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**DECISIONS, AWARDS,
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[More information](#)PEPSICO, INC. *v.* IRAN

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PEPSICO, INC., *Claimant**v.*

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
 FOUNDATION FOR THE OPPRESSED,
 ZAMZAM BOTTLING COMPANY AZARBAIJAN,
 ZAMZAM BOTTLING COMPANY EAST TEHRAN,
 ZAMZAM BOTTLING COMPANY ESFAHAN,
 ZAMZAM BOTTLING COMPANY GORGAN,
 ZAMZAM BOTTLING COMPANY KERMAN,
 ZAMZAM BOTTLING COMPANY KERMANSHAH,
 ZAMZAM BOTTLING COMPANY KHUZESTAN,
 ZAMZAM BOTTLING COMPANY MASHHAD,
 ZAMZAM BOTTLING COMPANY RASHT,
 ZAMZAM BOTTLING COMPANY SHIRAZ,
 ZAMZAM BOTTLING COMPANY TEHRAN, *Respondents*

(Case No. 18)

*Chamber One: Lagergren, Chairman; Ameli,^[1] Holtzmann,^[2] Members*Signed 11 October 1986^[3]

AWARD NO. 260-18-1

The following is the text as issued by the Tribunal:

APPEARANCES

For the Claimant: Mr. E. R. Leahy
 Attorney
 Mr. F. McRobie
 Mr. H. Sassine
 Representatives

[¹ Declaration of Judge Ameli, see p. 40 below; Dissenting Opinion, see p. 45 below.]

[² The following note is appended to the signature of Mr. Holtzmann: "Joining fully in the Award, except joining solely in order to form a majority as to the award of only \$25,000 in costs and interest of only 10 percent on the accounts receivable. See my Separate Opinion in *Sylvania Technical Systems, Inc. v. Islamic Republic of Iran*, Award No. 180-64-1 (27 June 1985) [8 IRAN-U.S. C.T.R. 298 at 329]."]

[³ Filed 13 October 1986.]

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PEPSICO, INC. *v.* IRAN

For the Respondents:

Mr. M. K. Eshragh
Agent of the Government of the Islamic
Republic of Iran
Mr. M. Kazazi
Legal Adviser to the Agent
Mr. M. Madadi
Representative of the Foundation for the
Oppressed
Mr. M. R. Montazeri
Mr. M. Shahverdi
Representatives of the Zamzam Bottling
Companies

Also present:

Mr. J. Crook
Agent of the United States of America
Mr. D. Price
Adviser to the Agent

AWARD

The claims in this Case arise out of transactions between the Claimant PepsiCo, Inc. (“PepsiCo”) and eleven Iranian bottling companies, all of which include the word “Zamzam” in their corporate names. Specifically, these eleven corporations are: Zamzam Bottling Company Azarbaijan, Zamzam Bottling Company East Tehran, Zamzam Bottling Company Esfahan, Zamzam Bottling Company Gorgan, Zamzam Bottling Company Kerman, Zamzam Bottling Company Kermanshah, Zamzam Bottling Company Khuzestan, Zamzam Bottling Company Mashhad, Zamzam Bottling Company Rasht, Zamzam Bottling Company Shiraz, Zamzam Bottling Company Tehran. (These eleven companies are referred to herein as the “Zamzam Companies”).

The claims are of two types. PepsiCo seeks payment of \$3,348,000 for accounts receivable for Pepsi-Cola soft drink concentrate allegedly sold and delivered to all of the Zamzam Companies except Zamzam Bottling Company Kerman. (The ten companies against which claims are made for payment of accounts receivable are referred to herein as the “purchasing Zamzam Companies”). In addition, PepsiCo seeks repayment of loans of \$6,500,000 that it allegedly made to all of the Zamzam Companies except Zamzam Bottling Company Tehran. (In view of the Tribunal’s finding on the claim for repayment of loans, the ten companies against which claims are made for such repayment are referred to herein as the “borrowing Zamzam Companies”).

PepsiCo asserts that the Government of the Islamic Republic of Iran and the Foundation for the Oppressed, as well as the respective Zamzam Companies, are jointly and severally liable with respect to the claims.

The Zamzam Companies have raised counterclaims for the amount of alleged overpricing of the concentrate sold to them.⁴

I. FACTS AND CONTENTIONS

1. Jurisdiction

PepsiCo asserts that it is a United States national. The Respondents are the Government of the Islamic Republic of Iran, the Foundation for the Oppressed and the Zamzam Companies. The Claimant contends that the Foundation for the Oppressed is an entity controlled by the Government of Iran. The Claimant also contends that, in carrying out orders of the Government, the Foundation for the Oppressed took the shares of the Zamzam Companies and that the Government, through the Foundation for the Oppressed, continues to control *de facto* those companies.

Initially, the Claimant sought payment of \$3,348,000 for Pepsi-Cola concentrate by way of a direct claim based on contractual arrangements with the purchasing Zamzam Companies. Later, it asserted this claim as an indirect claim on behalf of its allegedly wholly-owned subsidiaries Pepsi-Cola Manufacturing (Ireland) Ltd. (“PepsiCo Ireland”) and Pepsi-Cola Manufacturing Co., Inc. (“PepsiCo Puerto Rico”), two companies incorporated in Ireland and Delaware, respectively. The Claimant then contended that in March 1979 it had secured the assignment of the accounts receivable from its two subsidiaries, and that it was therefore entitled to claim them also in its own right.

The Respondents have raised a number of jurisdictional objections. They argue that the Claimant has not submitted sufficient proof of its United States nationality in accordance with the requirements of the Claims Settlement Declaration. They deny that the Foundation for the Oppressed is an entity controlled by the Government of Iran, but rather assert that it is a private, charitable organization with a separate legal entity. They also deny that the Zamzam Companies are

⁴ The purchasing Zamzam Companies had also brought a counterclaim seeking five percent of the price of the concentrate sold, allegedly owed as “aid towards publicity”. By Order filed on 7 June 1984, the Tribunal decided not to allow this counterclaim, considering the stage of the proceedings at which it was made.

controlled by the Foundation for the Oppressed in the sense of Article VII, paragraph 3, of the Claims Settlement Declaration. Rather, they assert that these Companies are private commercial companies with separate legal entities in which the Foundation acts only as an ordinary shareholder. The Respondents argue that any control of the Foundation over the Zamzam Companies would be so indirect as not to fulfill the requirements of Article VII, paragraph 3. Furthermore, the Respondents assert that, because “the situs of the Agreements invoked by the Claimant is Iran, and in practice the contracts were performed in Iran”, disputes over their performance are within the sole jurisdiction of Iranian courts.

The Zamzam Companies dispute that the Claimant is entitled to bring the claim for payment of concentrate on behalf of PepsiCo Ireland and PepsiCo Puerto Rico because it has in their view not proved its ownership of these two companies. The Zamzam Companies also deny that the Claimant can bring a direct claim. They contend that all the transactions took place directly between them and PepsiCo Ireland and PepsiCo Puerto Rico. With regard to the alleged assignments, the Zamzam Companies contend that they only cover part of the claim, and that, in any event, the Tribunal should not take them into account because they were presented at such a late stage of the proceedings.

With regard to the claim for repayment of the loans, the Respondents have raised the same jurisdictional objections made against the claim for accounts receivable. In addition, they argue that the claim for repayment of the loans was not outstanding on 19 January 1981 as required by Article II, paragraph 1, of the Claims Settlement Declaration because their alleged acceleration was not justified and repayment did not become due until 15 May 1982.

2. *Merits*

a) The claim for accounts receivable

The Claimant states that in 1955 it entered into an Exclusive Bottling Appointment with the then Zamzam Bottling Company of Iran (“Zamzam Iran”). Under this Appointment, the Claimant gave Zamzam Iran the exclusive right to purchase, bottle, sell and distribute Pepsi-Cola within Iran. The Claimant and Zamzam Iran operated under this Appointment until 1977.

In 1977, eleven regional bottling plants, the Zamzam Companies, were established in various cities in Iran, and on 1 March 1977 the Claimant entered into an Exclusive Bottling Appointment (“Appointment”) with each of these Zamzam Companies. Under those

Appointments the Zamzam Companies obtained the exclusive right to purchase concentrate and to bottle, sell and distribute Pepsi-Cola in designated territories. They undertook to comply with certain sanitary and other requirements in connection with the production, sale and marketing of Pepsi-Cola, and the Claimant undertook to assist them in this. Specifically, each Appointment provided that the Claimant would “sell or cause to be sold by one of its subsidiaries (hereinafter called the Seller)” to each Zamzam Company, and the Zamzam Company would buy from the Claimant or the Seller, units of Pepsi-Cola concentrate “at a price established by the Seller from time to time”. “Payment in full for each order” would be made by the Zamzam Company “immediately upon delivery or on such other terms as the [Claimant] or the Seller may from time to time specify”.

The Claimant asserts that during the period 1978 to 1979 each of the purchasing Zamzam Companies ordered and received concentrate from PepsiCo Ireland and PepsiCo Puerto Rico and that the agreed upon price of all these shipments totalled \$3,348,000. The Claimant asserts that the purchasing Zamzam Companies received these shipments, but did not pay the \$3,348,000. The Claimant has described the procedures involved in shipping the concentrate and in effectuating its payment after it received an order from a purchasing Zamzam Company. It has also submitted evidence relating to the offer and acceptance of the sales and shipment of the concentrates together with copies of specimen drafts and instructions for collection sent to Bank Saderat. During oral proceedings the representative of the purchasing Zamzam Companies confirmed that there was no dispute about receipt, but only about the price to be paid. While it has invoked the drafts totalling \$3,348,000 as evidence of its claim and for the purpose of calculating the relevant due dates, the Claimant bases its claim not on these drafts, but rather on the Appointments and on the shipment and receipt of the concentrate by the purchasing Zamzam Companies.

The aggregate claim for the allegedly unpaid price of Pepsi-Cola concentrate totals \$3,348,000. The Claimant seeks from each of the ten purchasing Zamzam Companies the portion of this amount which corresponds to the price of concentrate that was shipped to and received by the respective Company. Since the Government of Iran and the Foundation for the Oppressed have allegedly confiscated the Zamzam Companies, the Claimant seeks to hold them, along with the ten purchasing Zamzam Companies, jointly and severally liable with respect to each such portion of this claim.

The Claimant contends that on 20 April 1979 it gave notice to each

Zamzam Company demanding payment of the price for the concentrate. The Claimant asserts that in a letter dated 15 January 1980 Mr. Tabatabaie, the managing director of Zamzam Company Tehran and chairman of the board of directors of all other Zamzam Companies appointed by the Foundation for the Oppressed, acknowledged the Zamzam Companies' obligation to pay the total concentrate price of \$3,348,000. The Claimant further contends that during meetings in late 1979 and in 1980 the Foundation for the Oppressed also acknowledged the validity of this claim.

The Claimant seeks interest on the amount of each draft from its due date until payment of the award.

The purchasing Zamzam Companies assert that the drafts representing the amounts sought were never accepted by them and that a number of formalities required by the Geneva Convention of 1930 had not been fulfilled. In addition, they state that the letters of 20 April 1979 which demanded payment for the concentrate were not sent to or received by the respective purchasing Zamzam Company. Rather, these letters were addressed to each of the ten purchasing Zamzam Companies, marked to the attention of Mr. Iradj Sabet, the chairman of the board of each Company, and sent to him in Paris. Furthermore, the purchasing Zamzam Companies contend that the Claimant had since 1974 overcharged them for purchases of concentrate by 100 percent and that therefore any amounts which they might owe the Claimant must be offset by this overcharge. The Claimant denies this contention. Furthermore, the purchasing Zamzam Companies argue that in any event they could not pay for the concentrate because Executive Order No. 12170 issued by the President of the United States of America on 14 November 1979 created force majeure conditions with respect to the availability of United States Dollars.

As regards the acceptance by the purchasing Zamzam Companies of their obligations to pay for the concentrates expressed in Mr. Tabatabaie's letter dated 15 January 1980, they submit that this cannot be invoked because that letter was transmitted during settlement negotiations between the Parties and because it suffered from formal deficiencies.

Since there was no provision made in the drafts for payment of interest, the purchasing Zamzam Companies argue that according to the Geneva Convention no interest may be awarded. It also submits that the contracts between the Parties contain no provisions with respect to interest.

The Government of Iran and the Foundation for the Oppressed deny any liability for payment for the concentrate.

b) The claim for repayment of the loans

The Claimant also seeks a total of \$6,500,000 as repayment of the loans to the borrowing Zamzam Companies.

The Claimant asserts that in 1977 it extended to each of the Zamzam Companies, except Zamzam Tehran, a loan of \$650,000 which was to be used to make plant improvements, to provide working capital and to pay certain debts relating to the purchase of concentrates and various other obligations. According to the Claimant, the loans were evidenced by three sets of documents: a “Main Agreement” among PepsiCo, each of the ten borrowing Zamzam Companies, shareholders and three personal guarantors; ten individual “Loan Agreements” between PepsiCo and each of the ten borrowing Zamzam Companies, which were attached to the Main Agreement; and ten individual “Promissory Notes” made payable to PepsiCo and executed by each of the ten borrowing Zamzam Companies, which were also attached as an Exhibit to the Main Agreement. The Claimant argues that a specific choice of law clause contained in these documents provides that New York law governs and that, according to New York law, the documents constitute a single agreement.

The Main Agreement, signed on 16 June 1977, provided that PepsiCo was not required to implement the loans until certain conditions precedent had been met. The Claimant contends that all of these conditions were met, and that thereupon the loans were made. The Claimant further contends that the Main Agreement required the borrowing Zamzam Companies to satisfy certain requirements after the loans were made and that if such requirements were not satisfied then the Claimant had the right to accelerate the maturity of any or all of the Promissory Notes.

The Claimant asserts that the Loan Agreements, also signed on 16 June 1977, required each of the ten borrowing Zamzam Companies to comply with certain financial and production-related conditions, violation of any of which by any of the ten borrowing Zamzam Companies entitled the Claimant to accelerate the maturity of the Promissory Notes so that they became due and payable ten days after written notice was sent to the other party and confirmed by telex. Pursuant to the Loan Agreements, these loans would otherwise mature on 15 May 1982 and would be

interest-free unless the loans were not paid at that time or were accelerated earlier.

The Claimant contends that each of the ten Promissory Notes was signed on 15 May 1977 by Iradj Sabet in his capacity as chairman of the board of each Zamzam Company, obligating each of the ten borrowing Companies to repay the Claimant \$650,000 on 15 May 1982. The Promissory Notes contained a secondary, independent and personal guarantee by Habib Sabet, Iradj Sabet and Hormoz Sabet to repay the loans, which in the Claimant's view did not affect the principal obligation of the ten borrowing Zamzam Companies under the Agreements.

The Claimant asserts that it caused the funds loaned to be transferred into the accounts of each of the ten borrowing Zamzam Companies on 2 June 1977, 15 July 1977 and 2 August 1977 respectively, and that the loans were received by the Companies.

The Claimant contends that beginning in August 1977 the Zamzam Companies violated quality control requirements and other terms of the Main Agreement and of the Loan Agreements. It warned that it would accelerate the maturity of the loans, and after unsuccessful attempts to ensure compliance with the Agreements the Claimant on 20 April 1979 accelerated the maturity of the Promissory Notes and demanded payment of \$650,000 from each of the ten borrowing Zamzam Companies. The Claimant contends that under the terms of the Loan Agreements payment of the \$6,500,000 thus became due on 30 April 1979, and that it was never paid this amount. The Claimant states that it continued to sell concentrate to Zamzam Companies in Iran into 1981, but beginning in 1979 did so only by confirmed letters of credit.

The Claimant seeks interest on the \$6,500,000 at 3 percent above the three-month London Inter Bank Offered Rate (LIBOR) from 30 April 1979 until payment of the award. The Claimant argues that it is entitled to interest at this rate because this was provided for in the Loan Agreements if the loans were not repaid when due.

The Claimant asserts that the Government of Iran and the Foundation for the Oppressed are together with the ten borrowing Zamzam Companies jointly and severally liable for repayment of each of the loans owed by the respective Zamzam Companies. This argument is based on the facts that the Loan Agreements specifically provide that they are binding on successors and that the Government and the Foundation for the Oppressed both are "successors to all of the interests of the former Zamzam owners". The Claimant argues