC considered the prime contractor to be liable. NICIC's correspondence with AI lends further support to this conclusion. In his telex message of 18 January 1977, for example, Mr. Tavakoli told the Claimant that "we sincerely feel that our prime engineering and construction contractor, Parsons-Jurden Company, has not been in the past as responsive to our needs, and the seriousness of the total

⁶In this context, the Tribunal further notes an internal AI memorandum of 6 April 1979, describing a conversation NICIC's manager of manufacturing and marketing had with an Anaconda representative during a private visit to London on that date. On 22 March 1979 AI had notified NICIC that it would terminate the TAA if NICIC failed to pay the amounts due. See the Interlocutory Award, Interlocutory Award No. ITL 65-167-3 at para. 24, reprinted in 13 Iran-U.S. C.T.R. at 206. According to the memorandum, NICIC's manager "said that if Anaconda-Iran would provide a number of top-level people on a loan basis for use at Sar-Cheshmeh, irrespective of provisions of the contract, NICIC would probably pay amounts owed to A-I." Apparently, NICIC's manager "felt that we would get our money and the contract would be terminated but he also says that he feels they would like Anaconda's assistance by providing people to assist in operating the plant."

situation, as is justified." Invoking the TAA, NICIC's Managing Director therefore asked AI's help "particularly to take the matter up with the senior management of Ralph M. Parsons company to expedite and speed up the progress in order to make a head way and meet the targets." Having met with PJ's President on 28 and 29 March 1977, Mr. King on 30 March wrote to PJ to confirm NICIC's position on the issues they had discussed. His letter closed as follows:

In conclusion, let me reemphasize the fact that the concentrator/smelter construction program remains in very serious trouble, as it has from its very inception. It is PJIC's prime responsibility to furnish the engineering and construction expertise to execute the obligations of their contract with NICIC in such a way as to assure a timely, economic and efficient conclusion to the project; to this extent NICIC holds PJIC fully accountable.

97. NICIC already had strongly criticized PJ at the parties' meeting of 23 and 24 August 1976. As noted in paragraph 90, supra, AI's Mr. King on that occasion told PJ that he had recommended to NICIC that PJ be removed from the job if the project did not improve soon. The minutes bear out that the Respondent's Managing Director fully joined Mr. King in his severe criticism of PJ's performance. At the end of the meeting, Mr. Tavakoli issued a clear ultimatum to PJ:

Well, I do have my instructions, and I think we'll wait another three months. We'll see the results. What we would like to have by September '77, we would like the copper out of this complex. That's the whole thing, and I can assure you that our people and the Sar Cheshmeh people, from Anaconda or from anyplace, they will do the best cooperation as possible. September '77 should not be for long. We shall wait for another three months.

After PJ's project director had replied "I suggest we take a look every month, Mr. Tavakoli, not every three months. Just as tough next month as this month and the month after and the month after, I suggest," NICIC's Managing Director added: "Something will be much ... tougher after three months."

98. The minutes indicate that PJ accepted much of the blame thus placed upon it, both with respect to the general status of the project and with respect to specific issues. Addressing the issue of productivity in the project's non-process areas, for example, PJ's Mr. Gentry acknowledged that

our productivity is very low, and it is. And this to me was also a reflection of the way of our organization of the job and also our lack of supervision in these particular areas, because we're scattered out. People like to concentrate on the big problems, aren't paying attention to the numerous smaller blocks around which where we were spending man hours, not doing it very wisely. The numbers speak for themselves.

Responding to criticism directed at the prime contractor's Tehran office, PJ's Mr. Pedersen stated, inter alia: "I can't argue this point. I won't give you one argument on this. Some of our accounting problems have been atrocious. I can't argue this point at all."

99. Commenting generally on the issues raised by Mr. King, PJ's Mr. Kennard on the first day of the meeting observed that

these criticisms that Howard has brought out this morning are very, very important to getting the job done from our standpoint of productivity regulations, effeciency [sic], and some discipline. I agree with you. Wihtout [sic] that I would like to recommend that let's say we go back to our boards and comeup [sic] with some -- let's say -- constructive moves that we would intend to take to straighten out the criticism that you've offered which we admit; but we admit we've got to do something about it.

After the parties had reconvened the next day, Mr. Kennard resumed:

We have spent several hours, as we said we would do, going back to our drawing boards and do some preperation [sic], which we have. I would like to point out, though, that we did listen. We heard all of your points and criticisms that you made, and we can't disagree. The only thing I can say is that we had already, let's say, started to take action.

During the same meeting, describing discussions he had had with PJ employees on the site, PJ's Mr. Gentry reported:

[M]y message to them was this: We've got to pull our socks up. We cannot live with the type of progress, the type of productivity that we've been producing. Reviewed the number with them, discussed the organization, answered questions, and put it like this: Gentlemen, job security's at stake. Got to start producing.

100. Thus, the Respondent held the prime contractor responsible, and the prime contractor to a considerable degree acknowledged its responsibility.⁷ These factors seriously undermine the credibility of the Respondent's subsequent counterclaims against AI. This is all the more so because it appears to regard AI as the exclusive source of all problems. As NICIC has generally asserted, the project's failure "to start operation on schedule ... could be attributed either to A.I.'s incompetence in planning, technical evaluation, and work scheduling or to its failure in proper supervision or to both, but to no foreign factor." This assertion obviously is inconsistent with the blame the Respondent always had placed exclusively on PJ. Moreover, as indicated in paragraph 93, supra, the evidence suggests a series of other causes, none of which, the Tribunal notes, can be traced to AI's performance under the contract. In fact, as the Tribunal observes, more than a few appear to be attributable to the Respondent itself. The list of such factors beyond AI's control is very long; the following paragraphs contain a diverse sampling.

⁷In this connection the Tribunal notes that on 19 January 1982, before NICIC submitted its counterclaims in the present Case, it had filed a claim before this Tribunal seeking practically the same amount in damages not only from AI but also from PJ. Not being directed against the United States Government, the Respondent's claim against these entities was refused acceptance by the Co-Registrars on 9 September 1982 for non-compliance with the Claims Settlement Declaration. The Tribunal upheld this refusal through its Decision No. DEC 72-Ref 50-2 (22 Dec. 1987), reprinted in 17 Iran-U.S. C.T.R. 346.

101. AI's general status report of 2 May 1974 identified housing as "one of the most, if not the most, critical items facing Sar Cheshmeh now. It is quite unlikely," the report noted, "that even temporary housing for anyone will be available until the latter part of 1974. As a result, the employees both expatriates and Iranians are most disgruntled and unhappy. The present living quarters at the mine for men on single status are barely adequate." Accordingly, AI warned, "[w]e can expect a high labor turnover as long as this condition exists. Recruitment of both Iranians and expatriates becomes quite difficult under these conditions."

102. That AI's concerns regarding housing were justified is borne out by PJ's letter to NICIC of 11 August 1975. In October 1973 PJ presented a plan for NICIC's approval, which would have resulted in a complete camp by December 1974. "Unfortunately," the letter noted, "our schedule suffered a very serious setback when we were not allowed to proceed with this plan." Having previously recommended Yugoslavia chipboard housing, the Respondent directed PJ "to have all labor and material for the entire construction camp furnished by local contractors." However, the prime contractor complained, "the work by the subcontractor has dragged very slowly and it appears the contract will not be completed until October 1975." "Obviously," PJ concluded,

this has caused a very serious delay in getting our field forces organized and in getting construction started on a broad base.... Because of this situation, we lost a number of our key personnel and the townsite houses are still not available. It is difficult to accurately estimate the time lost because of the conditions outlined in the foregoing but from the point of practical experience, I would estimate a loss of at least six months in getting anything started, not to mention the discouragement and frustration of the construction staff who were attempting to carry on in spite of these unanticipated obstructions to progress.

103. By letter of 28 February 1975 AI's President Witcomb emphasized to NICIC's Managing Director Niazmand "the necessity for the Sar Cheshmeh Company to start staffing itself with plant

operating personnel." "It is standard practice," the letter explained, "to have senior staff, who will be responsible for the operation and maintenance of a metallurgical complex, selected and assigned to the project during the design and construction phase of the project.... It is at this stage where experienced operators are most valuable to the project in the design office." Accordingly, Mr. Witcomb concluded, "[s]taff with operating experience must be present in the field during construction, as anomalies in design will become evident, and quick field decisions can be made for the best alternate for operating purposes."

104. The King letter indicates, however, that NICIC failed to act on AI's recommendation.

Last but not least is the concern that I have for providing skilled personnel to operate and maintain the very complex and sophisticated plant facilities that we are constructing. I have had a vast amount of experience in this area and understand the magnitude and complexity of the problems involved and with partial plant start-up being projected at less than one year, the subject of providing operators and maintenance personnel becomes extremely important. Mr. Tavakoli, everything I can see being done at this time to recruit and train personnel is far too little and will be far too late. We are competing in a very tight labor market and cannot expect to attract large numbers of skilled workers to a remote mountain site mining operation to perform unpopular shift work. I sincerely believe that your national mine site managerial personnel, involved in providing manpower for this project, do not understand the magnitude of this problem and I can only foresee serious consequences if immediate changes in attitudes and procedures are not immediately forthcoming.

105. According to AI's general status report of 2 May 1974, "[o]ne major setback which was beyond the control of the group at Sar Cheshmeh was the severe weather conditions which occurred during January, February and into March. At least two months of productive efforts were lost during this period. Morale of personnel was extremely low." As further examples of such external factors, the minutes of the parties' meeting of 23 and 24 August 1976 attribute a loss of working days during the preceding month mainly to flood and labor unrest.

106. As the highly critical reviews cited in paragraph 87, supra, indicate, many of the project's problems can be traced to individual contractors. A letter of 1 September 1977 by Mr. King to NICIC's Assistant Managing Director -- the Respondent was without a Managing Director then -- highlights deficiencies in the performance of some of them.

As you know, the earth dam construction is at a complete standstill and has been so for many months. Arikan Company, the contractor, assigned its work to Esco early last year, and Esco has now given up any pretext of even being interested in completing the work. Most of the equipment and all of the personnel and supervision have been removed from the job.

With respect to another contractor, Mr. King observed:

In reviewing the construction status of the reclaim water system (tailings ditch and return water piping), we find that although Yassa (the concrete ditch contractor) is carrying on his work, he is badly behind schedule, is performing unsatisfactory work, and does not appear to have either the interest nor [sic] the money required to pursue the work. It is now obvious that Yassa will not complete the ditch in time for plant start-up.

Nevertheless, as AI already had noted in its progress report of August 1976, "for some reason we do not receive any expression of concern on this from Taleghani-Daftary." Referring to a meeting held with this engineering firm on the tailings dam spring problem, a telex of 26 August 1976 noted: "[A]s previously we asked questions they could not answer. They had made no effort to obtain the information."

107. "Poor performance on the part of some subcontractors" was also cited in a list of "delaying factors and problems" PJ sent to Mr. Tavakoli on 12 June 1975. The list further identified the following causes, none of them attributable to the Claimant: lack of process data; steel fabrication in Iran;⁸ worldwide

⁸As PJ explained to NICIC, "[the requirement] that we fabricate all structural steel in Iran, presented fabrication problems for both field and Home Office which appeared at times

procurement; delays in freight shipment;⁹ late acquisition and operation of the aggregate plant and batch plant;¹⁰ late craft housing; late housing for married expatriates; supplies of cement;¹¹ evaluation of bids; mathematical errors in bid package; customs clearance; excessive minor purchase qualifications; and late finalization of labor agreement.

to be unsurmountable. [sic] [It] necessitated extensive additional procurement action and forced P-J to purchase steel for the Iranian fabricators without priority during a worldwide market shortage. Fabricators (who have steel priorities based on previous years procurement) in the U.S. could have procured the steel on a priority basis and started fabrication many months earlier. In addition, the lack of knowledge of Iranian fabricators in fabricating structures of this type has caused considerable delays."

⁹PJ informed the Respondent that "[t]he initial requirement to ship via Iranian vessels produced substantial delays due to higher priority accorded military cargo. This problem has been minimized as a result of approval to use competing lines at equal freight rates. In addition, however, the congested port facilities have extended shipping times far more than we anticipated."

¹⁰As PJ's project director wrote to Mr. Tavakoli, "[w]e were ... advised that Sar Cheshmeh had purchased an aggregate and concrete batch plant, which would be operated by Sar Cheshmeh to provide Parsons-Jurden with ready-mix concrete as required for the project. For this reason we did not purchase plants for our construction requirements. Unfortunately, these plants became operative only recently, several months after schedule requirement, and operation has now been transferred to Parsons-Jurden." Specifically, as indicated by another letter from PJ to NICIC, dated 10 November 1975, the plants were scheduled to commence operations in January 1974, but the batch plant did not become operational until October 1974 and the aggregate plant only became ready in February of the following year.

¹¹"The initial supplies of cement provided by Sar Cheshmeh," PJ informed NICIC, "were so deteriorated that they could not be used for structural concrete. Currently, cement is not being supplied in adequate quantities to support placement of structural concrete at maximum capacity. Each of these cement problems has had a delaying effect on the project. All planned recovery actions are dependent upon adequate supplies of cement and the placement of concrete at maximum rates." PJ's letter of 10 November 1975 points out that "[p]lacement of concrete has also been restricted by the limited output of the Batch Plant ... and by the shortage of mixer trucks due to other usage ... and breakdowns resulting from extreme utilization of available mixer trucks precluding adequate maintenance."

108. The record is full of such examples. The evidence shows that NICIC frequently ordered significant changes in the scope of work.¹² Its purchase division was generally unresponsive to requests for procurement.¹³ As a result of problems relating to

¹²For example, an internal AI memorandum of 30 September 1975 attributes a revision of PJ's cost estimate to "the change in scope issued by SC in the third quarter of 1973 that the plant was to be designed and built for an early expansion of capacity of 100%. This was not envisioned in the Feasibility Study and is not reflected in my figures for plant construction. This change in scope could easily raise the constructed capital costs by 20% since the area had to be expanded causing increased excavation and longer utility runs. Added to this the piping and other utility systems are being installed for double the capacity required for the 40,000 ton/day operation. The quantity of concrete is far excessive for a 40,000 ton/day estimate since certain heavy foundation work is proceeding [sic] for a full 80,000 ton/day capacity. The expansion required necessitated certain operating layout considerations such as the decision for the construction of two smelter stacks instead of one and of course the sizing is for double the first phase requirements requiring special chocking devices at the tops to operate at half their designed volume. The amount of additional costs contained in the numerous decisions on belt sizes and power requirements to meet this 100% expansion ... would be difficult to extract from the total P-J estimate, but it would be sizeable."

¹³As early as 2 May 1974, AI warned that "[t]he Sar Cheshmeh purchasing group is badly in need of assistance which we have offered to provide. They do not fully grasp the scope of the project nor understand the accepted and orderly way of making purchases." The minutes of the parties' meeting of 23 and 24 August 1976 further document this point. PJ's project director told Mr. Tavakoli, inter alia: "It is impossible for us to complete our engineering here unless these approvals take place; and we have a list here of some 133 approvals that are still forthcoming, outstanding ones. That listing has been, I would say, that way for the last five months, those numbers been just about at that level; and we can't break loose with these things and finish our engineering. The Moley plant, we're practically at a standstill engineering-wise because we don't have the approvals to buy equipment, and we can't complete our drawings until we know what equipment we have to buy; so that's a very important item." Taking PJ's request for a drag crane as an example, Mr. Pedersen noted: "[W]hen we start in April and send it in and don't get any reply, then we send it in in June and still don't get any reply -- and July 7th was our last tickler, and the only thing they ever came back with was this bit where Brevcon was low bidder, and they asked us to go directly to the manufacturer, and we got a same price from them, and that was exactly the same price; and we still haven't got any word. This is a typical example."

tunnels, road capacity and government permission, it took the contractor in charge of transportation nearly one year to move crucial equipment from the port of Bandar Abbas to the site.¹⁴ Bank Markazi caused some twenty-five shipments of electrical equipment to be attached. There was a severe shortage of construction materials on the site. A significant increase in Middle East construction activity resulted in a shortage of skilled labor, led to heavy competition for experienced supervisory personnel,¹⁵ and caused prices of materials and equipment to soar.¹⁶

¹⁴"This," PJ's project director told NICIC at their meeting, "is a real problem to us. We talk about making progress, but we could really make progress ... if we had this equipment there; and it's been in Iran for many months ... we are at a standstill with the mill because we can't move these things."

¹⁵In a letter of 18 July 1977 explaining increases in costs, PJ's Senior Vice President informed Mr. Tavakoli that "the Engineering News Record statistics covering the years 1973 to 1977 for international engineering and construction firms reveal that total contracts increased 60% from 1973 to 1976, with 193% increase for Middle East projects in 1975 alone. This increase had an enormous impact on construction capability, particularly on foreign projects. This heavy Middle East increase placed an extraordinary demand for skilled labor and supervisory personnel which exceeded the available experienced people in the international construction industry. The net effect of this Middle East boom was a decrease in productivity and increased by 40% the numbers of supervisory personnel required. This demand for personnel resulted in a very competitive market for supervisors and skilled labor. This particularly effected [sic] the Sar Cheshmeh Project."

¹⁶AI's internal memorandum of 30 September 1975 quantifies this effect. "In early 1973," it notes, "the figure used for projected escalation by the metalurgical [sic] construction industry, was generally accepted as 4% to 5%. It was in the second half of 1973 that prices began to soar. The overall escalation rate in 1973 for plants of this type probably ended up about 18% to 20% with major equipment up over 25% and selected materials such as pipe and valves up 45%. In 1974 major equipment continued to escalate with an overall average in 1974 of better than 30% with selected construction materials, notably electrical and piping, escalating better than 40% and 50%. The overall average for total plant was about 23%. This year the escalation rates have decreased, but the year will probably end with an overall rate of 12% to 16%." Describing how this escalation affected the project, the memorandum notes, for example, that "certain heavy Catapillar [sic] equipment has escalated 60% to 100% since the date of the feasibility study."

109. In an affidavit submitted by the Claimant, AI's President Witcomb declared that AI "was unambiguously told that pollution control was not at all an issue to be taken into consideration, that it was irrelevant to NICIC, and that both Anaconda-Iran, and later, Parsons Jurden, were instructed by NICIC to design the smelter without reference or regard to pollution issues."¹⁷ Mr. Witcomb's statement is corroborated by a report from PJ to NICIC's Mr. Niazmand, dated 21 June 1974, in which Mr. Jurden pointed out that "[f]rom the beginning of our association with this project, we have been told that inasmuch as the location of the smelter is surrounded by desert - with no cultivated vegetation, there would be no danger of any damage." Nevertheless, PJ did conduct environmental studies. Having informed NICIC about the results thereof, Mr. Jurden explained that he had written only "for the purpose of acquainting you fully with the facts of the situation as we see it, and to present the only solution to the problem that we are aware of in the event that it becomes necessary to reduce the SO₂ emissions." Accordingly, the letter concluded, "[w]e would very much appreciate your comments and your approval to continue with the design and construction of the smelter as now planned." The record does not indicate any follow-up on this issue by the Respondent.

Construction costs for the mine support facilities would be expected to have escalated, to date, a minimum of 50% since early 1973 and by end of construction by 75 to 90%."

¹⁷On a similar issue, Mr. Witcomb stated: "[w]hile I am on the subject of pollution, it reminds me of another example with respect to the tailings dam. Although Anaconda-Iran, of course, had nothing to do with the design of the tailings dam; I think it was done by an Iranian contractor, but nonetheless, I remember discussing the problem with people at NICIC. We had offered to study the problem and give NICIC the benefit of our wisdom on ways of disposing of tailings in an efficient manner. That is to say, a manner which recycled the water back to the plant to reduce the water consumption and that also reduce[d] potential pollution consequences. They didn't want to do anything or study anything that was more exotic than just a simple placing of the tailings in a natural drainage."

110. Referring to a telex message he had sent to NICIC on 17 January 1979 "covering many critical points on the winterizing and moth-balling of the S-C plant" and to his letter of the same date "which included a program of maintenance to be performed while operations are suspended," AI's General Manager warned NICIC's Managing Director, in a letter dated 31 January 1979, that it was "of utmost importance that the instructions given in the above mentioned correspondence, and at the various meetings on the subject, be actively pursued." Stating that "[t]he following major points have been mentioned previously but warrant repetition" and that "[t]he engineers at S-C are thoroughly familiar with [these] points," AI's letter listed a series of recommendations, ranging from the "[u]nloading and rotation of heavy equipment, such as ball mills, lime-kilns, screens, crushers, conveyors, feeders, driers, thickeners [and] filters" to "equipment lubrication and operat[ion] as needed to maintain seals and prevent rusting." The record suggests, however, that none of AI's recommendations was implemented. The memorandum of 6 April 1979 referred to in note 6, supra, quotes the Respondent's manager of manufacturing and marketing as having told AI that "absolutely nothing was being done." According to NICIC's manager, "[t]he equipment is not being maintained because they don't know how. Ball mills and kilns are not being turned, nor is important equipment being lubricated and maintained."

111. The record contains numerous other examples of such causes beyond AI's control, many of them attributable to NICIC itself. Notwithstanding the obvious impact of these factors on the success of the project, the Respondent's charges against AI fail to address this evidence. Similarly ignored by the Respondent's pleadings are strong indications in the record that, by placing considerable limits upon AI's position and by failing to provide the necessary support services, NICIC actually impeded the Claimant's performance under the TAA. As a contemporaneous description of these impediments, the King letter bears extensive quotation.

112. Following several previous warnings to NICIC, AI's General Manager on 14 October 1976 wrote to Mr. Tavakoli that

[a]t present there are many factors affecting our ability to exercise sufficient managerial control over assigned areas of responsibility. The aforementioned factors cover such subjects as assigned scope of work, limits of authority, supporting services, interdepartmental relationships, communications (electronic and interdepartmental), human relations and requirements for skilled personnel.

... To date we have not been given authority to supervise or coordinate many of the supporting facilities and projects that have an influential effect on the timely and orderly completion of our project.

Severe limitations of authority have been placed on your Project Manager which is not compatible with the degree of accountability I feel we are being charged with. For example, we have very little input and no control over contract administration, transportation, purchasing, port operations, financing, cost accounting, security, industrial relations, recruiting, training, and many other areas that have [a] heavy impact on the successful completion of this total engineering and construction program. As a result of such dilution of authority, all jobsite contractors and sub-contractors are drawn to Sar-Cheshmeh's Tehran office or the Assistant Managing Director's office, to seek approvals or make changes they feel important to their interests. In most cases I am neither advised of the meeting or briefed as to their contents or conclusions. Under such circumstances, a Project Manager loses credibility at the job site and can be no more effective than an inspector.

Supporting services to the Construction Division have been practically non-existent. We spend endless hours tracking down information relating to our purchase requests, personnel requisitions, maintenance needs, service to our equipment, etc. Our memos and letters of inquiry in most cases go unanswered. Material and equipment requisitions are not honored and many times arbitrarily cancelled or cut without our involvement. Excessive time delays occur in reacting to our service needs. In general, the assistance we do receive is poorly executed, poorly managed, unorganized and unresponsive. The overall adverse situation with respect to supporting services has a serious crippling effect on the efficiency of supervising this project.

Interdepartmental working relationship within the Sar-Cheshmeh organization is poorly defined and results in much controversy and overlapping of responsibilities and authority. To this date I have not seen a Sar-Cheshmeh mine site organizational chart nor do I know the reporting structure of many of the various department personnel with whom I must work to obtain services or information. I have

not been able to obtain a policy manual or see a job description except for those I have created for my own division. I feel certain that most individuals with whom I work do not understand the extent of my responsibility and authority or that normally assigned to a Project Manager. As a result they are unresponsive to the Project Manager's directives. Again this has a detrimental effect on the effectiveness of administering such a complex project.

Communications at the mine site, and to and from the mine site, have been atrocious. Many of the problems have been on a national communications level and are therefore very difficult to correct. However, many of the problems have been generated by lack of good long-range planning and management.... We have made numerous pleas for extra phone extensions. P-J have two extensions and we have one (out of a total of approximately 50 lines) with which to carry out a huge expansion program. The method of passing information through our Tehran office telex from the mine site has been slow and cumbersome.... Mail service to Tehran has been extremely slow at times.... The effect of these limitations has been gravely felt and should not be considered tolerable after three years of operation at this site.

Mr. Tavakoli, the handling of the human relations problem at this site to date has been very poor.... People are badly received and processed through to the mine site during their initial assignment.... Life for seconded personnel at the site is a series of disappointments above and beyond that which is to be expected for a remote campsite location. A scramble for housing continually exists only to find, after being assigned a unit, that it is only partially furnished and in a bad state of repair. Townsite maintenance is, for all practical purposes, non-existent. When maintenance personnel can be found they are unreliable, unskilled, unmanaged and completely unresponsive.... Complicating the situation is the lack of means to procure missing fixtures and furnishings....

...

I have made an issue of the human relations problem in this report since it affects the morale of our expat personnel at the site, which in turn has a direct effect on the constructive progress and well-being of this project.... Please note that when campsite personnel are spending much of their energy and time merely trying to survive and provide for themselves, it proportionally detracts from their job assigned efforts. If this project were in its initial site occupancy stage many of the aforementioned problems would be understandable, but after three years on the site without much change in view it becomes inexcusable.

...

In summary, I have been trying to indicate to you the serious nature of many of the problems involved in developing, constructing, operating and servicing this complex project and the role your Anaconda seconded personnel play in effectively assisting the effort. At present most of your national staff and service personnel are not experienced in constructing, maintaining and operating a large mining operation, yet at the same time your Anaconda seconded technical assistance personnel have very little authority or influence in correcting most of the problems presented here. Nor do we have the means or the authority to provide for many of our basic human needs. As a result we cannot be effective, under the present arrangement, in assisting, managing or advising in such a manner as to have the desired impact on completing this project in its most economical and efficient way. With all of the above conditions in mind, it would be difficult to visualize how your experienced seconded managers could be held accountable for the successful completion of their assigned responsibility.

In conclusion, it is my opinion that most of the aforementioned problem areas are generated by basically two major factors. The first factor is key positions and service departments staffed with inexperienced personnel; and, secondly, organizational structure that severely limits the authority of the Project Manager and other seconded personnel. If it is desirable to National Iranian Copper Industries management to have Anaconda seconded personnel better utilize their background experience and to be more effective in assuring a successful completion of this project, then certain organizational changes would be in order.

113. Apparently, however, AI's warning did not have its desired effect. An internal AI memorandum of 22 February 1977 indicates that, instead, the Claimant's position only eroded further. Echoing many of Mr. King's comments, it states, inter alia:

Discharge of A-I's obligations under the Agreement continues to be very difficult for numerous reasons, some of which are discussed herein.

A-I performance is hindered and, in many instances, is ineffective since A-I has no fundamental decision making authority; A-I has a responsibility to recommend action but NICICO retains all authority for approval type decisions.... A-I cannot properly fulfill its duties unless NICICO provides necessary support functions. A-I's ability to carry out its obligations are seriously affected by NICICO indecision and the lack of support functions....

... [W]hen requested by NICICO, A-I is obligated to furnish ... a staff of qualified individuals.... Although, at present sixty-two seconded employees have been provided, extensive delays, for periods of 3 to 5 months, have been encountered while waiting for NICICO acceptance of A-I recommendations. Such delays have resulted in the loss of qualified applicants who accepted employment elsewhere.

Lack of adequate housing has precluded the possibility of providing more seconded staff people....

... The existing telephone system is out of service for periods of days at a time. At the best, only one or two telephone instruments are available for calls to Tehran and calls cannot be made to Sar-Cheshmeh from Tehran.

Anaconda-Iran has submitted several comprehensive training programs for approval; however, none have been approved by NICICO for implementation. A training director has been seconded, but NICICO has denied a request to recruit and hire personnel to staff the training organization....

NICICO management does not fully appreciate the magnitude and the complexity of the project.... The individual currently assigned as Assistant Managing Director, who is expected to become the General Manager, is totally incapable of assuming the responsibilities of the position. He has no training or experience in the field of mining or metallurgy. ... the organization chart is repeatedly ignored or bypassed. There is little or no respect for the chain of command which is vital to a well-managed organization.

In conclusion, the memorandum warned that "the Sar-Cheshmeh project cannot be completed and placed into production effectively on the established schedule under the present management organization.... It will be necessary for NICICO to be more responsive to our requests in providing support functions." Significantly, the memorandum alternatively suggested that "[a] recommendation could be made by A-I that NICICO approve a management contract which would provide authorization for managing the completion of the entire project."

114. AI's next report on the subject, dated 7 September 1977, perceived "little change toward improvement." The project's technical, operational and construction difficulties, the report noted, stemmed from "unsurmountable [sic] problems" relating to administrative and service support. "Iranian Management wishes to retain complete control and direct supervision (without even

advisement)," yet does "not understand the magnitude and complexity of the situation" and does "not have the knowledge or experience to cope with the problems." The position of AI's General Manager, the report warned, "will continue to drift into an increasingly weaker position unless Anaconda-Iran takes a firm stand against [sic] such deterioration and in addition takes positive action to reinstate its position as defined and intended by the terms of the TAA." The report even went so far as to recommend that, "if unable to do so," AI should "withdraw from the [TAA] in the form of contract default by NICICO."

115. By letter to AI's President of 25 December 1977 Mr. King complained that he had had "little success in being able to arrange meetings with [NICIC's Managing Director] Dr. Zarghamee for the purpose of discussing numerous problems that need attention. As a result," Mr. King wrote, "we lack positive direction concerning critical matters, which in turn are causing serious technical and environmental problems and undue delays." For example, AI's General Manager noted, "I have had no response from Dr. Zarghamee on the refinery project. By observation, I would guess he is forming his own staff to continue without Anaconda's assistance." Similarly, Mr. King complained, "I have not had any response to Anaconda's request ... that the Office of General Manager be referred to by its proper title (not as redesignated by NICICO) and that this office report directly to NICICO Managing Director; all being as fully described in the Technical Assistance Agreement."

116. Mr. King's letter indicates that, while AI's position continued to erode, NICIC's own involvement expanded. As AI's General Manager reported,

it has become apparent that the new Managing Director increasingly wishes to carry on a direct working relationship with P-J representatives concerning all aspects of the P-J related effort. Myself, and Construction Department personnel, are very seldom requested to participate in these meetings. Of course, this procedure weakens the effectiveness of the Construction Department in working with P-J representatives. Also, the Managing Director is

gathering about himself a large staff of highly educated, but little experienced, personnel with which he prefers to discuss matters of job related importance. Members of this same staff appear to have taken over major responsibility for completion of such auxiliary projects as the tailings dam, tailings ditch, Tavanir power, etc. I have been given no direction or policy concerning this procedure, which leaves this office somewhat confused as to its actual responsibility in those affairs.

117. At the end of his tenure as General Manager, Mr. King was forced to conclude, as recorded in a letter of 8 February 1978, that "very little has been accomplished in safeguarding the true intent of the Technical Assistance Agreement." According to Mr. King, his position, "re-named Deputy Sar-Cheshmeh Manager by NICICO to avoid contractual obligations ... has lost much of its responsibility and for all practical purposes all of its respect and authority which in turn renders it totally ineffective." Noting that "[t]he new Managing Director has indicated by his actions that it is his desire to totally manage the project from Tehran," AI's General Manager predicted that "his present course of action will prove disastrous to the project."

118. The limitations thus imposed upon the Claimant's position are incompatible with NICIC's contractual obligation, laid down in Article 3 of the TAA, to delegate to AI's General Manager "such powers and authorities as will be necessary to enable the General Manager to perform his duties in an efficient, effective and expeditious manner." See paragraph 27, supra. Likewise, NICIC's failure to provide the necessary support services conflicts with its duty, set out in Article 8 of the TAA, to furnish "[a]ll other adequate means and facilities ... required in connection with the Project or AI's performance of this Agreement, and to enable AI and Staff to perform their respective duties." Id.

119. Against this background, the Tribunal concludes its analysis of NICIC's counterclaims. Recapping the main considerations expressed in the foregoing, the Tribunal notes that, while the TAA assigned an important staff role to AI, the

actual design, implementation and completion of the smelter-concentrator complex were the responsibility of PJ. Other design and construction tasks had been assigned to a variety of Iranian and foreign contractors. The Respondent, which has failed to submit any contemporaneous evidence in support of its contentions, acknowledges that it never expressed any material objection against the Claimant's performance during the period of the contract. NICIC regularly paid AI and actually praised it for its work. Reference is made to the Tribunal precedents set forth in paragraphs 67 through 70, supra. Numerous documents disprove NICIC's defense that it was totally unaware of any problems. In fact, it was AI that brought most of the problems at Sar Cheshmeh to NICIC's attention. Significantly, until NICIC filed its response to AI's claim against it, NICIC consistently had held the prime contractor responsible. Indeed, to a considerable degree PJ acknowledged this responsibility. The record also evidences a series of other contributing factors beyond AI's control, many of which are attributable to NICIC itself. Finally, contrary to its contractual obligations, the Respondent actually impeded the Claimant's performance under the TAA. Taking into account all these circumstances, the Tribunal reaches the conclusion that the record affords insufficient basis to accept the Respondent's counterclaims.¹⁸

V. PAYMENT

120. As noted in paragraph 3, supra, the Tribunal had deferred the execution of any payment obligation on the part of NICIC until the Tribunal's final disposition of the counterclaims. See the Interlocutory Award, Interlocutory Award No. ITL 65-167-3 at para. 86, reprinted in 13 Iran-U.S. C.T.R. at 220. The counterclaims having been rejected, the Respondent's payment

¹⁸The Tribunal's finding eliminates the need to address the Respondent's request for the appointment of an expert to assess the damages allegedly incurred by it. See the Interlocutory Award, Interlocutory Award No. ITL 65-167-3 at para. 9, reprinted in 13 Iran-U.S. C.T.R. at 202.

obligation as determined in the Interlocutory Award therefore commences upon the filing of the present Final Award. Id. at para. 156, reprinted in 13 Iran-U.S. C.T.R. at 238-39.

121. The same consequence applies to the payment of interest, the final award of which had also been reserved. Id. at para. 152, reprinted in 13 Iran-U.S. C.T.R. at 238. Reference is made to the determinations the Tribunal already has made on this issue. Id. at paras. 135-151, reprinted in 13 Iran-U.S. C.T.R. at 233-38. To complete its calculation of interest on the amount payable by the Respondent of U.S.\$4,227,649.50, based on data provided by The Chase Manhattan Bank (National Association), the Tribunal has calculated the average of the prime rate charged by the same bank from 1 June 1979 through the date of final disposition of this Case to be 11,16%, to which 2% must be added in accordance with the Interlocutory Award. With respect to the amount of U.S.\$88,669.57, also payable by NICIC, the calculated average of the prime rate charged by The Chase Manhattan Bank (National Association) from 17 September 1984 through the date of final disposition is 9,06%, to which 2% must also be added.

VI. COSTS

122. On 19 November 1985 the Claimant filed a claim for U.S.\$425,739.94 for legal fees and disbursements incurred in this Case through 31 May 1985. Appended to the claim were copies of the invoices for these expenses. In the Interlocutory Award the Tribunal decided that it would rule on the claims for costs at a later stage in the proceedings. Id. at para. 154, reprinted in 13 Iran-U.S. C.T.R. at 238. By submission filed on 28 December 1987 AI claimed a further U.S.\$614,307.44 for legal fees and disbursements covering the period from 1 June 1985 through 30 November 1987. Submitting copies of relevant invoices, the Claimant in addition requested reimbursement of U.S.\$252,129.61 expended for the preparation of expert reports and the translation of memorials.

123. On 6 June 1988 the Agent of Iran filed a statement opposing the Claimant's "unreasonable and unproportionate" demand. The Agent reiterated Iran's view that no costs of arbitration should be awarded in respect of claims filed with the Tribunal. In case the Tribunal should not share that view, the Agent requested an award of costs to the Respondent in the amount of U.S.\$582,042. A statement filed by NICIC on 6 June 1988 attests to the various legal fees, expert costs and other expenses of which this amount is composed. On 21 July 1988 AI submitted a reply in which it argued that it is appropriate for the Tribunal to award costs to the prevailing party and that the amounts sought by AI are reasonable and proportionate to the circumstances of the Case.

124. Considering the outcome of this Case, the Tribunal, applying the criteria outlined in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1, pp. 35-38 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298, 323-24, finds it reasonable to award the Claimant costs of arbitration in the amount of U.S.\$70,000.

VII. AWARD

125. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

- a. The counterclaims of the Respondent THE NATIONAL IRANIAN COPPER INDUSTRIES COMPANY are dismissed.
- b. Further to the Tribunal's Award in Anaconda-Iran, Inc. and The Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 65-167-3 (10 Dec. 1986), the Respondent THE NATIONAL IRANIAN COPPER INDUSTRIES COMPANY is obligated to pay to ANACONDA-IRAN, INC.:

- (i) the sum of Four million two hundred twenty-seven thousand six hundred forty-nine United States Dollars and Fifty Cents (U.S.\$4,227,649.50), plus simple interest at the rate of thirteen and sixteen one-hundredths percent (13,16%) per annum (365-day basis) from 1 June 1979 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account;
- (ii) the sum of Eighty-eight thousand six hundred sixty-nine United States Dollars and Fifty-seven Cents (U.S.\$88,669.57), plus simple interest at the rate of eleven and six one-hundredths percent (11,06%) per annum (365-day basis) from 17 September 1984 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account;
- (iii) the sum of Five million nine hundred ninety-nine thousand nine hundred ninety-four United States Dollars (U.S.\$5,999,994), plus simple interest at the rate of ten percent (10%) per annum (365-day basis) from 1 June 1979 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account; and
- (iv) the sum of Two hundred twenty-seven thousand one hundred thirty-nine United States Dollars and Twenty Cents (U.S.\$227,139.20) as accrued interest up to and including 31 May 1979.

c. The Respondent THE NATIONAL IRANIAN COPPER INDUSTRIES COMPANY is obligated to pay to ANACONDA-IRAN, INC. the sum of Seventy thousand United States Dollars

(U.S.\$70,000) in respect of the latter's costs of arbitration.

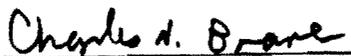
- d. The above-stated obligations shall be satisfied by payment out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.
- e. All other claims and counterclaims are dismissed.

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

Dated, The Hague
29 October 1992

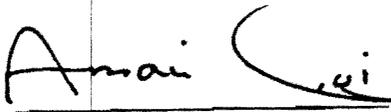


Gaetano Arangio-Ruiz
Chairman
Chamber Three



Charles N. Brower

In the Name of God



Parviz Ansari Moin
Dissenting Opinion