173-201

TES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

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Case No. 173 Date of filing: 7 Nov 88

** AWARD - Type of Award _____

- Date of Award _____

_____ 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 Mr ANSARI

- Date 27-Sep 1988

29 pages in English _____ pages in Farsi

** DISSENTING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

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- Date _____

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In the Name of God

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CASE NO. 173
CHAMBER THREE
AWARD NO. 378-173-3

HOUSTON CONTRACTING COMPANY,
Claimant,

and

NATIONAL IRANIAN OIL COMPANY,
NATIONAL IRANIAN GAS COMPANY,
and THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

Persian version filed on 5 Mihr-mah 1367/27 September 1988

SEPARATE OPINION OF JUDGE PARVIZ ANSARI

Introduction

I concur in large part with the instant Award, whereby a sizable portion of the Claimant's claims under four contracts, and the entirety of its claim for expropriation, with a total amount sought of over $30 million, have been dismissed. The fact that certain items of the Respondents' counterclaims were allowed as well, forms a further part of my concurrence in the said Award. Such concurrence, however, will not prevent me from expressing my dissent to certain portions of the Award. Hereinbelow, I shall examine the various portions to which I dissent, under the

heading of each of the four contracts. In order to avoid unnecessary prolixity, I shall refrain from commenting upon issues about which I have previously stated my opinion in connection with earlier awards by this Tribunal, such as the issues of counterclaims for taxes and Social Insurance premia, and claims for interest and costs of arbitration; nor will I discuss minor issues peculiar to the instant Case. This silence should not, however, be construed as signifying that I concur with the Tribunal Award with respect to those issues and matters.

I. THE ESFAHAN - REY CONTRACT

A. The claim for exchange invoices

1. Article 19.24 of Section II of the Esfahan-Rey Contract, concerning the conditions for adjusting the rate of exchange, which could be applied in favor of either of the Parties to the contract as the case may be, provides as follows:

> "The Contract price will be in Rials as stated in the price formats and all foreign currency requirement will be paid at the rate of the date of payment. Should there be any change in exchange rate with regards to the rates at the Tender date more than one percent, then appropriate (±) adjustment will be made to contract payments."

The clear and simple meaning of this Article, which is also the position taken by the Respondent, is that no adjustment can be made for changes in the exchange rate amounting to up to one percent above or below the contractually stipulated rate of exchange, while an adjustment will be made in the event that changes in the rate of exchange exceed one percent. The logical conclusion to be drawn from the above, is that the adjustment is to be applied with respect to any amounts in excess of one percent (±).

The other interpretation, which is the position taken by the Claimant, is that if the changes in the exchange rate exceed one percent, an adjustment must be made with respect to the entire difference between the exchange rate at the time of payment and that specified in the contract. This interpretation is not only inconsistent with the ordinary language of the Article, but also leads in practice to an illogical conclusion. Upon an examination of the practical consequences of these two positions, the correctness of the first interpretation, and the unsoundness of the second, will become more clear.

(a) According to the first interpretation, under conditions similar to those obtaining in the instant case, the Claimant would bear losses arising from changes in the rate of exchange and with financial consequences of nearly $1 million; but if there were a greater change in the rate of exchange in that same direction, the Respondent would bear that portion of the financial loss which was in excess of $1 million (because the differential would be paid to the Claimant as an adjustment).

(b) According to the second interpretation, the Claimant would bear financial losses of nearly $1 million arising from changes in the exchange rate; but as soon as this differential exceeded $1 million, the Respondent would have to bear not only the financial loss arising from the greater change in the exchange rate in the same direction, by adjusting the rate of exchange [applied] (in the form of exchange differential payments to the Claimant), but also the $1 million financial loss which had been borne by the Claimant until that time. This can hardly be called an "adjustment," and it is even more difficult still to agree that the Parties to the contract would have placed its financial fate in the hands of

eventualities through this aleatory approach, whereas the object in inserting the said Article in the contract was precisely the opposite, viz. to afford relative immunity to the Parties to the contract from radical fluctuations in the exchange rate. At any event, the meaning ascribed to the language of the said Article by the Award, which deems it to be susceptible of interpretation in either of the two ways discussed above, cannot -- aside from the fact that the Award's conclusion is incorrect -- establish the Claimant's assertion or justify the issuance of an Award in its favor.

2. In order to establish the point that its interpretation of the contract conforms to the facts, and that it is confirmed by other records, the Respondent has annexed to its memorials and submitted to the Tribunal several examples of its correspondence with two other contractors with whom it had contracts, namely Morrison-Knudsen and Snamprogetti-Saipem, dated 17 February 1976 and 19 November 1977. The evidence submitted indicates the said contractors' interpretation of a provision which was identical to Article 19.24, which is at issue in the present claim, and it evidences that when those contractors claimed for payment of an exchange rate adjustment they interpreted and understood that provision in the same reasonable manner as the Respondent, and applied it in the same way. On the other hand, the Claimant has not submitted any evidence whatsoever in justification of its own interpretation. Under these circumstances, the Claimant's claim on this count should have been dismissed.

3. Notwithstanding the above facts, in paragraph 73 of the Award, the majority argues that since the Respondent failed to object to the invoiced demands of the Claimant throughout the life of the contract, it is therefore estopped from invoking the contract at this stage in order

to deny the Claimant's claim. In my opinion, there is no merit in the supposition that the mere lack of a formal written objection by one Party to the contract would ipso facto confirm a right on the part of the other Party, without regard for the surrounding circumstances of the matter and contrary to the language of the contract. Such a presumption can give rise to a right on the part of the other Party only in the event that the circumstances of the case dictate that such an objection had to be made in order to preserve a contractual entitlement, and that failing to make such an objection would have been unreasonable under the prevailing circumstances and could be confidently construed as a waiver of rights. In addition, it will be a greater error still, to regard this situation as constituting a rule, and to apply it out of place, as we have seen done in the instant Case. If we hold that a failure to make a contemporaneous objection confirms a right on the other Party, then in the present case, this logic works more to the detriment of the Claimant than to that of the Respondent. Between July 1976 and March 1979, the Claimant submitted to the Respondent 27 invoices for exchange rate adjustments. Throughout that whole period of over two years, the Respondent paid only that portion of the amounts claimed by the Claimant which conformed to the terms of the contract, in accordance with the Respondent's own interpretation of the contract and on the basis of its own prevailing practice. Under the circumstances of the instant case, this nonpayment of the balance of the invoice indicates an objection to and rejection of the unpaid portion, especially since a part of the amount claimed was paid. Moreover, there was no need for the Respondent, which had in practice been able for several years to enforce its own interpretation of the contract, and to make its position clear, to resort to an objection so as to enforce its views. Under these conditions, the Claimant should logically have been expected to lodge an objection to the failure to pay its invoices in full, especially

since according to the Claimant's present allegation, it was the Party that was prejudiced by these circumstances. Despite this fact, the truth of the matter, which the Parties do not dispute, is that throughout this period of more than two years, the Claimant never made any protest against the Respondent's prevailing practice of making deductions from its payments on Claimant's invoices. The Claimant did not even bother to object in its subsequent invoices to those deductions made from payments on previous invoices, or to demand payment on unpaid portions thereunder. The majority has expressed its surprise at this conduct of the Claimant in failing to object during the period in question; and on the other hand, it has attached so much weight to the Respondent's lack of protest that it holds that the latter is precluded from invoking the contract in this connection.

4. In addition to the aforementioned matters, I must also refer to the text of the Claimant's letter dated 30 July 1979 to the Respondent, which states as follows:

> "We would bring to your attention the fact that our last two invoices for payment for differences in exchange rate between U.S. Dollar and Rial at the date of tender and date of payment are considerably overdue. Accordingly, we attach herewith a further two copies of our letters ER 823 and ER 850 dated 18th May 1978 and 21st March 1979 amounting to total U.S.$160,262.41.
>
> Previous invoices have been paid and we would respectfully request payment of these invoices to finalize the matter." (emphasis added)

This letter was written nearly three years after the date of the first invoice relating to the exchange rate adjustment, and roughly four months after that of the last such invoice, and even as of this date, the Claimant was not objecting to the Respondent's practice of deducting from payments on the invoices submitted by it. The total amount of the Claimant's claims as stated in this letter is

approximately one-sixth of the figure which it seeks in its Statement of Claim, and it regards payment of the amount stated in the letter as constituting finalization of the "matter" -- referring, that is, to the issue of the exchange rate adjustment. I would hold that besides effectively confirming the Respondent's assertions, the above-mentioned letter also constitutes evidence of the Claimant's contemporaneous admission that it was owed an amount less than that which it subsequently claimed for in the course of the present proceedings; and therefore, there is clearly no legal justification for awarding more than that amount.

In short, the Claimant's acts throughout the course of its performance under the contract, whether based on its acquiescence concerning the said matter in dispute, or on laches and a failure to assert its rights, now preclude and estop it from bringing such a claim. Venire contra factum proprium.

B. The claim for release of retention monies

5. Article 20.12 of the Particular Conditions of the Esfahan-Rey Contract expressly stipulates that:

> "... Final payment shall not be made to the Contractor before Certificate of Clearance from the W.S.I.O. and W.T. are produced."

Moreover, when the Final Certificate relating to the contract was issued on 1st September 1979, this same provision was incorporated therein and, was agreed to once more by the Claimant.

6. In light of the preceding, it is clear that the finding reflected in paragraph 87 of the Award is founded upon two unproven assumptions:

(a) The first assumption is that the Claimant actually paid the Social Insurance premia, whereas the Claimant has not produced the slightest evidence demonstrating that it paid those premia. The Claimant's letter dated 3 November 1979 referred to in the Award, which is treated as evidence that it paid the said premia, constitutes no more than an allegation on the part of the Claimant, and is not accompanied by any evidence of payment. The fact of the matter is that the Claimant has not even specified the amount of its alleged payments for the said premia, or when those monies were paid.

(b) The second assumption of the Award is that it would have been unlikely that the Claimant, as an American company, would have been able to obtain a clearance certificate from the Social Insurance Organization from 4 November 1979 on. The Award then interprets this as constituting a force majeure situation.

7. This conclusion is inconsistent with the available evidence in the record, and even with facts referred to in various parts of the Award:

(a) The Claimant asserts that apart from several minor details, it had completed all of the works under the contract by the date of issuance of Completion Certificate No. 2, namely 20 September 1977. Based on this contention, it must have paid the Social Insurance Organization the relevant Social Insurance premia on its payroll disbursements. It thus had two years' time from the said date up to 4 November 1979 within which to obtain the said clearance certificate, and there would have been no need for it to wait until November 1979 and then be faced, as the Award implies,

with force majeure conditions.

(b) The Claimant has not submitted any evidence to establish that it was impossible for it to obtain a Social Insurance clearance certificate after 4 November 1979. In fact, the instant Case is replete with correspondence and evidence of payments and agreements which indicate that if the Claimant had actually paid its Social Insurance premia, there would have been no obstacle to its obtaining a clearance certificate. As evidence of this point, I shall merely mention several examples of the facts agreed upon by the Parties to the Case. Mr. Neil White remained in Iran until 1980 as Claimant's Director and representative, during which he managed the Claimant's affairs. Thereafter, Mr. Jamshid Natan was appointed by the Claimant to manage its affairs in Iran, in which capacity he continued to serve until August 1981. Throughout 1980, and even 1981, the Claimant continued working on the contracts concluded with NIGC. According to its own statement, the Claimant resumed work on the project relating to the Ramin Contract in March 1979, and obtained a Completion Certificate from the Respondent on 4 September 1980. Also according to the Claimant's own statement, work was resumed on the Tehran Spur Project in October 1979, and the Completion Certificate for the work under this contract was issued in February 1981. During this period, the Claimant received payments under the contract, including "on-account" payments in certain instances, aimed at alleviating its financial difficulties. Under the Tehran Spur Contract, the Claimant was able, through negotiations, to secure NIGC's agreement to increase the contract price by Rials 36 million. Thus, given the aforementioned circumstances, I regard it as illogical, and contrary to the undisputed facts of the Case, for the Claimant

to have been unable to obtain a Social Insurance clearance certificate after November 1979.

(c) The Claimant has also presented no evidence that it even sought, or attempted to obtain, a Social Insurance clearance certificate. The Claimant's failure to make any prior request renders inadmissible its claim that it could not obtain a clearance certificate.[1]

II. THE GACH SARAN CONTRACT

A. Claim for cost adjustments

8. Pursuant to the contract, inter alia Sections 4.4 and 4.1.7 of Part IV thereof, and also the costs adjustment computation sheets relating to Payment Certificate Nos. 1 through 15, which were prepared at the time the contract was performed on and have been presented to the Tribunal by the Respondent, it is indisputable that not all the Variation Orders were covered by the costs adjustment provisions. Moreover, the cost adjustment factors proposed by the Parties as applicable are similar. Therefore, the dispute between the Parties does not arise from the application of

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1 The foregoing observations also hold true for the claim for release of the retentions relating to the Tehran Spur Contract. As for the claim for release of the retentions under the Ramin Contract, the Claimant's entitlement to recovery of retentions can be allowed in proportion to the evidence which it has submitted that it paid its Social Insurance premia, but not with respect to the whole of the amount claimed.

different factors, but rather from the difference between the figures underlying the cost adjustment calculations -- ie., the number of Variation Orders that were regarded as covered by the adjustment. As the record shows, the Claimant's claim rests on the premise that a greater number, or all, of the Variation Orders should have been covered by the cost adjustment. Under these circumstances, and given that pursuant to the contract some of the Variation Orders were categorically not covered by the cost adjustment, it is not enough for the Claimant to demand, in supporting its claim, that the cost adjustment factor be applied across the board to the total amount of all the Variation Orders. Rather, it is up to the Claimant to make clear, in order to prove its claim, on the basis of which contractual provision certain specific Variation Orders which have not been adjusted should in fact have been subject to such an adjustment, and also which Variation Orders these are, and for what amount. The Claimant is incapable of clarifying these ambiguities in its claim, and it affords no explanation which would enlighten the Tribunal as to precisely what problem it finds with the computations and cost adjustment papers prepared by the Respondent throughout the life of the contract. In this way, not only is the Claimant unable to prove its case, but it has not actually succeeded in setting forth the grounds for its demands, either. The Variation Order to which the Claimant does specifically refer, and which has clearly not come under the cost adjustment whereas the Claimant asserts that it should have, is Variation Order No. 26, relating to blasted rock. In connection with the said Variation Order too, in light of the evidence submitted, and given that the work under this Variation Order was agreed upon through negotiations between the Parties and as a lump-sum fixed

amount[2], there was no basis on which to apply the provisions relating to cost adjustment. This is because the provisions of the contract relating to cost adjustments applied only to those Variation Orders whose costs of performance were set on the basis of the rates set forth in the contract's price list, and which would logically be expected to be adjusted as a result of cost increases and differences between the rates agreed upon when the contract was concluded, and the actual rates at the time the work was performed.

9. In its telex dated 1st December 1979 declaring the contract terminated, the Claimant stated the total amount of its claims for costs adjustments at $200,000. This figure, which was stated one year after the Claimant's works in Iran came to a halt, is on principle indicative of the Claimant's maximum expectation and claim; and in view thereof, the Claimant cannot be permitted to increase the amount of the claim many times over, a number of years later, when presenting its Statement of Claim to the Tribunal. Contrary to the finding reached in the Award, this portion of the Claimant's telex specifically and without reservation or condition fixes the maximum amount of its claim in connection with the cost adjustment.

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2 By way of example, the Claimant's letter of 19 May 1978 to Foster Wheeler, which was the Supervising Engineer for the project reads, in relevant part, as follows:

"In reply to the letter dated 21 Ordibehesht 2537 (11 May 1978) and the decision taken and recorded at the Major Contracts Committee 17th April 1978, Item 6.6 (copies of both attached), HCC [Claimant] hereby confirm acceptance of the figure of U.S. Dollars 8,457,711 as payment for blasted rock excavation."

In pertinent part, the said telex states as follows:

> "... Additionally, escalation due Houston Contracting Company under the contract formula in the amount of approximately U.S. Dollars 200,000 is past due."

The Parties do not dispute the fact that the work under the Variation Orders for which the Claimant now demands a cost adjustment were performed in or before 1978, and that the sums and calculations pertaining to cost adjustments thereof were also carried out before the end of 1978, and the relevant amounts paid to the Claimant. The work relating to Variation Order No. 26 was also carried out in 1978, and all the monies relating thereto were paid to the Claimant between the months of April and August 1978. Under these circumstances, there is no justification for our supposing that the Claimant was unable or unwilling to set forth its claim relating to cost adjustment of the said Variation Orders in the telex of [1st] December 1979 -- that is, more than one year after the fact. In this way, the contents of the Claimant's telex as cited above constitute conclusive evidence as to the maximum amount to which the Claimant can conceivably be entitled under this claim.

B. Claims in respect of extra work

10. The main bulk of the Claimant's claims, and also most of the amounts awarded in respect of this part of the Case, relate to its alleged costs for stand-by of the Claimant's personnel and equipment owing to the Respondent's delays in delivery of materials, which therefore fall under the heading of "claims" pursuant to Clause 43.1 of the General Conditions of the Contract. According to the said provision:

> "43. CLAIMS
>
> (1) Within one month after any additional expense is incurred which is not covered by Clause 39 hereof, the Contractor shall send to the Engineer

> a written statement giving particulars (as full and detailed as possible) of all claims for any additional charges which the Contractor may consider himself entitled to make and no charges will be considered in respect of any expense which has not been included in such particulars."

None of the Claimant's claims relating to stand-by costs for personnel and equipment has been submitted in conformity to the said Article. Therefore, under the contract, the Respondent incurred no obligation to consider those claims or to make payment thereon, even if they were valid; and indeed, even if an authentic claim did exist, it would be precluded under the terms of the contract.

11. A further condition for accepting the claims relating to this part of the Case, is that the Claimant has complied with its duties as set forth in Article 8.8.3 of the Special Conditions of the contract, which are reiterated in Article 13.1.2 (a) of Section 13 of the contract, and also in Article 15.6 of the General Conditions of the said contract. That Article provides as follows:

> "8.8.3 The Company [Respondent] will not accept any claims from the Contractor [Claimant] arising out of delays in the delivery of Company supplied materials unless the Contractor shows that he has explored every possibility of adjusting his Programme of Work to minimize or eliminate extra costs and delays in completion of the Works."

Not only has the Claimant failed to submit any evidence in proof of its compliance with its obligations under the above-mentioned Article, but it would also not appear, on principle, to have asserted that it made any effort to minimize or eliminate costs.

12. Although the greater part of the Claimant's claims relating to stand-by costs have been correctly disallowed in the Award, that portion which has been accepted does not seem, in view of the contract price, to be consistent with

the facts as agreed on and the available evidence either, aside from the requirements of Article 8.8.3 above. In light of the fact that according to the Payment Certificates relied upon by the Claimant, 93.62% of the works under the contract had been completed by the end of the contract's term (14 July 1978), the amounts awarded under items 3, 7, 8, 42 and 56 for stand-by costs for the period included in the term of the contract, ie. over $2 million, are more than the maximum amount to which the Claimant can reasonably be said to be entitled, according to the available evidence in the Case. This is because according to the Payment Certificates relied upon by the Claimant, at the time the term of the contract expired, only 6.38% of the works under the contract had not yet been completed. Moreover, even if we assume that all of the causes of delay and failure to complete the works in a timely manner were fully attributable to the Respondent, and that the Claimant could have completed the works under the contract precisely on the expiration date thereof if the materials had been delivered on time; and even if we also assume that it was impossible for the Claimant to reorganize its work schedule and to minimize the stand-by costs, then in that event the maximum costs which the Claimant could have incurred owing to stand-by of its personnel and equipment was $943,672, equivalent to 6.38% of the contract price ($14,791,099).

C. Claim for release of retention monies

13. Pursuant to Article 41.2 (a) of the General Conditions of the contract, the Respondent was required to deduct 5.2%, for Social Insurance premia and the Apprenticeship Fund, from the amounts paid the Claimant. Under Article 41.2 (b) of the General Conditions of the contract, release of the retained monies was, inter alia, conditional upon the Claimant's presenting clearance certificates from the Social Insurance Organization and the Apprenticeship Fund.

Pursuant to Article 41.2 (b):

> "Upon issue of the Completion Certificate the Contractor [Claimant] shall submit a Final Settlement of Account Certificate from the S.I.O., an Account Clearance Certificate from the Apprenticeship Fund... and an invoice in quintuplicate to the Company [Respondent] in respect of the total amount of the said retentions and the Company shall within 30 days of the receipt thereof pay the amount shown thereon."

The Claimant has not presented any specific evidence or assertion that it paid the Social Insurance premia. Therefore, since the assumption that the Claimant paid the Social Insurance premia, which is a precondition for release of the retention monies, has been made moot, the issue of whether the Claimant could obtain an S.I.O. clearance certificate, and whether the contractual retentions should be released, naturally becomes moot as well.

14. The approach taken by the majority in order to release the said retentions on other grounds, in invocation of Article 52 of the General Conditions of the contract, fails to take into account the following facts: firstly, the frustration of certain other conditions relating to release of the retention monies and to the expiration of the contract, does not negate the Claimant's duty to pay its Social Insurance premia and the contractual condition that it obtain and present a clearance certificate from the Social Insurance Organization and the Apprenticeship Fund. Secondly, in addition to being inconsistent with the obligation to treat the Parties to the Case fairly and equally, the majority's decision taken in reliance on Article 52 of the contract, whereby it sets forth new legal arguments and grounds not brought by the Claimant or argued by the Parties, has in effect deprived the Respondent of its right to a defence, because the grounds adopted in the Award were not raised by the Claimant at any point in the proceedings, either as legal and contractual grounds or as

arguments, and the Respondent has thus had no opportunity to present arguments and evidence in response thereto.

III. THE RAMIN CONTRACT

A. The claims relating to outstanding variation orders

15. Articles 10 and 15 of the Special Conditions, and Article 68 of the General Conditions, of the contract gave the Respondent the right and final authority to decide what amount was payable for works performed under Variation Orders. Contrary to the presumption made in the Award, Article 10 of the Ramin contract, entitled "Ascertainment of the Final Contract Price," does not contain any reference to an obligation on the Respondent's part to be expeditious in ascertaining the price, or even anything which could be so interpreted. The Respondent disposed of the issue of the Variation Orders in its final Payment Certificate (No. 8) in the manner naturally required in view of the said Article and the nature of the contract involved, by ascertaining that the amount payable was Rials 18,653,591. Therefore, this decision taken by the Respondent on the basis of the terms of the contract should have been respected, especially inasmuch as the Claimant has neither denied the Respondent's right to ascertain the value of the Variation Orders, nor presented any arguments or evidence on the basis of which to argue that the prices set by the Respondent were unrealistic.

16. In its own defence, the Respondent points to its payment of Rials 15 million "on account." The evidence submitted as to the said payments, which includes the relevant Payment Certificates and correspondence in substantiation of the payments, leaves no doubt as to the veracity

of the Respondent's statement. The Claimant's response to this defence by the Respondent also supports the fact that payment took place, because although the Respondent advanced the said defence in its Statement of Defence, the Claimant first denied it, and provisionally at that, only in its Rebuttal Memorial No. 168, as follows:

> "Contrary to the statement in the brief, no 'cheques' or other evidence of actual payment are presented. Under these circumstances, HCC's statement that the amounts are still owing must be accepted."

The Award finds that the Respondent has failed to establish that it paid the Claimant this amount. Not only is this conclusion problematic in view of the evidence presented by the Respondent, but at the same time its peculiarness becomes obvious when we note that in certain other instances, inter alia the claim relating to release of the retentions under the Esfahan-Rey contract (paragraph 6 (a) of this Opinion, supra), the mere claim itself -- viz. the statement quoted from a letter from the Claimant to the Respondent wherein it is asserted that the former had paid the Social Insurance premia -- has been accepted as evidence of payment. This is one of the instances where a single specific standard for weighing the Parties' evidence or assertions has not been applied.

IV. THE TEHRAN SPUR CONTRACT

A. Additional cased crossings at KP 102, 108 and 111

17. This claim relates to the performance of additional work. The ascertainment of the price of work performed under Variation Orders falls under the provisions of Article 42 of the General Conditions, and especially of

Article 14 of the Special Conditions, of the contract, as follows:

> "14. VARIATION OF CONTRACT PRICE
>
> In case any variation of the works is required the price for such variation will be ascertained by negotiation between the Engineer and the Contractor [Claimant].
>
> In case an agreement is not reached the Engineer's price will be used."

Pursuant to the definition given in Article 5 of the Special Conditions of the contract, "the Engineer" signifies, "the Head of the Engineering Projects Division of the Company [Respondent]."

18. The evidence before the Tribunal demonstrates that when the contract was carried out, the Respondent ascertained the value of the works performed at Rials 300,000, and notified the Claimant accordingly. The "Engineer's" letter of 29 July 1980 to the Senior Engineer, Bills of Quantities, attests to this statement, as follows:

> "With reference to your Note dated 3 May 1980 wherein the costs of additional works demanded for the 30" Gas Supply Pipeline were estimated at 300,000 rials, not acceptable to the contractor [Claimant], we now enclose photocopy of the Contractor's letter No. TST 176/THL-2612 dated 8 July 1980 and the estimate attached thereto for your consideration and comments."

The hand-written note on the margin of the said letter indicates that pursuant to the above-mentioned letter, the works performed were reappraised at the higher amount of Rials 2,400,000. Pursuant to Articles 5 and 14 of the Special Conditions of the contract, both of these appraised prices constitute appraisals by the "Engineer," and are binding upon the Parties to the contract. Even if there might exist some doubt as to whether the second appraisal (ie. for Rials 2,400,000) was notified to the Claimant,

there is no doubt, in view of the above-mentioned letter, that the "Engineer's" first appraisal, for Rials 300,000, was notified to the Claimant. In light of the Claimant's protest of the figure arrived at by the "Engineer," pursuant to Claimant's letter No. TST-176/THL-2612 dated 8 July 1980, to which reference is made in the above-quoted letter, the Engineer's initial estimate of Rials 300,000 must have been notified to the Claimant sometime between 3 May and 8 July 1980, which latter date is the date of the Claimant's protest of the said appraised price. For this reason, the Award's conclusion that "HCC's letter therefore stands as the sole item of contemporaneous evidence between the Parties of the value of the work which was performed," is in error. For based on the above facts, the Claimant's letter is not the sole contemporaneous evidence; rather, the "Engineer's" appraisal is also a contemporaneous item of evidence, and there exists no doubt that it was notified to the Claimant. Therefore, the issuance of an award for an amount greater than that accepted by the Respondent is not justified.

19. At the same time, the Award's interpretation of the legal consequences of Article 14 of the Special Conditions of the contract, to which reference was made above, is also objectionable because if, arguendo, the Respondent did not notify the Claimant of the price set by the "Engineer" at the time the contract was carried out, or if the Tribunal does not wish, for justifiable reasons, to attach final and decisive importance to the view expressed by the "Engineer," the logical consequence of this decision will not necessarily be, to accept the Claimant's alleged figure, which is unsupported by any evidence. I can find no logical justification whatsoever for a finding that since the figure set by the "Engineer" is not final and binding, as a direct consequence thereof, the amount claimed -- or in fact, the figure set by the Claimant -- shall be accepted as representing the value of the additional work

performed. For even if we were to suppose that the provision that the "Engineer's" decision is binding upon the Parties to the contract had been stricken from Article 14 of the Special Conditions of the contract, then in that case the terms of the other portion of the said provision, namely the ascertainment of the value of the additional work on the basis of an agreement by the Parties, will prevail; and since it is certain that no such agreement exists, the forum adjudicating the Parties' dispute over the price of the work has the duty to determine the actual value of the work performed, in consideration of the statements and evidence presented as to the value of the work. As a result, the issuance of an award for any amount greater than that agreed upon must be supported by affirmative evidence that the alleged costs were really incurred. Therefore, in order to prove its claims, the Claimant is required to produce evidence establishing that it has incurred the alleged costs. The requirement to produce evidence of costs under such circumstances as a general rule is clear, and at the same time, Article 42 of the General Conditions of the contract also expressly provides that the Claimant must submit evidence in proof of its expenses incurred in order to perform the additional work. In this connection, the only evidence presented by the Claimant is the letter dated 31 March 1980, which simply demands the amount of Rials 30 million, without presenting any affirmative and supporting evidence showing that such costs were actually incurred. It would thus have been appropriate for the Tribunal, in seeking to resolve these disputes, to examine the nature of the work, the supporting arguments, and the evidence relating to the costs incurred; and for it then to render its decision. In the instant case, since the Claimant has not presented any evidence whatsoever in proof that costs in the claimed amount existed and were incurred, the claim for amounts in excess of the figure accepted by the Respondent should be dismissed for lack of proof.

B. Costs incurred to cut and reweld due to pipe shortage

20. As to this claim, just as was stated in paragraph 19 above, the Award's finding that the price proposed by the Respondent is not binding does not -- let alone the question of whether or not that finding is valid -- necessarily lead to the conclusion that the amount sought by the Claimant should be accepted. Because the Claimant has not, either at the time the contract was carried out or throughout the present proceedings, presented any evidence in proof of the costs incurred, the claim for amounts in excess of the figure accepted by the Respondent should be dismissed.

21. In view of the contract, certain of the costs claimed for under this claim are necessarily unacceptable. Inter alia, while the figure claimed has apparently been calculated on the basis of the contract's schedule of work rates, separate costs for supervision have also been included though they have no contractual basis.

C. Pipe failures at KP 7.7 and KP 9

22. I would infer from Article 18.3 of the General Conditions, and Article 4.5 of the Special Conditions, of the contract that in order to prove its claim, the Claimant must establish that the pipe burst was due to a latent defect, and that no subsequent actions on its part which could have damaged the pipe after it was delivered or during the work and the installation thereof, contributed to the occurrence of the damage. In this connection, the contractual clauses referred to are not mutually contradictory. Article 18.3 of the General Conditions of the contract is in reality a contractual presumption that the goods are without defect once the Claimant has taken delivery of them, unless the contrary -- ie. the existence

of a latent defect -- is subsequently proved. In the event that a latent defect exists, Article 4.5 of the Special Conditions of the contract holds the Respondent liable for any possible costs and damages, but it does not dictate that every defect which shows up in the goods following delivery is a latent defect. Therefore, under these circumstances, when pipe has been properly delivered to the Claimant pursuant to Article 18.3 of the General Conditions of the contract, if a problem appears the Claimant must prove that the pipe failure has arisen from a latent defect, because it is commonly possible for the pipe to have been damaged for numerous other reasons, inter alia due to damage during transport or installation, or because of improper maintenance after delivery to the Claimant. Of course, it might not be easy for the Claimant to prove the latent defect, but at the same time the available evidence shows that the Respondent made a good faith effort on its part, to clear up the matter by asking the Claimant to show the burst pipe or give it the manufacturer's serial number; whereas for its part, the Claimant made neither the defective pipe nor the manufacturer's serial number available to the Respondent. On the other hand, it is equally -- or rather more -- difficult for the Respondent to prove, as required by the Award, that the pipe failure was caused by a defect that occurred after the pipe was delivered to the Claimant, and that resulted from acts on the part of the Claimant during the time that the pipe was in its possession -- particularly since the Claimant refused to show the burst pipe. For this reason, the Claimant's claim for costs relating to the pipe failure at KP 7.7 should be dismissed as invalid, based on the fact that the Claimant has failed to sustain its burden of proof.

23. As for the Parties' dispute over the repair costs in connection with the pipe failure at KP 9, for the same reasons which I set forth in paragraph 19, supra, with respect to the claim for casing costs, the Claimant's

demand for amounts in excess of the figure confirmed by the Respondent is inadmissible, since no proof has been given that such costs were incurred.

D. The claim relating to bridge pier work

24. In light of the evidence, and also as indicated in the Award itself, the dispute underlying the Claimant's claim existed between the Parties well before the contract was entered into, and the Claimant was fully aware of its nature and dimensions; and yet, the Claimant proceeded to enter into the Tehran Spur Contract in October of 1979 in knowledge of that matter, without reiterating its claim in connection with the supports under the road bridge. This action can only be interpreted as signifying that the Claimant had waived its claim, and that it had over-all accepted the Respondent's position, in view of the agreed contract price. The answer which the Respondent, in its letter dated 23 October 1980 to the Claimant, gave to the latter's claim, clarifies the matter as follows:

> "With reference to your letter No. TST 172/THL 2606 of 6 July 1980, will you please take note that, before the execution of Contract No. 302/6029 in Oct. 1979, [all] the terms of the Letter of Agreement dated 12 Sept. 1978 which required alteration or inclusion were examined by the parties and the contract was executed without addition to it of any further detail and without the requirement of further negotiations, with thorough knowledge of the existence of the footings under the bridge.
>
> In view of the fact that construction of the lot beneath the Highway bridge form [sic] part of your undertaking and that the costs thereof were included in the contract price, no additional payment would be forthcoming."

Accepting such a claim, which had been waived at the time the contract was concluded and performed upon, and which is not mentioned in the contract, is tantamount to rewriting the contract for the Parties. The argument in the Award

that the Respondent must prove that the list of changes which are the subject of Article 1.4 of Section 5 of the contract is an exhaustive list, inverts the issue and reverses the burden of proof. The logical inference to be drawn from the execution of the contract, which makes no reference whatsoever to the Claimant's claim, is that the Claimant had waived its claim or that the problem had been settled through the Parties' agreement over the over-all price of the contract. As a result, the Claimant has the duty to prove that its previous claim was not prejudiced by its execution of the contract and over-all agreement with the Respondent, and that it had excluded its claim from the scope of the agreement arrived at pursuant to the contract.

E. The claim relating to increased costs due to program delay

25. It is first necessary to make the preliminary remark that the Tehran Spur Contract made no provision for adjusting the contract price, and that even according to Article 71 of the General Conditions, the agreed amount for the contract was final and no factor, such as an increase or decrease in the price of work or materials, etc., would result in an increase or decrease of the contract price. Despite the presence of the said provision, the Respondent agreed by its letter of 11 October 1979, pursuant to a request by the Claimant, to adjust the contract price by a certain amount, if certain conditions were met. The said letter states, in relevant part:

> "Based upon the directive to be issued by Plan and Budget Organisation instructing us to what extent, and in what manner you are to be compensated for the aforementioned extra costs we undertake to immediately commence negotiation with your duly authorised

> representative so as to determine fair and reasonable compensation for the extra costs you have incurred."

Therefore, the Respondent's agreement to adjust the contract price was not an unconditional obligation governed by the rate of inflation; rather, it constituted a provisional acceptance of an adjustment, whose level was to be approved by the Plan and Budget Organization. Another letter from the Respondent, dated 30 July 1980, reiterates this same position:

> "With reference to your letter No. TST-182/THI-2623 dated 14 July 1980, please note that as was verbally explained in the Meeting of 16 July 1980 in the presence of the Director of Survey and Execution of Projects, together with the authorities responsible for the Project, any action in this regard is contingent upon the promulgation and receipt of decrees from the Plan and Budget Organization, and this matter applies to all the contractors throughout the country. Therefore, in view of the foregoing, please refrain from further correspondence in this connection. As soon as it becomes possible to take action in this regard, the matter will be promptly taken up, and the Contractor will be notified of the results of the decrees." [retranslated]

Subsequently, the Respondent added Rials 36,732,150 to the contract price, on the basis of the aforementioned agreement. Under the above circumstances, the majority's decision to accept a part of the Claimant's claim is in contradiction to the Parties' agreement, and it is consequently unjust to require the Respondent to do something that it never agreed, either implicitly or explicitly, to undertake.

F. The counterclaim for goods supplied to the Claimant

26. In responding to this counterclaim of the Respondent, the Claimant does not assert that it did not receive the

goods in question. Nor does the Claimant dispute the price as claimed by the Respondent. The Claimant's defence to this counterclaim is that "there is no evidence that the said costs reflect expenses which the Claimant should have borne under the contract." Therefore, the issue in dispute is over which of the Parties bears the cost of the goods at issue, pursuant to the contract. As noted in the Award, pursuant to Article 17.5 of the Special Conditions of the contract, "The procurement, supply and transportation of all other materials beyond those listed as Company [Respondent] Supplied Materials... shall be provided by the Contractor [Claimant]..." In view of the list of goods which are for the responsibility of the Respondent, which list is annexed to the contract as Section IV thereof, the Respondent was not responsible for supplying the goods at issue in this counterclaim, and the Respondent was thus not obliged to provide them free of charge. Therefore, given that the Claimant neither denies that it took delivery of the goods nor disputes the price quoted by the Respondent, and since the Respondent was not obliged under the contract to provide the goods in question free of charge, in my opinion the entire amount of the counterclaim for reimbursement of the price of the goods should have been awarded.

G. The counterclaim for return of payments on account

27. As presented in its Rebuttal Memorial Concerning Respondent's Counterclaims (Doc. 172), the Claimant denies this counterclaim in a general way and without adducing any evidence, in the following words: "HCC [Claimant] fulfilled

its contractual obligations. No refund is due NIGC [Respondent]." The Award's analysis and reasoning are based on far-fetched assumptions about the evidence, inter alia Payment Certificate No. 11. The Award's findings are also in conflict with the conventional and acceptable presumption which can be drawn from the face of the said Payment Certificate, and with all the facts governing this matter. Payment Certificate No. 11 provides absolutely no evidence that part of the monies paid "on account" by the Respondent were included in the totals shown in the Payment Certificate in question. Moreover, the observations on which the Award is based were never raised or argued by the Claimant. Inter alia, the Claimant never alleged that Payment Certificate No. 11 or the other arguments now advanced in the Award constituted evidence in support of its assertion that it had set off the Respondent's payments "on account" from its own claims.

28. The Award's explanation of the facts, and its findings concerning the remainder of the "on account" payments demanded by the Respondent, are not founded upon evidence but are, rather, based upon unjustified and erroneous suppositions. Inter alia, Mr. White's Affidavit mentions the set-off of Rials 40 million in "on account" payments by the Respondent, from the amounts sought by the Claimant under the claim for "Increased costs due to program delay." In view of the fact that the Award has found in favor of the Claimant with respect to the said claim, and to the Claimant's claim under the heading of "Unpaid progress payments", it is obvious, in light of the Award's conclusions, that in reality no set-off of the Rials 40 million in "on account" payments by the Respondent, as mentioned by the affiant, has actually taken place. In view of the foregoing, and of the fact that it is not disputed that the Respondent made the "on account" payments on which it claims -- and also in view of the Claimant's total failure

to present any evidence in support of its defence that it had set off the monies -- the dismissal of the Respondent's counterclaim is devoid of any legal justification, and has resulted in the unjust enrichment of the Claimant.

The Hague, 5 Mihr-mah 1367 / 27 September 1988

Parviz Ansari Moin