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Case No. 195

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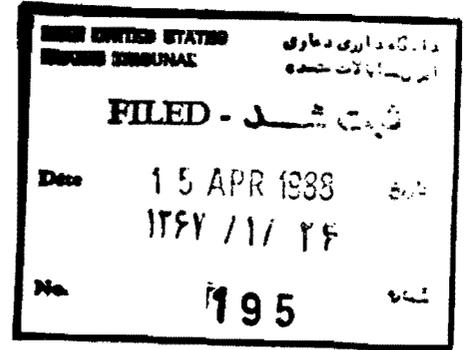
AWARD NO. 358-195-1

AGROSTRUCT INTERNATIONAL, INC.,
Claimant,

and

IRAN STATE CEREALS ORGANIZATION,
THE ISLAMIC REPUBLIC OF IRAN,

Respondents.



AWARD

Appearances

For the Claimant:

Mr. Charles Cummings,
Attorney,
Mr. Stuart Mishlove,
Envirodyne Engineers, Inc.,
Agrostruct International,
Inc., Treasurer.

For the Respondents:

Mr. Mohammad K. Eshragh,
Agent of the Government of the
Islamic Republic of Iran,
Mr. Akbar Riazi,
Legal Advisor to the Agent,
Mr. Abdolmajid Aghighi,
Legal Advisor,
Mr. Shahrokh Maleki,
Representative of the State
Cereals Organization.

Also Present:

Mr. Michael F. Raboin,
Deputy Agent of the Government
of the United States of
America.

A. INTRODUCTION

1. On 7 January 1982, the Claimant, Agrostruct International, Inc. ("Agrostruct"), filed a Statement of Claim against the State Organization for Grain, Sugar and Tea and the Islamic Republic of Iran raising various claims based on its performance of a turn-key construction contract for a bakery plant in Iran. On 23 August 1982, the Iran State Cereals Organization filed a Statement of Defence and Counterclaim naming the Claimant and Werner Lehara International, Inc. as Counterrespondents. By letter filed on 10 October 1982, the Respondents explained that the State Organization for Grain, Sugar and Tea had been divided into three independent organizations, one of which, the Iran State Cereals Organization ("Cereals"), undertook to present the Statement of Defence.

2. A Pre-Hearing Conference was held on 24 October 1983.

3. On 3 April 1986, Cereals filed a "Counterclaim on the Bank Guarantee" naming Cereals and Bank Melli Iran as Counterclaimants, and Agrostruct and Crocker National Bank as Counterrespondents.

4. A Hearing was held on 30 September 1987.

B. FACTS AND CONTENTIONS

5. Agrostruct is a corporation organized under the laws of the State of Washington. In 1975 it was engaged in the business of providing engineering and construction services to food industries outside the United States. In the middle of that year Agrostruct learned that the Iranian government planned to erect a number of automated bread bakeries. In this regard, Agrostruct contacted Werner

Lehara International, Inc. ("WLI"), a designer, manufacturer and supplier of automated baking equipment. On 24 July 1975, Agrostruct and WLI entered into an agreement to submit bids or proposals to the State Cereal Organization of Iran for the construction of bread bakeries in Iran. Agrostruct and WLI then submitted a proposal for a fully automatic barbary bread plant, dated July 1975, to the State Cereal Organization.

6. The proposal was accepted, and a contract written in Farsi (the "Contract") was signed on 2 September 1975. The Employer party to this Contract was the Ministry of Commerce, Foreign Transaction Corporation. It is not disputed that the Respondent, Iran State Cereals Organization, is the legal successor to the Foreign Transaction Corporation; therefore, in this Award reference is simply made to "Cereals." There is disagreement, however, between the Parties as to who entered into the Contract on the Contractor's side. Agrostruct asserts that it was intended to be and actually has become a contracting party with independent contractual rights and obligations. In any event, Agrostruct argues that the Contract was modified and that it was included as a contracting party by virtue of two letters dated 4 September 1975 to Cereals, signed by both Agrostruct and WLI.

7. Pursuant to Article 4 of the Contract, the Contractor undertook to complete the plant construction and start-up of production within ten months after the turn-over of the plant site. The plant site was turned over to WLI and Agrostruct on 4 November 1975. Agrostruct contends that it actually began off-site work early and that by that date it had implemented various changes in the preliminary specifications requested by Cereals. Agrostruct alleges that it began on-site activities in January 1976.

8. Article 15 of the Contract provided for payment of the Contract price of \$4,106,941 through drawings on a

letter of credit opened with Bank Markazi Iran according to work progress. Agrostruct contends that the letter of credit should have been opened within one month after the signing of the Contract, or in any event within a reasonable time thereafter. When by February 1976 Cereals had not opened the letter of credit, Agrostruct was allegedly unable to finance the project and had to stop on-site work on 28 February 1976.

9. On 27 June 1976, two letters of credit were opened with Bank Markazi Iran, one was in favor of Agrostruct for \$2,546,250, and the other was in favor of WLI for \$1,560,685. Agrostruct was then prepared to resume its work. Because of the delay, it requested, and was granted, an extension until 30 June 1977 to complete the project.

10. Agrostruct contends that Cereals then sought further changes in the Contract specifications, for which Agrostruct requested approval as extra work entitling it to compensation in addition to the fixed Contract price. Eventually, as documented in the procès verbal of a meeting on 9, 10 and 11 May 1977, Cereals agreed to review the claim for extra work, and to extend the deadline for the "provisional delivery" of the plant until one month after the commencement of the "test period" on 1 September 1977.

11. Agrostruct alleges that although Cereals again requested extra work causing additional delay, the plant nevertheless was nearly complete by October 1977. A letter from Agrostruct's representative in Iran, "Food & Nutrition Consultants NUTRICO," to Agrostruct, dated 16 October 1977, states that Cereals' consultant Technolog confirmed that 85 percent of the total work was completed. According to a telex sent to Agrostruct on 28 November 1977, Technolog at that point verified that 95 percent of the project was finished. Agrostruct asserts that the remaining incomplete items were minor. Agrostruct therefore repatriated its

United States employees and assigned its local representative to complete the work.

12. Article 19 of the Contract provides that 10 percent of each payment under the Contract was withheld pending acceptance of the "provisional delivery" of the plant by Cereals. Representatives of the contracting parties met on 13 March 1978 to discuss the "provisional delivery" and outstanding payments. They signed a procès verbal entitled "Preliminary Acceptance of Bandar Abbas Bakery Plant" memorializing the results of that meeting. The English translation of the procès verbal, which was submitted by Agrostruct,¹ states among other things that

[t]he Representative of Technolog discussed the report . . . from Technolog to the Cereal Organization and the list of deficiencies attached thereto, and stated that the reported plus 97% of job completion is judged merely from the standpoint of value of the project

Then the Director General For the Plan Industrialization of Bread stated that the said deficiencies do not interfere with productivity and exploitation of the plant, and reported that at the present time both production lines of Barbari Bread and Cake are proceeding and the plant is being exploited.

According to the procès verbal, Cereals offered Agrostruct two alternatives in order to obtain acceptance of the "provisional delivery" required to release the 10 percent retentions. Under the first alternative, Cereals would retain 3 percent of the Contract price, and the performance bank guarantees opened under the Contract would not be

¹ This translation from the original Farsi text appears to be inaccurate on some points. To the extent relevant for the findings in this Case, however, it is not disputed that the translation reflects the statements in the Farsi version.

released "until the deficiencies are corrected within the 30 days provided in the Contract." Under the second alternative, Technolog would prepare an itemized cost estimate for correcting the deficiencies. If that estimate was not objected to by the Contractor, it was provided that

the employer will be allowed to deduct the estimated amount separately from the construction and machinery portions of the job with the addition of a 15% penalty over said amount, and to deduct said amount respectively from the Letters of Credit Otherwise, (if the contractor does not accept Technolog's estimate), in accordance with Article 20-3 of the contract, the contractor will be obliged to correct the deficiencies within the stipulated dateline, in which case upon preliminary acceptance a 3% of the total value of the contract . . . will be retained . . . , with the understanding that payment of the 3% balance . . . will take effect upon correction of the deficiencies.

Agrostruct opted for the second alternative. Accordingly, the procès verbal states that "Technolog Engineers should proceed to make and report the estimate."

13. In September 1978, Agrostruct had still not received the cost estimate, nor was the "provisional delivery" accepted. It was not until January 1980, nearly two years after the procès verbal was signed, that Agrostruct received a telex containing Cereals' list of incomplete items together with cost estimates. According to Agrostruct, it did not agree with that statement but found itself unable to challenge the listed items or to complete the remaining work because of Cereals' delay in presenting the list and the intervening events in Iran.

14. Agrostruct argues that it is entitled to reimbursement of the full 10 percent retention, even though it did not obtain acceptance of the "provisional delivery" formally required by the Contract. Pursuant to agreement between the Parties, as detailed in the signed procès

verbal, Cereals was responsible for generating a list of deficiencies and estimated costs to repair those deficiencies. Agrostruct asserts that, because Cereals did not send the list for almost two years, during which time significant changes occurred in Iran, it was effectively prevented from correcting the deficiencies. It therefore seeks payment of the entire 10 percent retention in the amount of \$254,000.

15. Moreover, Agrostruct takes the position that under Article 15 of the Contract, Cereals should have opened the letter of credit within 30 days of the signing of the Contract, or at least within a reasonable time thereafter. Because the letter of credit was not opened until 27 June 1976, Agrostruct allegedly incurred unanticipated expenses due to the delay caused by Cereals' failure to fund the project on time, such as extra charges for storage, interest and price increases. Agrostruct contends that Cereals promised to review the documentation of these costs, and to reimburse those expenses which were properly documented. Agrostruct therefore claims that it is entitled to reimbursement of these costs in the total amount of \$157,488.85.

16. In addition, Agrostruct argues that as a consequence of Cereals' delay in funding the project, its financial and other resources were so severely strained that it was unable to take advantage of opportunities for other profitable projects which arose during this period. Agrostruct contends that it never recovered from the "financial trauma" caused by this delay and that it was eventually forced to go out of business. It is not presently operating although it does continue to exist as a legal entity. Agrostruct therefore claims damages in the amount of its value as an operating business which it estimates to be \$100,000.

17. Agrostruct further seeks compensation for the loss of equipment and tools which allegedly were left stored in

containers on the project site. It contends that this equipment was imported to Iran in Cereals' name in order to avoid customs duties, but that it belonged to Agrostruct and was not to be turned over to Cereals at completion of the bakery project. Agrostruct alleges that it could export the equipment only with Cereals' assistance, and that Cereals allegedly inhibited or prevented the export because of the outstanding "provisional delivery" of the plant. Agrostruct therefore seeks compensation for the fair market value of the equipment in the estimated amount of \$200,000 on theories of wrongful taking and unjust enrichment.

18. Agrostruct finally seeks interest at a rate equivalent to its cost of borrowing, and attorney's fees in connection with this arbitration.

19. The Respondents dispute the Tribunal's jurisdiction over the Claim, and argue that Agrostruct does not have standing to pursue the Claim.

20. Moreover, the Respondents deny the validity of each of the Claims on the merits.

21. The Respondents also raise Counterclaims against both WLI and Agrostruct. First, Cereals seeks payment of delay penalties amounting to \$572,906 pursuant to Article 13 of the Contract, alleging that Agrostruct failed to timely fulfill its contractual obligations. Second, Cereals seeks damages for expenses totalling 22,376,312 Rials which allegedly were incurred to remove deficiencies from the project. Third, Cereals seeks payment of 6,482,015 Rials which it claims it paid for additional expenses including removal of defects in the cooling system, provision of a power plant, and subscription to water, electricity and telephone - all of which it argues that Agrostruct was obligated to pay under the Contract. Last, it seeks amounts allegedly outstanding for payment of tax and social security obligations under the Contract.

22. Cereals also joined with Bank Melli Iran to raise a Counterclaim against Agrostruct and Crocker National Bank based on a standby letter of credit that was issued on behalf of Agrostruct by Crocker National Bank in Bank Melli's favor. Bank Melli in turn issued a bank guarantee in Cereals' favor for the sum of \$254,626. Cereals called the bank guarantee on 26 February 1980, and Bank Melli called the standby letter of credit, issued by Crocker National Bank, on 28 February 1980. Crocker National Bank refused payment under the standby letter of credit and notified Bank Melli that it had opened a "blocked account."

23. Bank Melli filed a claim with this Tribunal (Case No. 528) for payment under the standby letter of credit. Following Award No. 108-A/16/582/591-FT (25 Jan. 1984), the Tribunal issued an Order terminating the proceedings in Case No. 528. The Counterclaimants argue that the decision in Case A/16, in conjunction with the Termination Order in Case No. 528, permit the filing of this letter of credit Claim as a Counterclaim in the present proceedings. They contend that the calls on the bank guarantee and standby letter of credit were justified because Agrostruct did not fulfill its contractual obligations. The Counterclaimants therefore seek payment under the standby letter of credit in the amount of \$254,626 plus interest, and damages allegedly incurred due to the loss of prestige and goodwill resulting from Crocker National Bank's action.

C. REASONS FOR AWARD

I. Procedural Issues

1. Late Submissions

24. On 27 July 1987, Agrostruct filed a "Supplemental Pre-Hearing Memorial" which contains as an exhibit an affidavit of Ben Sosewitz, President of Envirodyne Engineering, Inc.. The Respondents deny the admissibility of this document.

25. In the Order scheduling the Hearing in this Case, filed on 4 March 1987, the Parties' attention was drawn to the following:

1. No new documents may be introduced in evidence prior to the Hearing unless the Tribunal so permits and unless such documents are filed not later than 2 months before the Hearing (emphasis added).

The Hearing was initially scheduled for 23 September 1987, but it was postponed until 30 September 1987 due to the last minute request of the Parties. It could therefore be argued that the document was technically filed prior to the two month deadline put forth in the Order. However, the Order also stated that all further submissions must be specifically approved by the Tribunal. In this Case, regardless of which one of the two dates is considered relevant for the two-month period, the Tribunal is not prepared to admit Claimant's late-filed "Supplemental Pre-Hearing Memorial."

26. Articles 22 and 28, paragraph 3, of the Tribunal Rules, taken together, provide authority for the Tribunal to establish and enforce deadlines for the filing of written submissions, provided that the parties are treated with equality. Fundamental principles of equality and fairness between the parties, possible prejudice to either party, as

well as the orderly conduct of the proceedings, require that time limits be established and enforced. The Tribunal has therefore repeatedly stated that no party shall submit any document for the first time at the Hearing, or so shortly before the Hearing that the other party cannot respond to it in an appropriate way. In deciding whether, in a particular case, a late-filed submission is nevertheless admissible, the Tribunal considers the character and contents of the submission, its length, and the cause of delay. See Harris International Telecommunications, Inc., and The Islamic Republic of Iran, et al., Award No. 323-409-1, paras. 57 et seq. (2 Nov. 1987).

27. The Claimant's "Supplemental Pre-Hearing Memorial" was filed almost one year after the time limit of 31 July 1986 for Agrostruct's Reply to the reformulated Counterclaim. See Tribunal's Order filed on 24 February 1986. It is, largely, a summary of earlier pleadings, but it also contains some new allegations, particularly with respect to the Counterclaim, and the affidavit of Ben Sosewitz as new evidence. Agrostruct did not offer an explanation for the delay in making this submission, nor is it evident why the arguments and evidence contained in the document could not have been presented earlier. Ben Sosewitz is one of Agrostruct's officers and arguably could have prepared this affidavit much earlier in the proceedings. The Tribunal, therefore, finds it inappropriate to admit the "Supplemental Pre-Hearing Memorial."

28. At the Hearing Agrostruct also presented a letter to the Foreign Transaction Company, dated 23 April 1976. The Respondents objected to the admissibility of this document as well. The Tribunal, again, refers to its Order of 4 March 1987 which states:

At the Hearing, any Party is free to make any argument it wishes, but new documents may not be introduced in evidence unless the Tribunal so permits which permission will normally not be granted except for evidence in rebuttal of evidence introduced in the Hearing.

The crucial question then is whether the letter was presented by Agrostruct as evidence in rebuttal of evidence presented for the first time by the Respondents at the Hearing. See Harris, supra para. 26, at para. 64. According to Agrostruct, the Respondents for the first time at the Hearing specifically denied that Agrostruct had requested the opening of a letter of credit immediately after the signing of the Contract. However, throughout their pleadings the Respondents denied an obligation to open the letter of credit within a specific time limit. Since the existence of such an obligation is part of Agrostruct's case-in-chief, the burden was on Agrostruct to produce on time all evidence to support its argument. The evidence presented at the Hearing was easily accessible to Agrostruct earlier in the proceedings. Therefore, the Tribunal denies the admissibility of this evidence.

2. Late Counterclaim

29. The Counterclaim for payment under the standby letter of credit by Cereals and Bank Melli Iran, against Agrostruct and Crocker National Bank, was filed on 3 April 1986. After Case No. 528 (Bank Melli Iran and The Government of the United States, Crocker National Bank, Los Angeles) was terminated, the Agent of the Islamic Republic of Iran requested further guidance on how to proceed with those claims, which now form the basis of this Counterclaim. In a communication to the Agents filed on 16 August 1985, the Tribunal stated that requests for submission of a counterclaim based on letters of credit in the case where the underlying claim is pending "must be timely filed, not later than six months from the date of this communication." Thus, the deadline for raising the letter of credit Counterclaim in this Case was 16 February 1986. Cereals did not file this Counterclaim until 3 April 1986 and did not offer an explanation for the delay. The Tribunal decides, therefore, to dismiss this late Counterclaim.

II. Jurisdiction

1. Claimant's United States Nationality

30. The Respondents dispute Agrostruct's United States nationality. Agrostruct offered proof of its corporate nationality pursuant to the Tribunal's Order of 22 February 1983 and the guidelines established in the Order of 21 January 1983 issued in General Motors Corporation and The Government of the Islamic Republic of Iran, Case No. 94, Chamber 1. On the basis of the evidence submitted, the Tribunal is persuaded that Agrostruct International, Inc., a Washington corporation, is 100 percent owned by Envirodyne Subsidiary, Inc., a Delaware corporation, which is in turn 100 percent owned by Envirodyne Industries, Inc., also a Delaware corporation. Furthermore, the Tribunal is convinced that United States nationals hold an interest equaling 50 percent or more of Agrostruct's capital stock, as required by Article VII, paragraph 1, of the Claims Settlement Declaration. Accordingly, Agrostruct is a United States national within the meaning of the Claims Settlement Declaration.

2. Dispute Settlement Clause

31. Cereals further argues that the dispute settlement clause contained in Article 25 of the Contract precludes the Tribunal's jurisdiction over this Claim. Article 25 reads as follows:

All disputes arising out of the interpretation and execution of this contract shall first be settled amicably by a 2-Member Committee If the Committee fails to reach a settlement within 45 days; or if the interested party cannot nominate the Committee Member within 15 days, then the dispute shall be referred to arbitration in accordance with the applicable laws of Iran.

The Tribunal has previously held that settlement clauses which provide for arbitration of disputes in Iran under Iranian law, do not establish the sole jurisdiction of Iranian courts within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. See, e.g., AHFI Planning Associates, Inc. and The Government of Iran, Award No. 234-179-2, para. 10 (8 May 1986). In line with this practice, the Tribunal finds that Article 25 of the Contract does not preclude the Tribunal's jurisdiction over the present Claims.

III. The Claimant's Standing

32. A crucial question in this Case is whether Agrostruct has standing to assert its Claim based upon the Contract before the Tribunal. Cereals argues that Agrostruct was not a party to the Contract and, therefore, cannot assert any rights under it. Cereals points to the preamble of the Contract which mentions the "Ministry of Commerce, Foreign Transaction Cooperation" as the "Employer," and only WLI as the "Contractor." The totality of the evidence establishes, however, that the Parties understood from the outset that Agrostruct was, in fact, a party to the Contract.

33. First, the "Agreement between Agrostruct International and Werner/Lehara International, Inc." entered into on 24 July 1975 states "[t]hat if a contract for said work is obtained such contract shall be taken in the name of Agrostruct Werner/Lehara unless mutually agreed otherwise." This understanding between WLI and Agrostruct was communicated to Cereals in two joint letters written immediately after the Contract was entered into. Agrostruct's letter expressly states "Agrostruct International accepts to execute, in joint cooperation with Werner Lehara International, Inc., the turn-key bakery project in Bandar Abbas,

under the terms and conditions of the contract" Second, Agrostruct procured a good performance guarantee in Cereals' favor which was issued by Bank Melli Iran. Bank Melli in the letter of guarantee expressly referred to "the Contract No. 28115 concluded between you and AGROSTRUCT INTERNATIONAL"

34. The fact that Cereals understood and accepted Agrostruct's role as a party to the Contract is also demonstrated by the record. The basis for the execution of this Contract was a joint proposal submitted by Agrostruct and WLI to Cereals in July 1975. On 4 November 1975, Cereals turned over the project site to Agrostruct and WLI. This event is recorded in a protocol that is signed by representatives of both Agrostruct and WLI. Moreover, when Cereals funded the project in June 1976, it chose to open two separate and independent letters of credit - one for Agrostruct and the other for WLI.

35. The Respondents also argue that Agrostruct entered into the Contract as a "partner" to WLI. Agrostruct denies this. Although Agrostruct and WLI both executed the project, the Tribunal is not persuaded on the basis of the evidence before it that they in fact formed a partnership. It, therefore, finds that Agrostruct has standing to assert its Claims as an independent contractor, and accordingly need not decide whether it could have done so in a capacity as a partner to WLI.²

² See Housing and Urban Services International, Inc. and The Islamic Republic of Iran, et al., Award No. 201-174-1, pp. 22 et seq. (22 Nov. 1985).

IV. Merits

1. Retention Monies

36. It is not disputed that Cereals still retains \$254,000 representing the 10 percent withheld from progress payments under the Contract until acceptance of the "provisional delivery" of the plant. Agrostruct asserts that it has essentially fulfilled its contractual obligations, and that Cereals is not entitled to any withholdings. Even if, however, there were minor deficiencies remaining in the project, Agrostruct argues that the failure to remove them was caused by Cereals' failure to produce a timely list of such deficiencies. Cereals, on the other hand, relies on Article 19 of the Contract, which provides for the release of withholdings only after the "temporary acceptance of the plant," and on the agreement between the Parties as recorded in the procès verbal of March 1978 which states that only 97 percent of the work had been completed. It submits that the withholdings are justified because Agrostruct failed to remove the remaining deficiencies and was, therefore, not entitled to the "provisional acceptance" of the plant.

37. The Tribunal finds that Cereals is liable for 97 percent of the total Contract price, but that it may retain 3 percent for deficiencies in the performance. Cereals cannot rely on the fact that the "provisional delivery" of the plant formally required by the Contract did not occur. According to the procès verbal of March 1978, Cereals agreed that its consultant, Technolog Engineering, would prepare an itemized cost estimate for correcting the deficiencies. It was only after receiving that estimate that Agrostruct could make a choice whether it would accept a deduction from the payment or correct the deficiencies. It was therefore Cereals' responsibility to take the first step by providing an itemized list of deficiencies. However, despite Agrostruct's repeated requests, Cereals did not provide Agrostruct with the list until 21 January 1980, almost two

years after the procès verbal had been signed. In the Tribunal's view, such a time period was unreasonably long, and Agrostruct's obligation to act upon the list no longer existed. By failing to provide the list within a reasonable period of time, Cereals frustrated the agreement reached in March 1978, and effectively deprived Agrostruct of the opportunity to cure the deficiencies and obtain acceptance of the "provisional delivery." Under these circumstances, Cereals cannot rely on any remaining deficiencies to withhold 10 percent of the Contract price pursuant to Article 19 of the Contract.

38. At the same time, however, Agrostruct cannot demand payment for work which was, in fact, not carried out. The Tribunal notes that according to the procès verbal of 13 March 1978, which was signed by Agrostruct, Cereals' consultant Technolog reported that the bakery plant project was only 97 percent complete. Agrostruct did not object to this estimate at the time, and the alternative accepted by it for obtaining the "provisional delivery" used a 3 percent deficiency factor in the calculation. The Tribunal, therefore, determines that Agrostruct is entitled to 97 percent of its share of the total Contract price.

39. Based on the letter of credit opened in Agrostruct's favor, the total Contract price payable to Agrostruct was \$2,546,250. It had thus effectively earned 97 percent of that amount, or \$2,469,862.50. It is undisputed that Cereals withheld 10 percent of the Contract price, or \$254,000, and that as a result Agrostruct had been paid 90 percent of the Contract price, or \$2,292,250. Agrostruct is, therefore, entitled to the difference between \$2,469,862.50 (97 percent of the Contract price) and \$2,292,250 (the amount of the Contract price which it has received) which yields \$177,612.50. Agrostruct is, therefore, awarded \$177,612.50 for this element of its Claim.

2. Extra Expenses

40. Agrostruct seeks payment of extra expenses of \$157,488.85 allegedly incurred due to Cereals' delay in opening the letter of credit. It contends that Cereals agreed to pay for these extra expenses. Cereals denies that any such agreement occurred and the Tribunal is not persuaded that an agreement in fact existed. The procès verbal of the meeting which took place on 9, 10, and 11 May 1977 merely states that it was "verbally indicated that the claim will be reviewed and acted upon." This indicates only a willingness on Cereals' part to "review" and does not state whether any action taken thereafter would be positive or negative. Agrostruct then sent a letter to Cereals dated 11 July 1977 detailing the reasons for the extra expenses and specifying the amounts. There is no evidence in the record that Cereals ever gave a positive response to this request for payment. The Tribunal is not satisfied, therefore, that Cereals intended to make a binding commitment to reimburse Agrostruct for these extra expenses.

41. The question remains, however, whether Agrostruct is entitled to these expenses as damages for breach of contract. Agrostruct argues that it incurred the extra expenses as a consequence of Cereals' failure to open the letter of credit within a contractually stipulated time period of one month after the signing of the Contract. In the alternative, Agrostruct argues that the Contract created an implied duty on the part of the Respondent to open the letter of credit within a "reasonable" time.

42. The Respondents deny that the Contract provided for the opening of the letter of credit at any specific time, and contend that any delay by Agrostruct in completing the project was not caused by the alleged delay in opening the letters of credit. Moreover, the Respondents argue that

if Agrostruct was dissatisfied with the timing of the letters of credit, it should have terminated the Contract.

43. The Contract does not contain a provision specifying the timing of the opening of the letters of credit. Article 15 of the Contract merely provides that payments for "Part One" of the Contract price would be made according to progress of work through drawings on a letter of credit, but it does not set a specific time limit within which the letter of credit had to be opened. Rather, under Article 6.5 the opening of a letter of credit was subject to the Employer's prior approval of certain machinery to be supplied by the Contractor.

44. The Tribunal need not decide whether in the absence of a contractually stipulated time period, Cereals nevertheless had an obligation to open the letter of credit within a "reasonable" period of time. Even assuming that June 1976 was unreasonably late in view of the tight project schedule, Agrostruct is still not entitled to any damages for extra expenses allegedly caused by that delay. The Contract at issue in this Case was ambiguous as to when the letter of credit should have been established. In light of this ambiguity, before Cereals can be held liable for damages arising from the alleged late establishment of that letter of credit, Agrostruct should have notified Cereals that it considered the letter of credit late, and that it was incurring damages as a result thereof. There is no evidence in the record that Agrostruct so notified Cereals in a timely manner. Therefore, under the circumstances of this Case, the Claim for these extra expenses is denied.

3. Consequential Damages

45. Agrostruct asserts that due to Cereals' delay in funding the project, its financial and other resources were

so severely strained that it was unable to undertake other projects during this period. Agrostruct contends that this financial strain eventually caused it to go out of business and claims damages in an amount of \$100,000 which it estimates to be equivalent to its value as an operating business. The Respondents argue that Agrostruct has not met its burden of proving that it received offers for other projects, or that any business failure was caused by the Respondents.

46. This Claim is dismissed because Agrostruct has not established a sufficient causal link between Cereals' delay in opening the letters of credit and any loss of business which may have occurred at this time. Vague references to potentially interested customers in other parts of the region who allegedly relied on the Bandar Abbas project as a prototype, without clear documentary evidence of such, are not sufficient to support the Claim. Accordingly, this element of the Claim is dismissed for lack of evidence.

4. Equipment Claim

47. Agrostruct further asserts that Cereals prevented it from shipping out of Iran certain containers with equipment which were allegedly left at the construction site after completion of the project. Agrostruct argues that Cereals' conduct in preventing the removal constitutes a wrongful taking and seeks compensation in the amount of \$200,000 for the estimated fair market value of both the equipment and the containers. The Respondents, on the other hand, argue that pursuant to the Contract any equipment remaining at the site after the completion of the project was intended to remain there. Moreover, they allege that repeated requests to Agrostruct's Iranian representative to remove the containers from the site were unsuccessful. Respondents believe that Agrostruct did not remove the

containers because it would have been obliged to pay customs duties for them, or that it was otherwise not economical to do so.

48. The Tribunal finds that Agrostruct has failed to meet its burden of proving this element of the Claim. Agrostruct has failed to identify either the specific pieces of equipment which allegedly were left in Iran or their value. Moreover, it has not shown that pursuant to the Contract, these items were not intended to remain at the project site after completion of the Contract. In fact, review of Agrostruct's late 1977 inventory, which is presented in support of this Claim, shows that many of the items claimed are such that they would normally be left in Iran. Although Agrostruct has presented invoices for the purchase of some of the claimed items, it has produced no evidence that this equipment was either intended for this project, or that it was ever actually shipped to Iran. Moreover, Agrostruct has produced no evidence of its alleged attempts to export the goods or any interference therewith by the Respondents. For these reasons, this element of the Claim is dismissed for lack of proof.

5. Interest

49. Agrostruct seeks interest on its award at a rate equivalent to its cost of borrowing. In accordance with the previous practice of this Chamber, however, interest is awarded in an amount approximately equal to the rate that Agrostruct would have been able to earn had it invested the amount in a form of commercial investment common in its own country. For a United States Claimant, the Chamber customarily uses the average interest rates earned on a six-month Certificate of Deposit. See Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1, pp. 31 et seq. (27 Jun. 1985). It is a

reasonable assumption that Agrostruct would have been able to remedy any remaining deficiencies and obtain the acceptance of the "provisional delivery" not later than 1 August 1978, if it had received the required deficiency list on time.³ The Tribunal therefore sets 1 August 1978 as the date from which the interest period runs. The average rate on six-month Certificates of Deposit for the period relevant to this Award, rounded to the nearest quarter percent, is 10.5 percent.

6. Counterclaims

a) Delay Penalty

50. Agrostruct is not liable for delay penalties under Article 13 of the Contract. Although it is true that the project was not completed within the time schedule initially contemplated in the Contract, it is undisputed that Cereals repeatedly granted Agrostruct extensions without claiming delay penalties. The Tribunal considers that this conduct effectively modified the original time schedule. Moreover, any delay subsequent to the March 1978 meeting is excused by Cereals' failure to submit the list of deficiencies in a timely manner, thus depriving Agrostruct of the opportunity to cure the deficiencies. Therefore, Cereals cannot in good faith demand delay penalties pursuant to Article 13 of the Contract. Accordingly, this Counterclaim is dismissed.

³ While Agrostruct, in a telex to Cereals dated 8 December 1978, again confirmed that it was awaiting the deficiency list, this does not alter the fact that the deficiencies could have been remedied earlier had Agrostruct received the list on time - the relevant factor for determining the commencement of interest.

b) Expenses for Removal of Defects

51. Cereals argues that Agrostruct is liable for expenses in the amount of 22,376,312 Rials for the removal of remaining defects in the project. These expenses, however, are compensated by the 3 percent deduction from the Contract price payable to Agrostruct. See supra para. 38. To the extent the amount sought in the Counterclaim exceeds the amount which is equivalent to 3 percent of the Contract price, the Tribunal finds that Cereals is not entitled to additional reimbursement because through its conduct it deprived Agrostruct of the opportunity to remove the defects at a lower cost. This Counterclaim is therefore dismissed.

c) Additional Expenses

52. Cereals also seeks reimbursement of expenses allegedly incurred for the removal of defects in the cooling system, for subscription to water, electricity and telephone, and for the provision of a power plant. Cereals argues that under the Contract Agrostruct should have borne these costs and it therefore claims damages totalling 6,482,015 Rials. In the Tribunal's view, Cereals has not met its burden of proving this Counterclaim. It did not present invoices from the electricity and telephone company to substantiate the allegation that it was in fact charged with these costs. Moreover, Cereals failed to specify the time period for which it is claiming expenses. This Counterclaim is therefore dismissed for lack of proof.

d) Taxes

53. Cereals further claims taxes allegedly outstanding from Agrostruct, Espace (Agrostruct's sub-contractor), and WLI. It relies, in particular, on Articles 6.18 and 9-1 of

the Contract which provide that the Contractor is responsible for the payment of Iranian taxes. However, notwithstanding a contractual stipulation of this type, the Tribunal has consistently denied its jurisdiction over counterclaims for taxes reasoning that such claims arise out of law, and not out of the same contract, transaction or occurrence that constitutes the subject matter of the claim, as required by Article II, paragraph 1, of the Claims Settlement Declaration. See, e.g., T.C.S.B., Inc. and Iran, Award No. 114-140-2, p. 24 (16 Mar. 1984), reprinted in 5 Iran-U.S. C.T.R., pp. 160,173; General Dynamic Telephone Systems Center, Inc. and The Islamic Republic of Iran, Award No. 192-285-2, p. 25 (4 Oct. 1985). In accordance with Tribunal practice, the tax Counterclaim is dismissed for lack of jurisdiction.

e) Social Security Premiums

54. Similarly, the Tribunal has consistently rejected counterclaims for social security premiums on the ground that they arise out of the application of law, and not out of the same contract, transaction or occurrence that constitutes the subject matter of the main claim. See, e.g., Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1, p. 41 (27 Jun. 1985), reprinted in 8 Iran-U.S. C.T.R., pp. 298,326-327; Questech, Inc. and The Islamic Republic of Iran, Award No. 191-59-1, pp. 39-40 (25 Sep. 1985). Accordingly, the Counterclaim for social security premiums is also dismissed for lack of jurisdiction.

7. Costs

55. Agrostruct seeks legal and translation costs in the total amount of \$72,798.87. In view of the general

considerations outlined in Sylvania, supra para. 54, at pp. 35-38, and taking into account that (1) Agrostruct was awarded approximately 25 percent of the amount claimed, (2) all Counterclaims were dismissed, and (3) the Respondents incurred translation costs for providing an English translation of the Contract in an estimated amount of \$1,000, which Agrostruct must bear, the Tribunal determines that \$9,000 is a reasonable amount of costs to be paid to Agrostruct.

D. AWARD

56. For the foregoing reasons,

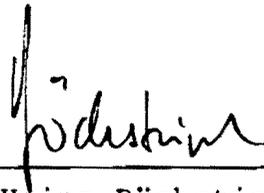
THE TRIBUNAL AWARDS AS FOLLOWS:

1. The Respondent IRAN STATE CEREALS ORGANIZATION is obligated to pay the Claimant AGROSTRUCT INTERNATIONAL, INC. the sum of One Hundred Seventy Seven Thousand Six Hundred Twelve United States Dollars and Fifty Cents (U.S.\$177,612.50); plus simple interest at a rate of 10.5 percent per annum (365-day basis) from 1 August 1978 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account; plus costs of arbitration in the amount of \$9,000.
2. The remaining Claims are dismissed.
3. The Counterclaims of the IRAN STATE CEREALS ORGANIZATION and THE ISLAMIC REPUBLIC OF IRAN are dismissed.
4. These 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.

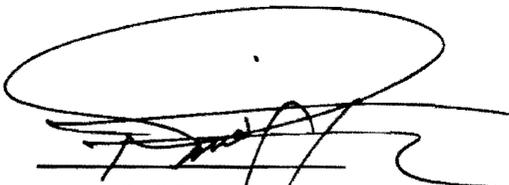
This Award is hereby submitted to the President of the
Tribunal for notification to the Escrow Agent.

Dated, The Hague
15 April 1988



Karl-Heinz Böckstiegel
Chairman
Chamber One

In the name of God



Assadollah Noori
Concurring in part
Dissenting in part



Howard M. Holtzmann