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B-209649, Dec 23, 1983

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B-209649, DEC 23, 1983

DIGEST: 1. NEITHER GRANT AGREEMENT BETWEEN AID AND BOLIVIA NOR CONTRACT BETWEEN BOLIVIA AND PRIVATE COMPANY TO CARRY OUT GRANT MAKES AID LIABLE TO PAY AMOUNTS AWARDED BY BOLIVIAN AND UNITED STATES COURTS AS LABOR BENEFITS RESULTING FROM COMPANY'S TERMINATING ITS EMPLOYMENT CONTRACTS. 2. AFTER AID DISCONTINUED MAKING GRANT PAYMENTS TO PRIVATE COMPANY UNDER GRANT AGREEMENT BETWEEN AID AND BOLIVIA, AND PRIVATE COMPANY TERMINATED EMPLOYMENT CONTRACTS, SEVERAL OF COMPANY'S EMPLOYEES SUED COMPANY FOR LABOR BENEFITS. SEVERAL OF THE LABOR BENEFITS AWARDED BY BOLIVIAN AND UNITED STATES COURTS ARE SUFFICIENTLY RELATED TO THE GRANT TO BE CONSIDERED ALLOWABLE INDIRECT GRANT COSTS IF SO APPROVED BY BOLIVIA, BUT THE ALLOWABLE COSTS THAT MAY BE PAID ARE LIMITED BOTH BY THE AMOUNT OF OVERHEAD REMAINING TO BE PAID AND BY PAYMENT OF OTHER GRANT COSTS.

AGENCY FOR INTERNATIONAL DEVELOPMENT - GRANTOR RESPONSIBILITY FOR SUB CONTRACTOR LABOR COSTS:

THE CONTROLLER FOR THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT (AID) MISSION TO BOLIVIA HAS ASKED A NUMBER OF QUESTIONS PERTAINING TO PAYMENT BY AID OF THE COSTS OF LABOR BENEFITS INCURRED BY PRACTICAL CONCEPTS, INC. (PCI), A PRIVATE UNITED STATES COMPANY WHICH HAD BEEN UNDER CONTRACT WITH THE GOVERNMENT OF BOLIVIA TO CARRY OUT CERTAIN TRAINING AND TECHNICAL ASSISTANCE ACTIVITIES IN CONNECTION WITH AN AID GRANT TO BOLIVIA. THE COSTS WERE INCURRED AFTER AID DISCONTINUED FUNDING A RURAL DEVELOPMENT PLANNING GRANT TO BOLIVIA, WHICH IN TURN TERMINATED THE CONTRACT WITH PCI. FOR THE REASONS GIVEN BELOW, WE FIND THAT AID IS NOT LEGALLY OBLIGATED TO PCI TO PAY THE COSTS OF THE LABOR BENEFITS; NEVERTHELESS, ASSUMING APPROVAL OF THE BOLIVIAN MINISTRY OF PLANNING AND COORDINATION AND AVAILABILITY OF SUFFICIENT REMAINING GRANT FUNDS, A PART OF THE COSTS MAY BE PAID TO PCI SUBJECT TO FINAL DETERMINATION BY AID THAT THEY ARE REIMBURSABLE INDIRECT GRANT COSTS.

UNDER SECTION 122 OF THE FOREIGN ASSISTANCE ACT OF 1961, AS AMENDED, 22 U.S.C. SEC. 2151T, THE UNITED STATES, THROUGH AID, ENTERED INTO A PROJECT GRANT AGREEMENT ON AUGUST 25, 1978, WITH THE GOVERNMENT OF BOLIVIA ENTITLED "RURAL DEVELOPMENT PLANNING GRANT." THE GRANT PROJECT, WHICH WAS INTENDED TO BE COMPLETED BY JUNE 30, 1982, WAS TO CONSIST OF (1) LONG AND SHORT-TERM TECHNICAL ASSISTANCE IN VARIOUS ASPECTS OF DEVELOPMENT PLANNING; (2) TRAINING FOR PERSONNEL OF THE BOLIVIAN MINISTRY OF PLANNING AND COORDINATION AND OF THE BOLIVIAN DEPARTMENTAL DEVELOPMENT CORPORATIONS; AND (3) PROVISION OF MATERIALS, OFFICE EQUIPMENT AND VEHICLES IN SUPPORT OF TECHNICAL ASSISTANCE. THE GRANT WAS PAID IN INCREMENTS, EACH BEING CONTINGENT ON THE CONTINUED AVAILABILITY OF FUNDS TO AID FOR THAT PURPOSE, AND THE MUTUAL AGREEMENT OF AID AND BOLIVIA TO PROCEED WITH THE PROJECT AT THE TIME OF EACH INCREMENT.

UNDER THE AGREEMENT, THE BOLIVIAN MINISTRY OF PLANNING AND COORDINATION WAS RESPONSIBLE FOR CARRYING OUT THE PROJECT. IN AUGUST 1979, THE MINISTRY ENTERED INTO A COST REIMBURSEMENT CONTRACT WITH PCI FOR THE PROVISION OF TECHNICAL ASSISTANCE IN IMPLEMENTING THE GRANT. THE CONTRACT WAS INTENDED TO RUN FOR THREE YEARS. THE CONTRACT PROVIDED THAT AID MAKE GRANT PAYMENTS DIRECTLY TO PCI UPON WRITTEN APPROVAL OF THE MINISTRY AND IT SET FORTH THE ALLOWABLE DIRECT AND INDIRECT CONTRACT COSTS. A CEILING ON INDIRECT COSTS WAS FIXED AT $842,771. THE COSTS INCLUDED "INDIRECT COSTS RELATED TO PERMANENT PERSONNEL," AND "GENERAL AND ADMINISTRATIVE INDIRECT COSTS". THE FORMER INCLUDED "F.I.C.A., WORKMAN'S COMPENSATION, RETIREMENT, SOCIAL SECURITY, BONUSES, INSURANCE, VACATION AND SICK LEAVE, ETC."; THE LATTER, PERSONNEL COSTS OF ADMINISTRATIVE EMPLOYEES SUCH AS SECRETARIES AND ACCOUNTANTS. A PERCENTAGE OF THE TOTAL INDIRECT COSTS WAS TO BE PAID TO PCI EACH MONTH. THERE WAS A FORMULA FOR PAYMENT OF INDIRECT COSTS IN THE EVENT OF TERMINATION: THE COSTS COULD NOT, WHEN ADDED TO INDIRECT COSTS PREVIOUSLY PAID DURING PERFORMANCE, EXCEED THE $842,771 CEILING, REDUCED UNDER THE FORMULA TO TAKE INTO ACCOUNT THE UNPERFORMED PORTION OF THE CONTRACT.

THE CONTRACT RESERVED TO AID CERTAIN RIGHTS, SUCH AS (BUT NOT LIMITED TO) THE RIGHT TO APPROVE THE CONTRACT TERMS, AND ANY AND ALL PLANS, REPORTS, SPECIFICATIONS, SUBCONTRACTS, BID DOCUMENTS, DRAWINGS OR OTHER CONTRACT AND PROJECT RELATED DOCUMENTS. HOWEVER, THE CONTRACT ALSO STATED:

"USAID, IN RESERVING ANY OR ALL FOREGOING APPROVAL RIGHTS, HAS ACTED SOLELY AS A FINANCING ENTITY TO ASSURE THE PROPER USE OF THE UNITED STATES GOVERNMENT FUNDS, AND THAT ANY DECISION BY USAID TO EXERCISE OR REFRAIN FROM EXERCISING THESE APPROVAL RIGHTS SHALL BE MADE AS A FINANCIER IN THE COURSE OF FINANCING THIS PROJECT AND SHALL NOT BE CONSTRUED AS MAKING USAID A PARTY TO THIS CONTRACT. THE PARTIES HERETO UNDERSTAND AND AGREE THAT USAID MAY, FROM TIME TO TIME, EXERCISE THE FOREGOING APPROVAL RIGHTS OR DISCUSS MATTERS RELATED TO THESE RIGHTS AND THE PROJECT WITH THE PARTIES JOINTLY OR SEPARATELY, WITHOUT THEREBY INCURRING RESPONSIBILITY OR LIABILITY TO THE PARTIES JOINTLY OR TO ANY OF THEM."

LIKE THE GRANT AGREEMENT, THE CONTRACT ALSO PROVIDED THAT FINANCING WAS SUBJECT TO THE AVAILABILITY OF FUNDS AND TO THE MUTUAL AGREEMENT OF AID AND BOLIVIA TO PROCEED AT THE TIME ADDITIONAL AMOUNTS WERE MADE AVAILABLE. MOREOVER, THE CONTRACT ALLOWED THE MINISTRY TO TERMINATE THE CONTRACT WHENEVER, FOR ANY REASON, IT FOUND TERMINATION TO BE IN ITS BEST INTEREST.

TO CARRY OUT ITS RESPONSIBILITIES UNDER THE CONTRACT, PCI ENTERED INTO A NUMBER OF INDIVIDUAL EMPLOYMENT CONTRACTS, INCLUDING THOSE WITH (1) RAFAEL DIEZ, TO SERVE AS A REGIONAL PLANNING ADVISOR TO ONE OF THE BOLIVIAN DEPARTMENTAL CORPORATIONS; (2) ENRIQUE GARCIA, TO WORK AS "CHIEF OF PARTY" FOR THE PCI TECHNICAL ASSISTANCE TEAM; (3) REYNALDO CANDIA, TO WORK AS AN ADMINISTRATIVE ASSISTANT; AND (4) MELVIN BURKE, TO WORK AS A REGIONAL PLANNING ADVISOR TO ONE OF THE DEPARTMENTAL CORPORATIONS. THE EMPLOYMENT CONTRACTS OF MESSRS. DIEZ, GARCIA AND BURKE WERE TO RUN FOR THREE YEARS, THE SAME PERIOD AS THE CONTRACT BETWEEN PCI AND THE MINISTRY. THEIR CONTRACTS ALSO WERE SUBJECT TO THE PROVISIONS OF PCI'S CONTRACT WITH THE MINISTRY. AID HAS INFORMED US THAT MR. CANDIA WAS A TEMPORARY EMPLOYEE.

IN MAY 1981, AID AND THE MINISTRY DISCUSSED AND AGREED THAT AID WOULD DISCONTINUE MAKING FURTHER PAYMENTS TO PCI FOR REASONS UNRELATED TO THE PROJECT AND NOT RELEVANT TO THIS CASE. SOON THEREAFTER, THE MINISTRY TERMINATED ITS CONTRACT WITH PCI, AND, IN TURN, PCI TERMINATED ITS CONTRACTS WITH THE ABOVE NAMED EMPLOYEES, EFFECTIVE JUNE 10, 1981. ACCORDING TO AID, ITS DISCONTINUING

MAKING FURTHER PAYMENTS ON THE GRANT TO PCI DID NOT RESULT IN THE GRANT'S TERMINATION. TO CONTINUE THE PROJECT, AID, IN ITS OWN NAME, ENTERED INTO EMPLOYMENT CONTRACTS WITH VARIOUS INDIVIDUALS INCLUDING SOME WHO HAD BEEN EMPLOYED BY PCI. THE CONTRACTS PROVIDE THAT THE EMPLOYEES ARE TO ADVISE AND ASSIST THE AID MISSION IN IMPLEMENTING THE RURAL DEVELOPMENT PLANNING PROJECT DESCRIBED ABOVE. THE COMMENCEMENT DATES FOR MOST OF THE AID CONTRACTS WERE JUNE 10, 1981. OF THE FOUR INDIVIDUALS MENTIONED ABOVE, ONLY MR. GARCIA WAS EMPLOYED BY AID AFTER LEAVING PCI.

AS REPORTED TO US, AID HAD, AT THE TIME THE PCI-MINISTRY CONTRACT WAS TERMINATED, ALREADY OBLIGATED GRANT INCREMENTS TOTALLING AN ESTIMATED $1,945,240 FOR THE CONTRACT. OF THIS AMOUNT, $647,418.76 REPRESENTED INDIRECT COSTS. AID HAS INFORMED US THAT AT THE TIME IT DISCONTINUED MAKING FURTHER PAYMENTS TO PCI APPROXIMATELY $250,000 HAD BEEN OBLIGATED BUT NOT YET PAID TO PCI. WE UNDERSTAND FROM AID THAT THE MINISTRY HAS APPROVED VOUCHERS FOR GRANT COSTS CONSIDERABLY IN EXCESS OF $250,000.

IN JULY 1981, MESSRS. DIEZ, GARCIA AND CANDIA FILED SUIT AGAINST PCI IN A BOLIVIAN LABOR COURT ALLEGING THAT PCI HAD FAILED TO PAY THEM VARIOUS LABOR BENEFITS PROVIDED UNDER BOLIVIAN LABOR LAW FOR TERMINATION OF EMPLOYMENT. FN1 ON FEBRUARY 5, 1982, THE COURT ENTERED A DEFAULT JUDGMENT FN2 AGAINST PCI IN FAVOR OF THE THREE CLAIMANTS. MR. DIEZ WAS AWARDED SOME $55,000; MR. GARCIA, $44,000; AND MR. CANDIA, CLOSE TO $4,000. MESSRS. DIEZ AND GARCIA WERE AWARDED ALL THE LABOR BENEFITS DESCRIBED IN NOTE 1; MR. CANDIA WAS AWARDED ALL BUT THE PRIMA. MOREOVER, THE BOLIVIAN COURT APPEARED TO CONSIDER THE VACATION BONUS AS ADDITIONAL, AND NOT EQUIVALENT, TO REGULAR VACATION PAY.

MR. BURKE FILED A SIMILAR SUIT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA. THAT SUIT WAS CONTESTED BY PCI. AWARDING MR. BURKE SOME $21,000 FN3 THE COURT FOUND THAT BOLIVIAN LAW APPLIED TO HIS CONTRACT, AND THAT UNDER THAT LAW, HE WAS ENTITLED TO ALL THE LABOR BENEFITS DESCRIBED. BURKE V. PRACTICAL CONCEPTS, INC., CIV. ACTION NO. 81-1191-A (E.D. VA. JUNE 11, 1982).

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT RECENTLY AFFIRMED THE DISTRICT COURT'S AWARD OF THE INDEMNIFICATION AND CHRISTMAS BENEFITS; HOWEVER, THE COURT HELD THAT MR. BURKE WAS NOT ENTITLED TO THE DISMISSAL, AND THE VACATION AND PROFIT BONUSES. BURKE V. PRACTICAL CONCEPTS, INC., NO. 82-1772 (4TH CIR. SEPT. 23, 1983). THE COURT FOUND THAT ARTICLE 12 OF THE GENERAL LABOR LAWS OF BOLIVIA AUTHORIZED THAT THE DISMISSAL BENEFIT BE GIVEN ONLY FOR THOSE PERSONS WITH INDEFINITE TERM CONTRACTS. AS MR. BURKE HAD A FIXED THREE-YEAR TERM CONTRACT HE WAS NOT ELIGIBLE TO COLLECT THAT BENEFIT. UNLIKE THE BOLIVIAN LABOR COURT, THE COURT OF APPEALS TREATED THE VACATION BONUS AS THE EQUIVALENT OF VACATION PAY, DENYING IT ON THE GROUND THAT MR. BURKE ALREADY HAD BEEN PAID FOR HIS VACATION TIME. THE COURT DENIED THE PROFIT BENEFIT BECAUSE MR. BURKE HAD FAILED TO PRESENT EVIDENCE TO THE DISTRICT COURT SHOWING THAT PCI HAD EARNED A PROFIT IN 1981.

SUBSEQUENT TO THE LITIGATION IN THE BOLIVIAN COURT, PCI GAVE AID ITS APPROVAL TO PAY THE MONIES AWARDED TO MESSRS. DIEZ GARCIA AND CANDIA DIRECTLY TO THEM. VARIOUS CORRESPONDENCE FROM AID INDICATES THAT AID WAS CONSIDERING PAYMENT IF THE MINISTRY PROVIDED THE REQUISITE APPROVAL. ALTHOUGH IT APPEARS THAT THE MINISTRY HAS CHANGED ITS POSITION SEVERAL TIMES, WE WILL ASSUME IT HAS AUTHORIZED PAYMENT. FN4

THE AID CONTROLLER ASKS A NUMBER OF QUESTIONS WHICH WE SUMMARIZE AS FOLLOWS:

(1) WHETHER WE SHOULD ASSUME THE PROPRIETY OF THE BOLIVIAN LABOR COURT JUDGMENT;

(2) WHETHER AID IS LEGALLY OBLIGATED TO PAY, EITHER TO PCI OR TO THE CLAIMANTS, ANY OF THE AWARDED SOCIAL BENEFITS;

(3) IF THE SOCIAL BENEFITS ARE ALLOWABLE COSTS UNDER THE GRANT, WHETHER THEY ARE INDIRECT COSTS AS DEFINED IN THE CONTRACT BETWEEN THE MINISTRY AND PCI AND THEREBY LIMITED TO THE INDIRECT COSTS ALREADY PAID TO PCI.

WE DO NOT HAVE FINAL FIGURES COVERING THE CONTRACT OR GRANT, NOR ARE WE COMPLETELY CLEAR AS TO THE PRECISE NATURE OF THE PAYMENTS ALREADY MADE TO PCI AND THE AMOUNTS CURRENTLY OBLIGATED. ACCORDINGLY, RATHER THAN CONSIDER OUR DECISION A FINAL ACCOUNTING OF THE SUMS AT ISSUE, WE WILL SUPPLY THE PRINCIPLES TO BE APPLIED TO THESE FIGURES.

LEGAL DISCUSSION

QUESTION 1. BOLIVIAN LABOR COURT JUDGMENT

THE LABOR BENEFITS SOUGHT BY MESSRS. DIEZ, GARCIA, CANDIA AND BURKE HAVE RESULTED IN JUDICIAL PROCEEDINGS BOTH IN BOLIVIA AND IN THE UNITED STATES. ALTHOUGH THE PARTIES WERE DIFFERENT, THE PROCEEDINGS IN THE COURTS OF THE TWO COUNTRIES INVOLVED THE SAME ISSUES, AND THE COMPLAINANTS SOUGHT SUBSTANTIALLY THE SAME RELIEF - AWARD OF THE FIVE LABOR BENEFITS DESCRIBED ABOVE. THE DECISION RENDERED BY THE BOLIVIAN LABOR COURT AND UNITED STATES COURT OF APPEALS CONCUR REGARDING THE AWARD OF THE INDEMNIFICATION AND CHRISTMAS BENEFITS (INDEMNIZACION AND AND AQUINALDO), BUT ARE IN CONFLICT ABOUT AWARD OF THE DISMISSAL (DESHAUCIO), AND MAY BE IN CONFLICT ABOUT AWARD OF THE VACATION AND PROFIT BENEFITS (BONO PATRIOTICO AND PRIMA).

ALTHOUGH FOREIGN JUDGMENTS ARE NOT ENTITLED TO FULL FAITH AND CREDIT, GENERALLY WHEN THEY ARE RENDERED IN A CONTESTED, FAIR PROCEEDING, THEY WILL BE RECOGNIZED IN THE UNITED STATES AS REGARDS THE IMMEDIATE PARTIES AND UNDERLYING CAUSES OF ACTION. HILTON V. GUYOT, 159 U.S. 113, 202 (1895); RESTATEMENT (SECOND) OF CONFLICT OF LAWS SEC. 98 (1969). IN THIS INSTANCE, WE THINK IT SUITABLE TO FOLLOW THE DECISION OF THE UNITED STATES COURT OF APPEALS. THE BOLIVIAN JUDGMENT WAS RENDERED IN A PROCEEDING THAT WAS UNCONTESTED BY PCI, WHEREAS PCI DID CONTEST THE SUIT BROUGHT BY MR. BURKE. MOREOVER, IT APPEARS THAT THE FOURTH CIRCUIT, AS AN APPELLATE COURT, IS A COMPARATIVELY HIGHER TRIBUNAL THAN THE BOLIVIAN LABOR COURT. FN5

ACCORDINGLY, WE WILL ASSUME THE PROPRIETY OF THE AWARD TO MESSRS. DIEZ, GARCIA, CANDIA AND BURKE FOR THE INDEMNIFICATION AND CHRISTMAS BENEFITS. AS REGARDS THE VACATION BONUS, WE FOLLOW THE COURT OF APPEALS DECISION TREATING THE BONO PATRIOTICO AS EQUIVALENT, AND NOT ADDITIONAL, TO REGULAR VACATION PAY. WE DO NOT KNOW WHETHER MESSRS. DIEZ, GARCIA AND CANDIA HAD RECEIVED THAT PAY, AS HAD MR. BURKE, PRIOR TO THE RENDERING OF THE BOLIVIAN LABOR COURT JUDGMENT. IF THEY HAD, CONSISTENT WITH THE COURT OF APPEALS DECISION, WE CANNOT ASSUME THE PROPRIETY OF THE BOLIVIAN LABOR COURT'S AWARD OF THAT BENEFIT; IF THEY HAD NOT, HOWEVER, THEN WE WILL ASSUME ITS PROPRIETY. SIMILARLY, WE DO NOT KNOW WHETHER THE THREE CLAIMANTS PRESENTED EVIDENCE TO THE BOLIVIAN LABOR COURT SHOWING PCI'S PROFIT IN 1981. IF THEY DID, WE WILL ASSUME THE PROPRIETY OF THAT COURT'S AWARD OF THE PROFIT BENEFIT TO THEM; HOWEVER, IF NO SUCH SHOWING WAS MADE, WE WILL FOLLOW THE COURT OF APPEALS DECISION DENYING THE PROFIT BENEFIT.

QUESTION 2. AID'S OBLIGATION TO CLAIMANTS.

PCI'S LIABILITY TO ITS EMPLOYEES OR FORMER EMPLOYEES DOES NOT NECESSARILY CREATE A LIABILITY ON THE PART OF THE MINISTRY UNDER THE CONTRACT, NOR DOES A MINISTRY LIABILITY TO PCI NECESSARILY CREATE A LIABILITY ON THE PART OF AID UNDER THE GRANT AGREEMENT. WHILE THE RELATIONSHIPS ARE INTERTWINED, THE AGREEMENTS AT EACH LEVEL ARE SEPARATE AND DISTINCT CONTRACTUAL ARRANGEMENTS. CONTRACT MAKING AID DIRECTLY RESPONSIBLE TO PCI OR TO PCI'S EMPLOYEES FOR LABOR BENEFITS OR FOR ANY OTHER PAYMENTS. ALTHOUGH THE MINISTRY-PCI CONTRACT DOES PROVIDE THAT GRANT PAYMENTS WILL BE MADE FROM AID TO PCI DIRECTLY, UPON MINISTRY APPROVAL, RATHER THAN TO THE MINISTRY, THE GRANTEE, IT ALSO STATES THAT THE EXERCISE OF ANY APPROVAL RIGHTS "SHALL NOT BE CONSTRUED AS MAKING USAID A PARTY TO THIS CONTRACT," AND THAT AID MAY EXERCISE SUCH RIGHTS "WITHOUT THEREBY INCURRING RESPONSIBILITY OR LIABILITY TO THE PARTIES JOINTLY OR TO ANY OF THEM." THUS AID IS NOT RESPONSIBLE TO PCI FOR COSTS ARISING FROM THE MINISTRY'S TERMINATION OF ITS CONTRACT WITH PCI, OR THOSE RESULTING FROM PCI'S TERMINATION OF ITS EMPLOYMENT CONTRACTS WITH MESSRS. DIEZ, GARCIA, CANDIA AND BURKE.

ON THE OTHER HAND, UNDER THE GRANT AGREEMENT AID IS COMMITTED TO SUPPLY FUNDS TO THE MINISTRY (SHORTCIRCUITED DIRECTLY TO PCI) TO CARRY OUT GRANT PURPOSES. THUS, AID IS COMMITTED TO PAY FOR "ALLOWABLE GRANT COSTS". ACCORDINGLY, EVEN THOUGH AID IS NOT CONTRACTUALLY OBLIGATED TO PAY THE SOCIAL BENEFITS DIRECTLY, IT IS COMMITTED TO PAY GRANT FUNDS FOR THE BENEFITS ULTIMATELY DETERMINED TO BE ALLOWABLE GRANT COSTS OF THE GRANTEE, THE MINISTRY. AS THE LAWSUITS CLAIMING THE LABOR BENEFITS, IN ESSENCE, AROSE FROM AID'S DISCONTINUING TO MAKE FURTHER GRANT PAYMENTS TO PCI, CONSISTENT WITH OUR DETERMINATIONS IN QUESTION 1, WE THINK THE BENEFITS AWARDED ARE SUFFICIENTLY RELATED TO THE GRANT TO BE CONSIDERED ALLOWABLE COSTS.

QUESTION 3. INDIRECT COSTS

NEITHER THE MINISTRY-PCI CONTRACT NOR THE CONTRACTS BETWEEN PCI AND ITS FORMER EMPLOYEES MAKE SPECIFIC PROVISION FOR LABOR BENEFITS ARISING FROM TERMINATION OF EMPLOYMENT. NEVERTHELESS, WE THINK THE CONTRACT'S DESCRIPTION OF COSTS SHOWS THAT THE LABOR BENEFITS ARE INDIRECT COSTS UNDER THE CONTRACT. AS MENTIONED IN THE "BACKGROUND" DISCUSSION, THE MINISTRY-PCI CONTRACT PROVIDES THAT INDIRECT COSTS FOR PERMANENT PERSONNEL INCLUDE SUCH LABOR BENEFITS AS "F.I.C.A., WORKMAN'S COMPENSATION, RETIREMENT, SOCIAL SECURITY, BONUSES, INSURANCE, VACATIONS, AND SICK LEAVE, ETC. ***". THIS DESCRIPTION OF INDIRECT PERMANENT PERSONNEL COSTS IS NOT AN INCLUSIVE LIST AND, THUS, ANTICIPATES COSTS OF A SIMILAR CHARACTER. WE THINK THE AWARDED BENEFITS ARE SUFFICIENTLY SIMILAR TO THOSE ENUMERATED TO BE COVERED BY THAT SECTION.

BASED ON THE ABOVE, WE CONCLUDE THAT UNDER THE CONTRACT, THE BENEFITS AWARDED TO MESSRS. DIEZ, GARCIA, AND BURKE, CONSISTENT WITH OUR FINDINGS IN QUESTION 1, IF ALLOWABLE AND AUTHORIZED BY THE MINISTRY, ARE INDIRECT COSTS. ALL THREE INDIVIDUALS HAD THREE-YEAR EMPLOYMENT CONTRACTS WITH PCI, THE SAME PERIOD OF TIME FOR WHICH THE MINISTRY-PCI CONTRACT WAS INTENDED TO RUN. ACCORDINGLY, THEY WERE PERMANENT PERSONNEL WITHIN THE MEANING OF THE MINISTRY-PCI CONTRACT. ON THE OTHER HAND, MR. CANDIA APPARENTLY HAD A SHORT-TERM CONTRACT WITH PCI, AN, THUS, WAS NOT PART OF THE PERMANENT PERSONNEL. NEVERTHELESS, WE THINK THE SAME LABOR BENEFITS AWARDED HIM WOULD, IF ALLOWED, FALL UNDER THE "GENERAL AND ADMINISTRATIVE INDIRECT COSTS" PROVISION OF THE CONTRACT. THOSE COSTS INCLUDE ADMINISTRATIVE COSTS OF PERSONNEL SUCH AS SECRETARIES AND ACCOUNTANTS. THINK IT WOULD APPLY TO ADMINISTRATIVE ASSISTANTS AS WELL. ALTHOUGH THERE IS NO LIST OF

BENEFITS DESCRIBED IN THIS PROVISION SIMILAR TO THOSE ENUMERATED FOR PERMANENT PERSONNEL, WE THINK THE CATEGORY "PERSONNEL COSTS OF ADMINISTRATION" WHICH IS MENTIONED, IS SUFFICIENTLY BROAD TO COVER MR. CANDIA'S LABOR BENEFITS.

WHETHER ANY OF THESE INDIRECT COSTS ARE PAYABLE OUT OF GRANT FUNDS UNDER THE CONTRACT AT THIS STAGE WILL DEPEND, IN LARGE PART, ON WHETHER THEY WILL EXCEED THE CEILING ON INDIRECT COSTS IMPOSED UPON PCI UNDER THE CONTRACT. WHILE THE INFORMATION BEFORE US IS INSUFFICIENT TO MAKE THIS DETERMINATION, THE STEPS THAT MUST BE TAKEN IN DETERMINING THE AMOUNT OF INDIRECT COSTS STILL AVAILABLE FOR PAYMENT OF THE ALLOWED BENEFITS TO THE FORMER EMPLOYEES ARE DISCUSSED BELOW.

UNDER THE CONTRACT, $842,771 IS THE MAXIMUM INDIRECT COST LIABILITY OF THE MINISTRY. WHERE, AS HERE, THE CONTRACT IS TERMINATED EARLY, IT PROVIDES A FORMULA FOR REDUCING THIS AMOUNT IN RELATION TO THE NUMBER OF PERSON MONTHS ACTUALLY WORKED UNDER THE CONTRACT. FIRST, THEREFORE, THE NUMBER OF PERSON MONTHS ACTUALLY WORKED IN RELATION TO THE TOTAL ESTIMATED FOR THE ENTIRE CONTRACT MUST BE DETERMINED. SINCE OVER A YEAR OF THE CONTRACT REMAINED WHEN THE CONTRACT WAS TERMINATED, AT THAT TIME WE WOULD EXPECT THAT A SUBSTANTIAL NUMBER OF THE ESTIMATED PERSON MONTHS HAD NOT BEEN WORKED. NEXT, THE INDIRECT COSTS ACTUALLY PAID BY PCI MUST BE DETERMINED. THE DIFFERENCE BETWEEN THE CEILING AND THE PAID INDIRECT COSTS IS WHAT IS POTENTIALLY AVAILABLE FOR PAYMENT OF THE ALLOWED LABOR BENEFITS. OF COURSE, THIS AMOUNT MAY BE INSUFFICIENT TO FULLY PAY THE BENEFITS, OR THERE MAY BE COMPETING CLAIMS THAT WOULD ABSORB THE DIFFERENCE. WE NOTE THAT UNDER THE CONTRACT, THE MINISTRY IS NOT RESPONSIBLE FOR DECIDING WHICH CLAIMANTS GET PAID OR HOW THEY MAY SHARE, IF THERE ARE INSUFFICIENT FUNDS.

THE ABOVE DISCUSSION ASSUMES THAT THE MINISTRY HAS AUTHORIZED PAYMENT OF THE LABOR BENEFITS TO MESSRS. DIEZ, GARCIA, CANDIA AND BURKE. THE LATEST INFORMATION WE HAVE SHOWS THAT THIS IS SO AS REGARDS THE FORMER THREE: WE DO NOT KNOW WHETHER THE MINISTRY HAS APPROVED THE AWARD TO MR. BURKE. ANY EVENT, AS DISCUSSED ABOVE, PAYMENT OF ANY BENEFITS REQUIRES MINISTRY APPROVAL.

DURING OUR CONSIDERATION OF THIS MATTER, MESSRS. DIEZ AND GARCIA SUBMITTED VARIOUS ARGUMENTS AND DOCUMENTS, INCLUDING A NUMBER OF LEGAL OPINIONS, SUPPORTING THEIR POSITION THAT AID SHOULD PAY THE LABOR BENEFITS AWARDED. IN THIS REGARD, THEY CONTEND THAT BECAUSE AID TOOK OVER THE GRANT PROJECT AFTER IT DISCONTINUED MAKING PAYMENTS TO PCI, TITLE II, ARTICLE 11 OF THE BOLIVIAN GENERAL LABOR LAW MAKES IT RESPONSIBLE FOR PCI'S OBLIGATIONS, INCLUDING ITS OBLIGATION TO PAY THE COURT JUDGMENTS. AS UNOFFICIALLY TRANSLATED, ARTICLE 11 STATES:

"THE SUBSTITUTION OF EMPLOYERS DOES NOT AFFECT THE VALIDITY OF THE EXISTING CONTRACTS; TO THAT END, THE FORMER EMPLOYER HAS A CORESPONSIBILITY WITH THE NEW EMPLOYER UNTIL SIX MONTHS AFTER SUBSTITUTION."

SOON AFTER AID DISCONTINUED MAKING GRANT PAYMENTS BECAUSE OF PCI'S ACTIONS, AS DESCRIBED ABOVE AID ENTERED INTO CONTRACTS WITH A NUMBER OF INDIVIDUALS FOR THE PURPOSE OF IMPLEMENTING THE GRANT. ALTHOUGH THIS SUGGESTS TO US THAT AID DID TAKE OVER ADMINISTERING THE PROJECT, WE ARE NOT IN A POSITION TO INTERPRET ARTICLE 11. IT IS WELL-SETTLED THAT A UNITED STATES FORUM CANNOT BE PRESUMED TO BE ACQUAINTED WITH, OR TO HAVE KNOWLEDGE OF, THE LAW OF A FOREIGN COUNTRY. E.G., 37 COMP.GEN. 485, 487 (1958). UNLIKE THE RECORD BEFORE THE UNITED STATES COURT OF APPEALS WHICH CONTAINED EXTENSIVE ARGUMENTS ABOUT WHETHER MR. BURKE WAS ENTITLED, UNDER BOLIVIAN LAW, TO THE LABOR BENEFITS DESCRIBED ABOVE, MESSRS. DIEZ AND GARCIA HAVE ONLY PROVIDED US WITH A SUMMARY ANALYSIS OF ARTICLE 11'S

SCOPE AND APPLICATION TO THE FACTS IN QUESTION. THIS IS NOT SUFFICIENT TO OVERCOME THE PRESUMPTION AND, ACCORDINGLY, WE CANNOT CONSTRUE IT HERE.

FN1 THEY ARE: (1) BONO PATRIOTICO - A VACATION BONUS EQUAL TO 1/12TH OF ONE MONTH'S SALARY FOR EACH MONTH WORKED, PAYABLE ANNUALLY IN JULY; (2) AGUINALDO - A CHRISTMAS BONUS EQUAL TO 1/12TH OF ONE MONTH'S SALARY FOR EACH MONTH WORKED PAYABLE ANNUALLY IN DECEMBER; (3) DESHAUCIO - A DISMISSAL PAYMENT EQUIVALENT TO THREE MONTHS SALARY FOR EMPLOYEES DISMISSED INVOLUNTARILY WITHOUT RECEIVING THREE MONTHS PRIOR NOTICE OF THE DISMISSAL; (4) INDEMNIZACION - AN INDEMNIFICATION PAYMENT FOR DISMISSAL EQUAL TO ONE MONTH'S SALARY FOR EACH FULL YEAR OF EMPLOYMENT, PLUS 1/12TH OF ONE MONTH'S SALARY FOR EACH MONTH OF EMPLOYMENT LESS THAN A FULL YEAR; AND (5) PRIMA - A SHARE OR PORTION OF THE PROFITS THE EMPLOYER EARNED DURING THE TERM OF THE EMPLOYEE'S EMPLOYMENT.

FN2 PCI NEITHER RETAINED COUNSEL OR ENTERED AN APPEARANCE, NOR MADE ANY DEFENSE OR DENIAL OF THE ALLEGATIONS IN THE COMPLAINT.

FN3 A TOTAL OF $28,397.70 MINUS $7,200 PREVIOUSLY PAID BY AID.

FN4 THE DOCUMENTS SUBMITTED TO US SHOW THAT IN AUGUST 1982, THE MINISTRY AUTHORIZED AID TO PAY THE FIVE LABOR BENEFITS AND COSTS; HOWEVER, THE AUTHORIZATION WAS RESCINDED ON DECEMBER 17, 1982. BY OPINION OF JANUARY 19, 1983, IT APPEARS THAT THE BOLIVIAN LABOR COURT THAT MADE THE AWARDS, IN EFFECT, RENDERED THE RESCISSION NUGATORY. A MINISTRY LETTER TO AID, DATED JUNE 21, 1983, SUGGESTS THAT THE MINISTRY AGAIN HAS AUTHORIZED AID TO PAY THE LABOR BENEFITS.

FN5 OUR POSITION ALSO IS CONSISTENT WITH THE RELATED GENERAL PRINCIPLE THAT WHERE INCONSISTENT JUDGMENTS HAVE BEEN RENDERED IN SUCCESSIVE ACTIONS BETWEEN THE SAME PARTIES, THE JUDGMENT THAT IS LATEST IN TIME PREVAILS. RESTATEMENT (SECOND) OF JUDGMENTS SEC. 15 (1982); AMBATIELOS V. FOUNDATION CO., 116 N.Y.S.2D 641, 648 (SUP.CT. 1952).