[redacted] ES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 195 Date of filing: 10 Jun '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 _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION (& Concurring) of Mr. A. Noori to Award 358-195-1.
- Date 10 Jun '88
40 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____
_____
- Date _____
_____ pages in English _____ pages in Farsi

R/12

In the Name of God

98

CASE NO. 195
CHAMBER ONE
AWARD NO.358-195-1

AGROSTRUCT INTERNATIONAL, INC.,
Claimant,

and

IRAN STATE CEREALS ORGANIZATION,
THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

DISSENTING AND CONCURRING OPINION OF A. NOORI

A. Factual Background

1. A turn-key contract was entered into on 11.6.1354 (2 September 1975) between the Ministry of Commerce, Foreign Trade (joint-stock) Company ("FTC")[1] on the one part, as Employer, and Werner Lehara International, Inc. (WLI) on

---

[1] In August 1976, FTC was succeeded by the State Organization for Grain, Sugar and Tea (SOGST). In a letter dated 13 October 1982, the Agent of the Islamic Republic of Iran to the Tribunal stated that Cereals was to be considered as a Respondent in this Case and that Cereals would pursue the defence and counterclaims of SOGST. Because of these developments, this Dissenting and Concurring Opinion will refer to "Cereals" in place of both FTC and SOGST.

the other, as Contractor, for the purchase, shipment, erection and construction of a barbari bread and cake bakery in Bandar Abbas.

2. The contract, which was later numbered 28115, was prepared in Persian only and was signed by a Mr. Hassan Sabeti Rahmati ("Mr. Rahmati") for and on behalf of WLI (preamble and the last page of the contract).[2] Agrostruct International, Inc. ("AGRO") was neither a party nor a signatory to the contract.

3. The contract required that the bakery be procured and constructed on the basis of certain "technical drawings and other specifications to be notified to the Contractor at a later date"[3] (Article 1 of the contract).

In turn, the Contractor was obligated to prepare and furnish complete and detailed drawings and specifications as required for the actual execution and performance of the works, which would, after being provided by the Contractor and approved by the Employer, form an integral part of the contract (Articles 6.1 and 6.2).

In view of the fact that those drawings and specifications were not yet ready at the time of signing, the contract left blank the relevant parts of Articles 6.15 and 29, which were supposed to reflect the number of pages of the technical drawings and specifications which would form the "integral parts" of the contract signed between the Parties (Article 6.15).

---

[2] Documents filed in this Case show that Mr. Rahmati was the owner or a director of a company named Nutrico.

[3] I.e., at a date falling somewhere after that on which the contract was signed.

4. Article 6.2.1 of the contract provided that:

> "All equipment, machinery and construction implementation drawings and general and particular specifications for each part shall be submitted to Employer within 30 days from the date of delivery of site...." (see also Article 6.10).

These specifications were to be studied, verified and commented on by the Employer for possible changes. The same Article 6.2.1 continued as follows:

> "... Employer may, if it deems necessary, give its comments for the required changes."

The Contractor was obligated to provide 5 copies of all final implementation drawings and technical specifications after their approval by the Employer (Article 6.2.4).

5. No equipment or machinery should have been purchased or supplied prior to approval of the Employer. Opening of the letter of credit was contingent upon such approval by the Employer (Article 6.5).

6. The contract further provided for a lump-sum amount of U.S.$4,106,941, divided into two parts (Article 3):

- Part one, covering the cost of engineering and technical works, purchasing, transportation, erection and commissioning of all equipment (plant) with the required spare parts, with a total value of U.S.$3,177,852. (Article 15.1 of the contract required that the payment under this part be effected by means of a letter of credit to be opened by Bank Markazi Iran).

- Part two, covering the cost of site evaluation, designing, metal and constructional work, heating

and cooling system, and certain other engineering services, valued at U.S.$929,089. (Contrary to Article 15.1, Article 15.2 did not specify the means of payment).

7. On 6 September 1975, through a letter co-signed by AGRO, WLI requested that the lump-sum amount of the contract be divided into two parts and that one part, amounting to U.S.$1,560,685, be paid to WLI and the other, amounting to U.S.$2,546,250, to AGRO or others. In view of the fact that the opening of the letter of credit was contingent upon turn-over of the site (Articles 6.2.1 and 6.10) and approval of drawings and specifications by the Employer (see discussions under §§ 3-5 above and Articles referred to therein), the letter of 6 September did not specify any deadline for opening the letter of credit.

Furthermore, while specifying the manner of payment and withdrawals of the first part of the contract amount (U.S.$ 1,560,685) under the future letter of credit to be opened for the total contractual amount, the letter of 6 September made no provision for how payment for the second part was to be effected, leaving it to future discussions and agreements to determine whether AGRO or others should be named as the beneficiary or beneficiaries. In pertinent part, the letter of 6 September reads as follows:

> "The balance of proceeds from the letter of credit, in the amount of US$ 2,546,250 is to be made payable to the beneficiary, Agrostruct International, or as they[4] may designate, in

---

[4] Here, "they" refers to WLI and AGRO.

accordance with the contract terms". (footnote added)[5].

8. On 4 November 1975, the site on which the bakery was to be constructed was turned over to the Contractor, and the procès verbal relating thereto was signed by the representatives of Cereals, WLI and AGRO.

9. After the turn-over of the site (apparently sometime in December 1975, based on the papers produced by AGRO as Exhibit 13 to Document 66), AGRO started to produce outline specifications, for comment and possible modification or approval by the Employer (Cereals).

10. Preparation of specifications and drawings, and approval thereof, as well as resolution of certain other administrative problems such as that relating to the opening of two separate letters of credit and the problems which AGRO faced in qualifying a US bank, took the Parties into mid-1976 or even longer. (E.g. Exhibit 3 to the Statement of Counterclaim shows that as of August 1976, AGRO had still not supplied certain plans and documents). At this point, two letters of credit, instead of the one previously requested by the Contractor (WLI) and agreed to by AGRO, were opened: one in favor of WLI in the amount of U.S.$1,560,685, and the other in favor of AGRO in the amount of U.S.$2,546,250. Letter of Credit No. 07/87905, in favor of AGRO, provided for payment to AGRO in the following manner:

---

[5] It appears (as will be seen) that after the turn-over of the site in November 1975 and preparation and approval of the specifications and drawings, which took the Parties well into 1976, the Parties eventually agreed, following lengthy discussions, to open the two separate letters of credit, instead of one as requested in the letter of 6 September; the second was opened in favor of AGRO, which was therein named as beneficiary.

1- 20% of the L/C amount against a bank guarantee.

2- 70% of the L/C amount against shipping documents.

3- 10% of the L/C amount against "procès verbal" delivery and after orderer's written confirmation.[6]

11. On 3 September 1976, AGRO sent a letter together with a schedule[7] on the basis of which it proposed to proceed with the work. The schedule showed, inter alia, the start of drawing and specifications submittals and site development in August 1976, shipping of trucks and construction equipment in September, excavation and underground plumbing in mid-September, and concrete foundation in early November of that same year.

12. On 4 September 1976, the term of the contract was extended to 25 February 1977. Cereals, however, learned that major parts of the works set forth in the schedule, which should have been started earlier (such as shipping of construction equipment, without which the Contractor could not start or perform the work), had still not been fulfilled by December 1976, whereupon Cereals asked the Contractor for an explanation.

13. In response to Cereals' "request for a letter regarding [AGRO's] realistic estimate of time required for completion of the work," and that AGRO "outline the

---

[6] Article 19 of the contract also provided that "Ten (10) percent of all payments in respect of local expenditures shall be withheld." It further made release of the withholdings contingent upon provisional delivery of the plant (same Article).

[7] See Article 4 of the contract and note 8 to this Opinion, infra.

more important factors contributing to delay" experienced "in obtaining materials and equipment necessary for the construction which make it an impossible task to meet the projected completion date,"[8] AGRO wrote a letter on 12 December 1976 wherein it outlined "the more important factors contributing to delay" as follows:

- Ships carrying containers from New York on September 6th and 11th to Bandar Abbas "transferred [the containers] to a single shallow - draft ship in Holland" which was scheduled to arrive October 24, 1976 but "ultimately off-loaded in Sharjeh."

- "The ship... carrying vehicles to be used during construction, due November 4, delivered the vehicles in two separate barges November 22, and December 2 [1976]."

- "The Bank of America ... has caused several delays subsequent to notification that the letter of credit would be opened...."

---

[8] Article 4 of the contract provided that:

> "The term of this contract shall be ten(10) months, effective from the date of delivery to Contractor of the site of the plant. Contractor agrees to perform all the works under the contract within the said time limit in accordance with the following schedule..."

It should be noted that the Parties gave no schedule under Article 4 and left the space provided for this work blank, since they were aware that the start of work would depend on numerous factors such as delivery and approval of final drawings and specifications, agreement between them as to how and when the letter of credit should be apportioned, etc. None of the Parties ever contended that a schedule was separately agreed upon either when the contract was signed or at a later stage, at least prior to 3 September 1976.

- "The ship... with containers carrying project houses and Bulter flour handling system, due in Bandar Abbas December 1, passed to Bandar Shapour..."

- AGRO has "to establish [its] own fixed concrete plant, resulting in a much slower method of production" compared to "transit-mixed concrete, a very rapid and simple method of obtaining large quantities of concrete".

- "Several short but important delays have been experienced in obtaining cement allocations and shipments."

- "Inability to obtain telephone service at the project site..."

AGRO qualified those factors, at the bottom of page two, as "force majeure" events and stated: "Barring any further unforeseen events... and assuming on-schedule arrival of shipments now at sea, it would appear that physical construction can be completed by May 18, 1977, permitting the baking test run period and final acceptance to be completed by June 30, 1977." It then concluded the letter, at page 3:

> "We are therefore respectfully requesting your approval of a schedule extention [sic] to June 30 1977".

14. The letter of 12 December 1976 made no allegation that any of these delays were attributable to Cereals. Rather, the entire thrust of AGRO's letter was that it should be relieved of liability on the ground that events beyond its control had intervened, and that it should be granted an extension for this reason.

15. Not satisfied by these arguments, and mindful of the requirements set forth in Article 11 of the contract, Cereals requested, through its letter dated 21 December 1976, that AGRO submit documentation supporting its allegation that "delays to the project schedule [were] caused by Force Majeure".

16. Before studying the letter of 17 January 1977 sent by AGRO to substantiate its position that the delays were due to force majeure, whereby it sought "relief from delays and increased costs, resulting from conditions beyond the control of Agrostruct," one must note Article 11 of the contract, which provides:

> "Article 11 - Force Majeure
>
> > If due to unexpected force majeure events beyond the control of Contractor, performance on a part of this contract becomes impossible, the Contractor shall have the right to request an extension of the period for performance on that part of the contract affected by force majeure, provided that it produces proof and documents to establish such event....
> >
> > In the event that the Employer decides to extend the term, Contractor shall immediately remedy the damage sustained and shall restore the works to pre-force majeure conditions...."

To avoid and/or mitigate its liabilities under Article 11 and to seek another extension, AGRO alleged, in a letter sent on 17 January 1977, that delays "resulting from conditions beyond the control of Agrostruct [are] not based totally on item 11 of the contract." Although this marks AGRO's first complaint in connection with the alleged delays, it invoked the delays in opening the letter of credit, along with many other so-called force majeure events, only in order to justify its demand for a further extension, and not to accuse Cereals of causing any delay in performance of the contract itself. After

dividing the factors contributing to delays in completing the bakery project into 3 categories, namely "(1) Delays Associated with Opening and Implementing the Letter of Credit, (2) Delays Associated with the Critical Path Schedule and (3) Miscellaneous Delays", AGRO merely sought another extension in concluding its letter:

> "Summary
>
> A. Delay in opening the letter of credit was 270 days; actual extension granted was 174 days. Allowing the full 270 days would bring contract extension to June 1, 1977 without provision for Force Majeure. We had asked for extension to April 25, 1977, based on factors pertaining as of September 3, 1976...
>
> B. Delays outside the control of Agrostruct subsequent to submittal of September 3, 1976..., justify a further extension from April 25, 1977 to June 30, 1977, barring any further unforeseen Force Majeure delays."

17. Subsequent letters also focused on the alleged events beyond the control of the Parties, such as problems in "(1) The clearing of shipments through customs... regardless of the efforts of the FTC [Cereals] and the Governor General's office to expedite the clearances.... [due to] not... receiving proper shipping documents by the time shipments arrive, [sic] even though some shipments have been delayed 4-8 weeks.... (2) ...damage... inflicted on... cargo by improper handling at the port.... (3) Heavy rains in late December and early January wash[ing] out a bridge... causing a ten-day shortage of concrete sand. (4) Periodic short periods of cements unavailability. (5) Numerous shipping delay[s]...".

18. AGRO did not entirely convince Cereals to extend the contract period to 30 June 1977 on the basis of the

foregoing excuses. While Cereals did eventually agree to an extension until 30 June 1977, it did so only after receiving Technolog (Consulting Engineers') certification that the extension could be granted, provided that certain additional works were carried out and that the relevant change orders were issued.

19. Although AGRO's request for extension of the contract until June 30th, 1977 had been granted, it was unable to meet the new deadline. AGRO thus continued to request further extensions, basing its demand this time on the excuse that approval of certain change orders had been delayed.

20. During another meeting, convened from 9 to 11 May 1977 (19-21/2/1356) to discuss some other pending matters, the completion date was, somehow, tacitly extended to 1st September 1977:

> "Re paragraph 6 of the above telex [i.e. Contractor's telex of May, 1977] the contractor undertake [sic] to submit to Technolog Consulting Engineers the time phased work progress schedule not later than (7) days of the date hereof and to commence work as approved by Technolog. However, the plant test phase shall commence not later than September 1, 1977."[9] (Emphasis added).

21. Notwithstanding Cereals' flexibility in granting these extensions, AGRO was unable to complete the work by carrying out the commissioning tests on 1st September 1977. After a site survey carried out on 3 October 1977, Technolog sent Cereals a progress report dated 19/7/1356

---

[9] Claimant's translation of the procès verbal is not an accurate one and indeed contains certain errors. Therefore, the Respondent's version has been relied on here.

(11 October 1977), wherein it enumerated a series of deficiencies and still-incomplete works, and concluded that

> "Considering the above-mentioned, 85% of the total work is complete".

By the time of the above report, almost 2 years had elapsed since the contract was signed with WLI, and more than 15 months since the letter of credit was opened in AGRO's favor.

22. On 24 November 1977, Cereals was still expressing its concern over AGRO's delinquency in completing the project, which was supposed to have been completed within 10 months from the date of site hand-over (4 November 1975), or at least from the date of issuance of the letter of credit opened in AGRO's favor in June 1976. In another telex, sent on 28 November 1977, Cereals complained about Mr. Zuniga's (AGRO's representative's) intention to leave Iran although the work was only 95% finished, and it emphasized that:

> "...5 percent remaining of job is such that has stopped whole project."[10] (sic)

It was not until March 1978 that AGRO could, with difficulty, convince the Employer and its Consultant that the work was 97% complete.

---

[10] Prior to those telexes, Cereals communicated, on various occasions, its dissatisfaction with the way that AGRO was performing its duties. In a telex sent on 8 October 1977, Cereals brought to AGRO's attention a lack of "co-operation between Agrostruct and Werner Lehara Personnel" and its failure to pay its local and expatriate workers for 3 months. As stated in para. 5 of the same telex, Mr. Zuniga, AGRO's representative at the site, was complaining about AGRO's failure to send

(Footnote Continued)

23. A meeting was held on 13 March 1978, and representatives of all Parties concerned signed a procès verbal, recording discussions and final agreements reached by all Parties on the percentage of the work completed, the manner in which they should proceed, completing the remaining incomplete portion, compensating Cereals for damages sustained as a result of the delays and reimbursements to be made pursuant to a cost estimate for correcting or completing the incomplete portion.

24. The procès verbal stated, inter alia, that:[11]

> "1. Technolog Report No.4760-258-321 dated 7.3.78 and list of deficiencies attached thereto.
> Technolog representative stated that the figure 97 percent referred to in the Report pertained only to funds expended and that Employer should express opinion as to how the deficiencies would affect bakery operation.
> Director General of Bread Industries declared that the deficiencies would not adversely affect the bakery operation and that bread and cake production lines are currently in operation."

The procès verbal offered two alternatives to the Contractor, in order to facilitate acceptance of the provisional delivery:[12]

(Footnote Continued)
sufficient money to secure the proper progress of the project.

[11] The translation provided by Respondent Cereals is used, rather than the version produced by Claimant because the former more closely reflects the original Persian version of the procès verbal.

[12] The words "Tahvil-e Movaqqat" have been translated as "provisional acceptance" by the Claimant. This is not a correct translation, since the English term corresponds to the words "qabul-e movaghghat" . I find "provisional delivery" a more accurate translation of "tahvil-e movaqqat".

> "(1) Should the deficiencies or any other visible defects not be corrected prior to turnover, a conditional turnover Process-Verbal will be drawn up and signed but the payment of the 3 percent balance due and owing to the Contractor and the amortization of the Contractor's guarantee will be dependent upon the correction of such deficiencies within the (30) days allowed.
>
> (2) Technolog would assess the deficiencies based on the latest report of its local representative prior to the turnover date. The Contractor would sign the list if it has no objection thereto and would authorize the Employer to deduct the related fund appropriations for each separate item of building and equipment, as well as 15 percent compensation, from the unused balance of the Letter of Credit opened in favor of WLI and Agrostruct. Otherwise, based on Article 20-3, it will be responsible for the correction of deficiencies within the time prescribed. In this case, too, the 3 percent of the total contract price in respect of building and equipment will be deducted from the letter of credit and withheld together with all guarantees. Payment of such funds and cancellation or amortization of all letters of guarantees will be dependent upon correction of such deficiencies."

The Contractor opted for the second alternative (see also Exhibit 36 to Document 66). Accordingly, the procès verbal provided that "Technolog [would] proceed with the assessment."

25. It should be noted here that from late November or early December 1977, AGRO started to evacuate the site, appointing Nutrico as its fully-authorized representative, which was to follow up and complete the remaining work on its behalf. In its telex of 29 November 1977 AGRO states:

> "2. ...Also you should have received a telex advising you that Nutrico is our representative in Iran and all contact for remaining work will be arranged through them...."

26. As Exhibit 38 to Document 66 clearly demonstrates, an exchange of telexes and Cereals' telex dated 4 June 1979 were without avail, and Cereals was thus compelled to send AGRO a follow-up telex dated 21 January 1980, this time with WLI as intermediary, requesting AGRO to abide by its commitments under the procès verbal of March 1978.

Despite WLI's suggestion that AGRO confirm its acceptance of the estimated costs to Cereals, this telex, receipt of which is not only undenied but also proved by the above- mentioned Exhibit, remained unanswered as well.

B. Reasons for this Dissenting/Concurring Opinion

I. Procedural Issues

1. Late submissions

27. While concurring with the Tribunal's decision not to admit the so-called "Supplemental Pre-hearing Memorial," filed by the Claimant on 27 July 1987 in the face of repeated objections by the Respondent and the Agent of the Islamic Republic of Iran, I dissent to the Chamber's decision to dismiss the "late" counterclaim for payment under the Bank Guarantee (called a "standby letter of credit" in the Award), because no objection to its late filing was ever raised by Claimant, not even orally during the Chamber's final hearing conference convened on 1st October 1987.

Fortunately, the Tribunal did not reject the counterclaim on any of the grounds put forth by the Claimant-- namely lack of "standing to raise [the counterclaim] and that Bank-e-Melli Iran is not a party in this Case" -- since it was cognizant of the fact that these

objections would fail because of the provisions of Article 2(1) of the Claims Settlement Declaration. Pursuant to this Section, the test that a counterclaim must arise out of the same contract as that underlying the principal claim is found to be sufficient, because the definition given to "Iran" makes superfluous the other condition, namely that a counterclaim be raised by the same Respondent.

II. Jurisdiction

28. It is unfortunate that in taking up the nationality issue, wherein a lack of care on the part of the Tribunal as to the quality and amount of evidence to be submitted in proof of nationality leads it to entertain claims which are not within its jurisdiction, the Tribunal has made haste in proceedings the keynote of its work and policy. The Tribunal should not, without giving sufficiently careful attention to the nature of the evidence submitted by the Claimant, accept its United States nationality as proved. The Tribunal's careless approach in this connection is totally at variance with the stipulations set forth in the Algiers Declarations and with the fundamental principles of international law requiring that the conditions governing the competence of an international tribunal be interpreted restrictively. These stipulations and principles should oblige the Tribunal to adopt a measured and strict policy in this regard. Were the Tribunal bound by the principle that it must not exceed its authority, the documents prepared by officials of corporations which are themselves interested parties -- so-called "affidavits" which are notarized with the easily-purchased stamps of equally-accessible notary publics scattered around the United States -- could no longer be treated as constituting conclusive "evidence" in proof of their nationality. Rather, by requiring claimants to submit sufficient evidence

whose authenticity and validity are not open to doubt or question, the Tribunal should ascertain that the conditions set forth in Article VII of the Claims Settlement Declaration have been met. The Orders issued by this Chamber in Flexi-van and The Government of Iran (Case No. 36) and General Motors and The Government of Iran (Case No. 94) required a minimum filing of evidence by the United States claimant, in order to support a prima facie presumption of its United States nationality. In so doing, those Orders at least stated the least that the fortunate United States claimants before this arbitral Tribunal could be expected to do in order to establish their United States nationality; albeit in my opinion, those Orders did not include such criteria as could prevent persons from filing claims who, according to paragraphs 1 and 2 of Article VII of the Claims Settlement Declaration, had no locus standi to do so.

29. I cannot understand, and therefore cannot concur with, the Chamber's finding at para 30, that "the Tribunal is persuaded that Agrostruct International, Inc." meets the requirements of Article VII, paragraph 1 of the Claims Settlement Declaration. For the Chamber has knowledge that in 1981, 51.3 percent of the common shares and 100 percent of the preferred shares of the mother company were owned by natural persons, whereas proof of nationality of only one of the individuals involved (the owner of 19 percent of the common shares) has been produced.

30. I believe it is never too late for the Tribunal to recognize the limits of the authority granted to it, and to act accordingly. The Tribunal must always remember that apart from the two Governments, the doors of this Tribunal are open solely to the nationals of the Iranian and United States Governments, the two Parties to the

Algiers Declarations. It was not, after all, the intention of either of the two Governments to satisfy any would-be claim of any would-be claimant through such unique and costly proceedings. Therefore, I maintain that more careful attention should be paid to the test of nationality of both the claimants and their claims.

III. Claimant's Standing

31. I am aware that the facts surrounding the present Case and the conduct of the Parties during the course of performance of the works may reasonably lead us to the conclusion that AGRO's claims are entertainable. At the same time, however, I have certain reservations with respect to the reasons set forth in paragraphs 32 to 35 of the Award which, I feel, require comment.

32. I cannot agree, and do not believe, that a very conclusive weight should be given to certain internal documents such as the "Agreement Between Agrostruct International and Werner/Lehara International, Inc.", allegedly concluded on 24 July 1975 but never made known to the concerned third party, Cereals.

I would, therefore, take the last sentence of para. 35 of the Award ("It, therefore, finds that Agrostruct has standing to assert its Claims as an independent contractor...") as a confirmation of my finding above and of my colleagues' concern to uphold the well-established doctrine of privity of contract.[13]

---

[13]The following sources may be referred to in connection with the doctrine of privity of contract: Dr. Nasser Katouzian, Hoquq-e Madani ("Civil Law"), vol. I, Introduction-Property-on Contracts in General, 1351/1972, p. 356 et seq.; Sayyed Hasan

(Footnote Continued)

33. Nor can I agree to give much weight to the letters of 4 September 1979 of AGRO and WLI (Exhibits 5 and 6 to Document 66), allegedly sent to Cereals, because the latter never agreed thereto, and neither responded to nor countersigned those letters.[14] Of course, I do not construe the intention of my learned colleagues as being, to give inordinate weight to those letters either -- particularly if we recall the provisions of Article 5.1 of the contract (Exhibit 1 to the same Document), which states:

> "....verbal agreement or instructions shall be of no force and effect."

34. In support of its position that AGRO was an independent party to the contract, the Tribunal refers, finally, to the fact that Cereals "in June 1976, ...chose to open two separate and independent letters of credit - one for Agrostruct and the other for WLI."

To begin with, these letters of credit were opened pursuant to a request by WLI, the Contractor (see

---

(Footnote Continued)
Emami, Hoquq-e Madani ("Civil Law"), vol. I, p. 252 et seq.; Article 231 of the Iranian Civil Code; Article 1165 of the Civil Code of France; Chitty on Contracts (General Principles) 25th ed., § 1221; Treitel, An Outline of the Law of Contract (2nd ed.) p. 220; Cheshire and Fifoot's Law of Contract 10th ed., p. 404; Corbin on Contracts vol. I § 778.

[14] It is again a well-settled rule of law that an offeree is not bound by silence (see Chitty on Contracts (General Principles) 25th ed. §§79-80; Cheshire and Fifoot's Law of Contract 10th ed. p. 42; Corbin on Contracts vol. 1 §72-73; Treitel, An Outline of the Law of Contract (2nd ed.) pp. 16-17; Sayyed Hassan Emami, Civil Law vol. 1 page 188; and Article 191 of the Iranian Civil Code), except where the conduct of the offeree may be proved to constitute acceptance, or where the offeree has a duty to respond (see footnote no. 18).

paragraph 7, supra). More importantly, the original price of a contract, particularly in the case of a construction contract with provisions for procurement from abroad, may always be subject to apportionment among various subcontractors and/or suppliers, based on the needs of the principal contractor. In other words, a letter of credit is, normally, a means of payment for an obligation arising out of a contract, and reflects the manner of payment as well.

35. Fortunately, the Award does not find it necessary to enter into a discussion of partnership, since it accepts that although AGRO and WLI were both involved in implementing the project, they did not perform the work jointly. This would have brought in the issue of applicable law, and whether a partnership, with joint rights and liabilities under that law, had been formed.

IV. Merits

1. Retention Monies

36. It is not disputed that on the face of uncontested facts, 97 percent of the work ("only [in terms of] funds expended") was complete as at the date when the Parties' relations were severed, and that AGRO did nothing thereafter to complete the remaining 3 percent and to rectify certain remaining deficiencies.

Nor is it contested that U.S.$254,000 (equal to 10 percent of the Letter of Credit opened in AGRO's favor) was still remaining unpaid, and that pursuant to the contract, this amount was to be released only "against procès verbal Delivery" (see § 10, supra).

I do not, however, concur with the conclusions drawn therefrom by my colleagues in Chamber One, because they

have oversimplified the issue and decided it precipitously. I must elaborate on certain facts, in order to clarify my reasons for dissenting to those conclusions:

37. First, a procès verbal (i.e. procès verbal of March 1978) was signed by all parties concerned, which empowered Cereals and/or its consultant Technolog to investigate project deficiencies and assess the value of works required to bring the project to completion. The procès verbal also provided that if the Contractor had no objection to the assessment, it "would authorize the Employer [Cereals] to deduct the related fund... as well as 15 percent compensation from the unused balance of the Letter of Credit..."). [15] In any case, the remaining 3 percent of the total contract price should have been withheld, together with the bank guarantee, until AGRO either paid Cereals for the assessed value of the deficiencies, or else rectified them.

To sum up, then, pursuant to the new arrangements contemplated in the procès verbal of March 1978, AGRO (1) authorized Cereals to assess the value of the unfinished portion of the contract works and (2) invited Cereals to offer the assessment for AGRO's consideration.

With the help of Technolog, Cereals measured and valuated the incomplete portion of the works; then, after making futile efforts to obtain AGRO's confirmation directly, Cereals finally notified AGRO of its assessment through WLI. AGRO did not object, although it was obligated to do so if it disagreed, but contrary to WLI's recommendations, it did not give its confirmation and acceptance, either. As a result, AGRO assumed a

---

[15] Emphasis added.

liability to pay Cereals as follows: (1) at least Rials 22,410,812 (equal to U.S.$320,150) plus (2) 15 percent compensation, pursuant to Article 13 of the Contract.[16]

It was only at the stage of the present litigation before this Tribunal that AGRO contended, for the first time, that:

> "The cost estimates [Cereals] attempted to get Agrostruct to accept were grossly inflated, but by the time they were provided, Agrostruct could no longer enter Iran to challenge them or to do any remaining work itself."

In view of the above, particularly the fact -- at least as alleged -- that AGRO had had a representative, viz., Nutrico and Mr. Rahmati, in Iran since 1975 and had appointed Nutrico to continue the project on its behalf after Mr. Zuniga departed in late November or early December 1977 (see § 25, supra), and that it remained silent with respect to the telexes of June 1979 and January 1980, not raising any of the objections or allegations to which it is now resorting, AGRO cannot now, in good faith, invoke the above allegations in order to avoid its liabilities.[17] More important, AGRO not

---

[16] Article 15 provided for a penalty payment of "5% (five percent) of [the] total price of the delayed works for each day of delay." In its written and oral pleadings, Cereals contends, therefore, that it was very generous in reducing the liabilities of AGRO to only 15 percent, as stipulated in the procès verbal of March 1978.

[17] It is most regrettable to see how easily this Tribunal has deserted its long-standing practice to the prejudice of the present Respondents.

Chamber Three reasoned, in accepting a claim of a U.S. Claimant:

"There is no indication that MORT raised any

(Footnote Continued)

only failed to raise any objection[18] against Cereals' estimate and demand, but it also refrained from seeking a refund of the retention monies,[19] which is by itself an indication that it had dropped its claim in order to avoid a substantially higher set-off claim.

(Footnote Continued)

> objection to the final invoices when they were submitted or at the time contended that they were untimely or were unjustified." (Award No. 143-127-3, p. 34, emphasis added.)

That same Chamber Three found (Award No. 176-255-3, page 27) that:

> "...TRC has not provided sufficient evidence justifying its failure to object to the requisitions."

Interestingly, in accepting a claim of a U.S. national (Award 215-52-1 page 16, n.6), Chamber One based its finding on the above-mentioned decisions. In another Award (290-123-1, para. 37), Chamber One decided:

> "....There is no evidence of any contemporaneous objection to the invoices."

Finally, in its Award No. 255-48-3, para. 111, Chamber Three accepted a claim despite the fact that it was on previous occasions objected to by the respondents, stating that:

> "....As no further objections were raised, Respondents are prevented from asserting new objections in this proceeding." (Emphasis added).

[18] In this particular Case, it was AGRO's obligation to respond, rather than remain silent, because it had solicited Cereals' offer, and had thus undertaken to respond thereto (second para. of §37 hereof). (See also Chitty on Contracts (General Principles) 25th ed., § 79.)

[19] In fact, AGRO stopped pursuing this issue in late 1978 (presumably after its representative informed it of the estimation), and this is a further indication that AGRO did not believe it enjoyed any right to the retention monies.

38. Second, by awarding in favor of Claimant in the claim for retention monies, less only 3 percent, the Chamber committed certain fundamental errors including, inter alia, the following:

a) In arriving at and accepting the figure of 97 percent as representing the proportion of works completed, the Chamber relied heavily on the contents of the procès verbal of March 1978 (see paras. 36 to 39 of the Award). It failed to note, however, that a factory may or may not become operational with 3 percent of the work left incomplete, depending on many factors such as the kind of factory involved, the nature of the incomplete work, and how urgently commencement of operation is needed.

Nor is the conclusion reached by the Chamber's majority consistent with the substance of the said procès verbal, which clearly states that "Technolog's representative stated that the figure of 97 percent referred to in the Report pertained only to funds expended..." (§24 supra).

b) Carrying out the final portion (such as 3 percent or any other amount) of an incomplete project will, in most instances, require funds much in excess of the equivalent percent of the contract price, particularly if this remaining work is to be carried out by persons other than the contractor.

c) The Chamber deducted only 3 percent of the contract price from the amount awarded, apparently in the belief that this sum would cover the costs of the unfinished portion of the work, which as discussed above, is an erroneous assumption. At the same time, the Award has made no provision for

compensation of the various deficiencies which were supposed to be rectified either by Cereals and debited to AGRO, or directly by AGRO at its own cost and expense.

d) In its Award, the Chamber does not indicate just where and how it has resolved the issue of the expenses of a variety of unfulfilled contractual obligations, for which the contractor received compensation in the lump-sum contract price. These include, without limitation, its obligation to:[20]

- maintain a qualified expert "for one month after installation of the plant... to exercise supervision over test operation of [the] equipment" (Article 6.20 of the contract);
- provide 10 years' spare parts at reasonable prices (Article 6.21);
- compensate for damage, up to the value of machinery, for any defect occurring before the expiry of the said 10-year period (Article 6.22);
- arrange, at its own expense, for two months' training of two Iranian engineers or technicians (Article 6.23);
- arrange, at its own expense, for a "Master Baker" to travel to Iran and remain there for 4 months (Article 6.24); and
- guarantee the good performance of the machinery and rectify or make good any defect or failure, at its own cost and expense, if same occurred

---

[20] Not to speak about the tax, SSO premiums and certain other liabilities, which are discussed under §§ 55-58, infra.

within one year of the date of provisional delivery of the plant.

2. Extra Expenses

39. I do concur with the Award's finding in rejecting the claim for extra expenses allegedly incurred due to Cereals' delay in opening the letter of credit, but on the basis of several additional reasons:

a) As stated herein above, Contract No. 28115 was signed between Cereals, as Employer, and WLI, as Contractor (§2, supra), and Article 15 did not provide for any specific means of payment for the second portion of the contract price (see §6 supra). Thus the Chamber could not possibly infer any more than that AGRO became an interested party, with certain rights to collect on a letter of credit, from the time the letter of credit was opened, and no sooner (see §34, supra). This being the case, AGRO could not reasonably be considered to have sustained any loss or damage under a contract which neither recognized it as a party nor provided for payment by letter of credit for that portion of the work later entrusted to it.

b) There is more than ample documentary evidence in the file to prove, beyond any doubt, that AGRO could not, and in fact did not, start the work until after the opening of the letter of credit, inter alia:

- Specifications and drawings (whether general or particular) were to be supplied to Cereals within 30 days from the date of delivery of the site (§§3 and 4, supra).

The site was turned over on 4 November 1975 (see §8, supra);

- Specifications were produced by the Claimant some time in December 1975 (see §9, supra) which were to be studied, verified and commented on by the Employer for possible changes (see §4, supra);

- Production of final drawings and specifications took the Parties well into mid-1976 (see §10, supra);

- machinery and equipment could not be ordered, purchased and supplied prior to approval by Cereals, and opening of the letter of credit was contingent upon such approval (§5, supra); and

- A work schedule was provided by AGRO, for the first time in September 1976, and most of the very preliminary works, execution of which would also have been possible and feasible prior to supply of the equipment, started only in that month. The work schedule makes no mention of any previously executed or suspended works (see §11, supra).

c) Under Article 21 of the Contract, the Employer had the right to suspend the contract for a period even beyond three months, by merely giving the Contractor an extension equal to the "suspension period".

40. More important, the procès verbal of March 1978 should be considered conclusive, because it provided for

release of the retention monies, if any remained after deducting what would become due by AGRO for correcting the deficiencies, as final settlement of all AGRO's rights and claims, whereby AGRO did not reserve any right to claim for the so-called extra expenses (§22, supra).

41. Even assuming, arguendo, that June 1976 was an unreasonably late date to open the Letter of Credit in AGRO's favor, it was in any case the Claimant's duty to exercise reasonable diligence and ordinary care to notify and warn the other party of any imminent damages for which that party would be liable, unless it was self-evident that such damages would occur. This applies particularly to cases such as the instant Case, where the Parties agreed upon a fixed lump-sum contract price, since the very purpose of such an agreement is, to permit a purchaser to plan its business affairs with knowledge of the full amount of its costs, and where, in essence, the agreement shifts the risk of any price increase to the contractor. Although this point is somehow stated in para. 44 of the Award, I felt it needed clarification.

3. Consequential Damages

42. I concur with the Award in rejecting AGRO's claim for so-called "consequential damages," or loss of business. The claim was unfounded and without merit. At the same time I would, and I believe my colleagues should, have dismissed the claim on another ground, adopted by Chamber Two in its Award in International Systems and Controls Corporation and Industrial Development and Renovation Organization, et al (Award No. 256-439-2, paras. 88-95), wherein a similar claim was found to be outside the Tribunal's jurisdiction.

4. Claim for Expropriation of Equipment

43. I concur with the Award in rejecting the claim for expropriation of equipment, particularly because it did so before finding it necessary to address the well-documented defenses put forth by the Respondent on grounds that the Claimant had failed, in all respects, to properly meet its burden of proof.[21] I hope that this Chamber will apply the fundamental principle of actori incumbit onus probandi in other instances as well.

5. Interest

44. I dissent to the awarding of interest in Claimant's favor for numerous reasons, inter alia on the following grounds:

45. First of all, I dissent to this part of the Award on the general ground that I consider the majority's reliance on Sylvania Technical Systems, Inc. and the Government of the Islamic Republic of Iran, Award No. 180-64-1, inappropriate. My dissent to the awarding of interest is

---

[21] On 8 October 1977, Cereals sent a telex to AGRO repeating what it had previously said to Mssrs. Zuniga and Sedigh, AGRO's representatives, about their obligations to remove AGRO's properties from the work site. In that telex, after reminding AGRO that

> "your representative Mr. Sedigh states that [he] intends to sell [containers] in Iran..."

Cereals asked AGRO to either pay the customs duties, if the intention was to sell, or return the property to customs for re-exportation, because they had been brought into Iran without payment of customs duties.

About two years later, on 5 December 1979, Cereals sent a last reminder to Nutrico (AGRO's representative in Iran) requesting it to appoint its representative

> "to take inventory of the contents of the containers... and to return the containers to the customs office...."

based in particular on Iran's positions adopted in Case No. A/19, because I find those positions especially well-reasoned from the perspective of the opinions of jurists, and in view of the precedents set by international courts. In my dissent to the awarding of interest, I have also borne in mind the reasons previously propounded in the dissenting opinions of other arbitrators, such as the Dissenting Opinion of Judge Mohsen Mostafavi in Sylvania (Award No. 180-64-1, reprinted in 8 Iran-U.S. C.T.R., p. 336)[22].

That Award ignores a very special feature of this Tribunal which distinguishes it from any other international tribunal, namely the fact that United States claimants before this Tribunal are, at the expense of the respondents, completely relieved of all the concerns, high risks and expenses involved in enforcing and executing the awards of any other comparable forum.

The Award in Sylvania not only erred in failing to take the particular features of this Tribunal and the Security Account into consideration, but it blatantly ignored the practice and rules followed by international fora in establishing rates of interest[23] and the date

---

22 In an award issued shortly after Sylvania, Chamber Three of this Tribunal found itself uncomfortable in relying on it as a precedent, and thus decided the issue of interest on grounds substantially different from those applied by Chamber One in Sylvania (see Award No. 225-89-3, pp. 33-41, and Dissenting Opinion of Judge Parviz Ansari to the same Award, pp. 11-12).

23 As in the Judgment of the Permanent Court of International Justice in the Wimbeldon Case (Ser. A, No. 1 (1923) at 32), most recent international awards have granted interest at a rate of 5 or 6 percent. (See Libyan American Oil Co. (LIAMCO) v. the Government of the Libyan Arab Republic, 20 Int'l Legal Mat'ls 82-83 (1981);

(Footnote Continued)

from which such interest shall commence[24].

46. The other reason for my dissent to this part of the decision relates to the particular circumstances of the Case itself. In this Case, one may reasonably conclude that AGRO was in default by not responding to Cereals'

(Footnote Continued)
AMCO Asia Corp. v. Indonesia, 24 Int'l Legal Mat'ls 1038 (1985); Revere Copper and Brass, Inc. v. Overseas Private Investment Company, 17 Int'l Legal Mat'ls 1367 (1978); S.P.P. et. al v. A.R.E. and Egyptian General Company for Tourism and Hotels, 22 Int'l Legal Mat'ls 783 (1983). It is interesting to note that none of the claimants in those cases benefited from any of the privileges uniquely provided by the Algiers Declarations. Almost all claimants in those and other cases decided by international fora were unable to settle their claims, although already adjudicated, for an amount anywhere near the amount of the face of the judgment, let alone receiving any percentage on top of the judgment debt by way of interest.

It appears that "the existence of some sort of security led the Venezuelan Arbitration Commission of 1903 to deny interest except in rare cases, and to grant a low rate even in those rare cases where interest was awarded." (see Award 180-64-1, Dissenting Opinion of Mohsen Mostafavi, p. 11-12).

[24] In LIAMCO, the arbitrator decided that the interest

> "is due on claims of money whose amount is known ... it cannot accrue for unliquidated damages before their judicial ascertainment and liquidation. Consequently, this Tribunal has to apply it only from the time of the final assessment of damages at the date of this Award. [Emphasis added] op cit at footnote 23.

This Tribunal also ruled in Sea-Land Services, Award No. 135-33-1, reprinted in 6 Iran-U.S. C.T.R. [1984-II], p. 173 that:

> "In view of the special circumstances in this case, interest could be awarded at most from the date of the Award to the date of payment from the Security Account...." (p. 34 of the Award)

offer (solicited by AGRO) to either rectify the deficiencies or pay the costs estimated by Cereals and Technolog, matters previously agreed upon in March 1978.[25] As stated above (§37, supra), by not responding to Cereals in 1979 and 1980, AGRO thwarted all the possible and reasonable attempts towards a fair and equitable settlement of the disputes. Had AGRO not chosen to remain passive (which by itself is a good indication that it had dropped its claims, in view of its liabilities), the claims would have been settled long before. Since it chose to act otherwise, AGRO should accept the consequences of its acts. By awarding interest in its favor, the Chamber is rewarding AGRO for its wrongs and failures.

Moreover, Contract No. 28115 was prepared in Persian only, and it was concluded and executed in Iran and governed by the laws of Iran. The Contract made no provision for interest. In rendering interest in the Claimant's favor, the majority neither paid attention to these facts, nor provided any reason for ignoring them.

47. In view of the foregoing, the Chamber should have either refrained from awarding payment of any interest to AGRO or, at least, awarded the minimum possible rate, running from the date of the Award itself.

48. In choosing 1st August 1978 as the date from which it considered the interest should start to run, the Tribunal acted arbitrarily, and gave no reasonable

---

[25] The Chamber's reasoning in paras. 37 and 49-50 of the Award amounts to endorsing a wrong in requiting a wrong, even if we were to consider Cereals to have been in default -- a finding, as already shown, which is not maintainable (see § 37, supra).

grounds for its finding. Taking into consideration the particular circumstances of this Case, it would have been more reasonable -- if the majority did not consider it justifiable to fix the interest as running from the date that the Award was issued -- for it to have set the interest as running from the date on which the Statement of Claim was filed, viz. the date of the first real and formal demand on AGRO's part after its long and unjustified silence, rather than selecting an arbitrary date. (See: Reliance Group, Inc. and The National Iranian Oil Company, Award No. 315-115-3 at page 68; Litton Systems, Inc., and The Islamic Republic of Iran Air Force, Award No. 249-769-1, at page 16; and Howard Needles Tamman & Bergendoff and The Government of the Islamic Republic of Iran, et al, Award No. 244-68-2, para 149). At most, the majority could have chosen 12 December 1978 as the date from which interest was to run, because it was on this date that AGRO sent Cereals a telex wherein it repeated its commitment to implementing the procès verbal of March 1978 and asked, based on "this concurrence on [its] part", that the "Preliminary Acceptance" a prerequisite for the release of the retention money, be executed.

6. Counterclaims

a) Delay Penalty

49. The Chamber erred in para. 50 of the Award. While the Award holds that "Cereals repeatedly granted Agrostruct extensions without claiming delay penalties," and qualifies this conduct as modifying "the original time schedule," this finding is incompatible with the clear language of the contract, as well as the understanding between Cereals and AGRO as reflected in the procès verbal of March 1978, which superseded such previous conduct, if any. Before drafting para. 50 of

the Award, the Chamber should have taken the trouble to review, once more, the Articles of the contract and the text of the procès verbal signed by all Parties.

50. Article 13 of the contract provided:

> "Should the Contractor fail to carry out the provisions of Article 4, it must pay to Employer an amount equivalent to 5% (five percent) of total price of the delayed works for each day of delay. If such delay exceeds one month, Employer may, in addition to withholding the deposits, terminate the Contract. If the damage caused by such violation exceeds the amount of the Performance Bond under Article 17 herein, the Contractor shall have to pay off all damages out of its own property and assets; in which case the decision of Employer in respect of damage shall be binding and subject to no protest."

Nor would extension of the contract's term due to force majeure have exonerated the Contractor from its liabilities. As noted above (§15), even in such an event, the Contractor would remain liable to "compensate damage sustained and... restore the work to pre-force majeure conditions."

51. In March 1978, all parties to Contract No. 28115 agreed that the second alternative contemplated in the procès verbal (cf.§§ 23-24, supra) would apply, and that Cereals would be authorized to deduct its cost estimate (if not objected to) plus 15 percent compensation from the unused balance of the letter of credit. The Parties to the procès verbal further agreed that in any case, "the 3 percent of the total contract price in respect of building[s] and equipment will be deducted from the letter of credit and withheld together with all guarantees."

52. By ordering the return of the retention monies, and not deducting the agreed 15 percent as compensation for delays, the Chamber has, in effect, disregarded the provisions of a valid contract and a binding agreement reached between the Parties to the Bakery contract in March 1978.

b) Expenses for Removal of Defects

53. As we have observed in previous sections of this Opinion (especially, Sections 23-25, and 51) the Parties to the Bakery contract authorized Cereals to survey and estimate the cost of the unfinished portions of the work and to deduct the estimated amount, plus 15 percent as compensation for delays, from the unused balance of the letter of credit, if the cost estimate was not objected by the Contractor.

In fact, not only did the Contractor not object to the cost estimate but WLI expressly accepted it in a telex conveying Cereals' telex to AGRO (See § 26, supra).

Bearing in mind the factual circumstances of the Case and the matters set forth in §§ 37 and 38 above, I believe that the Chamber should have awarded the sum demanded by the Counterclaimant.

Moreover, by rejecting this counterclaim the Chamber erred, once more, in failing to follow the precedent laid down by this Tribunal in Dic of Delaware, Inc., Underhill of Delaware, Inc. and Tehran Redevelopment Corporation, The Government of the Islamic Republic of Iran (Award No. 176-255-3) at page 27, wherein it has accepted that such "defects, if not waived, might provide a right to offset or counterclaim."

c) Additional Expenses

54. Apart from the deficiencies-- the existence of which the Parties conceded as of the date of the procès verbal of March 1978-- the Counterclaimant sought reimbursement of certain expenses for which the Contractor was liable under the contract. In this connection, the Counterclaimant sought relief in the amount of 6,482,015 Rials for:

- removal of defects in cooling system = Rials 1,046,950
- subscription of water, power and telephone = Rials 515,065
- provision of power plant = Rials 4,920,000

I could more easily have concurred with the dismissal of these items of counterclaims if the Chamber had decided to accept the procès verbal of March 1978 as constituting an agreement which resolved and settled all of the Parties' previous disputes with respect to construction of the Bakery plant. Nevertheless, I do agree with the majority that the Counterclaimant did not adequately meet its burden of proof.

It is true that the contract obligated the Contractor to rectify all deficiencies (see, inter alia, Articles 6.4, 6.22, 6.27 and 6.28), and "to supply and make available... the water and power required by the plant in sufficient quantity" (Article 6.8.6), and to pay for its own use of water, power and telephone (inter alia, Article 6.8.6). It is also true that in its telex of 16 January 1980 (Exhibit 8 to the Statement of Counterclaims, Doc. 22; and Exhibit 38 to Doc. 66), Cereals did inform AGRO about the existence of "some other payments like costs of electric power and telephone charges during installation of the plant and repairing costs of cooling equipment". But this evidence is too scanty to prove a claim, whether it be a principal claim or a counterclaim. Cereals failed to provide

satisfactory evidence, except for certain internal letters and memoranda, that it had been charged for, and had actually paid, those charges. More important, Cereals did not successfully argue: (1) why these issues were not brought up and discussed during the March 1978 meetings, (2) to what period these charges related, and finally, (3) why the costs for the repair of cooling equipment and other charges had not yet been estimated or determined by the date the telex was sent (January 1980).

D) Taxes and Social Security Premiums

55. Like the Tribunal's precedents relied upon in the Award, the Chamber's findings in dismissing these counterclaims are based on the argument that notwithstanding contractual stipulations, the Tribunal lacks jurisdiction over the counterclaims, because "such claims arise out of law, and not out of the same contract, transaction or occurrence that constitutes the subject matter of the claim." This is, however, the flimsiest and weakest of arguments.[26]

56. To better appreciate the weakness of such an argument, relevant contractual provisions should be cited first:

- Article 6.8.2 provides:

---

[26] Fortunately, it appears that in its recent decisions, the Tribunal has abandoned other weak arguments used in dismissing these claims for lack of jurisdiction, such as that claims for taxes and S.S. premiums are not counterclaims belonging to the same Respondent. This shift in position was apparently made after restudying provisions of Article II, paragraph 1 of the Claims Settlement Declaration, which does not consider such an element as a requisite (sine qua non).

> "Contractor has made allowance in its calculations for the costs of... Social Insurance Regulations and tax... which have been in force and applicable up to the date of delivery of the Plant."[27]

- Article 6.18:

> "Contractor is responsible for payment of all taxes due by it in Iran."

- Article 9:

> "9.1. Contractor shall be responsible for payment of any municipality taxes... other similar expenditures relating thereto and all and any levies which are to be paid within Iran...
>
> 9.2. Included in the total contract price... are the taxes, charges, official fees, social and other insurance premiums or any legal levies and charges which must be paid or which are relevant or have been applicable and paid in Iran."

57. Therefore, in light of the above and other provisions of the contract, it is out of place to conclude that the obligation to pay taxes and Social Security premiums arises" out of law, and not out of the same contract," because when the Parties entered into the contract, this statutory provision was crystallized into a specific and concrete contractual obligation between the Parties, against which a portion of the contractual consideration was to stand. It was for this reason that the "Contractor has made allowance in its calculations" for such costs, charges and premiums.

By not awarding payment of such liabilities, the majority has disregarded the clear terms of the contract;

---

[27] A law enacted in 1975 changed the title of the Code to the "Social Security Law" and the "premium" to "Social Security Premium".

and it has heedlessly approved the unjust enrichment of the Claimant, to Cereals' detriment, which had paid AGRO a consideration in return for the latter's accepting such obligations. Had there not been such an undertaking in the contract, the contractual consideration would certainly have been reduced proportionately.

58. Moreover, tax and Social Security premium claims are not, particularly in proceedings before the Tribunal, purely counterclaims in nature. These claims, being also contractual, should be deemed to be in the nature of a defense and treated as set-off claims. Therefore, any award in favor of the present Claimant should be proportionately set off against the value of such counterclaims. This Tribunal and other international tribunals have accepted this conclusion.

In Owens-Corning Fiberglass Corp. and The Government of Iran, et al (Interlocutory Award No. ITL18-113-2 p. 4), this Tribunal states:

> "...the question of the amount of taxes which might be owing on unpaid royalties would necessarily arise as an offset against recovery of those royalties, even if no affirmative recovery of such amount could be allowed as a counterclaim..."

The International Court has maintained, in its judgement in the Chorzow Factory Case, that:

> "if a liquid and undisputed claim is put forward against the reparation claim, it is not easy to see why a plea of set-off based on this demand should necessarily prejudice the

effectiveness of the reparation." (see Whiteman, On Damages, p. 1542)[28]

Dated, The Hague

10 June 1988 [20 Khordad 1367]

Assadollah Noori

---

[28] This has been the practice in many other international decisions, such as: American Independent Oil Co. (Aminoil) v. Kuwait, 21 Int'l Legal Mat'ls (1982), Libyan American Oil Co. (LIAMCO) v. The Government of the Libyan Arab Republic, 20 Int'l Legal Mat'ls (1981), Benvenuti et Bonfant v. The Government of the People's Republic of the Congo, 21 Int'l Legal Mat'ls (1982), and Revere Copper and Brass Inc. v. Overseas Private Investment Company (OPIC) 17, Int'l Legal Mat'ls (1978). This practice has support also in decisions of claims -- and mixed claims -- commissions (See eg., Whiteman's Digest of International Law, vol. 8, Lillich, International Claims; Postwar Practice (1967) and Lillich and Weston, International Claims; The Settlement by Lump sum Agreements (1957). As for the writings of eminent jurists, see Jimenez D'Archaga, State Responsibility for Nationalization of Foreign-owned Property, 11 N.Y.U.J. Int'l Law and Politics (1978) p.185.