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CLAIMS TRIBUNAL

دیوان داری دعاوی ایران - ایالات متحدہ

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ORIGINAL DOCUMENTS IN SAFE

Case No. 366

Date of filing: 3 Nov 87

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- Date _____

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- Date _____

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**** DISSENTING OPINION** of _____

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CASE NO. 366
CHAMBER THREE
AWARD NO. 325-366-3

126

ENDO LABORATORIES, INC.,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
TRASSPHARM TRADING COMPANY,
IRAN WALLACE COMPANY,
DAROUPAKSH, and
BONAYAD MOSTAZAFAN,
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
3 NOV 1987	تاریخ
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AWARD

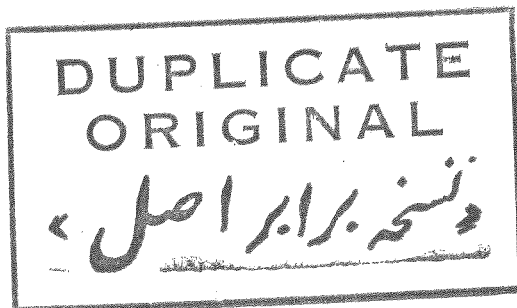
Appearances:

For the Claimant:

Mr. Carl B. Bartholomaeus,
Representative of the
Claimant.

For the Respondents:

Mr. Mohammad K. Eshragh,
Agent of the Government
of the Islamic Republic
of Iran;
Mr. Mohammad T. Naderi,
Legal adviser to the
Agent of the Government
of the Islamic Republic
of Iran;
Mr. Mehdi Bazoun,
Assistant to the Agent
of the Government of the
Islamic Republic of Iran;
Mr. Eghbal Ale Agha,
Attorney for Daroupakhsh;
Mr. Mehdi Jalilvand,
Mr. Manouchehr Lotfavar,
Representatives of
Bonyad Mostazafan.



Also present:

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

I. THE PROCEEDINGS

1. On 18 January 1982 the Claimant, ENDO LABORATORIES, INC. ("Endo"), filed its Statement of Claim against THE STATE OF IRAN (ISLAMIC REPUBLIC OF IRAN) ("Iran"), TRASSPHARM TRADING COMPANY ("Trasspharm"), IRAN WALLACE COMPANY ("Wallace"), DAROUPAKHSH TRADING COMPANY ("Daroupakhsh") and BONYAD MOSTAZAFAN ("Bonyad"). Endo requested an award against the Respondents in the amount of U.S.\$420,010.14, plus interest and costs.

2. All named Parties, with the exception of the Respondents Trasspharm and Wallace, have submitted pleadings on all aspects of this Case and a Hearing was held on 30 April 1986.

II. JURISDICTION

A. NATIONALITY OF THE CLAIMANT

3. Based on the evidence submitted, the Tribunal is satisfied that Endo is a national of the United States, as defined in Article II, paragraph 1, and Article VII, paragraph 1, of the Claims Settlement Declaration ("CSD"). At all relevant times Endo was a Delaware corporation wholly owned by another Delaware corporation, E.I. du Pont de Nemours and Company ("Du Pont"), more than 50% of the shares of which were owned by United States nationals. In December 1982 the Claimant's name was changed to "Du Pont Pharmaceuticals, Inc." and in 1983 it merged with its corporate parent, Du Pont, at which time the Claimant ceased to have an independent corporate existence.

4. The Claimant bases its claims before the Tribunal on certain sales made by its Mexican subsidiary,

Laboratorios Endo de Mexico, S.A. ("Endo Mexico"). The Tribunal finds that the evidence submitted establishes that the Claimant continuously owned 99.9% of the shares of Endo Mexico from the time the claim arose until 19 January 1981, and that the remaining shares were held by nominees of the Claimant. Accordingly the Tribunal finds that the Claimant's indirect claims based on debts allegedly owed to Endo Mexico are within its jurisdiction.

B. NATIONALITY OF THE RESPONDENTS

5. Under the CSD only claims of U.S. nationals asserted against "Iran" fall within the Tribunal's jurisdiction. Under Article VII, paragraph 3, of the CSD:

"Iran" means the Government of Iran, any political subdivision of Iran and any agency, instrumentality or entity controlled by the Government of Iran or any political subdivision thereof.

There is no question that Iran, as named by the Claimant, is the Government of Iran itself, and is within that definition.

6. The Claimant contends, and the Respondents dispute, that Iran took control of Wallace and Trasspharm, the formerly private Iranian companies which are alleged to be directly liable for the claims asserted, and delivered them to the control first of Bonyad and later to Daroupakhsh. Accordingly, the Tribunal must decide if these other Respondents are within the CSD's definition of "Iran."

1. Daroupakhsh

7. The Tribunal finds it established that Daroupakhsh is an "agency" or "instrumentality" of Iran within the meaning of the CSD. Its Articles of Association were established by a "Statutory Bill" under the auspices of the Ministry of Health, and Article 5 thereof states that all of the capital shares of Daroupakhsh are ~~"owned by the Govern-~~ment of the Islamic Republic of Iran." Article 6 states that "the Company is affiliated to the Ministry of Health." Daroupakhsh does not dispute that it is a government agency. Therefore, the Tribunal finds that Daroupakhsh is properly included within the jurisdictional definition of "Iran."

2. Bonyad

8. This Tribunal has already held that Bonyad is an Iranian governmental instrumentality within its jurisdiction. Hyatt International Corporation and Islamic Republic of Iran, Award No. ITL 51-134-1, at 31 (17 Sept. 1985). See also Foremost Tehran, Inc. and Islamic Republic of Iran, Award No. 220-37/231-1, at 18 (11 April 1986). There is nothing in the record in this Case which would cause the Tribunal to revise its position.

3. Trasspharm and Wallace

9. The Claimant identifies one or both of the two private Iranian companies Trasspharm and Wallace as the direct party to the agreement here at issue. The Claimant alleges that following their nationalization these two companies were controlled by Bonyad for some months and thereafter by Daroupakhsh. On that ground the Claimant alleges that Trasspharm and Wallace are controlled entities subject to the Tribunal's jurisdiction.

10. It appears from the evidence that both Trasspharm and Wallace were owned by three Iranian brothers -- Messrs. Badieollah, Kahlil and Habib Akhavan -- until the time of the Islamic Revolution in Iran. The Akhavans apparently left the country in 1979. On 5 August 1979 the Revolutionary Prosecutor General of Iran issued Order No. 18565, addressed to Bonyad, which stated:

Since Messrs. Badieollah Akhavan, Kahlil Akhavan, and Habib Akhavan, the shareholders in Iran Wallace Company (I.B.I.), due to misappropriation, corruption, and cooperation with the joint Bahai and Zionist societies have defected Iran, please make arrangements to supervise their property until such time a court order is issued.

11. Five months later, on 23 December 1979, Bonyad issued a letter to the Ministry of Health in which it referred to the Order No. 18565 of 5 August 1979 and stated that because "Bonyad is not able to manage pharmaceutical companies, please make appropriate arrangements for the supervision and taking delivery of the said companies."

12. Pursuant to Bonyad's request, on 2 January 1980, the Ministry of Health issued Order No. 60/2128, referring to Bonyad's letter of 23 December 1979 and ordering Dr. Nilforushan, the Managing Director of Daroupakhsh, to "take appropriate action for taking delivery" of those companies. This was done, as evidenced by an order of the Court of the Islamic Revolution in Tehran dated 27 January 1980 abrogating the rights of the former directors of certain pharmaceutical companies, including both Wallace and Trasspharm, and substituting instead the Managing Director of Daroupakhsh, Dr. Nilforushan.

13. Finally, on 11 October 1980 a notice was published in the Official Gazette of Iran stating that "by virtue of" the 23 December 1979 letter of Bonyad and the 2 January 1980

Order of the Ministry of Health, Dr. Nilforushan was appointed director of Wallace.

14. Certain of the above documents demonstrating the exercise of control by Iran over the pharmaceutical companies owned by the Akhavans refer to Wallace, without an explicit reference to Trasspharm. The Claimant alleges that ~~Trasspharm nevertheless was clearly included in the trans-~~ actions chronicled by the above documents.

15. According to the Claimant there are two explanations for the absence of a specific reference to Trasspharm in these documents. First, the Claimant states that the two companies were organized and operated as a single unit; although Wallace and Trasspharm were technically two separate companies, they shared the same offices and were operated by the same personnel. Thus, the Claimant argues, as a practical matter the companies were one enterprise, and references to Wallace in the documents and orders would have been understood as including Trasspharm. Second, the Claimant alleges that it was informed in early 1980 that Trasspharm had been formally merged into Wallace and that the separate corporate existence of Trasspharm had disappeared, apparently prior to the transactions in which the Government of Iran took control of the corporations. According to Mr. David A. Altman, at the relevant time the "Area Manager-Far East" for Endo, he was informed that the use of the Trasspharm name was continued only because it was under that name that licensing and registrations of pharmaceuticals had been obtained from the Ministry of Health.

16. The Claimant's suggestion that the two companies were merged and that Trasspharm ceased to exist as an independent entity is contradicted by other documents in the record. Daroupakhsh has submitted a series of corporate documents which demonstrate that during the months

immediately preceding the original order granting Bonyad control over the Akhavans' property Trasspharm and Wallace had held separate shareholder and board of directors' meetings and had published separate minutes in the Official Gazette. It also appears, however, that Daroupakhsh in practice considered Wallace and Trasspharm to be the same entity. This is demonstrated by the fact that although Endo

had conducted business only with Trasspharm the telex sent on 15 January 1980 from Dr. Nilforushan to Endo stated "all affairs and management of [Iran Wallace Co.] have been transferred to Darouh Pakhsh by our Ministry of Health ... [p]lease advise us clarifying your possibilities to continue your bussiness [sic] and cooperation with Darouh Pakhsh as well. Regards, Dr. Nilforushan - Managing Director." (Emphasis added.)

17. The Tribunal finds that whether or not the companies were in fact merged or were operated in a closely coordinated manner, the documentary evidence here invoked (see paragraphs 10-13, supra) must be deemed to include Trasspharm as well as Wallace.

18. This finding is confirmed by the statements of both Bonyad and Daroupakhsh. Daroupakhsh also agrees that both companies were subject to the government decrees evidenced by the documentary evidence, but alleges that the admitted transfer of both Trasspharm and Wallace to Dr. Nilforushan, who admittedly is a director of Daroupakhsh, did not grant control to Daroupakhsh over Trasspharm or Wallace. Daroupakhsh argues that the control of the companies (and several others) was granted to Dr. Nilforushan personally, unrelated to his position as Managing Director of Daroupakhsh, because he was a "trusted person."

19. It is jurisdictionally irrelevant whether control over Trasspharm was exercised by Mr. Nilforushan in his personal capacity or as a director of Daroupakhsh. In either event he acted by virtue of the authority vested in him by the Ministry of Health. Therefore both Wallace and Trasspharm are controlled entities of Iran, within the Tribunal's jurisdiction.

20. Finally, it is clear that the claims alleged in this Case arise out of a debt or contract and are therefore within the jurisdiction of the Tribunal under Article II, paragraph 1, of the CSD.

III. THE MERITS

A. BACKGROUND

21. It appears from the record before the Tribunal that on 15 March 1965 the Claimant designated Trasspharm, then a private Iranian pharmaceuticals distributor, as Endo's exclusive distributor in Iran. Although there is no specific evidence that the distributorship agreement was renewed beyond its initial 5 year duration, it is clear that the Parties maintained some kind of ongoing relationship, at least up to 1978. In 1978, whether pursuant to or independent of this agreement, Endo and Trasspharm entered into an agreement for the sale and purchase of certain pharmaceutical products. It is this agreement which is the subject of the dispute in this claim.

22. According to an affidavit by Mr. Altman, in early 1978 Trasspharm and Endo began discussing an order for two pharmaceutical products, "Mesopin" and "Vifort." By March 1978 the parties had reached an (apparently oral) agreement with respect to the quantity and price of the products to be

supplied. Thereafter, Endo sent a letter dated 15 March 1978 to Mr. B. Akhavan of Trasspharm enclosing a pro forma invoice from the Claimant's Mexican subsidiary, Endo Mexico. The pro forma invoice offered to supply the following quantities of Mesopin and Vifort at the indicated prices:

250,000 units (4 oz.) Mesopin elixer	\$175,000
250,000 units (4 oz.) Mesopin PD elixer	187,500
200,000 units (15 cc) Vifort drops	152,000
35,000 units (100's) Mesopin tablets	33,250
35,000 units (100's) Mesopin tablets	<u>33,250</u>
 TOTAL	 \$581,000

The prices were quoted "F.O.B. Mexico City;" forwarding and ocean freight charges were not included. The invoice noted that, as appears to be customary in the industry, samples of each item amounting to 10% of the ordered amount would be provided gratis.

23. After receipt of the pro forma invoice Mr. Akhavan telexed Mr. Altman, on 30 April 1978, stating that "after hard endeavor and substantial expenses" Iranian officials had approved import of the items from Mexico. Mr. Akhavan also stated that:

M.O.H. [Ministry of Health] presses us constantly to import "Vifort" and "Mesopin" immediately. Please inform Mexico to hurry production, "Vifort drops" and Mesopin liquids and ship half of total orders of Vifort and one fourth of Mesopin tab. immediately. Partial shipment allowed. Will confirm their bk. reg. [bank registration] no. soon.

24. By letter of 6 May 1978 Mr. Akhavan supplied the bank registration number as promised, referring "to your pro forma invoice for Mesopins and Vifort drops." His letter referred to the shipment as "Our order No. 81" and requested

that thereafter "order No. 81" as well as the bank registration number be listed on all documents.

25. Mr. Altman responded by letter of 2 June 1978 confirming receipt of the bank registration number and order number and further confirming that commission payments on Order No. 81 would be governed by the terms set forth in the ~~21 May 1975 letter, i.e., "Commissions would be 30% up to~~ \$250,000 volume; once this volume was obtained the commission would be 25%." The letter also stated that manufacturing schedule was being prepared and set forth "the total order and initial shipment" as follows:

	<u>UNITS</u>	
	<u>Total</u> <u>Order</u>	<u>Initial</u> <u>Shipment</u>
MESOPIN ELIXIR (120 ml.)		
- Sales	250,000	60,000
- Samples	25,000	6,000
MESOPIN PB ELIXIR (120 ml)		
- Sales	250,000	60,000
- Samples	25,000	6,000
MESOPIN TABLETS (100's)		
- Sales	35,000	9,000
- Samples	3,500	900
MESOPIN PB TABLETS (100's)		
- Sales	35,000	9,000
- Samples	3,500	900
VIFORT DROPS (15 ml.)		
- Sales	200,000	100,000
- Samples	20,000	10,000

The amounts listed in the Total Order column correspond to the amounts in the pro forma invoice and the amounts

indicated for initial shipment correspond to the amounts stated in Trasspharm's request for immediate shipment of one-half the Vifort and one-fourth of the Mesopin tablets in the telex of 30 April 1978. In addition, the shipment included one-fourth of the Mesopin Elixir.

26. By letter of 30 October 1978 Endo Mexico informed Trasspharm that the first shipment on Order No. 81 was shipped on 7 October 1978. Endo Mexico thereafter sent Invoice No. 90982 listing the goods shipped (in the quantities stated in the letter of 2 June 1978) and invoiced at a total amount of U.S.\$180,100. All Parties agree that the goods were received and that this invoice was paid.

27. By letter of 18 December 1978 Endo Mexico informed Trasspharm that the second shipment on Order No. 81 had been shipped 29 November 1978. This shipment, as shown on Invoice No. 91700 which accompanied the goods, included substantially all the remaining quantities of Mesopin PB elixir and Mesopin tablets, at a total invoice cost of \$165,958.60. Endo Mexico subsequently invoiced Trasspharm for the shipping charges on the second shipment, by Invoice No. 92242 dated 15 December 1978. The shipping charges amounted to \$25,297.98.

28. This shipment was temporarily diverted to Djibouti, but Trasspharm eventually had it transshipped and it arrived in Tehran sometime before 11 August 1979, on which date Trasspharm informed Endo that the goods had arrived. No payment for the goods or shipping charges for the second shipment was ever tendered by Trasspharm.

29. On or about 5 January 1979 Mr. Altman met with Messrs. Badi and Kalil Akhavan, apparently in the United States. Thereafter, on 15 January 1979, Mr. Altman telexed to Mr. B. Akavan the following message:

Per our discussion, please arrange a 120 day irrevocable letter of credit confirmed on a U.S bank in the amount of US\$270,000 for the third shipment from Mexico. Endo-Mexico will pay interest costs up to 12% P.A. Products are as follows:

Vifort	96,772 + 9,678	=	\$73,546.72
Mesopin PD Tabs	25,758 + 2,576	=	24,470.10
Mesopin Elixir	184,970 + 18,497	=	129,479.00
Freight Charges			42,504.18

TOTAL \$270,000.00

I would appreciate your prompt reply to arrange shipment.

30. In a follow up letter of 30 January 1979 to Messrs. Akhavan, Mr. Altman under the heading "Order No. 81" stated:

The complete order has been manufactured. Two (2) shipments have been made to the port of Khorramshahr The third shipment, as agreed, will be made after our receipt of your letter of credit in the amount of \$270,000.

31. The requested letter of credit for the third shipment was not immediately forthcoming. In a telex dated 20 February 1979 to Mr. B. Akhavan (at a telex address in Switzerland) Mr. Altman requested information concerning Trasspharm's "plans for the third shipment." In response, on 23 February 1979, Mr. Akhavan telexed (from Switzerland) that as to the "3rd shipment: Will advise as soon as situation normal." On 29 March 1979 Mr. Altman again telexed "B. Akhavan or K. Akhavan" (at their Tehran telex address) stating "I have not heard from you for one month. Please advise me of your business status." The telex noted that the second shipment had been diverted to Djibouti and suggested that the Akhavans make arrangements to transship (which, as noted above, was in fact done). Mr. Altman added: "When do you expect to accept thi[r]d shipment from Mexico? I would like to discuss matter with you."

32. That is the last record of contact between Endo and the Akhavans. It appears that in the summer of 1979 the Akhavans left Iran. On 6 January 1980, soon after Trasspharm had been delivered to the control of Daroupakhsh, the new "Managing Director" of Trasspharm, M. Mohaddes, wrote to Endo stating that "the new owners and managers of this company" desired to expand trade relations with Endo.

On 27 January 1980 Dr. Nilforushan sent a telex requesting Endo that "no amount whatsoever it may be i.e. for commissions, rebates, samples and any other then [sic] agreed allowances etc. should be paid to the previous proprietors Messrs Badi Akhavan and Kalil Akhavan[.] Otherwise[,] apart from discontinuing business[,] your outstanding dues will not be settled." The telex further requested information on any commissions previously paid to the Akhavans and directed that any future payments be made to Daroupakhsh.

33. The next day, 28 January 1980, Mr. Altman wrote Dr. Nilforushan stating that "Endo wishes to continue its business in Iran and will cooperate with Darou Pakhsh." Mr. Altman also stated that in light of Daroupakhsh's control over Wallace (and Trasspharm) "we wish to point out that Iran Wallace Co. has considerable debt outstanding to Endo, and has product still on order and in our warehouse under Bank of Tehran Bank Registration No. 575047/804/28." The telex continued, "Please advise as to when settlement of these debts and your order for the warehoused products can be expected." There is no direct response from Daroupakhsh to this telex in the record.

34. The last relevant item of correspondence that appears in the record is a letter sent to Daroupakhsh on 23 April 1981 from Endo Mexico over the signature of Arturo Fonseca A., General Manager, which states:

In the interest of renewing our commercial transactions in a near future, we are enclosing with this letter a detailed statement of Trasspharm Trading Co. account.

As you can see, Trasspharm still owes us \$80,159.56 plus \$80,773.08 worth of finished product which last year we were forced to give away to a public welfare institution in view of the fact that it was specifically manufactured for ~~this customer, not to mention the problems and~~ costs to keep products stored a long time in our warehouse.

We would kindly appreciate hearing from you in regard to these outstanding items so that we can settle this debt and continue our business relationship.

The referenced "detailed statement" states as follows:

TRASSPHARM TRADING CO.
TEHRAN, IRAN
APRIL 22, 1981.

OUTSTANDING INVOICES:

		<u>U.S. Dlls.</u>
91700	\$165,958.60	
92242	" <u>25,297.98</u>	\$191,256.58

CREDIT MEMOS:

15945	" 60,303.50	
15946	" <u>50,793.52</u>	" <u>111,097.02</u>
TOTAL		\$ <u>80,159.56</u>

Attached to this statement are copies of the referenced invoices and credit memos.¹

¹The Statement of Account and attachments were submitted to the Tribunal by the Respondent Daroupakhsh. They were included, however, only with the Farsi text of the Memorial, and not with the English text. Thus, when at the Hearing these documents were called to the attention of the
(Footnote Continued)

B. CLAIM FOR PAYMENT FOR THE SECOND SHIPMENT OF ORDER
NO. 81

35. The Claimant contends, and the Tribunal agrees, that the record as described above evidences that the goods listed on Invoice No. 91700 of 6 November 1978 (the second shipment) were received by Trasspharm.

36. Daroupakhsh denies, however, that the full invoiced amount is still outstanding. Daroupakhsh contends that the invoice amount should be reduced by the amount of commission payments payable on the sale. The contract for sale clearly provided for a commission of 30% up to the first U.S.\$250,000 of the invoiced amount and 25% thereafter, for each order. In support Daroupakhsh refers to the letter from Endo Mexico, dated 23 April 1981, in which Endo Mexico provided with a "detailed statement of Trasspharm Trading Co. account" (see paragraph 34, supra). In that letter, Endo Mexico stated "Trasspharm still owes us U.S.\$80,159.56 [for the second shipment] plus U.S.\$80,773.08 worth of finished product [the third shipment]." As shown on the attached account Endo Mexico calculated the balance of U.S.\$80,159.56 due on the second shipment by subtracting from the total invoiced amount, U.S.\$191,256.58, amounts appearing in two "credit memos," numbered 15945 and 15946, both dated 31 December 1978, which reflect credits of U.S.\$111,097.02 in favor of Trasspharm. The Respondents suggest that the credits represent the commissions due on the two shipments.

37. While the Claimant's counsel was unable at the Hearing to provide any other explanation of the source or

(Footnote Continued)

counsel for the Claimant, he stated that he was not previously familiar with them.

purpose of the credits, he agreed that they likely reflected commissions payable on the first and second shipments as they approximately corresponded to the contractual formula applied to the value of the first two shipments.

38. The Tribunal considers that, whatever the origin of these credits, it is quite clear that they were generated ~~by Endo Mexico in December 1978 and apparently considered by~~ it in 1981 as a valid reduction of the amounts outstanding on invoices 91700 and 92242 to U.S.\$80,159.69. Therefore, the Tribunal concludes that Trasspharm owes the Claimant the remaining balance of U.S.\$80,159.56 for the goods shipped under the second shipment.

C. CLAIM FOR PAYMENT FOR THE REMAINING GOODS
MANUFACTURED FOR ORDER NO. 81

39. The second part of the claim is based on the Respondents' failure to accept and pay for the remainder of the goods manufactured in response to Order No. 81. As described above, the pro forma invoice for Order No. 81 provided for specific quantities of goods at a total invoice cost price of U.S.\$581,000.00. Under the first and second shipments goods totalling U.S.\$180,100.00 and U.S.\$165,958.60, respectively, were sent to Trasspharm, leaving a balance remaining to be paid for goods remaining to be shipped of U.S.\$234,941.40. It appears, however, that Mr. Altman and Messrs. Akhavan agreed to modify slightly the amounts remaining to be provided in the third shipment and that the actual value of the third shipment was U.S.\$227,495.82. Together with shipping charges, the shipment would amount to U.S.\$270,000. It apparently was further agreed that shipment would be made after Endo's receipt of a 120 day irrevocable letter of credit confirmed by the U.S. bank in the amount of U.S.\$270,000.

40. For reasons which are not explained, the actual numbers of products which were ready for shipment (as listed on the invoice attached to the Statement of Claim) varied slightly from the amounts set forth in the 15 January 1979 telex (see paragraph 29, supra). The result of the difference is that the total amount claimed, U.S.\$228,753.56, is slightly larger than the amount contemplated in the 15 January 1979 telex, although it is still some U.S.\$7,000 less than contemplated in the original pro forma invoice. Whatever the reasons for this slight discrepancy, no Respondent has ever raised this variance from the contract amounts as an excuse for Trasspharm's refusal to take delivery of the goods.

41. Despite repeated requests, Trasspharm never ordered shipment of the goods. Finally, allegedly in April 1980, Endo Mexico donated the "third shipment" to a public health agency of the Mexican government.

42. Daroupakhsh's first defense to payment for the goods ordered for the third shipment is that the contract for the goods did not obligate it in any way to accept the third shipment, but that it had an option to order the remaining materials or not. Daroupakhsh alleges that Trasspharm was "at liberty to accept or reject the remaining part of the order no. 81 and they had no lawful and legal pressure and obligation."

43. It is clear from the record, however, that the pro forma invoice that was the basis of the contract was a single offer and that its acceptance created a contract for the entire amount. The entire order was called Trasspharm's Order No. 81 and was always referred to as such in the correspondence between the parties. A letter from Endo to Trasspharm on 2 June 1978 specifically noted the amounts to be shipped in the requested initial shipment, as well as the

amounts of the "total order." In light of these documents and the fact that Trasspharm accepted performance under the first part of Order No. 81, the Tribunal determines that there was a binding contract for the entire amount listed on the pro forma invoice.

44. The Respondents further claim that Trasspharm was ~~under no obligation to pay the claimed amount because the~~ invoice submitted by the Claimant was incomplete and did not list the ship on which the goods were shipped. The Respondents state that such a "fabricated" invoice cannot be the basis of a payment obligation.

45. The Tribunal finds it clear, however, that the claim on the third shipment is not a claim based on an invoice for goods delivered. Rather it is a claim based on a breach of a contractual duty to accept goods. Since Trasspharm never accepted the goods, they were never shipped. The fact that the invoice is not complete simply demonstrates that the goods were not shipped.

46. In the view of the Tribunal, what the Respondents' defense really amounts to is a denial that Endo was prepared for its part to complete performance of the contract, i.e., that, in fact, it had not manufactured the goods for which it now requests payment. In a meeting on 5 January 1979 (confirmed in a letter dated 30 January 1979), however, Endo confirmed to the Akhavans that "[t]he complete order has been manufactured." Endo stated that it was at that time ready to make shipment and it continued to reiterate to the new managers of Trasspharm that the goods were being stored in its warehouse and were ready for immediate shipment. The invoice for the goods appears to have been prepared in the ordinary course of business, preparatory to shipment. The Tribunal finds that, in the absence of any contrary showing by the Respondents, the evidence is sufficient to

substantiate the existence of the goods in the amounts listed on the invoice for the third shipment and thus to confirm the Claimant's readiness to perform.

47. A further defense raised is that when Endo gave away the goods that were to be shipped in the third shipment it thereby lost its rights to sue for payment of the goods.

~~According to Daroupakhsh, by donating the goods to the~~
Mexican government, Endo "took possession of the property of others and donated them to other people at its own will." Daroupakhsh also claims that donating the goods was unreasonable because the shelf life of the goods was sufficiently long that the Claimant could have waited longer until the issue became "somewhat clear."

48. The Claimant responds that it was perfectly clear that Trasspharm's refusal to provide shipment instructions after a delay of over a year meant that Trasspharm would not accept the goods. Conceding that the shelf lives of the goods were three years for the liquids and five years for the tablets, the Claimant argues that it was constrained to act sufficiently before their expiry in order to allow time for distribution, and that it was reasonable to find some beneficial use for the goods rather than store them indefinitely.

49. The Claimant further alleges that it was constrained to donate rather than sell the goods because they were manufactured and labelled specifically for use in Iran and therefore were not resaleable. The Claimant explained at the Hearing that the packaging of the goods was printed with registration numbers and label information that had been specifically required by the Iranian Government. In addition, the size of the packages and dosage forms were unique to Iran. To resell outside Iran would have required repackaging. The Claimant alleged that to repackage the

goods would have required manual opening of the bottles, a procedure both contrary to accepted cleanliness and control standards of the pharmaceutical industry and prohibitively expensive.

50. While more concrete evidence on this point would have been helpful, the Tribunal finds the Claimant's explanations reasonable. The goods appear not to have been resaleable. In addition the Tribunal takes into consideration the fact that continued storing of the goods would have caused the Claimant to incur additional warehousing costs and that shipment of same likewise would have caused it to incur costs with no prospect of reimbursement. On balance the Tribunal finds that the Claimant, under the circumstances, acted reasonably and consequently is not in breach of the obligation to mitigate damages.

51. Daroupaksh's final defense to payment of the full invoice amount is based on Endo Mexico's letter of 23 April 1981. In that letter Endo Mexico stated that the goods to be shipped in the third shipment were worth U.S.\$80,773.08. The Respondents argue that this should be considered an admission of the maximum value of the goods. The Claimant argues, on the other hand, that the U.S.\$80,773.08 amount reflected only its direct manufacturing cost of the goods, and does not take into account indirect costs, overhead or profit. According to the Claimant, Endo Mexico had stated that lower amount in the letter to Trasspharm in 1981 as a settlement offer, in the hopes of reestablishing business contacts.

52. The Tribunal finds nothing in the record suggesting that Claimant's explanation for the lower figure as to the third shipment is implausible. It appears that Endo was willing to forego recovery of all but its direct costs on the prior contracts in hopes of stimulating further sales.

As no such future business relations ever materialized, the Claimant is entitled to claim the full amount of its contract claim. It is clear that under the contract the Claimant was entitled to payment of U.S.\$228,753.56 upon making available the corresponding amount of goods to Trasspharm. Trasspharm was under a contractual duty to accept those items and pay that amount. Subtracting the 25% ~~commission which the Claimant admitted would have been~~ credited if Trasspharm had accepted and paid for the goods, the Tribunal finds that the Claimant is entitled to damages for breach of contract in the amount of U.S.\$171,565.17.

IV. INTEREST

53. The Claimant seeks interest on the amounts awarded. The Tribunal determines that the Claimant is entitled to interest and that 10% per annum in a fair rate.

54. The invoice for the second shipment required payment 120 days after shipment; shipment was effected 29 November 1978. The Tribunal therefore awards interest on the amount of U.S.\$80,159.56 beginning 1 April 1979.

55. Trasspharm was aware, at the latest by 30 January 1979, that the goods for the third shipment were ready to ship. The Tribunal finds that Trasspharm should have ordered the goods by that date and that consequently payment would have been due in 120 days. Accordingly, the Tribunal awards interest on the amount of U.S.\$171,565.17 beginning 30 May 1979.

V. COSTS

56. Each party shall bear its own costs.

VI. AWARD

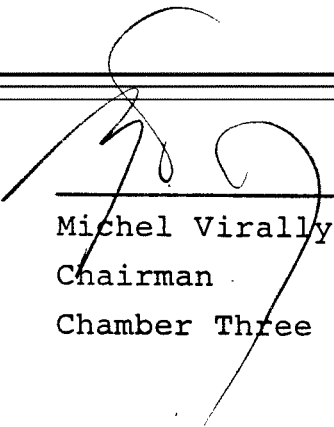
57. For the foregoing reasons:

THE TRIBUNAL AWARDS AS FOLLOWS:

- a) The Respondent TRASSPHARM is obligated to pay the Claimant ENDO LABORATORIES, INC. the sum of U.S.\$80,159.56 (eighty thousand one hundred and fifty-nine United States dollars and fifty-six cents), plus simple interest due at the rate of ten percent (10%) per annum (365 day basis) from 1 April 1979 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.
- b) The Respondent TRASSPHARM is obligated to pay the Claimant ENDO LABORATORIES, INC., the sum of U.S.\$171,565.17 (one hundred and seventy-one thousand five hundred and sixty-five United States dollars and seventeen cents), plus simple interest due at the rate of ten percent (10%) per annum (365 day basis) from 30 May 1979 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.
- c) All of the above obligations shall be satisfied by payment 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.
- d) Each Party shall bear its own costs of arbitration.

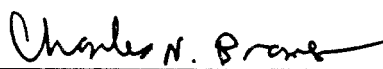
This Award is submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated, The Hague,
3 November 1987

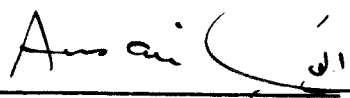


Michel Virally
Chairman
Chamber Three

In the name of God



Charles N. Brower



Parviz Ansari Moin
"Concurring in part
Dissenting in part"