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CLAIMS TRIBUNAL

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دیوان دادگستری ایران - ایالات متحده

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Case No. 389

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** DISSENTING OPINION of _____
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CASE NO. 389
 CHAMBER TWO
 AWARD NO. ITL 67-389-2

WESTINGHOUSE ELECTRIC CORPORATION,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,

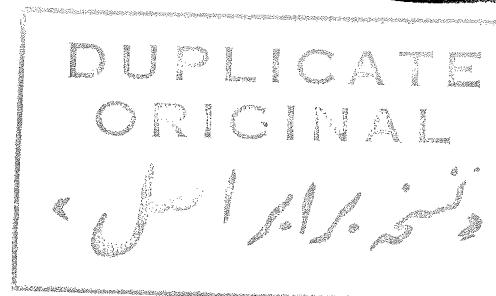
THE ISLAMIC REPUBLIC OF IRAN AIR FORCE,

IRAN AIR,

NATIONAL IRANIAN OIL COMPANY,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دادگاری دعوی ایران - ایالات متحده
FILED - شیوه	
Date 12 FEB 1987	تاریخ ۱۵۸۰ / ۱ / ۱۲
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INTERLOCUTORY AWARDAppearances:

For Claimant:

Mr. Stephen M. Boyd,
 Counsel
 Mr. James Langenwalter
 Mr. Robert McFarland
 Mr. Robert Angus
 Mr. John Suggs
 Mr. James Hutchinson
 Party Representatives

For Respondent:

Mr. Mohammad K. Eshragh,
 Agent of the Government
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 of Iran
 Mr. Seifollah Mohammadi,
 Legal Adviser to the
 Agent
 Mr. Mohsen Azadeh,
 Legal Assistant to the
 Agent
 Mr. Gholamreza Davarian,
 Attorney for the Air
 Force

Mr. Mansour A. Tehrani,
Mr. Manaf Dolatzadeh,
Representatives of the
Air Force
Col. Mohammad H. Shahrokhy,
Party Witness

Also present:

Mr. John Crook,
Agent of the United
States of America
Ms. Cathleen Corken,
Assistant to the Agent

I. The Issue

1. The claims jurisdiction of this Tribunal is limited to certain categories of claims and counterclaims as set forth in the Claims Settlement Declaration. For instance, the Tribunal has determined that it lacks jurisdiction over claims against nationals of Iran or of the United States (except for claims against controlled entities that fall within the definitions of "Iran" and the "United States" contained in paragraphs 3 and 4 of Article VII of the Claims Settlement Declaration). Decision No. DEC 1-A2-FT (26 Jan. 1982). However, Article II, paragraph 1, of the Declaration grants jurisdiction over counterclaims against those nationals who bring claims to the Tribunal, provided that any such counterclaim "arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim". Such a grant of jurisdiction is understandable as a matter of elementary fairness; if such closely connected counterclaims exist, it would be unfair to bar them from being raised and decided in the same proceeding that resolves the claims. This is also consonant with the procedural practice of international tribunals generally, which only permit counterclaims that are directly connected to the subject matter of the principal claim.¹ At the same time, the Declaration's grant of jurisdiction over counterclaims is not exclusive (the counterclaimant is free to pursue those claims in other tribunals). E-Systems, Inc. and The Government of the Islamic Republic of Iran et al., Award No. ITM 13-388-FT (4 Feb. 1983). Furthermore, our jurisdiction is limited to closely connected counterclaims; a Claimant, by bringing a claim arising out of one or more contracts does not open himself in that proceeding to any

¹ See, e.g., Article 80 of the Rules of Procedure of the International Court of Justice; Article 46 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

counterclaims a Respondent may have against him, but only to those arising out of the same contract or transaction. The question facing the Tribunal in the present Interlocutory Award is whether certain of the counterclaims in this Case, which arise out of three contracts other than those on which the claims are based, arise out of the same "transaction" as the claims.

II. The Facts

2. In the part of this Case relevant to the question at issue, WESTINGHOUSE ELECTRIC CORPORATION ("the Claimant") brought four claims against THE ISLAMIC REPUBLIC OF IRAN AIR FORCE ("the Respondent"), each based on a different contract between the Parties concerning an Integrated Electronics Depot ("the Depot") which the Claimant had designed and assisted the Respondent in establishing for the repair and maintenance of weapon and electronics systems. The Respondent, in turn, asserted numerous counterclaims against the Claimant based on various contracts between the Parties, including several of the contracts on which the claims are based, as well as a number of other contracts on which the Claimant has raised no claims. Almost all of the counter-claims were based on contracts involving the Depot.

3. The Depot was designed so that it could be modified easily to accommodate new weapon and electronics systems as they were acquired by the Respondent and was organized into several discrete work areas or "shops" equipped to handle, for example, radio, radar, or electro-mechanical equipment. The Depot contracts were concluded at various times between 1971 and 1978 and each contract called for the provision by the Claimant of specified services or equipment, or both, needed for the establishment, modification, or expansion of one or more of the specialized shops in the Depot.

4. Of the eighteen counterclaims brought in this Case, only three are directly at issue in the present Award. These three are based on three contracts concluded between the Parties in 1975 as part of the second general expansion of the Depot, an expansion required by the acquisition of new types of aircraft by the Respondent: Contracts numbered IWPC-018, dated 13 August 1975 and relating to the radar shop; IWPC-019, dated 13 August 1975 and relating to the electro-mechanical shop; and IWPC-020, dated 13 August 1975 and relating to the radio shop ("the counterclaim contracts"). The question of the Tribunal's jurisdiction over these three counterclaims was separated for early decision because the same claims based on those three contracts were brought by the Respondent against the Claimant in an Iranian court proceeding, and the Claimant responded by a suit in a United States court seeking a declaratory judgment. Both national court proceedings have been stayed pursuant to Orders of this Tribunal.

5. The four contracts on which the Claimant bases the claims brought against the Respondent are: Contracts numbered IWPC-007, dated 19 November 1974 and relating to modification of test stations in the radar shop as a result of the acquisition of a new radar system, the AN/APQ-120; IWPC-009, dated 16 February 1975 and relating to the provision of a capability in the Depot for maintenance of a radar-controlled anti-aircraft gun system called the "Super Fledermaus"; IWPC-010, dated 1 March 1975 and relating to the provision of a capability in the radio shop for maintenance of two newly-acquired radio systems, the AN/TPX-46 (V) Interrogator Set and the AN/TRC-145 Terminal Set; and IWPC-035, dated 5 February 1978 and relating to engineering assistance and support services to the radar shop and to Depot personnel for certain ground and airborne radar systems and for a computer system which had been supplied pursuant to a previous contract between the Parties. These

four contracts are hereinafter referred to as "the claim contracts."

III. Reasons for the Award

6. It is evident that each of the counterclaim contracts was legally separate and distinct from the claim contracts. The Respondent was under no contractual obligation to buy the services and equipment covered by the claim and counter-claim contracts from the Claimant or, indeed, even to give the Claimant an opportunity to bid for that work. On the other hand, it is apparent that the Claimant, as designer of the Depot and supplier of most of the Depot's equipment, had great competitive advantages with respect to receiving any proposed contracts for the expansion, modification, or servicing of the Depot. The evidence indicates that, with one exception, the Respondent purchased engineering services for the Depot only from the Claimant, although in special circumstances it purchased test equipment and support services in connection with certain weapon and electronics systems from the manufacturer rather than from the Claimant. In the special case of expansion of the Precision Measurement Equipment Laboratory, which apparently was established prior to the Depot, engineering services were purchased from another company.

7. Examination of the counterclaim contracts and the claim contracts reveals significant factual interrelationships. The Depot project as a whole went forward as a joint effort of the Claimant and the Respondent, although neither Party had either a legal right or obligation to continue the work beyond the scope of concluded contracts. The evidence indicates that the Parties maintained communications with each other throughout the period from 1971 to 1978 on a Depot-wide basis, not simply contract by contract, although questions of their mutual obligations and performance were, of course, determined in each instance by the relevant

contract. Moreover, the counterclaim contracts were cumulative in the sense that they represented expansion from the technological bases created by earlier contracts, including some of those on which the Claimant bases its claims in this Case, and they envisaged use of equipment provided pursuant to such earlier contracts.

8. In the few awards where the question has been considered, the Tribunal has only once found jurisdiction to exist over a counterclaim arising from a contract other than a contract on which a claim in the case was based. American Bell International Inc. and The Government of the Islamic Republic of Iran et al., Award No. ITL 41-48-3 (11 June 1984). In four cases, the Tribunal has found that it lacked jurisdiction because the contract on which the counterclaim was based was not part of the same transaction as the contract on which the claim was based. R.N. Pomeroy et al. and Government of the Islamic Republic of Iran, Award No. 50-40-3 (8 June 1983), Morrison-Knudsen Pacific Limited and The Ministry of Roads and Transportation et al., Award No. 143-127-3 (13 July 1984), R.J. Reynolds Tobacco Company and The Government of the Islamic Republic of Iran et al., Award No. 145-35-3 (6 Aug. 1984), and General Motors Corporation et al. and The Government of the Islamic Republic of Iran et al., Award No. 279-94-1 (17 Dec. 1986).

9. In R.N. Pomeroy, the claim was based on a contract for planning, development, and administrative services in connection with two construction projects for the Iranian Navy, while one of the counterclaims sought recovery of payments made to the claimant under previous contracts between the parties. In Morrison-Knudsen, the relevant claim was based on a contract for the design of two sections of a motorway, while some of the counterclaims were based on two additional contracts concluded some ten months later, involving the procurement of equipment, the mobilization of workers, and the construction of work camps for the motorway

construction. In R.J. Reynolds, the claims were based on specific contracts of sale of tobacco products, while four of the counterclaims were based on an overall license agreement which permitted the Iranian licensee to use Reynolds' techniques and trademarks and to distribute Winston cigarettes in Iran. In General Motors, one of the claims was based on a portion of a loan agreement, in which a third party was involved, to finance the cost of certain locomotives sold to the respondent, while the counterclaims were based on the contracts of sale of those and other locomotives.

10. In the one case in which the Tribunal found jurisdiction over a counterclaim based on a separate contract from the claim, American Bell, three contracts were concluded to cover successive periods of time in the continued performance of the same work by the claimant on a single project. The claims were based on the second and third contracts, each covering a one-year period, while the counterclaims in question were based on the first contract, which covered a three and one-half month interim period until the second contract, which covered a full year, was concluded. The Tribunal found that, in light of these particular circumstances, the linkage between all three contracts was "sufficiently strong" to make them a single transaction for the purpose of the Tribunal's jurisdiction over counterclaims.

11. Comparing the circumstances in the present Case to these Tribunal precedents, it seems clear that the factual pattern here fits more closely the rationale in American Bell than the rationale in the other four cases. While the various contracts here covered different goods and services and were entered into at different times, all the contracts were linked to the Depot project, with respect to which both Parties were, in practice, committed as a whole. As a practical matter, even though the Parties agreed to conclude separate contracts, the Respondent had no reasonable

opportunity to obtain the desired services from a competitor of the Claimant. Nor had performance of Phase III of the initial contract between the Parties on the Depot project yet been completed when the claim contracts and the counter-claim contracts were added to the on-going Depot project. The Parties initially simply amended the initial contract to add Phase III services to the Depot project and later they concluded discrete additional contracts, but this change in form did not change the substance of their relations in connection with the Depot project. Finally, when the Parties agreed to wind up the initial contract, some remaining works from the initial contract (as amended) were transferred to the relevant counterclaim contracts, which originally only implemented a second general expansion of the Depot's capabilities. In this sense, the Depot project as a whole consisted of a single transaction. The Tribunal therefore holds that it has jurisdiction over the counter-claims at issue in this Award.

12. The determination that the Tribunal has jurisdiction over the counterclaims in question supersedes the Orders of the Tribunal staying proceedings in Iranian and American courts as an interim measure. Because these counterclaims are within the Tribunal's jurisdiction, the Parties are barred by Article VII, paragraph 2, of the Claims Settlement Declaration from proceeding with their respective suits in the Public Court of Tehran and the Maryland District Court of the United States.

IV. Interlocutory Award

13. For the foregoing reasons,

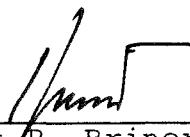
THE TRIBUNAL DECIDES AS FOLLOWS:

(a) The counterclaims based on Contracts Nos. IWPC-018,

IWPC-019, and IWPC-020 are within the jurisdiction of the Tribunal.

- (b) All other jurisdictional issues in this Case are joined to the merits.
- (c) The counterclaims determined in the present Award to be within the Tribunal's jurisdiction were and continue to be, as of the date filed with this Tribunal, excluded from the jurisdiction of the courts of Iran, of the United States, or of any other court.

Dated, The Hague
12 February 1987



Robert R. Briner
Chairman

In the name of God,



George H. Aldrich



Hamid Bahrami-Ahmadi
Concurring