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S CLAIMS TRIBUNAL

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R/12

CASE NO. 302
CHAMBER THREE
AWARD NO. 186-302-3

INTERNATIONAL TECHNICAL PRODUCTS CORPORATION
and ITP EXPORT CORPORATION, its wholly-owned subsidiary
Claimants,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN
and its agencies, THE ISLAMIC REPUBLIC IRANIAN AIR FORCE
and the MINISTRY OF NATIONAL DEFENSE, acting for THE
CIVIL AVIATION ORGANIZATION,
Respondents.

PARTIAL AWARD

Appearances:

For the Claimants:
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Mr. Nicholas H. Zumas
Special Counsel
Washington, D.C.

For the Respondents:
Mr. Khoshrow Tabassi,
Representative of the Agent of
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Mr. Mohammad Taghi Naderi,
Legal Advisor to the Agent of
the Islamic Republic of Iran
Mr. Golamreza Davarian,
Legal Advisor to the Ministry of
National Defense and the Islamic
Republic Iranian Air Force
Mr. Mansur Tehrani
Mr. Ali Azizi
Mr. Mohammad Reza Pedram,
Representatives of the Islamic
Republic Iranian Air Force
Mr. Hassan Sheikh-al-Islam,
Assistant to the Islamic
Republic Iranian Air Force
Delegation
Mr. Mohsen Kakavand,
Representing Bank Tejarat

Also present:
Mr. John R. Crook,
Agent of the
United States of America

Mr. Daniel M. Price,
Deputy Agent of the
United States of America

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I. THE PROCEEDINGS

INTERNATIONAL TECHNICAL PRODUCTS CORPORATION ("ITPC"), for itself and on behalf of its wholly-owned subsidiary, ITP EXPORT CORPORATION ("ITP Export"), filed a Statement of Claim on 15 January 1982. The named Respondents were the GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("Iran"), the AIR FORCE OF THE ISLAMIC REPUBLIC OF IRAN ("AFIRI"), which is the successor in interest to the IMPERIAL IRANIAN AIR FORCE ("IIAF"), and the MINISTRY OF WAR FOR ARMAMENT ("MOW"), now the MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN ("MOD"), which acted for the CIVIL AVIATION ORGANIZATION OF IRAN ("CAO") with respect to one of the contracts at issue. The claim comprised eight separate disputes, including claims for breach of contract, expropriation of real property, cancellation of letters of credit and bank guarantees, expulsion, and costs.

Separate Statements of Defense were filed on 16 June 1982 by AFIRI, Iran and CAO. Both AFIRI and CAO appended counterclaims to their Statements of Defense.

An additional Statement of Defense was filed by AFIRI and Faridan Construction Company ("Faridan") on 22 June 1982. Faridan, allegedly a subcontractor under one of the disputed contracts between ITP EXPORT and IIAF, also included a counterclaim.

On 21 June 1982, two volumes of supporting documents entitled "Statement of Defence" were filed, apparently by AFIRI.

On 2 July 1982, Bank Tejarat filed a Statement of Defense and Counterclaims. Bank Tejarat is the successor in interest to the former Iranians' Bank. Its participation relates principally to the letter of credit claim, which involved Iranians' Bank, and to the expropriation claim,

which involved real property upon which Iranians' Bank held a mortgage.

ITPC and ITP Export (collectively "Claimants") filed their Reply to the Statements of Defense and Counterclaims on 16 September 1982.

On 4 April 1983, Bank Tejarat filed a Rejoinder. CAO filed its Rejoinder on 11 April 1983; AFIRI's Rejoinder followed on 12 April 1983.

By letter filed 18 April 1983, Claimants requested that a Hearing be scheduled. By Order dated 13 February 1984, the Tribunal scheduled a Pre-Hearing Conference for 25 May 1984.

The Pre-Hearing Conference was held as scheduled.

By Order dated 30 May 1984, the Tribunal requested certain documents from the Parties. Claimants, who are involved in United States bankruptcy proceedings under Chapter 7 of Title 11 of the United States Code, submitted, on 12 July 1984, the requested copies of the relevant provisions of that statute. On 19 July 1984, Respondent AFIRI submitted the documents it had been requested to produce.

By Order dated 30 July 1984, the Tribunal scheduled a Hearing on 24 January 1985.

Claimants filed their Memorial and documentary evidence on 13 August 1984.

On 13 November 1984, CAO filed a reply to the Claimants' Memorial. On 2 January 1985, Bank Tejarat filed a submission in reply to Claimants' Memorial. On the same date, AFIRI submitted its Memorial and documentary evidence.

On 3 January 1985, CAO filed a supplementary submission relating to its counterclaim.

On 7 January 1985, AFIRI filed a Supplementary Memorial Concerning Debts of ITPC to the Social Security Organization of Iran.

Claimants submitted their Reply Memorial and Rebuttal on 21 January 1985.

Also on 21 January 1985, AFIRI filed a counterclaim for income taxes.

On 24 January 1985, Bank Tejarat filed a supplement to its previous submission in reply to Claimants' Memorial.

The Hearing was held as scheduled, and the Parties were given the opportunity to file post-Hearing submissions.

Respondent Bank Tejarat filed a supplementary brief on 1 March 1985, containing the English text of exhibits filed with the Farsi text of its 2 January 1985 submission in reply to Claimants' Memorial. On 19 April 1985, Bank Tejarat filed a copy of the last page of its 1 March 1985 submission, which page had been missing in the original filing. By a filing of 1 May 1985, Bank Tejarat advised the Tribunal that it had no further statements to make. On 14 May 1985, the Agent of the Islamic Republic of Iran, acting apparently on behalf of Bank Tejarat, filed an additional English text of certain portions of one of the exhibits originally filed on 2 January 1985 and supplemented on 19 April 1985.

Claimants filed their post-Hearing submission on 14 March 1985.

its establishment on 7 August 1972 and continuation beyond the November 1979 appointment of Mr. Bakst.[1]

Two Certificates of First American Bank, N.A., of Washington, D.C., U.S.A., the Transfer Agent for Claimant ITPC, attest that as of 31 December 1977 and 12 February 1985 said Claimant had 694,570 shares of common stock issued and outstanding, held by a total of eleven shareholders, two of whom at both times held a total of 502,660 (or more than 72% of the) shares, i.e., Mr. Joseph L. Jarvis, Jr. (364,460 shares) and Mr. William C. McConnell (138,200 shares). Moreover, two partners of the accounting firm of Touche Ross & Co. have stated under oath that "[d]uring the entire period when this office was responsible for the preparation of credit reports and consolidated tax returns for" Claimant ITPC and its subsidiaries "to the best of our knowledge and belief . . . Joseph L. Jarvis, Jr. held a majority of the issued and outstanding shares of ITPC."[2] Each of the two shareholders named has submitted a sworn statement confirming such shareholding and attesting that he was born in the United States and has been a U.S. citizen all his life. In addition, copies of U.S. passports were produced valid for Mr. Jarvis for the periods from 2 November 1971 to 25 March 1984 and from 1 October 1984 to 30 September 1994, and for Mr. McConnell for the periods from 2 December 1971 to 14 May 1984 and from 17 May 1984 to 16 May 1994 (as well as a Copy of Record of Birth evidencing his birth in Boston, Massachusetts, U.S.A.).

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[1]Mr. Bakst was appointed separately as Trustee in Bankruptcy of ITP Export on 18 July 1984 but effectively became responsible in respect of it upon his earlier appointment as Trustee in Bankruptcy of Claimant ITP because the latter, as indicated below, was then the sole owner of the former.

[2]The former controller of Claimant ITPC, Mr. Philip M. Leitzinger, has stated under oath that this period encompassed "April 1974 to September 1979."

The same Certificates of the Transfer Agent record ownership of another 7500 shares by five other individuals who Mr. McConnell has stated under oath are "[m]embers of my family who were and are all American citizens." Furthermore, Mr. Jarvis has stated under oath that "90% of the shares of ITP were owned by American citizens," an assertion he bases on the fact that "ITP and its subsidiaries had contracts with the United States Government which regularly monitored the extent of foreign ownership of ITP to determine whether ITP could be permitted under U.S. law to retain its security clearance."[3]

Mr. Jarvis also states under oath as of 20 February 1985 that Claimant ITP Export "has been wholly-owned by ITP since [its incorporation in 1972] to the present day," a fact substantiated for the period of Touche Ross & Co.'s involvement by the aforementioned sworn statement of two of its partners and for the period commencing November 1979 by a sworn statement of Mr. Bakst, the Trustee in Bankruptcy.

Finally, Mr. Bakst testified at the Hearing and since then has reiterated under oath that he has "been a United States citizen all my life." As supporting evidence Mr. Bakst produced at the Hearing a certificate of birth and current U.S. passport, and with a subsequent statement under oath produced copies of U.S. passports valid for him for the periods 9 July 1979 to 8 October 1979 and 10 January 1985 to 9 January 1995.

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[3]At the Hearing the testimony of no less than three witnesses, supplemented by pertinent bankruptcy court records, substantiated that since at least 1 January 1978 and up to the date of the Hearing a minimum of approximately 82 percent of Claimant ITPC's shares have been owned by three individual U.S. citizens.

Based upon the foregoing, the Tribunal determines that both ITPC and ITP Export are United States nationals within the meaning of Article VII(1) of the Claims Settlement Declaration. Cf. Flexi-Van Leasing Inc. and Islamic Republic of Iran, Order filed 20 Dec. 1982, reprinted in 1 Iran-U.S. C.T.R. 455; General Motors Corp. and Govt. of Islamic Republic of Iran, Order filed 21 Jan. 1983, reprinted in 3 Iran-U.S. C.T.R. 1.

The Tribunal also determines that all Respondents in this case, including CAO, as well as Bank Tejarat, are agencies or instrumentalities of or entities controlled by the Iranian Government. No Respondent has challenged the Tribunal's jurisdiction in this respect.

B. Bankruptcy

The Tribunal rules that the pendency of U.S. bankruptcy proceedings involving ITPC and ITP Export does not affect the jurisdiction of the Tribunal over their claims. Claimants have demonstrated that ITPC, ITP Export, and the Trustee in Bankruptcy have been United States nationals at all relevant times. Thus, irrespective of whether the claims are to be deemed owned by ITPC and ITP Export or by the Trustee, the Tribunal has jurisdiction.

C. Remaining Exceptions

The Tribunal determines that the remaining general exceptions raised by Respondents are without merit. The Tribunal Rules do not require the submission of a power of attorney; we are satisfied that the instant Claim was filed by an authorized representative of the Claimants. With respect to Respondents' objection concerning aggregation of claims, the Tribunal has ruled that the inclusion of one or more claims of less than $250,000 with other claims (whether or not any of them alone is for $250,000 or more) is

permissible insofar as the Tribunal's jurisdiction is concerned so long as the total demanded is $250,000 or more. Ford Aerospace & Communication Corp. and Air Force of the Islamic Republic of Iran, Interim Award No. 39-159-3 at 10 (4 June 1984), citing Minutes of Full Tribunal, 24th Meeting, 18 Dec. 1981.

D. Conclusion

The Tribunal concludes that the claims were filed properly by United States nationals against Iran.

III. THE CLAIMS AND COUNTERCLAIMS

A. Wrongful Expulsion

Claimants assert that they were wrongfully expelled from Iran in December 1978 as a result of certain acts and failures to act by Iran. This allegation not only serves as the basis for a claim covering extraordinary expenses incurred as a result of Claimants' hasty departure from Iran, but also is relevant to certain contractual claims and counterclaims. Accordingly, the issue of whether Iran wrongfully expelled Claimants will be addressed at the outset.

Claimants contend that by late 1978 violent anti-Americanism in Iran compelled it to begin withdrawing its personnel to Kuwait. Claimants further contend that such withdrawal was intended to be temporary and that it hoped to return to Iran to complete work on its various projects and solicit new business in Iran as soon as circumstances permitted.

To highlight the dangers faced by its personnel at the end of 1978, Claimants refer to newspaper reports of violence in Iran, including incidents in areas in which their

personnel were operating, and of the departure of other American companies in November and December 1978 as evidence of the worsening situation confronting Americans. Specifically, Claimants cite four newspaper articles appearing in the New York Times and one article appearing in Aviation and Space Technology purporting to establish the following facts:

(1) that 4000 Americans left Iran in the closing weeks of November and early December 1978;
(2) that various U.S. Companies had by that time ordered their employees out of Iran;
(3) that violence was occurring in various Iranian cities, and;
(4) that the U.S. Government announced it would pay the travel expenses out of Iran of dependents of its employees.

Respondents contend that Claimants were not compelled to leave Iran when they did and that any hostility experienced by Americans at that time was the result of anti-foreigner sentiment in Iran, not anti-Americanism. Respondents also contend that U.S. nationals were ordered by the United States Government to leave Iran. There can be no question of expulsion, Respondents further contend, as there is no evidence that residence permits were cancelled or that the persons in question were forcibly removed from the country.

In this case the Tribunal is asked to decide (1) whether the alleged acts amounted to expulsion, and, if so, (2) whether the expulsion was wrongful under international law. In addressing the first issue, the Tribunal must proceed from the concept of "expulsion" as it is understood in international law. According to one typical definition, "[t]he word 'expulsion' is commonly used to describe that exercise of state power which secures the removal, either

'voluntarily', under threat of forcible removal, or forcibly, of an alien from the territory of a State." Goodwin-Gill, International Law and the Movement of Persons between States 201 (1978). There is no doubt that measures, based on municipal regulation of aliens or immigration, whereby a foreigner is either physically removed from the country by state authorities or ordered to leave by a specified time under threat of physical removal, constitute expulsion under international law. In principle, it is immaterial whether, under municipal law, such measures are called "expulsion" or "deportation," or are effectuated through other modalities such as cancellation of residence permits. On the other hand, it also is well settled that the actual escorting of an alien to the borders by state authorities can constitute expulsion in international law even if it occurs outside the framework of the municipal laws governing aliens.

In the present case it is undisputed that no formal expulsion order or corresponding decision was issued against Claimants' personnel. It also is uncontested that the individuals in question were not actually escorted from the country by Iranian authorities or persons for whose actions Iran is responsible. This is conceded by Claimants who, with reference to the conditions then prevailing in Iran, state in their Memorial that "[u]nder these circumstances, Claimant decided that it must foresake its operations in Iran . . . and evacuate its personnel and their families." (Emphasis added.)

This leads to the question as to whether an ostensibly "voluntary" departure (i.e., one not based on specifically focused governmental action such as an expulsion order or the application of force specifically to the individual involved) induced by general circumstances in the country can also constitute expulsion. The Tribunal is not aware of specific decisions of other international tribunals in which

such a departure led to an award on the basis of expulsion with the specific legal consequences attached to such a determination.[4]

Although it is clear that not every inconvenience which may cause an alien to leave the country constitutes expulsion, the Tribunal accepts, in principle, the possibility that the constituent elements of expulsion ("removal, either 'voluntarily', under threat of forcible removal, or forcibly") can be fulfilled in exceptional cases even where the alien leaves the country without being directly and immediately forced or officially ordered to do so. Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of state responsibility.

Having said this, the Tribunal has concluded that it need not decide whether the requisite conditions were fulfilled and would have constituted expulsion in the present case. The Tribunal is able to decide on other grounds each of the claims and counterclaims argued to have been affected by the claimed wrongful expulsion. Thus the Tribunal may defer determination of the issue here presented until another case or cases where it hopefully will have

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[4]The Tribunal has not examined whether such circumstances leading to the departure of an alien justified an award on the basis of "denial of justice", "failure to protect", or other breaches of minimum standards concerning the treatment of aliens in a country required by international law.

been more extensively pleaded, documented and argued than was done by the Parties here.[5]

B. Claims and Counterclaims Relating to the RAPCON and Civil Works Contracts

1. Background

On 23 December 1973, ITP Export and IIAF executed contract No. 08/81211 pursuant to which ITP Export agreed to supply and install Radar Approach Control Systems ("RAPCON") at nine IIAF base sites throughout Iran ("RAPCON Contract"). The RAPCON system is a radar tracking, ground to air and air to ground communications system. The RAPCON Contract also provided that ITP Export would provide spare parts and test equipment and two years' engineering support service, for a total original contract price of $40,395,251. The RAPCON Contract was supplemented by three addenda, which increased the contract price to $40,746,783, and rewritten in November 1977 (Amendment 01). Amendment 01 reflected an agreement between the parties to settle for $1,488,076 a claim submitted by ITP Export seeking compensation for additional work, materials and delays caused by IIAF.

ITP Export and IIAF concluded a second agreement (No. 5411) on 1 July 1975 to provide for the construction of certain civil works at each of the nine sites to permit the installation of the RAPCON systems ("Civil Works Contract"). The Contract price was 920,354,823 rials, in the form of a global award, subject to later adjustment according to the actual work performed, materials used, and certain escalations for inflation.

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[5] The Tribunal is aware that the question of expulsion is presented, inter alia, extensively in certain cases involving claims for less than $250,000.

In order to fulfill its obligations under the Civil Works Contract, ITP Export entered into a teaming arrangement with Iran Advanced Technologies Corporation ("IATCO"), an Iranian joint stock company. IATCO, in turn, contracted with a second Iranian corporation, Faridan, to perform the necessary construction work.

2. Claims Relating to RAPCON Contract

Claimants have presented five claims for payments allegedly owing under the RAPCON Contract.

(a) Invoice Claims

Claimants seek payment of two invoices covering spare parts shipments that they contend went unpaid: Invoice No. 78/01/0001, dated 7 January 1978, in the amount of $45,568.74, for shipments made 22 December 1977, and Invoice No. 78/01/0011A, dated 10 July 1978, in the amount of $26,070.98, for shipments made 12 December 1977. Claimants seek the total of these invoices, $71,639.72, plus interest.

Claimants' documentary evidence consists of the two invoices and a letter of 10 May 1978 seeking payment. In addition, the affidavit of Howard L. Fitzhugh, Contracts Manager for Claimants between May 1976 and November 1978, attests to the shipment of the spares and the non-payment of the invoices. Further, the affidavit of Philip M. Leitzinger, Controller of Claimants from April 1974 until September 1979, also substantiates that the invoices were correct and were not paid.

AFIRI's only defense rests upon the alleged failure of ITPC to respond to a 9 July 1978 letter it sent to ITPC advising ITPC that it would not make any further payments until ITPC verified its financial condition and intention to fulfill the RAPCON Contract.

Because AFIRI has not challenged the validity of the invoices or otherwise contested its underlying obligations, the Tribunal holds AFIRI liable on the invoices and awards Claimants $71,639.72.

(b) Letter of Credit Claim

Claimants' second claim on the RAPCON Contract seeks $50,000, plus interest, for IIAF's alleged underfunding of letter of credit 08/81211, the main letter of credit through which Claimants received payment for the RAPCON Contract. Testimony presented at the Hearing by Claimants' former Controller revealed that this claim represented money owed to ITP Export under the original contract. Claimants allege that it was not drawn down from the letter of credit because ITP Export instructed the bank to pay only partially its final invoice so as to leave a balance of $50,000 remaining on the credit. Claimants sought to leave the credit open in order to facilitate its renewal for purposes of effecting payments under Amendment 01, which was then under negotiation. ITP Export had expected to draw the $50,000 together with the funds to be owed under the Amendment. When payments under Amendment 01 were made directly, however, rather than through the letter of credit, the credit expired.

According to AFIRI, Claimants are not entitled to the balance, because they were never able to present the necessary documents to the bank as to the completion of their obligations. The Tribunal is satisfied, however, as Claimants have explained, that at the time they made their final draw under the letter of credit they could have drawn down the full amount to which they were then entitled but chose not to do so. As such entitlement remains, the Tribunal holds that AFIRI is liable to Claimants in the amount of $50,000.

(c) Field Service Representatives Claim and Counterclaim

Claimants' third claim under the RAPCON Contract is for a total of 52 man-months of field engineering support services rendered at several RAPCON sites prior to Claimants' departure in December 1978. They claim $170,444 (52 x $3,277.76 per man-month), plus interest.

Article 2 of the original RAPCON Contract provides that ITP Export was to supply two years' field engineering support at a lot price of $706,917, which charge was included in the price of the RAPCON system. Apparently, one engineer was to be placed at each site. In Addendum No. 1 to the Contract, dated 20 July 1974, the Parties disaggregated the charge for field engineering support from the RAPCON system price and provided for its separate payment in Iranian rials. Appendix F to Amendment 01, a schedule of payments, indicates that $706,917 for field engineering support remained to be paid "in rial equivalent" in accordance with a supplementary agreement, which apparently was never executed.

In support of their Claim, Claimants have submitted the affidavit of their former Contracts Manager in which he states "[o]ut of a total of 216 man-months required (9 x 24), we had supplied 42 months but were never paid for any of it." Respondent AFIRI conceded in its Statement of Defense that 36 man-months work of engineering services were provided; it counterclaims for $5,301,877.50, the price it purports to have paid for the remaining engineering services not rendered.[6]

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[6]The amount of the counterclaim appears to reflect a misunderstanding of the Contract's price terms. Article 02, Item 0003 of both the Contract and Amendment 01 indicates
(Footnote Continued)

The Tribunal finds that no payments were ever made for field engineering services, based upon the absence of the supplementary agreement referred to in Amendment 01 and the uncontradicted affidavit of Claimants' former Contracts Manager. In the absence of any rebutting evidence concerning the number of man-months of services provided, the Tribunal relies upon Claimants' affidavit evidence and concludes that Claimants are entitled to compensation to the extent of 42 man-months worth of field engineering services. The amount owing can be calculated as follows:

$ 706,917	Contract price for 216 man-months
/ 216	Man-months
3,272.76	Price per man-month
x 42	Man-months provided
$137,455.92	Amount owed for 42 man-months engineering services

Accordingly, the Tribunal awards Claimants $137,455.92 from AFIRI for field engineering support services. AFIRI's counterclaim for refund of payments it never made necessarily must be rejected.

(d) Good Performance Retention and Lost Profits Claims

Claimants seek their lost profits on the unperformed field engineering support services, calculated on the basis of a 25 percent profit margin applied to the Contract price of the unperformed services. Claimants also seek the return of a $300,000 good performance deposit retained by IIAF, pursuant to the terms of Alteration No. 01 to Amendment 01, pending completion of the Contract.

(Footnote Continued)
that the Contract price for field engineering support services was $706,917 in total, not per site as the counterclaim presumes.

Claimants argue that force majeure conditions prevented them from completing performance under the RAPCON Contract and that under the force majeure provisions of the Contract they are entitled to return of the good performance retention and damages for lost profits. Claimants rely upon their letters to IIAF of 21 October 1978 and 5 December 1978 notifying IIAF of the existence of force majeure conditions.

Respondent AFIRI contends that Claimants were not compelled to leave Iran in December 1978 and that Claimants breached the Contract by terminating performance.[7] It relies upon letters to ITPC of 21 October 1978 and 24 December 1978 rejecting the assertion of force majeure and advising ITPC that it would accept no delays in ITPC's performance.

The force majeure provision of the RAPCON Contract, Article 14 of Amendment 01, provides as follows:

> 1. Each party shall be excused for failure and delays in performance of the Contract obligations caused by war, civil war, riot, insurrection, strike, lockout and such catastrophies which are beyond their reasonable control and without the fault of such party except that neither party shall be excused for a failure or delay in making any payment of money to be made hereunder.
>
> 2. Neither party shall be excused from making its best efforts to avoid or remove all such cause [sic] and shall continue performance of contract obligations promptly whenever such causes are removed.
>
> 3. Any party claiming any excuse for failure or delay in performance shall promptly notify the other party in writing as soon as he is aware of possibility of failure or delay advising the anticipated term of such delay or failure, the cause of said delay or failure and what corrective action is being or will be taken.

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[7] AFIRI's counterclaims for breach of contract are addressed in the next section of this Award.

Because this provision does not excuse performance indefinitely, it does not fully support Claimants' position. Nor can Claimants' standpoint as regards the lost profits claim be supported by the provision of paragraph 1 according to which "neither party shall be excused for a failure or delay in making any payment of money to be made hereunder." It is evident that this must refer to payments which have become due prior to the commencement of force majeure.

Claimants seem, however, to base their claim for lost profits and return of their good performance deposit on the ground that they were prevented from completing the RAPCON Contract due to actions of the Iranian Government. It is contended that, after departing because of expulsion or force majeure, "Claimant remained willing and able to return to Iran and complete performance ... as soon as law and order was restored to that troubled country."

It can indeed be concluded that at least by the time of ITPC's letter of 5 December 1978 the conditions in Iran had ripened into a force majeure situation. As stated by the Tribunal in other cases, "[b]y December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic force majeure conditions at least in Iran's major cities. By 'force majeure' we mean social and economic forces beyond the power of the state to control through the exercise of due diligence."[8] Thus Claimants were entitled to withdraw their personnel from Iran and suspend their performance for the period of force majeure; AFIRI was similarly justified in not fulfilling its

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[8] Gould Marketing, Inc. and Ministry of National Defense of Iran, Interlocutory Award No. 24-49-2 at 11 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 147, 152; Sylvania Technical Systems, Inc. and Govt. of Islamic Republic of Iran, Award No. 180-64-1 at 15 (27 June 1985).

contractual obligations except as regards payments for work already performed. However, as the force majeure provision of the Contract suspended rather than terminated performance obligations, Claimants, to be successful in their claim for lost profits in the unperformed field engineering support services, have to show that at some point the force majeure situation excusing both parties from performing was transformed into conditions in which ITP Export's inability to resume its work continued, while AFIRI could no longer invoke force majeure. Claimants further have to show that as a result the Contract had ceased to be in force before 19 January 1981 so as to make the claim for lost profits outstanding on that date. For the good performance retention to be upheld it is enough if Claimants gave the required good performance until 31 December 1980; according to the relevant provision of Alteration No. 01, the "Good Performance deposit in the favour of the IIAF for the amount of $300.000 shall be valid until 31 December 1980."

No detailed evidence as to when the force majeure situation ceased to exist or changed into something else has been presented. As there is no evidence that ITP Export was invited to resume performance before 30 October 1979, however, the Tribunal holds that Claimants were not obliged to return to Iran during that period. The evidence indicates that on the last-mentioned day AFIRI did send ITP Export a letter asking it to send its representative for negotiations concerning the RAPCON project, but this was only a few days before 4 November 1979, the date when the hostage crisis started.[9] The Tribunal has concluded earlier that at least after 4 November 1979 those American companies which had remained in Iran "were forced to leave their

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[9] Claimants contend that "[w]ith the kidnapping of American diplomats in November 1979, hope for . . . a return to Iran disappeared . . . ."

projects and had to evacuate their personnel," and that the absence of such personnel could not be relied on by Iran as an excuse for derogating from its legal obligations.[10] Also, in this case the Tribunal determines that the risks for American citizens connected with the situation which started in November 1979 could not be characterized as force majeure in the sense of events excusing both Parties, as was the case in December 1978, but gave Claimants a valid reason not to perform despite AFIRI's above-mentioned letter. In the new situation AFIRI, on the other hand, was precluded from invoking force majeure in its contractual relationship with ITP Export.

Ordinarily one would readily conclude that by virtue of the situation in Iran, including, in particular, the hostage crisis, the RAPCON Contract was at an end by 19 January 1981. Some confusion on this point arises, however, from the utterances of the Parties. In a letter, dated 8 February 1980, apparently in response to AFIRI's 30 October 1979 letter ITP Export refers, inter alia, to "the condition of force majeure which compelled suspension of effort on the RAPCON project [and] continues unabated." For its part, AFIRI has sought in its pleadings, among other things, specific performance of Claimants' outstanding obligations, thus assuming the continuous validity of the Contract. Nonetheless, on balance, the Tribunal concludes that by 19 January 1981 the contractual relations between the Parties had come to an end. As already stated, the situation in Iran which commenced in November 1979 constituted a valid excuse for Claimants, but not for AFIRI, not to continue

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[10] See Starrett Housing Corporation and Government of the Islamic Republic of Iran, Interlocutory Award No. 32-24-1 at 53 (19 Dec. 1983). Cf. Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3, (Judgment of 24 May), reprinted in 19 Int'l L. Mat'ls 553 (1980).

their performance under the Contract. That Claimants, in spite of their letter of 8 February 1980, actually did not regard themselves as being bound by the Contract may be inferred from the fact that, during the eleven month period between the date of the letter and 19 January 1981, Claimants made no efforts to resume negotiations concerning the possible resumption of the work. This position of Claimants must be deemed to have been understood by AFIRI, which, after its October 1979 letter, took no further steps to have the work continued.

On this analysis, and as in the present case no circumstances were pleaded by AFIRI suggesting that Claimants could not reasonably have expected profits on future field engineering support services, Claimants are entitled to any such profits of which they may have been deprived. Starting with their Statement of Claim they have expressly sought a 25 percent profit on the remaining unperformed services. The affidavits of Claimants' former Contract Manager, and of their President, inferentially support this claim and Respondents have not contradicted it either in their pleadings or by evidence.

In these circumstances, the Tribunal must grant the claim and finds the asserted profit margin reasonable. The Tribunal therefore awards $142,365.27, derived as follows:

$706,917.00	Contract price for 212 man-months
-137,455.92	Awarded for 42 man-months' service rendered
$569,461.08	Unperformed value
x .25	Profit margin
$142,365.27	Lost profit

With regard to the good performance deposit, AFIRI concedes that it retained $300,000, and the Contract is clear that the deposit was to be valid only until 31

December 1980. Claimants have presented testimony that they were in compliance with their RAPCON obligations at the time of their departure which took place at the end of 1978. Thus, the evidence indicates that all nine RAPCON systems had been delivered to Iran well before the state of force majeure which commenced not later than December 1978 and that installation work was in progress. Between December 1978 and 31 December 1980 Claimants were excused from performing, first because of the state of force majeure just referred to and subsequently due to the situation which started in November 1979. Therefore, the Tribunal concludes that up to 31 December 1980, until which date the good performance deposit was valid, Claimants had rendered the required good performance and were therefore entitled to the return of the deposit.

In view of the above, the Tribunal awards Claimants the amount of the good performance deposit, $300.000, for which AFIRI is responsible.

3. Other Counterclaims Relating to RAPCON Contract

In its counterclaim, AFIRI alleges that of the nine RAPCON systems to be installed only three were provisionally handed over and they were in defective condition. The remaining six are purportedly unusable. The first relief sought is an order for Claimants to fulfil their obligations under the RAPCON Contract. Alternatively, AFIRI claims damages as specified under (a) and (b) below. AFIRI also contends that ITP Export illegally collected on bank guarantees for good performance established in favor of AFIRI.

The Tribunal rejects AFIRI's request for specific performance; as set forth above, Claimants' further performance under the Contract was legally excused.

(a) Installation

AFIRI seeks $4,241,502 as reimbursement for payments made for installation services at six sites where it contends installation was not completed. The amount of the counterclaim appears to be based on an installation price of $706,917 per site. The RAPCON Contract and Amendment No. 1 are somewhat ambiguous as to whether the price of $706,917 specified for installation services is an aggregate or per site price, as the relevant clause specifies a quantity of "9" and then, across two columns labelled "Unit Price" and "Total Price," states "Price of $706,917.00 is included in Item 0001," the RAPCON Systems price. In construing this price term, the Tribunal notes that throughout the Contract's pricing provisions, wherever one price is noted it is a total price and not a unit price. As to the degree of work involved in installation, the Tribunal notes that all work preparatory to installation, including construction and electrical work, was covered by the Civil Works Contract, and that installation work under the RAPCON Contract was to be performed in a maximum of 45 days per site. The Tribunal therefore finds it more reasonable that the $706,917 price was intended as a total price, not a per site price.

In its written submissions, Claimants contend that they essentially completed installation of five sites before their expulsion. At the Hearing, ITPC's former President, John R. Whitford, testified that "four or five" systems had been installed. Claimants also assert that they performed site surveys at all nine sites, which surveys comprise an unspecified portion of the Contract price for installation.

Having examined the acceptance certificates for hand-over of installed RAPCON systems and the various procès-verbaux reporting on the status of the project, the Tribunal finds that ITP Export had completed installation at four

sites by December 1978 and was in compliance with its obligations to remedy any defects that had appeared. The remaining sites were in various stages of completion, such that roughly five-ninths of the total installation work required by the contract was done, including site surveys. No evidence has been presented to indicate that site surveys were not performed at all nine sites. Given that installation work had begun at all sites, the Tribunal concludes that all required site surveys were performed.

The Tribunal has already found that completion of the RAPCON Contract by ITP Export was at first excused by force majeure and later rendered impossible. Such impossibility necessarily relieved Claimants of any unperformed contractual obligations to AFIRI. It would not justify the retention by Claimants, however, of funds already received in respect of work yet to be performed. As ITP Export was paid the full contract price of $706,917 allocated for installation services, including site surveys, it is obligated to return to AFIRI an amount corresponding to the proportion of uncompleted work as of December 1978. The Tribunal rejects Claimants' argument that it is entitled to retain payments made for services not yet performed on the basis of the Contract's force majeure provision. Paragraph 1 of Article 14, Amendment 01, which provides that IIAF's payment obligations are not excused by force majeure, as already discussed, contemplates the eventual completion of ITP Export's performance. When, as in this case, further performance is excused, payment for unperformed services must also be excused.

In light of the fact that approximately five-ninths of the installation work had been completed and considering the testimony by Mr. Whitford at the Hearing that "several hundred thousand dollars" worth of installation work remained to be performed, the Tribunal finds that $300,000 of the installation work remained to be performed under the

RAPCON Contract. Therefore, ITP Export would owe this amount to AFIRI. As the affidavit testimony of Claimants' former President confirms that the anticipated actual cost of the remaining installation work would exceed this amount, it does not appear appropriate to reduce it by any amount for a putative profit.

(b) Spare Parts

AFIRI seeks $4,218,907 for alleged deficiencies in spare parts and test equipment which ITP Export was obligated to provide. Claimants contend that they shipped all spare parts and test equipment required under the Contract. Claimants also assert that vandalism and lack of security contributed to a loss of parts, which losses occurred while AFIRI held title and custody of the parts.

AFIRI's general allegations of spare parts deficiencies are not supported by the evidence and are contradicted by Alteration No. 01 to Amendment 01. That Alteration, signed by both ITP Export and IIAF representatives sometime in late 1977 or early 1978, indicates that as of the date of its execution the parties had agreed that the value of unsubstantiated spare parts shipments amounted to only $268,792. Moreover, a deposit in this amount was retained by IIAF from monies otherwise owing to ITP Export. No evidence indicating why or how deficiencies arose after this accounting has been presented.

However, AFIRI has produced a letter from ITPC to IIAF dated 7 March 1977 in which ITPC supplies packing lists of parts requiring repair or replacement in the United States. The value of the parts, as indicated on the packing list, totals $116,278.36. Both Parties agree that the parts were shipped to the United States; they disagree on whether the parts were ever returned to Iran.

The Tribunal rules that the packing lists supplied by AFIRI, as substantiated by testimonial evidence of Claimants' witnesses at the Hearing, constitute prima facie evidence that the parts listed were shipped to the United States. Because Claimants have failed to produce evidence of reshipment of any of these parts to Iran, such as bills of lading, the Tribunal holds Claimants liable to AFIRI for the full value of the parts returned to the United States, $116,278.36.

(c) Bank Guarantee

AFIRI contends that the conditions of the documentary credit under which ITP Export was paid required the issuing bank to withhold 10 percent of the amount of invoices presented for payment as a good performance guarantee. It alleges that the bank failed to deduct the guarantee amount, and seeks $3,977,856 from Claimants (10 percent of the total of its invoices). Alternatively, AFIRI claims an unspecified sum as interest on a theory of unjust enrichment.

Claimants deny that any such good performance guarantee was required under the RAPCON Contract or letter of credit and assert that the bank, not it as beneficiary of the credit, would be liable if the guarantee provision did exist.

The Tribunal notes that the RAPCON Contract contains no provision requiring a good performance bank guarantee. Respondents have provided no documentation in support of this claim. Lacking substantiating evidence, the counterclaim relating to good performance retention is hereby dismissed.

4. Claims and Counterclaims Relating to Civil Works Contract

(a) Background

With respect to the Civil Works Contract, Claimants allege that they virtually had completed their performance obligations under the Contract prior to leaving Iran and that any work remaining was completed by IATCO's subcontractor, Faridan. Consequently, Claimants seek compensation in accordance with the Contract's payment terms and return of good performance retentions. Claimants claim initially totalled 229,144,972 rials; later filings adjusted the claim to 230,857,091 rials. Claimants also seek interest on this amount.

The Civil Works Contract claim comprises four elements. First, Claimants seek 59,326,000 rials for services rendered and billed prior to their departure from Iran that remain unpaid. This amount appears to be net of three withholding deductions totalling 15.7 percent required under the Contract: 10 percent good performance retention, 5.5 percent social insurance withholding, and 0.2 percent education tax withholding. Second, Claimants request payment for 136,633,091 rials worth of unbilled additional work, less withholding deductions, performed under the Contract but outside the scope of the works initially contemplated.[11] The actual amount requested is thus 115,181,696 rials, which amount represents the gross price of 136,633,091 rials less 13,663,309 rials good performance retention (10%) and

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[11] The Civil Works Contract recognized that the exact scope of the works to be performed could not be determined at the time of the Contract's execution. It therefore provided that the Contract price would be adjusted to reflect any additional works necessary to fulfill the goals of the Civil Works project.

7,789,796 rials tax withholding (5.7%). Third, Claimants ask for 37,827,000 rials in inflation escalation payments, which amount is net of tax withholding but not good performance retentions. Lastly, Claimants demand the return of bank guarantees and good performance retentions which, adjusting for the increase in the value of the additional works reported in Claimants' rebuttal memorial, total 37,369,309 rials. This amount reflects 13,663,309 rials good performance retention on the additional works plus 23,706,000 rials in outstanding bank guarantees.

At the Hearing, Claimants conceded that their claim did not take into account a 4 November 1978 progress payment made by AFIRI in the amount of 48,521,917 rials. Claimants concede that this payment should be accounted for by reducing the claim by the grossed-up amount of the progress payment, because the payment received was net of withholding deductions. In other words, the payment received was less than the actual price of the services rendered because the 15.7 percent withholding deductions had been made; such deductions must therefore be added back to the net payment amount to determine the gross value of the payment. The relevant computations reveal a gross value of 57,558,620 rials [(48,521,917)/(100%-15.7%)], consisting of the 48,521,917 rials paid by IIAF, 5,755,862 rials in good performance retentions and 3,280,841 in tax withholding. Claimants argue, however, that they are entitled to the good performance retention.

Respondent AFIRI contests the Tribunal's jurisdiction over this claim on the basis of the forum clause contained in the Civil Works Contract.

With respect to the merits of the claim, AFIRI asserts that it paid all invoices for work completed prior to December 1978. It denies that Claimants completed any of the nine sites prior to departing Iran. Rather, AFIRI

asserts that substantial work remained to be performed and that such work was performed by Faridan, for which AFIRI paid Faridan directly.

As to the claim for escalation and additional work payments, AFIRI argues that the Civil Works Contract required both that IIAF approve any additional work and that ITP Export provide provisional progress reports of additional work carried out. AFIRI alleges that the requisite approvals were not given and that progress reports were not submitted. Respondent AFIRI also objects to release of the good performance guarantee on the ground that Claimant failed to perform 100 percent of its obligations.

AFIRI has filed three types of counterclaims, one of which is joined by Faridan. These include a claim for payments allegedly made to Faridan totalling 160 million rials, claims for 124,191,191 rials for social insurance premiums and 737,393 rials for education fees, exclusive of penalties, and various claims for breach of the Civil Works Contract in an amount exceeding $4.2 million.

(b) Jurisdiction

The threshold issue presented by the claims on the Civil Works Contract is whether the forum clause contained in Article 53 of the Contract's General Conditions divests the Tribunal of jurisdiction. Article II(1) of the Claims Settlement Declaration excludes from the Tribunal's jurisdiction claims arising under a binding contract "specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position."

Apparently, the Contract was executed in Farsi only; the Parties have submitted English translations of Article 53 that differ from one another in material respects. With

their Statement of Claim, Claimants submitted an uncertified English translation of the Contract in which Article 53 reads as follows:

> Article 53 - Settlement of Disputes
>
> Any disputes that may arise between the Contractor and the Employer whether relating to execution of the works subject matter of the Contract or relating interpretation of any of the Articles of the Contract Booklet the General Conditions or other documents attached to the Contract, and which cannot be settle [sic] amicably through mutual agreements, shall be settled through the appropriate courts of the Ministry of Justice.

AFIRI argued in its Statement of Defense that Article 53 precluded any exercise of jurisdiction by the Tribunal. Claimants responded by submitting a new translation of Article 53, this one sworn to by a professional translator who stated that he was licensed as such by the Iranian Ministry of Justice:

> Article 53 - Settlement of Disputes
>
> Where disputes arise between the Owner and the Contractor, whether in relation to the performance of the operations under the contract or to the interpretation and construction of any of the provisions of the contract and of the general terms and other instruments and documents attached thereto, if the parties fail to resolve such disputes through agreement, recourse shall be had to competent judicial courts and fora.

Later, AFIRI submitted the following uncertified translation of its own:

> Where disputes arise between the owner and the contractor including but not limited to those disputes arising out in relation to the performance of the operation under the contract and/or to the interpretation and construction of the provisions of the contract and of the General Terms and other instruments and documents attache there to [sic], if the parties fail to resolve such disputes

through agreement, recourse shall be had to competent judicial courts and fora.

Article 53 as thus variously translated presents two questions relevant to the jurisdictional exclusion contained in Article II(1) of the Claims Settlement Declaration: (1) Does it satisfy the requirement of exclusivity embodied in that exclusion by specifically providing for the sole jursidiction of competent Iranian courts? See, e.g., Howard Needles Tammen and Bergendoff and Gov't of Islamic Republic of Iran, Interlocutory Award No. 3-68-FT (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 248; (2) Is Article 53 sufficiently comprehensive so as to cover any dispute arising under the Contract, as required by the exclusion? See Ford Aerospace and Communication Corp. and Air Force of Islamic Republic of Iran, Interlocutory Award No. 6-159-FT (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 268.

As to the first issue, Respondent's translation agrees with Claimant's certified translation in referring to "competent judicial courts and fora," without express reference to Iran. AFIRI argues, however, that such reference should be implied in the Farsi original. It states that "[c]onsidering the general meaning of Article 53, the use of words 'Ministry of Justice' and 'Iran' for the phrase 'competent judicial courts and fora' is understood," a point inferentially supported by Claimant's first, uncertified translation, which spoke of "appropriate courts of the Ministry of Justice."

On the second issue the lines are more clearly drawn: Both translations provided by Claimants appear to bring the case within Ford Aerospace whereas Respondent's translation would appear to suggest a contrary result.

To complicate matters still further, the Tribunal understands that the Farsi text of the relevant phrases in Article 53 are identical to the Farsi text of the clause

that was before the Full Tribunal in Zokor Int'l Inc. and Gov't of Iran, Interlocutory Award No. 7-254-FT (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 271. In Zokor, too, the contracts in issue were "drawn up in Farsi." The Tribunal relied upon a translation which examination of the record in that case reveals was provided by Claimant in its Memorial on Jurisdiction:

> Article 45 - Settlement of Disputes
>
> Should a dispute arise between the Manufacturer and the Employer, whether related to the execution of the contractual works or about the interpretation of the Articles of the contract, general conditions of the contract and other contractual documents, and if the dispute is not resolved in an amicable way, the same shall be referred to competent judicial authorities and courts according to the laws in force in Iran . . . .

This differed in several respects from the translation it had supplied earlier with its Statement of Claim:

> Article 45, Settlement of Disputes
>
> If a disagreement arises between the Manufacturer and the Employer, because of expenses concerning the execution of the contractual works or about the interpretation of the Articles of the Contract, general conditions of the Contract and other contractual documents, and if the disagreement is not resolved in an amicable way, this disagreement will be taken to court according to the laws in force in Iran . . . .

The Respondent in its Memorial on Jurisdiction both relied on Claimant's original translation and supplied its own, as follows:

> In the event a dispute arises between employer and manufacturer, irrespective of whether it relates to performance or interpretation of the provisions of the contract, the General Conditions, or other documentations appended to the contract, in case the parties are not capable of settling the dispute through compromise, the dispute shall be settled by reference to the competent courts of justice, under the laws of Iran . . . .

After considering the pleadings filed by the parties and after providing them a full opportunity to be heard, the

Full Tribunal determined that the cited provision failed to oust it of jurisdiction, on two grounds:

> Article 45 . . . does not contain any provision which unambiguously restricts jurisdiction to the courts of Iran . . . [It] does not with sufficient clarity fulfil the requirements laid down in the exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration . . . .
>
> * * * *
>
> Article 45 confers jurisdiction . . . only in respect of disputes concerning the execution of the contractual works or the interpretation of the contract and related documents . . . [T]his formulation means that the parties have left certain aspects of the contract outside the jurisdiction of the selected courts, if any. Interlocutory Award, dated 5 November 1982, in Case No. 159 [Ford Aerospace and Air Force of Iran, Interlocutory Award No. 6-159-FT, reprinted in 1 Iran-U.S. C.T.R. 268].

In these circumstances we have considered the appropriateness of consulting the Tribunal's own Division of Language Services. On the one hand it can be argued that in considering factual issues the Tribunal is limited to the record made by the Parties. See George W. Drucker, Jr. and Foreign Transaction Co., Interlocutory Award No. 4-121-FT at 2-3, (5 Nov. 1982) reprinted in 1 Iran-U.S. C.T.R. 252, 253, in which the Full Tribunal relied on essentially identical English translations provided by the parties of a contract apparently executed only in Farsi, but printed with Farsi and English texts appearing on opposite sides of the page, without obtaining a translation from the Tribunal's Division of Language Services. Classic references to experts, under Article 27 of the Tribunal Rules, ordinarily require an adversary proceeding. On the other hand the Tribunal is bound to examine its own jurisdiction most carefully, neither unwittingly exceeding it nor failing by oversight or otherwise to exercise it where granted. Given these considerations the Tribunal has made a strictly limited inquiry of its Division of Language Services, in writing. This request and the response of the Division are attached as Annexes A and B hereto, respectively.

The circumstances outlined above present the following issues:

(1) Is the Tribunal bound here by the decision in Zokor?

(2) If the Tribunal is not bound by Zokor, then

(a) Does a clause "specifically provid[e] that any disputes thereunder shall be within the sole jurisdicition of the competent Iranian" courts within the meaning of Article II(1) of the Claims Settlement Declaration if said clause is ambiguous in any respect; and

(b) If such clause may be ambiguous, how are any ambiguities presented here to be resolved?

The Tribunal concludes that it is appropriate, particularly considering Article 27 of the Tribunal Rules, that the Parties have an opportunity to comment on the response of the Division of Language Services (Appendix B) as it relates to these issues, and is granting them by separate order a period of time within which to do so. Accordingly, the Tribunal reserves decision on all claims and counterclaims arising out of the Civil Works Contract, which will be the subject of a later award.

5. Letters of Credit Claims Relating to Civil Works Contract and Counterclaims

(a) Claims

In addition to their direct claims under the Civil Works Contract, Claimants seek cancellation of Letter of Credit No. S-13576, issued on behalf of ITP Export by First

National Bank of Boston ("FNBB") to Iranians' Bank to secure the performance guarantee given to IIAF, as well as cancellation of all other bank guarantees and standby letters of credit issued in connection with the Civil Works Contract. Claimants also seek compensation for legal fees and expenses totalling $30,000, plus interest as from 30 June 1980, incurred in obtaining a preliminary injunction in a federal court in the United States to prevent AFIRI from seeking payment on two of these letters of credit. Claimants do not name any of the banks involved as Respondents, although Bank Tejarat, successor to Iranians' Bank, has participated in the proceedings by filing defenses and counterclaims.

Because this claim is inextricably related to the claims and counterclaims propounded in relation to the Civil Works Contract, the Tribunal reserves decision on the issues here presented.

(b) Bank Tejarat's Counterclaims

(1) Counterclaim Relating to Letters of Credit

Bank Tejarat has sought to intervene in this proceeding, inter alia, to interpose a counterclaim against Claimants based upon the letters of credit issued by FNBB in its favor. Bank Tejarat originally sought the full original amount of the two letters of credit, or 84,976,911 rials, apparently because FNBB failed to extend or pay them, but later reduced its claim to 54,716,093 rials, the combined amounts presently outstanding on the two credits, plus interest.

The counterclaim presents two jurisdictional issues. First, may Bank Tejarat, which is not named as a Respondent

in any claim, properly file a counterclaim?[12] Second, does the counterclaim arise out of the same contract, transaction or occurrence as any claim? Because the Tribunal concludes that it lacks jurisdiction over the substance of the counterclaim, it need not decide the first question.

In United States of America and Islamic Republic of Iran, Award No. 108-A-16/582/591-FT (25 Jan. 1984), the Full Tribunal held that the Claims Settlement Declaration did not confer upon the Tribunal jurisdiction over direct claims by Iranian banks against United States banks or other United States nationals. The Tribunal also ruled as follows:

> Whether an Iranian bank claim on a standby letter of credit can be joined as a counterclaim against the relevant United States Contractor is a matter that each Chamber will have to deal with in accordance with Tribunal Rules concerning jurisdiction over counterclaims.

Id. at 21. The issue thus left undecided by the Full Tribunal in favor of case by case adjudication is now before this Chamber.

Letters of credit and bank guarantees are autonomous obligations independent of the underlying obligations to which they are ancillary. See Harza Engineering Co. and Islamic Republic of Iran, Award No. 19-98-2 at 14 (30 Dec. 1982). Thus, the obligations of the banks vis-a-vis one another are distinct and independent from the obligations of the parties to the underlying transaction vis-a-vis one another.

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[12] In this connection, the Tribunal notes that Bank Tejarat had filed separately a direct claim seeking payment of these letters of credit, naming FNBB and the Government of the United States of America as Respondents. This claim has been dismissed, however, pursuant to the Tribunal's decision in United States of America and Islamic Republic of Iran, Award No. 108-A-16/583/591-FT (25 Jan. 1984).

Where, as in this case, Claimants' claim relates solely to the obligations of the Parties on the underlying obligation, a counterclaim relating to the documentary credits and the obligations of the banks that are parties thereto does not arise out of the same contract, transaction or occurrence as the claim, as required by Article II(1) of the Claims Declaration. The soundness of this ruling is evidenced by the counterclaim here at issue. It alleges wrongdoing not on the part of the Claimants but on the part of the American issuing bank, FNBB. Because FNBB is not a party to this proceeding, the Tribunal can have no jurisdiction to adjudicate its obligations to Bank Tejarat. At most, the Tribunal could determine the rights of the Parties before it with respect to the letters of credit and bank guarantees relating to the underlying Civil Works Contract.

Accordingly, Bank Tejarat's counterclaim on the letters of credit is dismissed for lack of jurisdiction.

(2) Other Counterclaims

Bank Tejarat also has filed two additional counterclaims. First, Bank Tejarat counterclaims against ITP Export for the amount of net debits outstanding in two current accounts maintained by ITP Export at Iranians' Bank. Apparently, these debits resulted from charges levied by Bank Tejarat for extension of the bank guarantees securing advances and contract fulfillment. Because the obligation to pay such fees arises not from the Civil Works Contract, but from the bank guarantees, the Tribunal rules that it must be dismissed for lack of jurisdiction. The bank guarantees, like the corresponding standby letters of credit, constitute obligations independent of the underlying transaction.

The Tribunal also notes that while Bank Tejarat has specified the sums allegedly owed on the two accounts to be

302,519 rials and 352,704 rials, it has offered no evidence regarding either the existence of the accounts or the existence of debit balances therein. Accordingly, if jurisdiction existed, the claim would have to be denied on the merits for failure of proof.

Second, Bank Tejarat seeks $2,990, plus interest, from ITP Export for a check allegedly cashed by an authorized signatory of ITP Export drawn in U.S. dollars on the U.S. account of another ITP employee. Bank Tejarat paid the check, which was later returned to it by the U.S. payor bank for insufficient funds. This counterclaim bears no relationship whatsoever to any claim brought by Claimants; therefore, the Tribunal orders it dismissed for lack of jurisdiction.

6. Income Tax Counterclaim

In addition to the numerous counterclaims discussed above which AFIRI pleaded in its Statement of Defense, AFIRI, on 21 January 1985, filed a counterclaim aggregating 372,104,533 rials, plus interest and penalties, for Iranian income taxes allegedly owed by Claimant for the years 1973-1978 and 1980. This counterclaim must be dismissed as untimely filed in accordance with Article 19(3) of the Tribunal Rules.[13]

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[13] Judge Brower would prefer that the Tribunal also clarify that it would be required to dismiss the income tax counterclaim in any event for lack of jurisdiction on the ground that it cannot be construed as arising out of any contract, transaction or occurrence constituting the subject matter of Claimants' claim, as required by Article II(1) of the Claims Settlement Declaration. See T.C.S.B., Inc. and Iran, Award No. 114-140-2 at 23-24 (16 Mar. 1984).

C. Claims and Counterclaims Relating to VORTAC/TACAN Contract

Claimants' Statement of Claim included a claim of $122,340.46 against AFIRI for payment of three invoices allegedly rendered under VORTAC/TACAN Equipment Contract Number 79-7308. That contract, dated 18 December 1973, was executed by IIAF and International Technical Products (Canada) Limited ("ITP Canada").

AFIRI asserted various defenses, including a challenge to the Tribunal's jurisdiction over the claim of a Canadian corporation. AFIRI also filed two counterclaims: the first, with its Statement of Defense, claiming $2,190,813 "for non-installation and operation of VORTAC and TACAN facilities"; the second, with its Rejoinder, claiming $122,150.56 as a refund for overpayment allegedly resulting from a dispute as to whether the contract was priced in U.S. or Canadian dollars.

During the course of the Hearing, Claimants' attorney noted that, while ITP Canada had been wholly-owned by ITPC, a U.S. national, at the time the claim arose, ITPC sold ITP Canada to a Canadian corporation in late 1979. He conceded, therefore, that the Tribunal lacked jurisdiction over the claim in view of the continuous nationality requirement of Article VII(2) of the Claims Settlement Declaration. That provision requires that claims be "owned continuously" by a national of Iran or the United States, as the case may be, "from the date on which the claim arose to the date on which this agreement enters into force [19 January 1981]. . . ."

Respondent AFIRI agreed to Claimants' withdrawal of this claim, but has sought to maintain its counterclaims. The Tribunal, however, has held that its jurisdiction over counterclaims is dependent on its having jurisdiction over the main claim; thus, where a claim is dismissed or

otherwise terminated for lack of jurisdiction, the counterclaims relating to such claims must also be dismissed. See Reliance Group, Inc. and National Iranian Oil. Co., Award No. 15-90-2 at 3 (8 Dec. 1982); Behring Int'l, Inc. and Islamic Republic of Iran, Interim and Interlocutory Award No. 52-382-3 at 38 (21 Jun. 1985). Accordingly, as the Tribunal is satisfied that it would not have had jurisdiction over the main claim now withdrawn, the Tribunal orders the counterclaims relating to the VORTAC/TACAN Equipment Contract dismissed for lack of jurisdiction.

D. Claims and Counterclaims Relating to Civil Aviation Organization Contract

1. Invoice Claims

Claimants' remaining contract claim relates to a 19 March 1977 contract between ITPC and MOW (Contract No. 79-8998) and names MOW as Respondent. The contract, executed by MOW on behalf of CAO, called for certain modifications to, and the installation of, Manual Flight Information Systems in two aircraft ("CAO Contract").

The claim relates to unpaid invoices for expenses and work performed over and above that specified in the CAO Contract. Claimants seek payment on four invoices totalling $38,403.28, plus interest. The first invoice, dated 23 May 1978, is for $31,198.24 and represents charges for "corrective maintenance activities" performed on the two aircraft "per amendment No. 2" to the contract. The second invoice, also dated 23 May 1978, is for $3,805.04, covering "airworthiness directives" for each of the two planes "performed in accordance with Amendment No. 1." The third invoice, dated 5 May 1978, in the amount of $1,000, seeks reimbursement to ITPC for travel expense advances provided for four CAO representatives in April 1978. The final invoice, dated

27 March 1978, in the amount of $2,000, also is for reimbursement of travel expense advances. The latter two invoices state that the invoiced advances relate to travel for inspection and acceptance of the aircraft in California and that copies of signed receipts for the advances stated are attached. The Tribunal has not been provided with copies of these receipts.

CAO, although not named as a direct respondent, has presented a defense and counterclaims on its own behalf, while MOW, the named Respondent, has not participated in the proceedings. Claimants have not objected to CAO's direct participation and the Tribunal finds such participation to be appropriate because CAO is the real party-in-interest.

CAO raises two specific jurisdictional defenses and several defenses on the merits. Regarding jurisdiction, it first argues that it is a national of Iran and that the claim should be referred to the competent courts of Iran, and, second, that the CAO Contract expired on 22 June 1978 and thus the claim did not exist on the date of the Algiers Declarations. On the merits, Respondent CAO challenges the invoices for travel expenses, alleging that (1) CAO paid the travel expenses and per diems of the individuals involved; (2) the claim should be substantiated by receipts indicating the expenses were in fact incurred; (3) the expenses, in part, resulted from delays caused by Claimant; and (4) CAO is not obligated under the Contract to pay travel expenses. As to the invoices seeking payment for additional work, CAO asserts it never ordered such services and that Claimant has failed to document adequately the services performed. Respondent further argues that it paid all its obligations under the CAO Contract and that an invoice, without more, does not constitute evidence of a claim.

In response to Respondent's jurisdictional challenges, the Tribunal rules that the invoice claims are within its

jurisdiction. The invoices claimed upon, all issued in March and May of 1978, were allegedly due and unpaid as of 19 January 1981 and thus were outstanding on the date of the Algiers Accords, as required by Article II(1) of the Claims Settlement Declaration. Respondent has not demonstrated that any forum selection clause in the CAO Contract divests the Tribunal of jurisdiction; the mere fact that CAO is an Iranian national does not, under the terms of the Article II(1) exclusion, affect our jurisdiction. As to Respondent's second jurisdictional objection, the Tribunal rules that the expiration of the underlying Contract is irrelevant to determining the dates on which the debts represented by the invoices became outstanding.

On the merits, the Tribunal finds it necessary to treat the invoices for services separately from the invoices for travel advances. With respect to the former, Claimants have submitted copies of certificates for each of the aircraft, dated 8 March 1978 and 8 April 1978 and signed by MOW representatives, accepting delivery and installation of the systems. In the absence of evidence to the contrary, the Tribunal must assume that the corrective maintenance and airworthiness directives were incorporated into the aircraft prior to delivery. Thus, MOW's acceptance of delivery constitutes acknowledgment and acceptance of the invoiced services. Accordingly, the Tribunal holds MOW and CAO jointly and severally liable to Claimants for $35,003.28, the sum of the two invoices.

With respect to the invoices for travel advances, the Tribunal notes that Claimants have submitted neither the receipts covering the advances made nor a copy of the CAO Contract. As a result, the Tribunal cannot ascertain whether the advances were, in fact, made, or what the contractual obligations of the parties were with respect to travel advances. Accordingly, the Tribunal denies for

failure of proof the claim with respect to the two invoices for travel advances.

2. Counterclaims

CAO counterclaims against ITP Export for two alleged breaches of the CAO Contract. CAO alleges that ITP Export breached the contract by installing four navigation receivers made by Collins, when the Contract specified that Bendix receivers were to be installed. In support of its claim, CAO has submitted a copy of a Statement of Work, purportedly part of the CAO Contract, providing, in pertinent part that

> The original installation in each aircraft will consist of two (2) Collins . . . Navigation receivers. Twelve (12) months after the effective date of this Contract, these receivers will be replaced by ITP with Bendix . . . receivers at no increase in contract price.

It argues that Collins receivers are inferior technically, and requests an award requiring Claimants to deliver four Bendix receivers, or, alternatively, to pay $50,000 in damages.

In its second counterclaim, CAO alleges that Claimants failed to deliver 46 volumes of technical manuals as required by the CAO Contract, and seeks damages in the amount of $50,000.

Claimants contest both counterclaims. While not contesting that the CAO Contract required Bendix receivers, Claimants respond that the Collins receivers were fully satisfactory substitutes and that the Contract permitted them to make changes in equipment. Claimants also assert that the IIAF wanted Claimants to use the Collins radios because they were IIAF standard equipment. With respect to the technical manuals, Claimants have not made any specific

arguments other than to note that CAO never previously advised them that such manuals were missing.

The Tribunal determines that the counterclaim is meritorious but that no damages have been proved. While the Parties have presented numerous arguments as to the technical merits of the Bendix receivers versus the Collins receivers, neither has presented any evidence to support its arguments. Indeed, the fact that the Contract provided for substitution of the two types of receivers "at no increase in contract price" would appear to indicate that their market value is identical. Respondent CAO, which has the burden of proving its counterclaim, has not indicated how it arrived at a damage figure of $50,000. Likewise, Respondent has offered no proof of what damages, if any, it sustained in connection with the purportedly undelivered technical manuals or how it arrived, again, at a damage figure of $50,000. Accordingly, the Tribunal can award only nominal damages, in the amount of $1,000, to CAO.[14]

E. Expropriation Claims

In addition to the contract claims against AFIRI and CAO discussed above, Claimants bring a claim against Iran for the expropriation of real property. Claimants purport to have been either the beneficial owners or legal owners, at all relevant times, of a building containing eight apartments located in Tehran. Claimants initially based their claim on the alleged failure of the Imperial Government of Iran and its successor, the present Iranian government, to protect the building, thereby depriving Claimants of the use and benefit of the building even prior to Claimants' departure from Iran in December 1978.

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[14] Judge Brower would prefer to award no damages.

Claimants assert that the property, assessed by an engineer at 48 million rials in May 1978, was subject to an outstanding mortgage held by Iranians' Bank equivalent to $216,915 as of December 1978. Initially, Claimants sought recovery in the amount of 48 million rials ($682,303), the asserted value of the building plus interest as of December 1978, plus interest, if they remained obligated on the mortgage, or $465,388, the value net of mortgage, plus interest, if they were no longer so obligated. In their Rebuttal Memorial, however, Claimants contend that the building presently has an "estimated appraised value" of over 180 million rials.

The evidence indicates that, at all relevant times prior to December 1978, legal title to the property in question was held by Mitchel and Roberts, an Iranian private joint stock company. Bank Tejarat, successor to Iranians' Bank, appearing as mortgagee of the property, and, for the purposes of this claim, apparently as the representative of Iran as well, challenges the authority of Claimants to file a claim on behalf of Mitchel and Roberts and the jurisdiction of the Tribunal to hear the claim of an Iranian company.

It is not disputed that control of the building passed to Bank Tejarat after Claimants' departure from Iran in December 1978. In its early pleadings, Bank Tejarat suggests that transfer of legal title was then about to take place pursuant to a contract of sale, negotiated by a Mr. Attar on behalf of Mitchel and Roberts, with the transfer deeds to be signed, in Mr. Attar's later absence from Iran, by the Revolutionary Prosecutor as authorized by Iranian law. Allegedly, Mr. Attar had agreed to sell the building to Iranians' Bank for 21,200,000 rials, and the Bank intended to sell the individual apartments to certain of its employees.

In its later submissions and at the Hearing, Bank Tejarat clarified its position to assert that it took title to the building by foreclosing for non-payment by Mitchel and Roberts of its mortgage obligations. Bank Tejarat alleges that it obtained legal title on 19 September 1983 in compliance with the foreclosure procedures set forth in Article 34 of the Law for Registration of Deeds and Property.

Thus presented, the claim presents complex legal issues, relating to both jurisdiction and the merits. The Tribunal has found that it requires additional time to study and deliberate these issues. Therefore, the Tribunal reserves decision on Claimant's expropriation claim. See Harnischfeger Corp. and Ministry of Roads, Award No. 144-180-3 at 13 (13 July 1984).

F. Claims Against Iran for Extraordinary Expenses Stemming from Wrongful Expulsion

Claimants also claim against Iran for extraordinary expenses allegedly incurred by Claimants as a direct result of their allegedly wrongful expulsion from Iran. Specifically, Claimants seek $60,800 for severance payments made to 18 U.S. employees, $30,250 for severance payments made to 11 Iranian employees, $3,400 for termination costs on the lease of their Vice President's residence in Tehran, $20,325 in shipping costs, $10,000 in losses on the forced liquidation of personal property, $25,000 in special legal fees, $148,000 for post-departure representative and custodial services, plus $79,518 for consultant and subcontract services (mainly fees of Mr. Attar). Claimants also ask for interest on these total charges of $377,293.

In their Rebuttal Memorial, Claimants sought to amend their expulsion claim to include a claim for $10 million to compensate for lost profits on future business anticipated

in Iran. Claimants, however, withdrew this new claim at the Hearing. Respondent Iran contends that the claim for expulsion charges is unsubstantiated and unfounded. AFIRI denies that either it or Iran was responsible for Claimants' withdrawal from Iran.

The only evidence submitted by Claimants concerning these expulsion related damages consists of a 30 June 1979 statement of Attar & Associates, Claimants' post-1978 representative in Iran, covering expenditures made on behalf of Claimants (including expenses for Mitchel and Roberts).

The expenses itemized by Attar & Associates total 7,379,820 rials and include the following categories of expense: severance settlements with employees, termination taxes, shipping charges, attorney's fees and notary charges, payroll expenses (including payroll taxes and SIO taxes), overtime settlements, xerox charges, transportation expenses and visa charges. It is far from clear whether and to what extent any of the listed expenses was in fact an extraordinary expense caused by the events of the time, rather than a normal expense to be incurred sooner or later when the various contracts had been fully performed. Absent sufficient evidence, the Tribunal is compelled to dismiss this claim.

E. Claim for Costs

The determination of the Parties' entitlement to costs of arbitration is deferred until the final award.

IV. INTEREST

The Tribunal rules that Claimants are entitled to simple interest at the annual rate of ten (10) percent from

and including 1 January 1980 on the net balance of amounts awarded in respect of claims and counterclaims relating to the RAPCON Contract and CAO Contract. The Tribunal has chosen 1 January 1980 as the date on which to commence the payment of interest, having found it to be the mean date on which amounts awarded on the various claims and counterclaims here decided were originally due.[15]

V. AWARD

IN VIEW OF THE FOREGOING, the Tribunal hereby awards as follows:

1. Respondents AIR FORCE OF THE ISLAMIC REPUBLIC OF IRAN and IRAN, jointly and severally, are obligated to pay and shall pay Claimants INTERNATIONAL TECHNICAL PRODUCTS CORPORATION and ITP EXPORT CORPORATION the sum of Two Hundred Eighty-Five Thousand One Hundred Eighty Two Dollars and Fifty-Five Cents ($285,182.55) plus simple interest at the annual rate of ten (10) percent (365 day year) from and including 1 January 1980 up to and including the date on which the Escrow Agent instructs the Depository Bank to pay the Award on the claims and counterclaims relating to the RAPCON Contract.

2. Respondents CIVIL AVIATION ORGANIZATION OF IRAN and MINISTRY OF NATIONAL DEFENSE, jointly and severally, are obligated to pay and shall pay Claimants INTERNATIONAL TECHNICAL PRODUCTS CORPORATION and ITP EXPORT CORPORATION the sum of Thirty-Four Thousand Three Dollars and

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[15] Judge Brower would prefer that the Chamber adopt and apply consistently an interest formula related to market conditions so as to compensate more realistically for damages suffered. See Sylvania, supra note 8, at 30-34 (27 June 1985). On such basis he would award interest of 12 percent.

Twenty-Eight Cents ($34,003.28), plus simple interest at the annual rate of ten (10) percent (365 day year) from and including 1 January 1980 up to and including the date on which the Escrow Agent instructs the Depository Bank to pay the Award, on the claims and counterclaims relating to the CAO Contract.

3. Such payments shall be made out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

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

Dated, The Hague
19 August 1985

Nils Mangård
Chairman
Chamber Three

In the name of God

Charles N. Brower

Parviz Ansari Moin

Concurring in part,
Dissenting in part

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

MEMORANDUM

TO: Mr. K. Fahim, Head of Language Services
FROM: N. Mangård
DATE: 13 August 1985
RE: Translation Request

The Chamber is currently considering the issue of whether a particular forum selection clause contained in a contract which was executed in Farsi only is within the scope of the exclusion contained in Article II(1) of the Claims Settlement Declaration. The original Farsi of the relevant contractual clause is attached to this memorandum as Attachment No. 1. Please have your staff prepare as precise a translation of this clause as possible, noting any ambiguities that may be present.

Also it has come to our attention that the Farsi clause contained in the contracts at issue in the forum clause decision in the Zokor case may be virtually identical to the clause in Attachment No. 1. The Zokor Farsi clause is attached as Attachment No. 2 to this memorandum. Please have your staff advise of all respects in which that Farsi clause differs from the Farsi clause in Attachment No. 1.

As a final matter, please advise us whether in translating the phrase "competent courts of Iran" appearing in Article II(1) of the Claims Settlement Declaration the Division of Language Services uses the corresponding phrase appearing in Attachment No. 1, or, if Attachments Nos. 1 and 2 differ in this respect, that appearing in the latter. If the phrase normally used by the Division of Language

Services is different from that appearing in Attachments Nos. 1 and/or 2, I would appreciate your staff explaining precisely how it differs.

As the matter to which this material relates is currently under deliberation, I would appreciate your response as soon as possible, preferably no later than 1 p.m. on Wednesday, August 14th, 1985.

Thank you for your kind assistance.

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

Date: 14 August, 1985

TO : Judge Nils Mangård

FROM : K. Fahim, Head of Language Services

RE. : Translation request on forum selection clauses

Pursuant to your request of 13 August 1985, Language Services hereby provides you with a precise translation of Attachments 1 and 2 to said request:

Attachment 1 :

"Article 53 - SETTLEMENT OF DISPUTES

Any disputes which might arise between the Employer and Contractor-- including but not limited to execution of the Works which are the subject of the Contract and interpretation of any of the Contract's articles, the General Conditions or any of the other instruments attached to the Contract-- and which the Parties are unable to resolve by means of agreement, shall be settled through recourse to the competent courts and authorities of the Ministry of Justice."

Attachment 2 :

"Article 45 - SETTLEMENT OF DISPUTES

Any dispute which might arise between the Employer and Builder-- including but not limited to execution of the Works which are the subject of the Contract and interpretation of any of the Contract's articles, the General Conditions or any of the other instruments attached to the Contract-- and which the Parties are unable to resolve by means of agreement, shall be settled through recourse to the competent courts and authorities of the Ministry of Justice and in accordance with existing Iranian law, unless there exist a convention and regulations between the Imperial Government and the Government of the Builder in this respect."

Notes:

Attachment 2 is identical to Attachment 1, except where underlined. They differ as follows: the Farsi term for "disputes" is in the singular in Attachment 2 and in the plural in Att. 1; "Builder" vs. "Contractor"; the phrase beginning,"and in accordance with existing Iranian law" does not appear in Att.1. One key phrase which might give rise to ambiguity in translation, and which appears in both Attachments, is the Farsi expression, "a'amm az inke...va ya..." This phrase can be translated, "including ... and..." However, in Farsi it signifies that all possible contingencies are to be subsumed under a provision or condition, and it should therefore be translated, "including but not limited to", in order not to give rise to an ambiguity in English which is not in the original Farsi. The other major problem lies with the Farsi word, "dad-gostari." In isolation, this word can be translated into English as "justice," or "administration of justice." It can, however, also be translated as "Ministry of Justice," and this is indeed its normal meaning. In speaking of Iranian Ministries, speakers and writers of Farsi do not habitually prefix the word "vizarat" ("Ministry") to the agency in question, since that would seem superfluous; they speak of "Culture," for example, rather than of "the Ministry of Culture." Similarly, before the current term for the Ministry of Justice was coined several decades ago,"Adliyyeh" ("Justice") was often used to refer to "vizarat-e adliyyeh" ("Ministry of Justice"). In this connection, please refer also to the attached page of Haim's Persian-English Dictionary, where circled. In the context of these forum clauses, only the meaning, "Ministry of Justice" would be plausible, and speakers of Farsi would assume that this meaning was intended.

As for the phrase "the competent courts of Iran," appearing in the Claims Settlement Declaration, the unofficial Farsi version employs the same Farsi phrase normally used by Language Services, "dadgah-ha-ye saliheh-ye Iran". This is