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IRAN-UNITED STATES CLAIMS TRIBUNAL

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پارک وگ ۱۳، شماره پستی ۲۵۸۵-جی اچ لاهه، هلند
تلفن ۵۲۰۰۶۴ (۰۷۰)

CASE NO. 308

COMBUSTION ENGINEERING, INC.,
VETCO INC.,
NATCO UK LIMITED,

CHAMBER TWO
AWARD NO. 506-308-2

Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN, THE
INDUSTRIAL DEVELOPMENT & RENOVATION
ORGANISATION OF IRAN, OIL SERVICE
CO. OF IRAN, NATIONAL IRANIAN OIL CO.,
NATIONAL IRANIAN STEEL INDUSTRIES CO.,
MACHINE SAZI PARS, BANK OF IRAN &
MIDDLE EAST, FOREIGN TRADE BANK OF
IRAN, BANK BAZARGANI, BANK MARKAZI,
MACHINE SAZI ARAK,

Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داری دعاوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	23 MAY 1991
	۱۳۷۰ / ۲ / ۲ تاریخ

DISSENTING AND CONCURRING OPINION
OF SEYED KHALIL KHALILIAN

1. I dissent to the Partial Award on a number of issues, while on other points, although the Members of Chamber Two have unanimously arrived at the decision, my approach was sometimes different. I will therefore also include my viewpoints on the latter issues in this Opinion, which is primarily designed as a dissent. The major points will be treated under the five headings of jurisdiction, invoice claims, retention claims, social security contributions, and miscellaneous issues.

A. Jurisdiction

2. On the question of jurisdiction, the majority erroneously granted remedy for claims that were not asserted by the proper claimants, and justly dismissed a portion of the indirect claims, although not on the grounds warranted by the proper rules of procedure. Paragraph 21 of the Partial Award, therefore, seems highly disputable. In this paragraph, the majority has treated two similar jurisdictional issues in two diametrically different ways, i.e., it has excluded the 25% shares owned by an Iranian shareholder from their jurisdictional ambit, while conversely, it included therein three shares owned by three non-claimant directors. Disregard for the Tribunal's procedural rules led the majority to the dichotomy observed in the said paragraph.

3. Before elaborating on this point, I shall give an account of some facts as reflected in the written submissions of the parties. Vetco Iran, which was a subsidiary of Vetco Inc. (one of the claimants), had an Iranian shareholder who held one quarter of the company's shares. In that company, there were also three shareholders who were directors of VIAG, the Swiss mother company for Vetco Iran. From the viewpoint of determining the Tribunal's jurisdiction (both ratione personae and ratione materiae), the question of indirect claims should have been treated the same way in both instances. Since none of these shareholders appeared as a claimant in the Case, and they did not submit any evidence to justify their American nationality, they should have been excluded from the Case, on the grounds that the proper claimants were missing, and that these shareholders had not, furthermore, been proven to be of dominantly American nationality. Despite these facts, two different approaches were taken in the Partial Award in regard of these two

identical issues. The majority has treated them in two oddly different ways.

4. The dichotomy existing in the majority's finding is that it has joined the proprietary interests of the three directors (whose nationality is still unknown to the Tribunal, but is hypothetically presumed to be American) with those of Vetco Inc., and has proceeded to award in their favor. But on the other hand, it disregarded the Iranian shareholder arguing, with a strained logic, that he was out of reach and that it was in any case uncertain whether the proceeds of the award would be handed over to him. Of course, I am not of the opinion that the Tribunal had jurisdiction over the Iranian's claim as an indirect claim, but I do criticize the majority's approach and reasoning in this respect. It adopted two different positions on two similar issues, and made a decision on grounds entirely extraneous to the established rules of procedure. The logic it applied in respect of the Iranian shareholder, (see infra), was equally applicable to the three directors, but the majority chose to treat them quite differently. As regards the Iranian shareholder, the Claimants had requested recovery of that portion of the remedy sought which corresponded to his 25% share. This claim was dismissed for lack of jurisdiction --which decision was correct, but not for the reasons stated by the majority. It relied, surprisingly enough, on certain feeble grounds instead of searching for a proper basis for the decision. Here, the core issue was primarily the locus standi (in this context, the nationality) of the Iranian shareholder, which point seems to have been altogether disregarded in the judgment. But on the other hand, the claims of the three directors encountered no jurisdictional obstacle, even though those claims, apart from being absolutely hypothetical since the directors had never

alleged that they had such claims against the Respondents, were not instituted by the proper claimants. No elaboration was made in the Partial Award to justify this dichotomy in the majority's decision.

5. Such an inconsistency in the positions taken in the Partial Award constitutes a violation of the most obvious rules of procedure. Nowadays, the Tribunal no longer hesitates very much in determining its jurisdiction ratione personae. In the light of clear-cut precedents, and of the interpretations made consistently throughout the whole case-law of the Tribunal in respect of Article VII (paras. 1 & 2) of the Claims Settlement Declaration,¹ the majority had no leeway to entertain a claim as admissible, if asserted by an Iranian against Iran while the latter was still the State of his dominant nationality.² Similarly, no proof had been given of the United States nationality of the three directors. This is the valid ground on which the majority could have based its dismissal of the claim. In addition, by virtue of another well-established rule of procedure, no remedy could possibly be sought for a claim that has not been asserted by its owner, or by some other person who has established his legal entitlement as attorney-in-fact. Keeping these rules in mind, we review a portion of para. 21 of the Partial Award. Limiting the Claimants' recovery of damages to a ceiling of 75%, namely by excluding the Iranian share, the Partial Award states:

¹ In the Drucker Case, Chamber Two holds that the notion of control, used in Article VII(2) of the Declaration as the criterion for admissibility of indirect claims, embraces all juridical persons over which U.S. nationals, individually or collectively, retain control, even though the majority of them have not appeared as a claimant in the case. See my observation in Drucker, Jr. v. Foreign Transaction Company, Award No. 379-121-2 (Khalilian, Separate Opinion), 19 Iran-U.S. C.T.R. at 271-272.

² Cf. Decision No. 32-A/18-FT, 5 Iran-U.S. C.T.R. 251.

The Claimants argue that their standing to present indirect claims on behalf of Vetco Iran entitles them to recover 100% of any amount found due to Vetco Iran, despite owning only 75% of that company. However, the Claimants acknowledge that they have had no contact for ten years with the Iranian who owns the remaining 25% share of Vetco Iran. Thus, the Claimants do not, and could not, represent the minority shareholder, and there is no evidence that they are legally obliged to pay over any recovery that they receive on behalf of Vetco Iran to that person.

Thus, the majority does not attend to the question of the proper claimant, nor does it make any reference to the shareholder's nationality. The contrapositive of the majority's logic is that if an American corporation does represent an Iranian shareholder [no matter what his dominant nationality], or if it has been in contact with the latter, or if it ever shows that it must pay over a portion of the recovery received to that Iranian [no matter under what title], the American claimant will be entitled to receive the Iranian's pro rata portion of the claim. Such a fallacious finding is an obvious judicial error. As stated above, I concur fully with the majority's decision rejecting the Claimants' argument for recovery of 100% of any amount due as an indirect claim, but not on the basis of the flimsy reasoning quoted above.

5. On the issue of the three shareholding directors, the majority also disregarded the rules. So doing, it allowed the Claimants to recover the potential claims of some non-claimants. The three directors in question had never instituted any action against the Respondents in the present Case, nor was any document filed in evidence, to the effect that Vetco Inc. or the Claimants were their legal representative acting on their behalf. Therefore it was not unlikely that they had no claim at all; and this is the point on which rests, in part, the logic of non-admissibility of claims not asserted by the owner of the said claims. Despite these obvious facts, the Tribunal chose to pay the recovery

relating to those directors over to the mother corporation, without feeling any concern over its poor judgment. The majority has couched its decision in the following terms:

The Tribunal therefore decides that the Claimants' recovery on the claims brought on behalf of Vetco Iran should be limited to 75% of the amount found due. (Para. 21)

This sentence follows a footnote in the same paragraph, stating that: "[O]n 31 December 1980, of 600 shares, all but three, which were owned by VIAG directors, were owned by Vetco Inc". No further explanation was given in justification of this finding in favor of the claims relating to both the Claimants and non-claimants alike. The grounds adduced by the majority in dismissing that part of the claim which concerned the 25% share of the Iranian shareholder (see supra) could equally well have been raised here too, in order to dismiss the claim for any recovery due the three directors. Thus the majority's decision on this point both disregards its own ruling in the same paragraph of the Partial Award and deviates from settled rules of procedure.

B. INVOICE CLAIMS

6. A number of claims adjudicated in this Case arose out of a series of allegedly unpaid invoices, some of which should, however, have been dismissed. In order to evaluate the evidence in all these claims, the Tribunal took, as its criterion, whether or not the work contracted for was actually done. This principle lies in para. 53 of the Partial Award: "[T]he key issue for the five regular invoices here is whether Vetco Iran personnel actually did the work that is claimed on the invoices." This principle met with

the full agreement of the Members of Chamber Two, of course. Yet, studying the merits of each invoice in the light of the above principle calls for meticulous attention to the contractual provisions on which the parties agreed and conducted their business in the past. Therefore, in my view, the mere presentation of an invoice, which itself is a claim and not evidence substantiating the claim --even if supported by the stories and statements of some affiant employed by claimant, or by submission of a time sheet or force report lacking the necessary data or the authorized signatures-- should not be accorded value of corroborating evidence to establish that the work has actually and properly been done. However justly the majority invoked the principle, it was much too flexible towards the Claimants in respect of several invoices.

7. In Claim 2.1, the above-mentioned principle was applied as a yardstick to the admissibility of several unpaid invoices relating to the Feedstock Project of the Iran-Japan Petrochemical Company (according to a contract executed by Oil Service Company of Iran (OSCO) and Vetco Iran).³ In my view, some of the invoices had not been sufficiently supported by evidence and should therefore, not have been paid. The Tribunal relied on Article 23 of the General Conditions,⁴ which specifies the process for payment of the invoices. Quoting the provision contained in that Article, the Partial Award states: "invoices were subject to certification by OSCO's representative;"⁵ and then adds a

³ See paras. 29-30 of the Partial Award.

⁴ The General Conditions of Contract for Services was a contract governing the general aspects of the contractual relations established between the Oil Service Company of Iran (OSCO) and its contractors.

⁵ Partial Award, para. 32. In practice, the certification of invoices would occur after the processing of the relevant backup documents, which consisted of time sheets and force reports. One of the Claimants' witnesses, M. Skelton, testified in his affidavit [Doc. No. 184] that once force reports were signed by Parsons and OSCO, they constituted the primary source of back-up information needed in order to make invoices. The invoices were scrupulously checked in Ahwaz, then they were

highly questionable explicative phrase: "--in this case, Parsons." This interpretation is incorrect, because Parsons was on no account OSCO's agent. Parsons was actually the managing director on the Feedstock Project, with the duty of supervising the work of the contractors retained by OSCO. The issue of whether or not Parsons was OSCO's agent impacts on the question whether those force reports⁶ (viewed as backup documents for the invoices) which bore only Parsons' signature could be considered as contractually valid papers justifying payment of the invoices issued upon them. The majority held that Parsons had such legal status, in addition to its supervisory position on the Project. However, I disagree because neither the provisions of the contract nor the conduct of the Parties (OSCO and Vetco Iran) during the whole period of their business on the Project reveals such a legal link between the two Parties. As stated above, Parsons was acting as a managing contractor, and its role was not that of a legal agent; rather, it was supervising technical aspects of the work performed by Vetco, as well as by the other contractors hired by OSCO.⁷ Therefore, in the event that an invoice lacked certification by an OSCO representative, it was not sufficient for the Tribunal to rely on force reports bearing only Parsons' signature.

8. Upon reading para. 55 of the Partial Award stating: "... Parsons was OSCO's representative on this project," I suggested that the question of Parsons' agency should be elaborated upon since I could not find any contractual basis

sent to Parsons and OSCO to be signed. Therefore, each invoice was accompanied by the relevant time sheets and force reports.

⁶ See para. 55 of Partial Award.

⁷ Section 8 of Contract No.IJPC/77/006 provides: "The Parsons Corporation, is undertaking the management of this project on behalf of the Company [OSCO]."

for this finding.⁸ But it was not felt necessary, and the majority ultimately awarded the Claimants for payment of even those invoices backed up by only the force reports not signed by OSCO's representative.

9. In fact the OSCO's signature was essential to provide the Tribunal with evidence that the work had been done. Apart from the lack of any contractual provision to establish Parsons' agency, the conduct of the Parties, as explained by the affiants of both Parties and reflected in the written submissions, evidenced that it had no such agency.⁹ Furthermore, each force report provided two separate boxes, one for Parsons' signature and the other for OSCO's, and the force reports submitted to the Tribunal generally bear OSCO's signature in addition to that of Parsons. It is also significant to note that given the special circumstances prevailing in Iran on the eve of the Revolution, when the both Parsons and Vetco personnel left Iran almost simultaneously, the Tribunal should have been more preoccupied with the interests of the Respondents, in order to afford them more protection against any possible abuse of documents. Therefore, it should not have found VETCO's submission of documents signed by Parsons alone to be persuasive evidence in support of its claim.

10. In connection with this same claim, the Respondents raised certain counterclaims, including an invoice claim

⁸ As regards the other passage in paragraph 55 in which the majority used the they used word or ["The Tribunal therefore decides that Vetco Iran's five regular invoices should have been paid, in whole or in part, to the extent that they were supported by force reports signed by representatives of Parsons or OSCO"], I suggested that or be replaced by and in order to give effect only to those force reports which had been signed by both Vetco and OSCO.

⁹ The Partial Award itself states that "[T]he evidence shows that, in most cases, Parsons and OSCO continued to approve Vetco Iran's force reports through late December 1978." There would have been no logic for OSCO to append its signature to the force reports, had Parsons been nominated as its agent. Moreover, apart from the papers presented by the Claimants allegedly relating to the turbulent, chaotic period from 1978 on, the phrase in most cases does not reflect the Parties' actual practice; OSCO would always sign the papers.

labeled the Catering Services Counterclaim.¹⁰ The majority rejected it, finding "that the documents submitted by the Respondents are obscure and lack adequate support."¹¹ It is more convenient to use such a general phrase than to explain why and how the diverse papers and documents submitted in evidence by the Respondents, as well as the affidavit submitted by an accountant involved all fell short of supporting the claim!

11. In Claim 2.4,¹² the point was, whether there existed a contract warranting the payment of certain allegedly unpaid invoices. Vetco Inc. asserted that these invoices were due from Machine Sazi Pars (MSP), a private State-owned company, in connection with inspection services which Vetco Iran had performed at the Pahlavi Steel Complex. In addition, MSP itself had a contract with National Iranian Steel Industries Company (NISIC) for assembly and erection of various steel structures at the Pahlavi Steel Complex. This contract, it was alleged by the Claimants, obligated MSP to hire a supervising contractor to inspect its work. Therefore, there should have been two separate contracts on this project: a main contract concluded between MSP and NISIC, and a second, auxiliary contract which would have had to be executed at normally a subsequent stage by MSP and Vetco Iran. The Respondents denied that such an auxiliary contract had ever been executed.

12. The primary issue in this case was whether or not a valid contract existed between the Parties. It was next necessary to ascertain whether or not any work had actually been performed. Whereas it was imperative for the Tribunal to base its decision on unimpeachable documents, the papers

¹⁰ Partial Award, paras. 79-81.

¹¹ The Partial Award, para. 81.

¹² The Partial Award paras. 151 et seq.

submitted in evidence contained a number of ambiguities and flaws. Yet, the majority deemed those materials persuasive and based its holding on the assumption that the work had been performed, irrespective of whether a written contract existed or not.

13. With regard to the existence of a contract, the Respondent denied ever having accepted any contractual obligations vis-à-vis Vetco Iran. Nor did the Claimant allege that such a contract had been executed. The only document which could possibly be considered a contract is a letter dated 6 February 1978 made by Vetco Iran and addressed to MSP. This letter states, in fine: "[S]hould you accept the above terms and conditions, signatures by both parties to this letter will constitute a binding contract between the two parties." The letter, however, is not signed by either Party. Moreover, the date of this potential contract is noteworthy: it was not overtaken by the principal contract. That is, the principal contract between MSP and NISIC for the main project was dated 19 March 1978, while the secondary, at best potential contract was dated 6 February 1978, which means that this contract, though auxiliary to the first, had been issued 6 weeks earlier. As a matter of common sense, one can hardly believe that the negotiations and final draft for the auxiliary contract had been accomplished more than one month before the main contract was supposed to be executed. Moreover, there was no provision in the MSP-NISIC contract,¹³ contrary to what the Claimants alleged, stating that MSP had a contractual obligation toward NISIC to hire an inspector for itself. Nor was it proved by other means that MSP was bound by such an obligation. By contrast, Article 6 of this contract expressly provides that NISIC itself has the task and responsibility of supervising the technical works

¹³ Doc. No. 324 (copy of the contract) filed as evidence in this Case.

and soundness of the papers prepared. Therefore, there is no basis for believing that the two Parties were bound by any contractual arrangement relating to inspection of the project.

14. Facing with this highly controversial issue, the majority proceeded to rule that MSP was under an obligation to pay Vetco for the work supposedly performed by the latter. With a quite superficial approach and in a short paragraph, it states:

The Claimants have submitted extensive evidence establishing that Vetco Iran rendered services for MSP on NISIC project, and that MSP accepted the same. Accordingly, the Tribunal finds that an enforceable contract existed between the parties..¹⁴

I would note that such a general statement, lacking any elaboration as to precisely what evidence the majority found to be extensive, renders the judgment frivolous.¹⁵

15. The Claimants submitted some evidence to prove that the services were in fact rendered to MSP, but that evidence is remarkably sketchy. The majority has taken these materials into account, but the conclusion it reached was the product of a tunnel vision approach. That is to say, the majority took into account only the materials filed by the Claimants, as though the Respondents had submitted nothing in rebuttal. In para. 165, the Partial Award reads: "[T]he Tribunal finds that the progress reports are adequate evidence of the work performed by Vetco Iran for MSP," and in para. 166 it states: "[T]here are progress reports documenting Vetco Iran's work from April through September. Therefore, the invoices for this period are payable in full." The majority preferred not to mention that none of these progress reports bore the MSP's

¹⁴ Partial Award, para. 163.

¹⁵ Cf. supra para. 10.

signature, and that Vetco had apparently made them up. The evidence in this claim is extremely sketchy. There is not even a single work progress report that bears MSP's signature. The work for which payment was claimed as from February 1978 was the inspection of a project that itself was contracted more than one month later. The rebuttal evidence furnished by the Respondents has not been taken into account in the majority's decision. The only existing invoice filed with the Tribunal was that which covered the month of November 1978, and it was rejected since according to a number of affidavits submitted by the Claimants themselves in this very Case, no work was performed on the project in that period.¹⁶

C. RETENTION CLAIMS

16. In Claim 2.1,¹⁷ the Claimants argued that they are entitled to the release of certain retention monies. "Finally," the Partial Award says, "the Claimants contend that they are entitled to the return of the money that was retained by OSCO to secure the payment of the SIO [Social Insurance Organization] contributions by Vetco Iran" Thus, the claim was framed in terms of the Claimants' entitlement to a refund of the amounts regularly retained over a period when both Parties were conducting business. Here, a few points need to be addressed: first, the nature of the remedy sought by the Claimants; second, a proper application of the Tribunal's case-law to the present claim; and finally, an appraisal of the evidence submitted by the Claimants in order to prevail in this Case.

¹⁶ Partial Award, para. 167.

¹⁷ Partial Award, paras. 63 et seq.

17. There is no doubt that the Claimants did not seek a declaratory award. But like all other cases where a release of retentions is at issue, here too the claimants requested the Tribunal to enforce their contractual rights by issuing an arbitral award.¹⁸ These retentions were being held pursuant to a contractual stipulation providing that:

The Company [namely, OSCO] shall retain a further 5% of all the gross amounts payable to the Contractor [namely, Vetco Iran] under the Contract. Upon expiry or earlier termination of the Contract the Contractor shall submit to the Company (a), an invoice in quintuplicate for the total amount of the said retentions, (b), a certificate from the Social Insurance Organization to the effect that either he has paid all his S.I.O. premia or he is exempt from the payment thereof...¹⁹

Vetco having failed to obtain the certificate, the Respondents denied the Claimants had any entitlement to the retentions. Therefore the Tribunal must decide, effectively in lieu of the SIO, whether Vetco did in fact fulfill its obligations, in order to find grounds for declaring that the Claimants are released from their obligations. Thus, holding the Respondents liable for return of the retentions constitutes, in effect, a tacit declaration of that kind, which declaration is by nature tantamount to the certificate of clearance which was supposed to be issued by the SIO . The majority states that the Vetco case differs from TME²⁰. There, the claimant had requested the Tribunal to pronounce upon its entitlement to an SIO clearance certificate,²¹ but here the Claimants have sought "the enforcement of Vetco

¹⁸ "...the Claimants seek the enforcement of Vetco Iran's bargain with OSCO" (para. 65 of the Partial Award).

¹⁹ General Conditions, para. 23(3), supra note 4.

²⁰ TME International, Inc. and The Islamic Republic of Iran, et al., Award No. 473-357-1 (12 March 1990).

²¹ Partial Award, para. 64.

Iran's bargain."²² I do not believe, however, that TME has ever demonstrated that a mere declaratory award to that effect would be satisfactory.²³ The remedy sought by the claimant in TME was exactly what the Claimants in the present case have sought.²⁴ Yet the Tribunal dismissed TME's claim, basing its decision on the reasoning that if it adjudicated such a claim, it would in effect be taking the place of the SIO. The majority here misconstrued the claim in TME²⁵ as a request by the claimant for a declaratory award, while stating that this is not the case with Vetco. As stated above, however, the fact is that in neither case did the claimants content themselves with a mere declaratory judgment.

18. In the Partial Award, two instances of the Tribunal's case-law have been cited to support the majority's finding in favor of the claimants: Houston²⁶ and TME.²⁷ However, the only close analogy between the present Case and Houston whereby the Partial Award could find support for the finding reflected in para. 64 is that in both cases, "the claimants sought the enforcement of contract provisions for the release of SIO retentions;" and in both cases, "the claimants had failed to comply with contract provisions that conditioned

²² Ibid. para. 65.

²³ "It was only in Arthur Young that the Tribunal was requested for findings that a contracting party has fulfilled its obligation under Iranian social insurance or tax law." General Electric Company v. Iran, Award No. 507-386-1 (15 March 1991), para. 113 and accompanying notes.

²⁴ cf. TME (supra note 20), Noori, Opinion, para. 41.

²⁵ See Partial Award, paras. 64-65. The majority avoided applying the logic of the Tribunal's ruling in TME by making its own interpretation. It decided, therefore, that the decision in TME precedence is not applicable to the present Case because here, "the Claimants do not seek a declaration that Vetco Iran is entitled to a clearance certificate from the SIO," para. 65. This argument makes me recall another case where my colleagues took quite similar position in order to avoid violating Tribunal's precedent relating to the interpretation of Chorzow. See Phillips Petroleum Co. Iran v. Iran, Award No. 425-39-2, 21 Iran-U.S. C.I.R. 79, at 122 (para. 110, in fine).

²⁶ Houston Contracting Co. and NIOC, Award No. 378-173-3, 20 Iran-U.S. C. I. R. 3. See contr. Ansari, Separate Opinion, ibid. at 155-156.

²⁷ See note 20.

release of the funds upon the submission of SIO clearance certificates." But there is also a distinctive element here in that the present Claimants have failed to prove the existence of force majeure conditions preventing Vetco from obtaining the certificate. Vetco's failure to make an effort to obtain the clearance certificate casts considerable doubt on the Claimants' allegation that Vetco Iran had paid all the SIO contributions. This subject will be elaborated further infra. As regards TME, it seems that Chamber One has overtaken Houston and other cases in spelling out the real nature of the retention claims. See supra.

19. Finally, I must set out my remarks on the evaluation of the Claimants' evidence. Despite having failed to submit in evidence the certificate required under Article 23 cited above, the Claimants still requested the Tribunal to award them a release of the retentions. They argued that Vetco Iran had carried out its obligation by paying all the amounts due to the SIO, but it became impossible to obtain the clearance certificate, owing to force majeure. Two questions had to be addressed: the existence of force majeure conditions, and the exact amount paid to the SIO. To that end, the Tribunal proceeded on the basis of the evidence before it.

20. The majority framed the issue in the following terms: "[T]he principal issue in this claim is whether OSCO should release the SIO retentions that it holds, despite Vetco Iran's failure to submit an SIO clearance certificate to OSCO." Para. 63. Then, in answer to the question implicit in the quoted passage, it held:

In short, if the Claimants can show that Vetco Iran paid its SIO contributions but was prevented by force majeure from obtaining a clearance certificate, they are entitled to the release of the retention money. ibid.

What the Claimants should have established for the Tribunal, therefore, was that the supervening conditions of force majeure made it impossible to obtain the clearance certificate, and that Vetco Iran had fully paid its dues to the SIO. But the evidence they provided was extremely meager. The Claimants offered only two kinds of evidence: "affidavits, including one from the accountant responsible for making SIO payments, and ledger sheets to prove that Vetco Iran made all of its required SIO payments."²⁸ The Respondents argued that this evidence is inadequate. The account given by one affiant was, in sum, that under the turbulent conditions prevailing in Iran in late 1978, which could be characterized as force majeure, Vetco was unable to obtain the certificate of clearance. But on the other hand, the Respondents rejected the plea of force majeure arguing that Vetco had failed to effect payment of the SIO contributions and that, further, the process for obtaining the certificates had not been affected by hazardous conditions of any kind. The Respondents also submitted evidence and affidavits but they were accorded little weight contrary to the principle of equality.²⁹ No matter how incomplete the evidence submitted by the Claimants, and regardless of how effectively it was rebutted by that of the Respondents, it persuaded the majority to rule in favor of release of the retentions.³⁰

21. The Claimants were also accorded considerable flexibility on the subject of the exact amount to be released. A copy of a sketchy, in some parts illegible, handwritten sheet convinced the majority that a total of

²⁸ Partial Award, para. 46.

²⁹ Article 15(1) of the Tribunal's Rules mandates: "... the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality..."

³⁰ Partial Award, para. 72.

17,849,000 rials had been paid. This was in fact what the Partial Award mentions as the "ledgers" in para. 70. It was barely legible, failed to make clear which company had paid the amounts, presented in some instances the aggregate of Vetco's tax and SIO contributions, and contained the word payable adjacent to some of the figures. A principle established in the Tribunal's case-law is that when a party has been unable to clarify, through evidence, what exactly it is claiming for, the claim must be dismissed. In Houston, despite the fact that the Tribunal held that a taking had occurred, it dismissed the claim for compensation on the ground that it was not possible to identify from the record the items of equipment affected by the taking (see paras. 464-71 of the Partial Award³¹). This precedent was not followed in the present Case, even though here a simple principle of procedure, namely, that judges shall not adjudicate obscure, undefined cases, clearly applies. On the Respondents' side, also the accountant responsible testified that the exact amount of the retentions was 15,974,309 rials,³² but the majority disregarded his testimony.

22. In Claim 2.3, the retentions were of a different nature than those in Claim 2.1. They represented the accumulated amounts held by virtue of Contract DC-170, executed by the National Iranian Oil Company (NIOC) and VIAG, a Swiss subsidiary of Combustion Engineering, primarily to secure good performance of the pipeline inspection services:

Payment in respect of accepted performance of the work to be rendered ... shall be on per man per month bases ... subject to a 10% (ten percent) guarantee retention. The 10% retention on each payment shall be released as follows: 5% on the date of "Handing Over of the Project by the

³¹ Supra note 26.

³² The Respondent's affiant proposed a conversion rate of 70.35 rls./US\$1.00, but the rate applied in the Partial Award is 70.475.

Contractor to the Employer. 5% after satisfactory completion of the period of Remedy of Defects and after final acceptance of works i.e. 12 months after completion of works by Contractor ...³³
(Clause 11)

In Claim 2.1, by contrast, the claimed amounts were those retained solely to secure payment by the Contractor of its SIO premiums.

23. If only the above-quoted provisions are taken into account, there would appear to be no correlation between those retentions and the SIO premiums, and the Respondents could not refuse to release the retentions on the plea of non-payment of the SIO contributions. To that extent, I see no flaw in the passage, "the Tribunal can find no textual support in clause 11 linking the release of the retentions to the submission of an SSO clearance certificate."³⁴ However, in Part II of the Contract, which is entitled as SPECIAL CONDITIONS OF AGREEMENT, there is a clause on the subject of Social Insurance Organization regulations, which provides that:

The inspector shall obtain S.S.I.³⁵ clearance certificate at the end of each Calendar year and again at the end of the agreement.

The final yearly payment and the final agreement payment will be released only after submission of S.S.I. clearance certificate by Inspector to Employer.³⁶ (Clause 21)

Whether this clause set a condition precedent for the release of the retentions was a matter of dispute, which the majority ultimately resolved by dissociating this clause from Clause 11:

³³ General Conditions of Agreement, also quoted in the Partial Award, para. 93.

³⁴ Partial Award, para. 121.

³⁵ S.S.O. and S.I.I are acronyms for the Social Security Organization and the Social Insurance Organization, respectively.

³⁶ Special Conditions of Agreement (emphasis added).

The Tribunal concludes that clauses 11 and 21 are separate provisions; the submission of an SSO clearance certificate is not a condition for the release of VIAG's retention money.³⁷

Thus, in the majority's opinion, Clause 11 should be read independently from Clause 21.

24. I disagreed with this finding, noting that the majority had misread Clause 21. The key element to be interpreted is the expression final yearly payment, which had to be examined objectively in order to ascertain whether it embraced the retentions. The majority believed not, holding that the "final yearly payment" referred to certain invoices which could hypothetically have been remained unpaid for one year.³⁸ This interpretation is not correct, nor does it correspond with the proper analysis of the definition which should be given, by reference to the context and logic of the contractual clauses, to the term "final yearly payment. Reading Clause 11 more carefully, we find that the Contract envisions two kinds of payment to the Contractor: a) fees for the services rendered; b) retentions of 10%. The first, which could be correctly termed agreement payments, were on a man/month basis. The second, namely the retentions, were to be paid to the Contractor in two stages: 5% on the date of handing over, and 5% after expiration of a 12-months period. Throughout the Contract, only this half of the retentions was contemplated as a "yearly payment." It was therefore correct when I suggested that only the 5% retentions were what could be termed final yearly payment. As to the unpaid invoices, even those which might have remained outstanding for one year, they were merely the fees, and had already been included under the definition of the expression agreement payment. It is therefore redundant to apply the term "final

³⁷ Partial Award, para. 121.

³⁸ "The expression 'final yearly payment' appears to mean the final payment of a given year. This must refer to the payment of an invoice, not the release of retention money..." para. 121.

yearly payment" to cover the unpaid invoices, because they had already been covered by the expression "final agreement payment".

D. SOCIAL SECURITY CONTRIBUTIONS

25. Under the heading of counterclaims, or alternatively as a set-off, the Respondents brought certain claims against the Claimants for unpaid Social Security contributions. The majority totally rejected those claims as jurisdictionally inadmissible. In order to justify that holding, it advanced two general arguments: a) payment of the premiums was a legal obligation imposed by operation of Iranian law as distinct from contractual obligations;³⁹ therefore, the Tribunal cannot perform the function of the Iranian authorities in order to enforce that State's laws;⁴⁰ b) such counterclaims should have been brought by the SIO, which is not a respondent in this Case; consequently, the claim was inadmissible since it had not been instituted by a proper claimant.⁴¹ This subject, however, requires more reflection.

26. The premises that "the Tribunal cannot take the Iranian authorities's place" and that "no claim is actionable while the proper claimant is missing" are, of course, not disputable. However, invoking them as a basis for dismissing the premium claims is certainly a judicial error stemming out of a confusion between two different notions --counterclaim

³⁹ "As already decided by the Tribunal, counterclaims for Social Security contributions and taxes do not arise from the same contract, transaction or occurrence as VIAG's Claims as required by Article II of the Claims Settlement Declaration. See supra paras. 87, 88. The Tribunal therefore dismisses the Social Security and tax counterclaims for lack of jurisdiction." Para. 135 of the Partial Award.

⁴⁰ "The 'asserted obligation to pay social security premiums...is imposed not by the contract that is the subject matter of the claim, but by the operation of the applicable Iranian Social Security law.' Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1 ..." para. 85 of the Partial Award.

⁴¹ "There is no award against the SIO that can be the basis for a set-off." para. 87 of the Partial Award.

and set-off. I have elaborated on this subject in one of my opinions.⁴² In a nutshell, such claims are generally divided into two categories, according to whether or not payment of the SIO contributions has been provided for as an express, distinct contractual obligations.⁴³ Even in the former case, where there exists an express contractual stipulation, the Tribunal has been rejecting the claim, reasoning that the SIO premiums are mandated by operation of law and not by contract. The propriety of this holding is not understandable. For if a contractual provision expressly requires one party to perform a certain act, it constitutes a binding contractual obligation, whether or not that act has already been enshrined in law. The parties can even make, on their own, penalty provisions in the contract for any failure to abide by that obligation.⁴⁴ The Tribunal cannot, therefore, render such contractual provision inoperative by relying on the notion that enforcing the provision would be tantamount to enforcement of the municipal law of a State. By taking such a position, the Tribunal has in effect rewritten the Contract itself, whereas a judicial body does not enjoy any authority to do so.

27. A set-off is a plea of defence, and not a counterclaim. It is operative even in respect of the SIO contributions that are stipulated in the Contract. When a claim for Social Security contributions is formulated as a set-off, it must be deemed admissible by the Tribunal --no matter whether it arises from the general regulations of Iran pertaining to the

⁴² See infra note 45.

⁴³ Some contracts contain provisions providing, in general terms, that the contractor is bound to respect the Iranian laws and regulations, and in some others he is specifically held responsible to pay SIO contributions and to obtain the relevant clearance certificate. Ex. Clause 21 of the Special Conditions of Contract No. DC-173, supra 23.

⁴⁴ Ex. Clause 21 of the Special Conditions of Contract No. DC-173, whereby the NIOC can withhold the final yearly payment (a half of the retentions) if VIAG fails to furnish it with the clearance certificate, supra para. 24.

Social Security Organization, or from specific contractual stipulations.⁴⁵

E. MISCELLANEOUS ISSUES

28. The Tribunal has judiciously dismissed a number of claims for damages in the case under review, but the Partial Award is somehow sketchy in its reasoning. In Claim 2.1, the Claimants requested the Tribunal to award damages on the ground that the contracts were wrongfully terminated without the sixty days' notice required by Article 29 of the General Conditions of Contract for Services.⁴⁶ This claim was rejected because there was no contractual provision for payment of termination costs or lost profit "in case of termination as a result of force majeure."⁴⁷ However, I disagree with the majority's reliance on the maxim the loss must lie where it falls in their reasoning.⁴⁸ For this maxim, dating back to the early 1900^s in Blakeley v. Muller, required that both parties be released from any further performance of the contract, while leaving undisturbed any legal rights already accrued or payments already made under the contract. Therefore, the rule did not recognize the concept of apportionment of loss, under which due respect must be given to compensation for a partial payment and to

⁴⁵ In terms of legal definition, set-off is distinguished from counterclaim. See First National Bank of Boston v. Iran, Decision No. 83-202-2 (Khalilian, Separate Opinion), 19 Iran-U.S. C.T.R. 307, at 311. It is therefore not a valid interpretation of Article 19 of the Tribunal Rules to take the "set-off" mentioned in Note 2 thereto as a "counterclaim. See ibid. at 312-316.

⁴⁶ See Partial Award, paras. 59 et seq.

⁴⁷ Partial Award, para. 62.

⁴⁸ "In this situation, the Tribunal will adhere to the general rule that 'the loss must lie where it falls'." Ibid.

restoration of any undue payment made before the conditions of force majeure supervened.⁴⁹

29. I also concur with the Partial Award in dismissing the Soleimani rental property counterclaim,⁵⁰ but the reason adduced by my colleagues is plagued by flaws. They state that NIOC failed to prove that "this counterclaim arises from the same contract, transaction or occurrence as the Claims in this Case. The Tribunal accordingly must dismiss the Soleimani rental property counterclaim for lack of jurisdiction." Para. 139. Instead of this argument based on a ratione materiae concept of jurisdiction, I believe that the basis for the Tribunal's lack of jurisdiction should have been stated in terms of personal jurisdiction. Soleimani was not a proper counterclaimant in the Case. So long as the Ahwaz court had not issued its judgment, Soleimani remained the owner of the claim for the rentals unpaid by VIAG, and he was never mentioned as a respondent in the Case.⁵¹ It was only in June 1981, when the court pronounced the judgment, that ownership of the claim was shifted to NIOC.⁵² The point that two different addresses existed for the properties should not have led the Tribunal to conclude that the houses rented by Vetco Iran were different from those rented by VIAG. Nothing in the Contract prevented the latter from renting a place to use as an office, warehouse or whatever else.

⁴⁹ See Chitty on Contracts, vol. 1, para. 1570 (1983).

⁵⁰ Partial Award, paras. 131-133, 136 et seq.

⁵¹ It therefore sounds very odd for the Tribunal to hold that: "[I]t is clear that this counterclaim, as a claim by either Mr. Soleimani or NIOC, was outstanding on 19 January 1981." Para. 137 (emphasis added).

⁵² It is also strange that the Partial Award holds that: "[I]t is not jurisdictionally significant when NIOC's obligation arose." Ibid. NIOC's obligation to pay the rentals, in lieu of VIAG, arose when the judgment was handed down, and thereby it became the owner of the claim in June 1981. The quoted passage demonstrates a confused perception of the principle of subrogation.

30. Claim 5.1 for £66,847.61 in damages and £39,586.64 for lost profit⁵³ was dismissed on jurisdictional grounds. Though the Respondents presented persuasive evidence on the merits, the evidence presented by both Parties demonstrated that the "blowcase agreement began to founder almost immediately after it was concluded." This situation resulted from strikes and other turbulence caused by the Islamic Revolution. The Parties were, however, negotiating and doing their best to overcome the situation. Natco kept negotiating and signing its waiver for any claim against MSA.⁵⁴ This situation did not change between the autumn of 1979 and 19 January 1981, which shows that "they still expected MSA to manufacture the blowcases."⁵⁵ Thus, no claim was outstanding on 19 January 1981.⁵⁶

31. The Tribunal did not award the Claimants the 18% interest claimed with respect to VIAG's invoices.⁵⁷ This was a sound judgment, despite the fact that the invoices bore the statement: "[F]inance charge of 1½% per month (18% per year) will be charged on past due invoices." Because the law applicable to the Contract was Iranian law, it would have been appropriate to make reference in the Partial Award, in addition, to Article 719 of the Civil Procedure Code nullifying any contractual arrangement for interest in excess of 12%.

32. I dissent to the majority's opinion in respect of the Rey-Sari pipeline counterclaim.⁵⁸ The Tribunal is right in

⁵³ Partial Award, paras. 225 et seq.

⁵⁴ See Partial Award, para. 240.

⁵⁵ Ibid. para. 241.

⁵⁶ Cf. my observations on Phillips (Award No. 425-39-2) in 'Controversial Theory of Frustration Before Iran-U.S. Claims Tribunal,' Journal of International Arbitration, vol. 7, No. 3 (Sept. 1990), at 22-23.

⁵⁷ See Partial Award, para. 119.

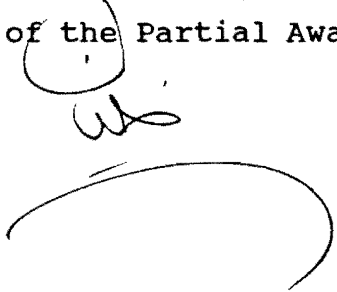
⁵⁸ Partial Award, paras. 140 et seq.

finding, despite the time limitation provision in the Contract, that it "is reluctant to hold that VIAG could not be liable for latent defects in its inspection work that were discovered more than one year after the hand-over of the project."⁵⁹ Para. 145. However, the majority failed to apply this principle to the present Case, and incorrectly proceeded to relieve VIAG from liability even though the existence of the corrosion on the pipelines was indisputable. The Respondents' experts gave their opinions in detail on the subject, and requested the Tribunal to appoint an independent expert to examine the causes of corrosion; however, the majority did not take any heed thereof. It is mentioned in the Partial Award that the evidence submitted by the Respondents is insufficient to prove their counterclaims. How could this opinion be justifiable while the Respondents presented the experts' opinions, samples of the corrosion, and a motion to the Tribunal to appoint an independent expert to find out the latent nature of the defects? What else could be done to convince the Tribunal to take the counterclaim very seriously?

33. Finally, I dissent to the Partial Award in the dispositive part, para. 11, where the majority requests the President of the Tribunal to notify the Escrow Agent to enforce the said award. The history of the proceedings shows that the Claimants aggregated more than ten different claims under the umbrella of one Case. The Respondents raised objections thereto, but the Claimants argued that the way they presented the case was sensible, and much more convenient. The Tribunal accepted the latter position. In the same Case, however, there is still one pending claim --Claim 2.2-- which has been separated from the other Claims in order

⁵⁹ Viz. the time limit set by the Contract, beyond which the claim for defects must be considered time-barred.

to be taken up later. Having been notified of the Respondents' counterclaims, the Claimants proposed to withdraw that claim. This suggestion did not meet with the agreement of the Respondents, who apparently believe that the evidence is cogent enough to substantiate their counterclaim. It was therefore crucial, under these circumstances, for the Tribunal to withhold payment of the amounts awarded, until the issuance of the final award. Such a precautionary approach is supported also by the Tribunal's case-law. In Anaconda,⁶⁰ while the Tribunal even took an unclear position as to the inadmissibility of the counterclaims, it deferred enforcement of the Partial Award until the final decision in the Case.⁶¹



⁶⁰ Anaconda-Iran v. Iran, Award No. ITL.65-167-3 (10 December 1986), 13 Iran-U.S. C.T.R. 199.

⁶¹ "The Tribunal defers the execution of any payment obligation on the part of the National Iranian Copper Industries Company until the final disposition of this Case." Ibid. at 239 (para. 156 [b]).