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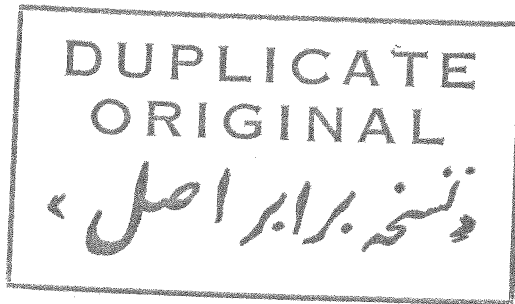
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داری دعاوی ایران - ایالات متحدہ



CASE NO. 210

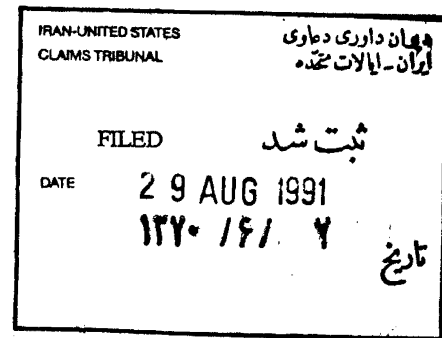
CHAMBER THREE

AWARD NO. 520-210-3

WILLIAM J. LEVITT,
Claimant,

and

ISLAMIC REPUBLIC OF IRAN,
MINISTRY OF AGRICULTURE AND
NATURAL RESOURCES OF THE
ISLAMIC REPUBLIC OF IRAN,
MOGHAN AGRO-INDUSTRIAL AND
LIVESTOCK DEVELOPMENT CORP.,
and BANK MELLI IRAN,
Respondents.

AWARD

Appearances:

For the Claimant:

Mr. William J. Levitt,
Claimant;
Mr. Alan Weitz,
Mr. John Grabow,
Attorneys;
Ms. Laura Marshall,
Assistant to Claimant's
attorneys;
Mr. Ralph Della Ratta,
Witness.

For the Respondents:

Mr. Ali H. Nobari,
Agent of the Government of the
Islamic Republic of Iran;
Dr. Mohammad Taghi Naderi,
Legal Advisor to the Agent of
the Government of the Islamic
Republic of Iran;
Mr. Karam Ali Kamayestani,
Legal Assistant to the Agent
of the Government of the
Islamic Republic of Iran;
Dr. Mohammad Tehrani,
Attorney of Ministry of
Agriculture and Natural
Resources of the Islamic
Republic of Iran and of Moghan
Agro-Industrial and Livestock
Development Corp.;
Mr. Mohammad Ali Okhovati,
Representative and Legal
Advisor of Ministry of
Agriculture and Natural
Resources of the Islamic
Republic of Iran and of Moghan
Agro-Industrial and Livestock
Development Corp.;
Ms. Narges Esfandiari,
Representative of Bank Melli
Iran;
Mr. Iraj Rezaei,
Mr. Latif Fathi,
Witnesses.

Also present:

Ms. Lucy F. Reed,
Agent-Designate of the
Government of the United
States of America;
Mr. Michael F. Raboin,
Deputy Agent of the Government
of the United States of
America.

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I. INTRODUCTION

1. The Claimant, WILLIAM J. LEVITT ("Levitt" or the "Claimant"), is an American building contractor. He presents a claim on behalf of a Bahamian corporation named International Construction Co. (Iran) Ltd. ("ICC" or the "contractor") that is allegedly owned by him. The Respondents are the ISLAMIC REPUBLIC OF IRAN ("Iran"), the MINISTRY OF AGRICULTURE AND NATURAL RESOURCES OF THE ISLAMIC REPUBLIC OF IRAN ("the Ministry"), MOGHAN AGRO-INDUSTRIAL AND LIVESTOCK DEVELOPMENT CORP. ("Moghan" or the "employer"), and BANK MELLI IRAN ("Bank Melli") (collectively the "Respondents").

2. In 1977 ICC entered into a contract ("the Contract") with Moghan for the construction of an irrigation system in the Moghan Project in Northern Iran. To secure the Contract, ICC provided performance bonds backed by letters of credit. The Claimant asserts that, when the general situation in Iran in November 1979 forced ICC to withdraw from the project, ICC had substantially completed its performance under the Contract in spite of mismanagement on Moghan's part, civil unrest, expulsion of expatriate workers, strikes and orders for extra work issued by Moghan, but that Moghan breached its contractual obligations by failing to accept delivery of the work and to pay accordingly. The Claimant seeks compensation for the work that Moghan has allegedly not paid for, including certain additional work performed, and for equipment allegedly expropriated by Iran. The Claimant also seeks the release of the letters of credit that were called by Moghan and subsequently blocked and of an amount contractually withheld from payment on the Claimant's invoices. The total amount

of damages he claims is U.S.\$4,065,209.23 plus costs and interest.¹

3. The Respondents deny any liability and contend that it was ICC that breached the Contract by completing the work in 1981 instead of April 1978. The Respondents further assert that ICC's performance was defective, that Moghan has paid Rls. 32,152,252 in expenses that should have been borne by ICC, that ICC's late performance caused damage to trees planted by Moghan, and that Moghan is entitled to the proceeds of the blocked letters of credit. The Respondents present counterclaims in the amount of Rls. 70,695,055 for overpayment made to ICC, Rls. 74,257,974 for damages caused by ICC's performance, and Rls. 42,240,050 for taxes allegedly due by ICC.

II. PROCEDURE

(a) History

4. The procedural history of this Case is protracted. It involves a series of Tribunal Orders requesting the Respondents to produce evidence. The Orders stem from the Claimant's Statement of Claim, which was filed on 11 January 1982. In that filing, the Claimant asserts that in late 1979 ICC's Tehran office was ransacked by individuals "acting either under the direction of Defendants or through their acquiescence." The Claimant contends that on that occasion all records, documents and bank statements were either destroyed or confiscated. As a result, according to the Claimant, neither he nor ICC possesses copies of the relevant contracts, bank records, and other pertinent evidence. He suggests, however, that the Respondents have

¹Initially the Claimant sought at least U.S.\$8,500,000 plus costs and interest.

access to the confiscated documents.

5. On 30 April 1982 the Respondents filed their Statements of Defense and Counterclaim. By Motion filed on 8 June 1982 the Claimant pointed out that the Respondents had failed to file the exhibits referred to in the text of their Counterclaim. By Order filed on 15 June 1982, the Tribunal directed the Respondents to submit the missing exhibits. On 26 July 1982 the Respondents filed a document purportedly containing all the exhibits pertaining to the Case.

6. On 6 September 1982 the Claimant filed, in addition to a brief Statement of Defense to Counterclaim, a Discovery Request, asserting that "[a]s Defendants' Statement of Defense and Counterclaim and the attached exhibits make clear, Defendants are in possession of many, and perhaps all, of the documents that are material to this case." The Claimant further stated that "during negotiations between Levitt and a representative of Defendants in October 1981, Defendants promised promptly to provide Levitt with copies of the contract and all other pertinent documents." By Order filed on 23 September 1982 the Tribunal scheduled a Pre-hearing Conference and instructed the Respondents to submit "the contract in question and legible exhibits." It also directed the Respondents to be prepared "to respond to the Claimant's request for discovery of documents at the Pre-hearing Conference."

7. The Pre-hearing Conference was held on 12 October 1982. On 1 November 1982 the Claimant filed a report concerning the Conference. The report stated that at a subsequent meeting, held at the Tribunal's suggestion, the Claimant's counsel had provided the Respondents' attorney with a list of documents that the Claimant desired, most of which documents the Respondents had referred to in their pleadings and certain of which they allegedly had in their possession

at the meeting. The report further stated that the Respondents' counsel promised that the Ministry would "produce all existing documents requested in items 1-9 and 11-12."

8. On 16 November 1982 the Tribunal issued an Order for Production of Evidence requiring the Ministry to submit, inter alia, "all available documents listed in Annex A to this Order, which documents have been referred to in the Respondents' submissions indicated in the Annex." The Order requested the production of, inter alia, (i) "[a]ll contracts and process verbals [sic] between the parties including but not limited to ... [certain named documents];" (ii) "[a]ll minutes of meetings" between the Parties "between 1977 and 1981 on this project including but not limited to ... [certain named meetings and their dates];" and (iii) "all correspondence" between the Parties "including but not limited to ... [certain items of correspondence]."

9. On 31 January 1983 the Claimant filed an affidavit and other evidence relating to his ownership of ICC.

10. On 16 March 1983 the Respondents filed their response to the Order for Production of Evidence. Their response contained a copy of the Contract, certain new exhibits and exhibits that the Respondents had already filed in their submission of 26 July 1982. It also included the following general comment on the Order:

In general, until such a time that Claimant does not [sic] specifically refer to the subject and reference numbers of the letters, documents and papers requested by it, fulfilment of such requests remains impossible (notwithstanding the relation of such documents and paper to Claimant and their availability). For example, Claimant in items 1, 2, 3, 4, 6, 7, specially 9 and 12, requests all records and documents, or all monthly status reports, or all records of Ministry of Agriculture bank transactions and all records of payments and credits to ICC. Does fulfilment of

such request sound reasonable to the respected Tribunal? Under such conditions, Respondent has to establish an office and hire a number of employees to dig into the records for a long time and extract and make available for the Claimant the documents needed by it over which the Claimant has no right.

11. On 7 April 1983 the Deputy Agent of Iran filed a request for an extension to respond further to the Order for Production of Evidence. He explained that the Respondent was "in the process of implementing the Tribunal's order but, owing to existing difficulties, has been unable to announce the result of its actions." The Tribunal granted this request on 19 April 1983.

12. On 25 April 1983 the Claimant filed a motion requesting the Tribunal to direct the Respondents to comply fully with the Order for Production of Evidence. The Claimant renewed his request on 9 June 1983. On 20 June 1983, noting that "[o]n 16 March 1983, the Respondents filed parts of the material ordered to be produced, stating that they were not able to comply fully with the 16 November 1982 Order," the Tribunal directed the Respondents to file "those documents which have not already been submitted in accordance with the Order of 16 November 1982 to the extent that such documents are available to Respondents or under Respondents' control." On 28 September 1983 the Agent of Iran filed a statement that the Ministry "has informed us that in spite of investigations made and actions taken, it has not been able to obtain any further documentation other than what has been filed previously."

13. On 18 October 1983 the Claimant requested the Tribunal to order the Respondents to specify what actions they had taken in response to the Tribunal's Order for Production of Evidence. The Claimant observed that "the Ministry has failed in all respects to comply with the Tribunal's Order" and, moreover, "has failed to explain the reasons for its non-compliance."

14. On 21 October 1983 Bank Melli filed its Memorial. On 1 November 1983 a joint Memorial was filed by the Ministry and Moghan.

15. On 3 November 1983 the Tribunal issued a further Order regarding the production of documents by the Respondents. Following a review of the previous Orders and responses, the Tribunal concluded that "the explanation offered by the Ministry in the 28 September and 1 November 1983 submissions provide[s] an inadequate basis upon which to determine whether the Ministry's failure to provide all of the listed documents is justified under the circumstances." The Tribunal ordered the Ministry to file a separate response to each of the items listed in the Order of 16 November 1982 and added that

[e]ach separate response shall be clearly identified, enumerated and tabulated by item or sub-item to facilitate the Tribunal's review of the efforts to comply with the Tribunal's Order of 16 November 1982; ... Each of the separate responses shall either include the document listed (even if previously filed) or explain fully the reasons why a certain document cannot be submitted.

16. On 9 November 1983 the Ministry filed a Memorial. As to the production of evidence, the Ministry noted that it had "extremely collaborated" and had already submitted all available documents requested by the Claimant.

17. On 9 January 1984 the Ministry filed its Reply to the Order of 3 November 1983. Contending that it had complied with the Order of 16 November 1982, the Ministry in this Reply provided various explanations with respect to the items requested by the Tribunal. With respect to the correspondence requested, the Ministry declared that

the term "all correspondence between ICC and Ministry of Agriculture between 1977 and 1981 on this project" is very ambiguous and beyond the

ability of Respondent to possibly explore, locate and submit such correspondence. All available documents as listed under items (a), (b), (c), (d), (e) ... have been prepared and submitted to the Tribunal for Claimant's information and use. If Claimant needs other additional documents, it should give the date or number or at least the subject matter of such correspondence indicating for example, letter of Contractor to Employer concerning a given subject matter and other details to enable Respondent to look for the needed documents and submit them, if they are located.

The Ministry filed a further Memorial on 8 March 1984 in which it submitted that it had no further documents at its disposal. This Memorial included a tax counterclaim.

18. On 16 March 1984 Iran filed a Brief relating to the Tribunal's jurisdiction.

19. On 22 April 1986 the Respondents filed a Statement of Counterclaim Arising out of Bank Guarantee. The procedural status of this counterclaim is discussed in paragraphs 29 and 30, infra.

20. By Motion filed on 12 August 1986 the Claimant again requested the Tribunal to order the Respondents to comply with the Orders for the production of documents. He further asserted that additional records relating to ICC were taken when the Foundation for the Oppressed (Bonyad Mostazafan) on 30 July 1982 confiscated the files of ICC's lawyer in Tehran. Attaching an affidavit by ICC's Iranian lawyer to this effect, the Claimant argued that the Respondents should produce these files as well. By submission filed on 19 September 1986 the Respondents objected to the Claimant's request, which the Claimant reiterated in a response filed on 24 October 1986.

21. The Tribunal issued its final production Order on 31 March 1987, stating in part:

The Tribunal, after the examination of the documents and explanations submitted by the Ministry and consideration of the statements of both Parties relevant thereto, finds that the Ministry did not fully comply with the Tribunal Order of 3 November 1983. Therefore the Ministry shall by 5 May 1987:

- I. submit either the documents listed below or explain why a certain document cannot be submitted.
- II. clarify certain inconsistencies of its contentions described below.

The Order further specifically directed the Respondents to submit, inter alia, copies of the minutes of seven meetings, a number of letters and other communications, and payment records, all of which had been referred to in exhibits previously filed by the Respondents. Finally, because the Foundation for the Oppressed is not a party in this Case, the Tribunal declined to grant the Claimant's request relating to the files allegedly confiscated by the Foundation for the Oppressed.

22. On 26 May 1987 the Respondents filed a Reply to the Order of 31 March 1987. In pertinent part, it stated that the Tribunal's production Orders had been exactly complied with, that all minutes and letters requested by the Tribunal had been submitted, that all banking records of the Ministry in connection with the project had been provided, and that the production of evidence other than that already filed was an impossible task for the Respondents. With respect to a circular of 12 December 1979 requested by the Tribunal the Respondents stated:

As no such request had been made by the Claimant in the list of Annex A of the Tribunal's order dated 15 November 1982 so that an order to be rendered by the Tribunal on that basis, thus this request has been raised after the Tribunal's order. Therefore, as the Honorable Tribunal would note, no order has been issued in this respect upon which the Claimant could rely.

23. On 25 February 1988 the Tribunal issued an Order noting the Respondents' Reply to the Tribunal's Order of 31 March 1987 and setting the schedule for further proceedings in the Case. An evaluation by the Tribunal of the Respondents' replies to the Tribunal's Orders for the production of documents is included in the Tribunal's consideration of the merits of this Case. See paras. 56 through 66, *infra*.

24. On 25 May 1988 the Claimant filed his Hearing Memorial attaching his own affidavit including exhibits. On 1 March 1989 the Ministry filed a Memorial.

25. The Claimant and Iran each submitted a Rebuttal Memorial on 29 May 1989. Having previously indicated that further extensions of time should not be anticipated, by Order of 11 July 1989 the Tribunal denied an extension request by the other Respondents and directed them to submit Rebuttal Memorials forthwith. On 28 September 1989 Bank Mellî filed Comments in rebuttal and on 9 October 1989 the Ministry filed a Reply to the Claimant's Rebuttal Memorial. The Tribunal has decided not to accept the latter two submissions because they were filed in violation of the schedule set by the Order of 11 July 1989 and sought to respond to the Claimant's Rebuttal Memorial. The Parties were informed of the Tribunal's decision at the Hearing.

26. A Hearing was held on 28 February 1990.

(b) Admissibility of Rebuttal Evidence

27. On 25 January 1990 the Claimant designated Mr. R. Della Ratta as a witness. The Respondents on 16 February 1990 filed a notification designating Mr. I. Rezaei and Mr. L. Fathi as "rebuttal witnesses." Article 25, paragraph 2, of the Tribunal Rules requires the notification of witnesses to take place at least 30 days before the Hearing. Note 2 to

this Article provides an exception, however, for rebuttal witnesses:

The information ... is not required with respect to any witnesses which an arbitrating party may later decide to present to rebut evidence presented by the other arbitrating party. However, such information concerning any rebuttal witness shall be communicated ... as far in advance of hearing the witness as is reasonably possible.

28. In its Award on another claim filed by the Claimant, William J. Levitt and The Government of the Islamic Republic of Iran, et al., Award No. 297-209-1, para. 23 (22 Apr. 1987), reprinted in 14 Iran-U.S. C.T.R. 191, 197-98 ("Levitt I"), the Tribunal observed that this exception pertains only to witnesses who are called to rebut evidence presented at the Hearing or so soon before it as to render the normal period of notice impossible. Having found that this condition was satisfied, the Tribunal decides to admit into the record the testimony presented by Mr. Rezaei and Mr. Fathi.

(c) Statement of Counterclaim Arising out of Bank Guarantee

29. In April 1981 Bank Melli demanded payment under the two letters of credit at issue in this Case. On 8 May 1981 the United States Department of the Treasury issued a license to ICC to block these letters of credit. Bank Melli subsequently submitted to the Tribunal a claim for their release, which claim was filed as Cases Nos. 513 and 550 in Chamber One. By Orders issued on 24 April 1985 Chamber One decided that Bank Melli should request that its claim to release the letters of credit be joined as a counterclaim to the Case involving the contract to which they relate, i.e., Case No. 210. The Order was issued pursuant to Award No. 108-A-16/582/591-FT, which had been rendered by the Full Tribunal on 25 October 1983. On 16 August 1985 Chamber One informed the parties in Cases Nos. 513 and 550 that such

request "must be timely filed, not later than six months from the date of this communication."

30. The Respondents filed their Statement of Counterclaim Arising out of Bank Guarantee in the present Case, requesting the release of the letters of credit, on 22 April 1986. By Order of 25 February 1988, taking note of the Parties' comments submitted on 25 August 1986 and 17 February 1987, the Tribunal ruled that "the Respondents' request of 22 April 1986 was submitted too late and cannot be admitted."

(d) Tax Counterclaim filed on 8 March 1984

31. The Claimant has suggested that the Respondents' tax counterclaim, submitted with their Memorial of 8 March 1984, was not timely raised. He contends that, especially given the Respondents' failure to respond to the Tribunal's production Orders, admission of this counterclaim would severely prejudice his position. In response to this objection, the Ministry explained that the counterclaim for taxes was not filed with the Respondents' other counterclaims because at that time the Ministry of Finance had not yet levied those taxes. Iran has added that this was "due to the fact that the Claimant company failed to submit its commercial books to the Ministry ... on time, so that the applicable amount of tax could not be clarified."

32. Article 19, paragraph 3, of the Tribunal Rules states that a counterclaim may be made in the statement of defense, or at a later stage in the proceedings if the Tribunal decides that the delay was justified under the circumstances. The prevailing practice of the Tribunal is to determine the admissibility of a late-filed counterclaim by considering the possibility for prejudice to the other party and the explanation, if any, for the delay. See Harris International Telecommunications, Inc. and The Islamic

Republic of Iran, et al., Award No. 323-409-1, para. 94 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 31, 59.

33. In assessing the explanation provided by the Respondents, the Tribunal notes the following. ICC has submitted income tax returns for 1978 and 1979, which, together with 1980, are the operating years on which the counterclaim is based. The cover letters transmitting these returns to the Iranian tax authorities state that ICC had attached a "detailed list of the accounts indicated in the income tax return." These accounts and the returns have been submitted by the respondents in the Levitt I Case, thus making them available to the Claimant for submission in the present Case. The Respondents' explanation for the delay in filing the counterclaim is contradicted by the dates of the income tax assessment sheets introduced by the Respondents. The assessment for 1978 is dated 8 June 1980 and the assessment for 1979 carries the date of 17 March 1981. Therefore, the Respondents have not justified the late submission of their tax counterclaim, and the Tribunal must reject it as untimely filed.

III. JURISDICTION

(a) The Claimant

34. The Claimant contends that he is a United States national, that he has continuously owned more than ninety-nine percent of ICC's stock at all relevant times, and that ICC as a Bahamian corporation is not itself entitled to bring the claim under the terms of the Claims Settlement Declaration. In support of this contention, the Claimant has submitted various evidentiary materials. The Tribunal in Levitt I found that the evidence submitted in that Case established that the Claimant "was a United States national from the date of his birth in New York in 1907 and

at the date of issue of his current passport on 4 August 1982;" that "4,996 of the 5,000 shares issued as at 1 January 1977 were held in the name of Mr. Levitt, and that he continued to own the same number on 23 February 1984;" and that ICC was incorporated in the Bahamas and thus was ineligible to claim before the Tribunal. See Levitt I, Award No. 297-209-1 at paras. 25, 27, reprinted in 14 Iran-U.S. C.T.R. at 198-99. In view of these findings, which the Respondents have not contradicted, the Tribunal is satisfied that Levitt's claim meets the requirements of Article VII, Paragraph 2, of the Claims Settlement Declaration.

(b) The Respondents

35. Moghan does not contest the Claimant's assertion that Moghan is an entity controlled by the government of Iran within the meaning of Article VII, Paragraph 3, of the Claims Settlement Declaration. The Tribunal further notes that the "Generalities and Instruction Concerning Participation in Tender" for the Moghan project, which document was submitted by the Respondents, describes Moghan as "affiliated to the Ministry." The Tribunal is therefore satisfied that it has jurisdiction over Moghan.

36. In the initial stage of the proceedings the Ministry contended that Levitt's claim is not attributable to it. At the Hearing, however, the Ministry did not dispute its designation as a Respondent. Considering the Ministry's involvement in the project, as demonstrated by Moghan's affiliation to the Ministry and by a number of documents in the record, the Tribunal finds that the Ministry is a proper Respondent in this Case.

37. Bank Melli has asserted that it is not properly a Respondent in this Case. It reasons that "claims regarding the cancelling or release of the guarantees shall be made by

the beneficiary and the party guaranteed as litigants, in that Bank Melli is in no position to cancel or release the guarantees. Putting any claim in this respect against Bank Melli . . . is irrelevant." The Tribunal observes that the relief sought by Levitt with respect to the letters of credit necessarily involves Bank Melli, being the beneficiary of those letters. The claims filed by Bank Melli itself in Cases Nos. 513 and 550 confirm this involvement. The Tribunal thus holds that Bank Melli has properly been named a Respondent in this Case.

(c) Dispute Settlement Clause

38. The Respondents argue that article 53 of the "General Conditions" incorporated into the Contract precludes the Tribunal's jurisdiction over the claim. In the English version of the Contract supplied by the Ministry, this clause provides in relevant part:

Disputes between the employer and the Contractor, whether involving the execution of the contract or related to interpretation of the Articles of the contract, the General Conditions or the supporting documents, should be settled through negotiation. If negotiations are not successful, the disputes should be settled according to the Iranian laws by recourse to competent judicial authorities.

39. As noted in Levitt I, it is well settled that in order to constitute an exclusion from the Tribunal's jurisdiction by virtue of Article II, Paragraph 1, of the Claims Settlement Declaration, a forum selection clause must, by its terms, unambiguously restrict jurisdiction over any disputes arising out of the contract to the courts of Iran. See Levitt I, Award No. 297-209-1 at para. 30, reprinted in 14 Iran-U.S. C.T.R. at 199. Article 53, both in its limitation to disputes regarding the execution and the interpretation of the Contract and in its reference to "competent judicial authorities," fails to meet this test. The clause does not unambiguously set forth the required

choice of forum. Cf. Ford Aerospace & Communications Corporation, et al. and The Air Force of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 6-159-FT, p. 4 (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 268, 270; Howard Needles Tammen and Bergendoff and the Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 3-68-FT, pp. 3, 4 (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 248, 250. The Tribunal therefore holds that the Contract's dispute settlement clause does not bar the Tribunal's jurisdiction over the claim.

IV. THE MERITS

(a) The Parties' Contentions

(i) Introduction

40. The Claimant is primarily a builder of housing communities. His contacts with the Iranian Ministry of Housing and Urban Development in 1976 led to the formation of ICC, which in January 1978 entered into a contract with the Housing Organization of Iran for the construction of 2,500 housing units. This contract is the subject of the Levitt I Case. On 15 September 1977, ICC concluded the Contract with Moghan to construct a drip irrigation system on approximately 1500 hectares of land located in the Moghan Agro-Industrial and Livestock Project in Northern Iran near Tabriz. Drip irrigation is a technology that uses aboveground and underground pipes to release water near the roots of plants.

41. Article 3 of the Contract mentioned an initial Contract amount of Rls. 224,816,630, subject to further work. Pursuant to the Contract, in late October 1977 ICC caused American Express International Banking Corporation to issue,

via Bank Melli, three performance guarantees, secured by three irrevocable letters of credit in favor of Bank Melli. The project was to be completed in six months. ICC's performance was to be monitored by supervisors appointed by Moghan.

(ii) The Claimant

42. The Claimant contends that ICC faced repeated changes in the project specifications ordered by the Respondents; these changes caused substantial extra work and delayed the completion of the project, he argues. He further asserts that the project was beset by bureaucratic delays on the part of Moghan and the government that made it difficult to proceed and to import the necessary materials. Another factor in the delay asserted by the Claimant was mismanagement and incompetence on Moghan's part, of which Levitt cites three examples. Over ICC's protests, Moghan had planted fruit trees at the project too soon, resulting in the perishing of a number of those trees. The asbestos cement lines that Moghan had installed blew up. Also, Moghan's employees opened water pumps prematurely, damaging the piping system and requiring ICC to reconstruct much of it. Compounding these problems were large scale civil disturbances that allegedly occurred in March 1978; the Moghan workers went on strike and many were arrested in the course of these upheavals.

43. According to the Claimant, following various meetings between ICC and Moghan at which new time schedules were agreed, the project was substantially completed; this occurred in late 1978, the Claimant contends. ICC allegedly sought to deliver the project to Moghan but, as a result of the unstable political situation, it was impossible to find anyone in the Ministry or Moghan who would take responsibility for such acceptance. The Claimant asserts that additional mishandling of the project by Moghan

employees and vandalism in late 1978 and early 1979 caused substantial damage, which ICC was pressured to repair. According to the Claimant, the Revolution intervened and all work had to be suspended.

44. After the Revolution, ICC's then chief representative in Iran, Mr. Azar-Pey, allegedly discovered that substantial damage had been caused and that all equipment had been expropriated. Mr. Azar-Pey had been told by the Ministry that ICC was to complete the project; according to the Claimant, Mr. Azar-Pey had no choice but to agree to stay and to supervise the work. Hoping that normal conditions might return, the Claimant allegedly paid ICC's expenses for the project in 1979. He was forced to cease work in Iran in November 1979, when the American hostages were taken. Thereafter, alleges the Claimant, ICC's Tehran office was raided by the "Local Workers Revolutionary Committee" and all of its records were confiscated. In April 1981 Bank Melli demanded payment under the two remaining letters of credit, no. 70085 and no. 70087. Pursuant to a United States Treasury authorization, issued on 8 May 1981, payment of the amounts outstanding under the letters of credit was blocked; payment remains blocked.

45. The Claimant asserts that by not paying for the extra work Moghan ordered and by refusing to accept delivery of the project and to make final settlement, Moghan has breached the Contract. As to the extra work caused by delays and damages arising from the Revolution, the Claimant cites article 43 of the General Conditions, which entitles ICC to compensation for all costs of restoring the project to its original condition where repair has been necessitated by, inter alia, "revolutions and public strikes." The Claimant further argues that the Respondents have breached their obligation to release the letters of credit and to refund the contractual ten percent withholding on ICC's invoices.

46. The Claimant states that he has not received any income from the project; all part-payments from the Respondents to ICC were used for the construction and repair of the project. He allegedly also sent personal funds to Iran in 1979. Based on ICC's tax returns for 1978 and 1979 -- see para. 33, supra -- the Claimant argues that ICC expended Rls. 90,182,514 more than it received in performing the Contract. He, therefore, seeks U.S.\$1,288,321 as reimbursement of these excess expenses. He further claims U.S.\$1,894,719 for costs incurred by his New York office, to the extent these were not already awarded in Levitt I. In addition the Claimant requests the ten percent of ICC's invoice amounts that corresponds to the sums withheld by Moghan as a performance guarantee. This amounts to Rls. 26,272,905 according to the Claimant's calculations, which he bases on the income stated in the above-mentioned tax returns. Moreover, he seeks compensation for the alleged expropriation of ICC's equipment. Finally, the Claimant requests the Tribunal to order Bank Melli to release the letters of credit and to award his legal costs and interest.

(iii) The Respondents

47. The Respondents deny liability under the Contract. They contend that ICC was in fact paid more than it was owed, that no extra work was ordered or performed, that any delays were attributable to ICC's incompetence, and that the Claimant has adduced no proof of his claims. Based on these contentions, the Respondents present counterclaims, which are explained in paragraphs 51 and 53 below.

48. Denying that any expropriation took place, the Respondents argue that the expropriation claim conflicts with the Claimant's assertion that ICC continued to work until the taking of the American hostages in November 1979. According to the Respondents, the alleged ransacking of ICC's Tehran office in late 1979 did not occur; in June

1979, explain the Respondents, ICC changed its address from the allegedly ransacked Baghestan office to another address in Tehran. The allegation also conflicts with the Claimant's statement that ICC continued to work until November 1979. The Respondents deny that import problems existed, noting that, in any event, the Contract called for most of the materials to be produced in Iran. As to the general circumstances, the Respondents deny that Tabriz' civil disturbances had spread to Moghan in March 1978; they assert that by the end of April 1978, when according to the Respondents the project should initially have been completed, there were still no effects there of the Revolution.

49. Concerning the examples of Moghan's alleged incompetence cited by the Claimant, the Respondents assert that the blow-up of one or two asbestos cement lines was not abnormal, and that Moghan arranged for their repair without involving the Claimant. Contrary to the Claimant's assertions, the fruit trees were not prematurely planted nor were water pumps prematurely opened. The Respondents reason that had the alleged damage resulted, ICC would have made a claim under its insurance.

50. The Respondents contend that the amount of work was never increased and thus, there never was any approval of an extension of the Contract period. In fact, the Respondents assert, it was even agreed to delete a section named "K" from the contractual work. They contend that at the outset ICC failed to mobilize the project site after it had been handed over on time by Moghan. Moghan on several occasions advised ICC to expedite the work. By April 1978 approximately fifty percent of the work was complete. The Respondents point to various communications in the record in which ICC acknowledged the delay incurred in the project. About the reasons for this delay, the Respondents state that

[u]nder these circumstances where the contractor has not sufficient capital and has no experience and experts in drip irrigation and admits to necessity of imports from abroad and is involved in another project, undertakes to complete another contract according to Article 4 of which the period of procuring equipment and machinery and setting up the job site is one month and the period for performing the contract is 5 months, there is no doubt that performance of such undertaking within designated period will face difficulties and delays.

51. The Respondents assert that they never interfered with the implementation of the project. Rather, they claim, they assisted ICC by advancing funds for certain materials and by paying wages without reimbursement from ICC. The Respondents further maintain that "it was the Contractor who always had shortcomings in the way of supply of materials, appointment of site manager and carrying out the operations," and that any problems were due to the Claimant's lack of qualifications. The main flaw identified by the Respondents concerns the young trees imported from France. The Respondents state that lack of progress on the part of ICC, not premature planting, damaged these trees. On this basis, the Respondents present a counterclaim of Rls. 63,036,245 for "dryness" and Rls. 11,221,729 for manual irrigation.

52. Regarding the completion of the project, the Respondents argue that "[t]he contract was not terminated upon the victory of the Islamic Revolution. Mr. [Azar-Pey], the Iranian Managing Director of the Company appointed Mr. Arami as his representative to Moghan Corporation, in an attempt to complete the project." The Respondents have submitted documents, relating to the period after ICC's departure in November 1979, purporting to show ICC's acknowledgement of late performance and of defects for which deductions would be made from amounts due to ICC. Eventually, subject to further work to be done by the employer and to be charged to ICC, provisional acceptance took place on 20 April 1981.

The Claimant contends that these documents were drawn up or signed after ICC was forced to cease its operations in November 1979. By that time, the Claimant suggests, Mr. Arami was not acting as the Claimant's representative; rather he was "taking his orders, and being paid ... by Respondent Moghan." The Respondents point out that the record contains a letter from ICC to Moghan dated 16 June 1979 introducing Mr. Arami as "Chief Resident Engineer of this Company's site at Moghan," and state that they never received any further information about him.

53. As to the amounts paid and payable under the Contract, the Respondents' position is at odds with that of the Claimant. The Respondents maintain that Moghan has fully discharged its obligation to pay on the basis of progress reports. They argue that the total Contract value is Rls. 224,816,630, from which the value of the deleted section is to be deducted, leaving Rls. 204,816,630. According to the Respondents, ICC should only have collected Rls. 191,481,044 for work performed but collected Rls. 262,176,099; the second counterclaim filed by the Respondents is for the difference between these two amounts.² The Respondents also observe that, even if the amount admittedly received by the Claimant -- Rls. 221,017,832 -- is deducted from the amount of the Contract, only Rls. 3,798,798 would remain. Finally, the Respondents suggest that ICC owes Rls. 32,152,252 for goods and services paid for by Moghan³.

54. In reply to the allegation of overpayment, the Claimant points out that article 37 of the General Conditions allowed

²The Respondents argue that under the Contract payment can only be based on the quantity of the work performed, and not on "alleged unfounded amounts of expenditures."

³An undated schedule from Moghan's Accounts Department values these goods and services at Rls. 30,000,000.

Moghan to refuse payment of ICC's invoices and obliged Moghan to assert any objections within thirty days. The Claimant concludes that by not doing so, Moghan waived its rights. Also, the Claimant asserts, the amounts allegedly paid to ICC included payments made in 1980 and 1981 after ICC had ceased to be involved; such sums cannot therefore be deemed to constitute payments to him, the Claimant argues. Moreover, in the Claimant's view, even if Moghan could establish that ICC received more than the Contract amount, that would only evidence that extra work was done.

55. On the subject of the bank guarantees Bank Melli states that

using the rights which the letters of guarantee issued by Bank Melli had created for the Ministry of Agriculture, and using the rights instituted for Bank Melli by American Express' issuing the letters of credit[s] is an established legal right, which may not by any means be termed as abusive and fra[u]dulent.

(b) Production of Documents

56. The Tribunal, having reviewed the evidentiary record, concurs with the Claimant's observation that his "claim admittedly presents difficult issues of proof." The Claimant maintains that "it would work a gross injustice if Respondents were permitted to profit from their flagrant violations of the Tribunal's Discovery Orders so as to defeat Mr. Levitt's legitimate claims." The Claimant further suggests that the Tribunal must draw a negative inference from the Respondents' alleged failure to produce documents in their possession and that it should award to the Claimant "a default judgment in the full amount of [his] claim." The Respondents agree that a party's failure to submit documents may warrant an adverse inference. The Respondents would, however, condition the principle on such failure or contempt being "substantiated by the Tribunal through supporting evidence." According to the Respondents,

the Claimant has failed to produce any such evidence. Their presentation of certain documents, the Respondents argue, does not imply that further documentation was available for submission.

57. As a preliminary matter, therefore, the Tribunal must determine whether the Respondents have complied with its Orders for the production of evidence. See para. 23, supra. Such Orders were issued on 16 November 1982, 20 June 1983, 3 November 1983, and 31 March 1987. See paras. 4 through 26, supra. Each of these production Orders specifically listed communications referred to in the Respondents' own pleadings and/or in documentary exhibits submitted by the Respondents, some of which were communications from ICC.⁴

58. The Tribunal observes that the Respondents did not file any new material in response to paragraphs 2 through 9 and 11 of the Order of 16 November 1982. In disregard of the specific dates and descriptions given in the Order, which information was derived directly from the references contained in the Respondents' pleadings, the Respondents in their general reply to the Order contend that, in the absence of references to "the subject and reference numbers," it was impossible for them to produce the requested documents. The Respondents further informed the Tribunal that they could not be expected "to dig into the records for a long time" to locate documents "over which the Claimant has no right." See para. 10, supra.

⁴In the light of this fact, it is unnecessary to examine the Claimant's allegation, contested by the Respondents, that ICC's Tehran office was ransacked. See paras. 4, 44, and 48, supra. The source of the references set forth therein forms a sufficient basis for the Tribunal's production Orders.

59. In reply to the Tribunal's next production Order, dated 20 June 1983, the Respondents informed the Tribunal that they were unable to obtain any further documentation. See para. 12, supra. The Tribunal then issued its production Order of 3 November 1983 (see para. 15, supra), in response to which the Respondents repeated their assertion that they had no other documents at their disposal. At the same time, however, they stated that more specific document references might enable them "to look for the needed documents." In this connection, the Respondents incorrectly asserted that they had not been informed of the dates of the communications requested.

60. The Tribunal notes that both the tax counterclaim that the Respondents filed on 8 March 1984 and their counterclaim relating to the letters of credit, filed on 22 April 1986, included documentary evidence not previously submitted.

61. Based on a review of the full record, the Tribunal then issued its five-page production Order of 31 March 1987. See para. 21, supra. Following its detailed list of questions and references, the Order put the Respondents on clear notice that the Tribunal "remains free to draw appropriate conclusions from the Ministry's compliance with its Orders concerning production of documents." In their reply to this Order the Respondents assured the Tribunal that all the minutes and letters listed had been provided. See para. 22, supra. The Tribunal's examination of the record, however, appears to reveal that of the minutes requested from seven meetings, only those of the 12 December 1979 meeting have been filed, and of the four items of correspondence requested, only the 13 May 1978 communication has been submitted.

62. Contradicting the Respondents' repeated assertions that they had no further documents at their disposal, the Ministry's memorial filed on 1 March 1989 then introduced two new

exhibits into evidence: a letter from Moghan to ICC dated 17 September 1978 and minutes of a meeting of 20 April 1981.

63. At the Hearing, the Respondents initially maintained that all requested documents were included in their submissions of 26 July 1982 and 16 March 1983. When the Tribunal expressed its concern that the Respondents had submitted certain letters and reports written by Moghan but, in spite of the Tribunal's Orders to that effect, had failed to present the communications from ICC to which these letters and reports expressly refer, the Respondents stated, inter alia, that ICC's letters were sufficiently described by reference in Moghan's own documents. Next, in response to a further question by the Tribunal, the Respondents contended that they did not have access to the materials and that, when they did obtain access, the Tribunal did not renew its request for the documents. Finally, in reply to a query regarding one particular letter, the Respondents stated that they could not locate that document but that, if the Tribunal insisted, they could make an effort to find it.

64. Based on the foregoing, the Tribunal finds, as foreshadowed by some of its production Orders, that the Respondents have failed to submit the majority of the documents requested and have done so without supplying adequate reasons for this failure. It bears emphasis that the requested documents were ones that they had referred to in their own pleadings. Their often contradictory and evasive explanations suggest deliberate non-compliance rather than an inability to produce. The introduction by the Respondents of exhibits not previously filed in support of their counterclaims lends further support to this suggestion.

65. As this Chamber determined in Arthur J. Fritz & Co. and Sherkate Tavonie Sherkathaye Sakhtemanie, et al., Award No. 426-276-3, para. 42 (30 June 1989), reprinted in 22

Iran-U.S. C.T.R. 170, 180, "it is an accepted principle that an adverse inference may be drawn from a party's failure to submit evidence likely to be at its disposal." There, the Tribunal concluded that it must take into account the party's failure to produce ordered documents in weighing the evidence that was before it. See also INA Corporation and The Government of the Islamic Republic of Iran, Award No. 184-161-1, p. 14 (13 Aug. 1985), reprinted in 8 Iran-U.S. C.T.R. 373, 382.

66. Accordingly, while the Tribunal does not accept the Claimant's request to grant a "default judgment," the Tribunal must interpret the incomplete record with respect to the claim and the counterclaims in the light of the Respondents' failure to comply with the Tribunal's production Orders. See also para. 109, infra.

(c) The Tribunal's Findings

(i) Termination of the Contract

67. Both the claims and the counterclaims are based on the Parties' performance of the Contract. The life span of the Parties' contractual relationship is thus a preliminary issue. Faced with a similar issue in Levitt I, the Tribunal found, inter alia, that although one of the respondents contended that "ICC abandoned the project, it is clear from the evidence that Mr. Levitt and his associates intended ICC to continue as soon as circumstances allowed." Levitt I, Award No. 297-209-1 at para. 38, reprinted in 14 Iran-U.S. C.T.R. at 202. Noting that "[f]inally, after the events of November 1979, much of the site was occupied and built on by unauthorized persons," the Tribunal concluded that "[a]n exact date of termination is impossible to determine, but the Contract must be taken to have come to an end independently of the later events of the Revolution, and at

the latest by the end of 1979." Id. at para. 39, reprinted in 14 Iran-U.S. C.T.R. at 203.

68. In the present Case, Levitt asserts that "we were forced to cease all work in Iran in November of 1979 at the time of the taking of the American hostages." Accordingly, ICC's claim is based on the work allegedly performed by it up to that date. The Respondents contend, however, that Mr. Azar-Pey had appointed Mr. D. Arami to head ICC in an effort to complete the project, and that ICC continued working until April 1981, when provisional acceptance of the work took place. The Tribunal notes that only Mr. Arami appears as signatory of the progress reports and other communications that the Respondents have submitted to document ICC's alleged continued involvement. At the Hearing, when asked about his relationship with ICC after November 1979, the Claimant explained that he had no contacts with ICC after that date. As he stated, "nothing happened thereafter from our point of view. Apparently Arami, an engineer, became manager and was paid by Moghan."

69. The Tribunal is not convinced that Mr. Arami's involvement implies that ICC's contractual relationship with Moghan continued beyond November 1979. While Mr. Arami's appointment as "Chief Resident Engineer," announced in Mr. Azar-Pey's letter of 16 June 1979, conferred a certain authority on him, there is insufficient basis in the record to conclude that it was intended to go beyond the day-to-day operational level to encompass the overall management and formal representation of ICC, particularly under the circumstances prevailing after November 1979.

70. Various factors further support the Tribunal's view on this point. The record suggests that Mr. Azar-Pey continued to represent ICC during the second half of 1979, an inference that corresponds to the Tribunal's finding in Levitt I that "Mr. Azar-Pey remained in Iran in close

contact ... throughout 1979 in an effort to persuade the authorities to carry the project forward." Levitt I, Award No. 297-209-1 at para. 38, reprinted in 14 Iran-U.S. C.T.R. at 203. The first minutes of a project status meeting signed by Mr. Arami are dated 12 December 1979; the minutes themselves refer to Mr. Arami as one of the "resident site engineers." It is furthermore striking that the post-November 1979 project communications (co-)signed by Mr. Arami allegedly on behalf of ICC for the most part entail work orders, acknowledgements of technical defects, and instructions to debit ICC's account for costs made by Moghan. Rather than illustrating any independent involvement on the part of ICC, these communications leave the clear impression that Moghan itself had assumed exclusive control over the operations.

71. As the Tribunal found in Starrett Housing Corporation, et al. and The Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 32-24-1, p. 53 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 122, 155, "it is notorious that at least after 4 November 1979, the date when the hostage crisis began, all American companies with projects in Iran were forced to leave their projects and had to evacuate their personnel." See also, e.g., International Technical Products Corporation, et al. and The Government of the Islamic Republic of Iran, et al., Award No. 186-302-3, pp. 22, 23 (19 Aug. 1985), reprinted in 9 Iran-U.S. C.T.R. 10, 24. In Levitt I, the Tribunal found that

the evidence indicates that ICC would have experienced considerable difficulties in proceeding with the major phases of the construction under the prevalent conditions of disruption and unrest, particularly in view of the fact that it was the first such project Mr. Levitt had undertaken in Iran. It is most unlikely that the project could have been completed according to the time schedule originally envisaged, or that the cost would not have been greatly increased by difficulties in providing supervision by the Levitt organization and in obtaining imported materials.

Levitt I, Award No. 297-209-1 at para. 57, reprinted in 14 Iran-U.S. C.T.R. at 209-10. Against the background of these observations, here the Tribunal finds that the discontinuation of ICC's activities at Moghan in the late fall of 1979, resulting from the general conditions of force majeure then prevailing, caused the Contract to come to an end by reason of frustration or impossibility of performance.

72. As to the specific date of such termination, the Tribunal initially notes that, although the Contract contains a clause dealing with force majeure and a termination clause listing conditions entitling Moghan to cancel the Contract -- one of which is the abandonment of the site by ICC without the occurrence of a force majeure incident --, the Contract itself does not expressly provide for its termination for reasons of force majeure, and the record does not contain any formal termination notice. As the Tribunal has observed in International Schools Services, Inc. and The Islamic Republic of Iran, et al., Award No. 290-123-1, para. 28 (29 Jan. 1987), reprinted in 14 Iran-U.S. C.T.R. 65, 73 ("International Schools"), "[i]t is always difficult to identify a precise date of termination for force majeure where, as here, the Parties themselves have not expressly terminated the Contract for that reason." Considering the circumstances referred to in the preceding paragraphs and the fact that there are no tax returns in the record for the period beyond 1979, the Tribunal determines that the contractual relationship between ICC and Moghan had come to an end by December 1979.

(ii) Consequences of Force Majeure

73. Under article 43 of the Contract, Moghan undertook to remedy damage to the project resulting from revolutions, strikes and other incidents for which ICC could not be held responsible. Moghan's duty to fund repairs was subject to

two conditions. First, the incident must have been one not covered by insurance. Second, Moghan was not required to fund repairs that it did not consider "necessary and possible." The Contract does not, however, expressly set forth what is to happen when events constituting force majeure terminate the Contract. The Tribunal is called upon, therefore, to do something other than simply to enforce the Contract according to its terms.

74. Various precedents set forth the approach to be followed. Two in particular elucidate the governing principles. In International Schools Services, Inc. and National Iranian Copper Industries Company, Award No. 194-111-1, pp. 14, 15 (10 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 187, 197, the Tribunal determined that

[t]he governing rule as to the rights and liabilities of the Parties in these circumstances is that "the loss must lie where it falls". As the Tribunal has pointed out in connection with this rule, "[t]he apportionment of the loss is subject generally to the Tribunal's equitable discretion, using the contract as a framework and reference point." Award No. 37-172-1 of 15 April 1983 in Queens Office Tower Associates and Iran National Airlines Corp. at 14.

Applying these principles, the Tribunal went on to determine that the claimant should be reimbursed for the costs and fees incurred prior to the date the contract came to an end, but should not be reimbursed for any costs or fees incurred after that date, nor for any lost profits.

75. In making this determination the Tribunal followed an approach similar to that which it had applied in Gould Marketing, Inc. and Ministry of Defence of the Islamic Republic of Iran, Award No. 136-49/50-2, pp. 4, 5 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 272, 274-75 ("Gould"). In that Case, the Tribunal stated, inter alia:

The termination of the contract as a result of frustration has obviously worked a hardship on

both Parties ... Under American law, as under English law since 1943, the general principle applied to equitably allocate such consequences of frustration of contract is that amounts due under the contract are to be proportioned to the extent the contract was performed. If no payment has been made, the Party which has performed is entitled to receive payment to the extent of that performance. If payment has been made, the Party which received such payment is entitled to retain that amount of money proportionate to its performance and must return any money in excess of that amount. In applying this general principle, the Tribunal should avoid unduly burdening either party with the hardships arising from the termination.

76. To administer these principles, the Tribunal must piece together the events that comprise the history of the Parties' contractual relationship and review ICC's and Moghan's performance under the Contract. This task is hampered considerably by the evidentiary difficulties related in paragraphs 56-66, supra. However, as the Tribunal observed in Gould, "[r]egardless of how difficult it might be for the Tribunal, as for any Court, to equitably allocate these burdens and how imperfect might be the justice reached, such difficulty and such imperfection should not be a reason for denying any relief." Id.

(iii) Terms of the Contract

77. Sometime prior to 20 July 1977 the Respondents circulated the "Generalities and Instruction Concerning Participation in Tender," inviting bids for the Moghan project. Attachment No. 1 to this document required the bidder to submit "its offered preliminary plan with regard to the timing below," and specified "end of Aban 1356 (21 Nov. 1977)" as "[t]he period for the performance of the entire work." On 20 or 23 July 1977 ICC submitted its bid. Following several further communications and meetings, Mr. Karami, managing director of Moghan, by letter of 10 September 1977 issued a request to "instruct the concerned personnel to take action in concluding and executing the contract

with International Construction Company (the lowest bidder in the Tender)." The Contract was concluded on 15 September 1977.

78. Article 1 formulates the main object of the Contract as the "[s]upply of material, transportation, complete installation and getting into operation of a network of drip irrigation for 1522 hectares of Moghan gardens in accordance with the drawings and specifications of the consultant engineer."

79. Article 3 mentions an "initial contract amount" of Rls. 224,816,630, "subject to changes on volume of work and the new works." Article 7 of the General Conditions defines the "Total Contract Price" as "the Original Contract Price plus all additions due to changes in the quantities of work as well as new works under Articles 29 and 30." In accordance with a Ministerial Directive of 25 May 1974, which is appended to the Contract, article 29 specifies that the "[q]uantity of work may be changed ... provided that the total price ... does not exceed ... 25% of the contract's initial price." Increases in the work were to be priced on the basis of the table of prices agreed by the Parties. Article 30 deals with new works for which unit prices have not yet been established.

80. As to the management of the project, while article 6 of the General Conditions defines the site manager as "the legal entity introduced by the employer to the Contractor or the supervisory body," article 18C obliges the contractor to

present in writing a qualified person acceptable to the supervisory body as the Manager of the Manufacturing Plant (site). The Manager should be present at the manufacturing plant (site) during the working hours and supervise the executive operations.

The Contractor will delegate adequate authority to the manager of the manufacturing plant (site) for

receiving instructions and designs from the supervisory body.

81. In relation to this supervisory body, article 6 states that supervision of the contractor's undertakings "shall be performed, as determined by the employer, by Agronomic Consultant Engineers and Hawaian Agronomics" of Tehran. "[T]he contractor is bound to carry out the works in accordance with the contract and technical principles, and also in accordance with instructions and trainings given by [the supervisory body] within the scope of the specifications." Articles 4 and 5 of the General Conditions further define the supervisory body and the on site supervisor, who is described as "the person introduced by the employer or the supervisory body to the contractor, in writing, for the task of direct on site supervision."

82. The Contract also provides for supervision by a "representative engineer:" according to article 32 of the General Conditions, "the employer may inspect the Contractor's operations through its supervisory body, the representative engineer or other agents." Article 33 authorizes the representative engineer "to maintain a careful control over the operations of the Contractor on behalf of the Employer or the supervisory body ... [i]f any faults or mistakes are noticed, he can instruct the Contractor to remove or rectify the same." This article further provides that "[t]he Contractor shall follow the instructions of the representative engineer within the provisions hereof." Articles 18 and 33 stipulate that the control and supervision by the employer, the supervisory body and the representative engineer "will not reduce the responsibility of the Contractor ... for the good performance of the contract works."

83. Several articles establish a framework for payments under the Contract. Article 34 of the General Conditions requires the contractor to provide a bank guarantee equivalent to five percent of the initial Contract price. The

employer was to release this guarantee, whose purpose was "to assure proper execution of the contract," "immediately upon approval of the proces-verbal of the provisional acceptance" of the work. Article 6 of the "Special Conditions" provides that, in addition to the guarantee referred to in article 34 of the General Conditions, "the Contractor shall provide the Employer with a Guarantee in the amount of Rls. 39,890,000, the equivalent of 15% of the initial amount of the Contract, for five months." Article 6 states that the guarantee "shall be extendable until the provisional acceptance in the event of non-conformity of the Contractor's operation with the time schedules or non-suitability of the work."

84. Article 37 provides that the supervisory body, in conjunction with the contractor, shall prepare monthly invoices on the basis of work performed and materials delivered. Moghan was to pay these invoices after the deduction of a number of items, including an amount equal to ten percent of the gross amount of each invoice. Pursuant to article 35, one half of the amount so withheld was to be paid to ICC upon Moghan's approval of the final invoice, and the other half upon Moghan's approval of the "final acceptance proces-verbal."

85. A further item to be deducted from the invoice amounts relates to an advance payment of up to 25 percent of the Contract amount that article 36 required Moghan to make. Ten percent was to be advanced by Moghan upon execution of the Contract, with a further fifteen percent to be paid in the course of ICC's performance of the Contract. As to the repayment of these amounts, article 36 provides that

[f]or the 10% ... an equivalent of 12% of the gross amount of each invoice would be deductible. For other advance payments upon the employer's discretion a percentage would be deducted from the gross amount of each invoice so that with payment of the provisional invoice (the invoice before the last one), all the advance payments be reimbursed.

To secure this reimbursement, ICC was required to provide a bank guarantee, the amount of which was to be reduced in proportion to the monthly deductions. Finally, article 40 provides, inter alia, that "[i]mmediately after the provisional acceptance of all the works under the contract, the supervisory body (or its successor) accompanied with the Contractor's representative will take measures to evaluate the work accomplished and to prepare the final invoice."

86. Article 4 of the Contract sets out the time frame for the performance of the work. Following the execution of the Contract, ICC had one month to supply the necessary equipment and to set up its workshop, and a further five months to carry out its operations. Article 4 further provides that the "[s]tart of the contract period, shall be the date of the first proces-verbal on delivery of the workshop." Within this five-month period, ICC was required to complete at least 97 percent of the work and to present to Moghan a request for its provisional acceptance. Article 18 of the General Conditions requires ICC to submit monthly progress reports in the meantime. Article 31 allows for an extension of the Contract period, subject to Moghan's approval, in the event of changes in the quantity or nature of the work or in case an act of God as referred to in article 43 occurs. See also para. 73, supra.

(iv) Performance History

87. A schedule dated 21 September 1977 and signed by ICC's Mr. Green indicates that at that point the work was planned to commence on that date and to be completed by 20 March 1978. However, a letter of 1 November 1977 from Moghan to ICC makes reference to "the start of the operations relating to the aforesaid contract, commencing on October 8, 1977." A Moghan letter of 5 November 1977 stating that "twenty-five days have passed since the allocation of land for the operations" points to the October 8 date as well. Various

communications attest to ICC's purchase of equipment, installation of living quarters, and hiring and introduction of personnel around that period. On 28 October 1977 ICC caused letters of credit nos. 70085 and 70087 to be issued in favor of Bank Melli in the respective amounts of Rls. 11,241,000 and 56,000,000; on 8 December 1978, the latter amount was reduced to Rls. 37,491,671. Also on 28 October 1977, letter of credit no. 70086 was issued for Rls. 19,418,500; this guarantee later was allowed to expire.

88. By letters dated 1 and 5 November and 15 December 1977 Moghan complained to ICC that it was falling behind schedule and urged ICC to expedite the work. An undated Moghan communication, which refers to a letter of 21 December 1977, points out that the delay "will forestall the possibilities of planting on schedule, and cause this company to face irreparable damages." By letter of 1 January 1978, Moghan demanded that the situation improve within 70 days. It attributed the absence of progress to lack of technical and executive ability on the part of ICC's resident representative, to lack of manpower and materials, and to logistical problems at ICC's Tehran office. The letter further indicates that Mr. Green had "travelled abroad to seek medical treatment" and recommended that "after his return to Iran he be detained in this country and prevented from leaving Iran until he carries out his obligations under the contract."

89. On 3 January 1978 ICC introduced two agricultural engineers "to additionally assist" and to expedite the work. On 14 January 1978 Mr. Alamzadeh, head supervisor, informed ICC that "a period of one month has been added to the total period of the contract to take into account the advent of the winter season and allow for recurrent closures of the site due to periods of rainfall in the course of the operations." Mr. Alamzadeh further stated that "[t]herefore, you

are obliged to fulfill all the provisions of the contract within six months, and the closure of the site due to a few days of rainfall is no reason for delaying the work." A Moghan letter to ICC of 23 January 1978, stating that "most of the fruit trees of 1522 hectares have been ... planted," attempted to alert ICC to the potential damage to the trees and requested ICC to prepare a work schedule within one week.⁵

90. Several communications establish that ICC was making serious efforts around that time to expedite the work. A schedule dated 5 February 1978 shows that ICC intended to test certain areas for completion by 15 April 1978. As evidenced by receipts, Moghan put various materials at ICC's disposal. A status report by ICC dated 21 February 1978 describes a variety of operations, the hiring of additional equipment and the subcontracting of certain tasks.

91. An undated letter by Mr. Shahmirzadi of the supervisors' Tehran office, which refers to a letter of 14 March 1978, states that "the figure of 77 percent is erroneous and the true figure of work progress is 39 percent. Weekly follow-up sessions continue to be held as before, and necessary reminders will be brought to the attention of the contracting company." The minutes of a status meeting held on 9 April 1978 describe the defects and shortcomings then existing, showing that the project areas were in varying stages of progression. Similarly, a letter sent by Moghan to ICC apparently in April 1978 details damages caused to the fruit trees. On 14 April 1978 the supervisors reported to Moghan that the progress made in the period from 22 March to 22 April 1978 amounted to eight percent.

⁵At the Hearing, the Respondents stated that the saplings had to be planted in the winter in order for the trees to bear fruit in April.

92. Following negotiations with the supervisors and Moghan, ICC on 13 May 1978 submitted "a report of measures taken and a program to rectify and expedite effected by this company to overcome difficulties and complete the drip irrigation system." This program included a revised time schedule that foresaw completion of the first section by 31 May 1978 and of the final section by 15 October 1978.⁶ Moghan agreed to this schedule, as is confirmed, inter alia, by a letter to ICC of 2 June 1978 and a letter of 17 September 1978 referring to "the last time schedule produced by your company which has been confirmed." See also para. 94, infra. A letter from ICC to the supervisors dated 5 June 1978 records that, to implement its completion program, ICC hired new managers, a group of experts and a substantial number of additional workers.

93. The progress made during the few months following June 1978 is documented by a number of communications, including progress reports submitted by the supervisors to Moghan. By 14 June 1978, 62.04 percent of the total work had been done, representing an increase of 7.5 percent over the preceding month; by 22 July 1978, the percentage was 66.54. On 2 August 1978 ICC requested the supervisors to accept temporary delivery of three project sections, stating that "more than 97% of the work required in [these] areas has been completed at this time." According to the revised work schedule, these three areas, which represented about one-third of the total project acreage, were to be completed between 30 July and 15 August 1978. In response, informing ICC that "the aforesaid Areas cannot be temporarily delivered due to the existence of the following defects which prevent the proper utilization of the system, the

⁶Moghan later decided to postpone the operations relating to the final section "to the years ahead." The preceding area was to be completed by 15 September 1978.

supervisors specified further replacement and installation work to be performed "in such a way that at least 97 percent of the total work is completed."

94. On 19 August 1978 the supervisors reported 70.74 percent completion. A letter from Moghan to ICC of 17 September 1978 identified the remaining "extensive defects" and requested ICC to "make necessary arrangements so that further delay of the work [is] prevented by increasing the performing group and quick supply of the remaining equipment and as soon as possible required steps [are] taken for completing and preparing the system, for provisional acceptance." The progress report of 25 September 1978 mentions 74.44 percent accomplishment. By letter of 16 October 1978 the supervisors gave account to Moghan of measures instituted as a result of "long sessions of discussion [...] held at Moghan in your presence." Referring to the revised completion plan, the head of the Tehran supervisory office concluded that

[w]hile not being able to tolerate any more the losses pertaining to the subject of this contract, I hope that the construction of the network will be completed in accordance with this program because, for the first time, the plan of action and the manpower required proposed by International Construction Company is meaningful and acceptable.

95. The next progress report from the supervisors, dated 24 December 1978, certifies that 82.64 percent of the total work had been performed. It also indicates that the operations were coming to a halt: the work accomplished during the preceding month represented a mere 1.7 percent. The report explains that "due to lack of payment of the wages and salaries of the company's workers and staff, the absence of responsible officials on the site, and the expulsion of a number of workers, no considerable activities have been noted." In the same vein, an internal report of the supervisors of 6 January 1979 states that "[o]wing to industrial

strikes, the officials of ... Moghan ... were not available in the area, and therefore it was not possible to deliver the equipment of Area K." A copy of this report was sent to Moghan on 13 January 1979.

96. The next communication in the record is dated 17 March 1979. It is a letter in which ICC complains to the supervisors that the fertilizer injection system, purchased by ICC in accordance with the contractual specifications, did not function properly thus disrupting the flow of work. The letter further requests the supervisors to prepare the relevant schedule for the connection of the pipe to the station in area I, which according to the schedule was the final area to be completed. A radio message of 29 March 1979 sent, as the Respondent confirmed at the Hearing, by Moghan's Tehran office to its on-site representatives, states that ICC "has declared its readiness for the temporary delivery of [the] drip irrigation system" and requests the representatives to "issue instructions that you may also declare the date of readiness so that necessary steps will be taken as soon as possible for conveying the date of temporary delivery to the consultant engineer and contractor."

97. In response, the supervisors on 4 May 1979 informed ICC and the employer that "the date of convening a commission for the temporary delivery ... is May 10, 1979." The Respondents have also submitted a second version of this letter giving 10 June 1979 as the meeting date. The supervisors, while asking ICC "to designate a representative to participate at the commission," requested ICC to "make arrangements for overcoming the defects listed ... so that existing deficiencies will at least be less than 3

percent."⁷ The letter identifies seven remaining items of work. On 9 May 1979 ICC introduced to Moghan two representatives specifically "for investigating the work and overcoming existing defects."

98. Other than ICC's letter of 16 June in which Mr. Azar-Pey introduced Mr. Arami and a notice of change of ICC's Tehran address of 18 June 1979, there are no communications in the record for the subsequent period up to mid-September 1979. On 14 September 1979 Mr. Green, writing from the United States, informed head supervisor Mr. Alamzadeh that, according to Mr. Azar-Pey, "the work is substantially completed." Listing examples of extra work ICC had been required to do, Mr. Green asked Mr. Alamzadeh to help ICC finalize "these open items" as recorded in "various work order requests" ICC had conveyed to the supervisors. In a letter to ICC of 6 October 1979 Moghan, observing that "your site has closed down and you are not prepared to continue the work," gave ICC notice that "if you do not commence work within 15 days after receiving this letter you will forfeit two guarantee bonds." The record contains no further communications covering the final stage of the Parties' contractual relationship as determined in paragraph 72, supra.

(v) The Tribunal's Evaluation

99. While the Tribunal realizes that the above outline of events, to the extent that it reflects a selective presentation of documents, must be read in the light of the observations set out in paragraphs 64 through 66, supra, the picture emerging from the communications cited and from the

⁷In view thereof, it appears likely that the meeting was indeed scheduled for the later date, i.e., 10 June 1979.

other documents in the record permits the Tribunal to draw conclusions about the Parties' performance under the Contract. Set out immediately below, in a listing that reflects the fragmented nature of the evidence, is a series of considerations in support of the Claimant's position. The next section enumerates a number of factors that argue in favor of the Respondents' position. Following thereafter is a summary of the Tribunal's conclusions.

(1) Considerations in favor of the Claimant

100. There is every indication that the contractual performance period allocated to ICC was far too tight. The tender documentation even foresaw the end of November 1977 as the date of completion. The Contract was only signed on 15 September 1977, however, and the starting date was changed to 21 September 1977. Eventually, Moghan did not hand over the site until 8 October 1977. As confirmed by the supervisors, the project was hampered by winter conditions and periods of rainfall, leading to an agreed extension of the Contract period by one month; the corresponding amendment of the Contract refers to problems "[d]ue to the timing of execution of the contract and the difficulties arisen out of coincidence of work with [the] winter season."

101. The installation schedule shows that the trees were to be planted gradually over a period starting on 15 January and ending by 21 March 1978. However, as Moghan itself has stated, by 23 January 1978 most of the trees had already been planted. This created a considerable burden for ICC, as is confirmed by Mr. Green's letter of 14 September 1979. The project was put on a new footing when the Parties in May 1978 agreed on the program to rectify and expedite the work. This plan of action, which the supervisors recommended as meaningful and acceptable, contemplated the fall of 1978 as the date of completion. There are indications that ICC, following its recruitment of substantial additional

manpower, was proceeding more or less according to this new schedule. In August 1978 it requested temporary delivery of the three areas that, pursuant to the plan, were due to be completed around that time. By the end of 1978, 82.64 percent of all the work had been done. This estimate, made by the supervisors, justifies the Claimant's assertion that the project had been "substantially completed."

102. The fact that the project subsequently came to a halt is consistent with the general picture of disruption that characterized Iran in the months leading up to the success of the Revolution. See Sea-Land Service, Inc. and The Government of the Islamic Republic of Iran, et al., Award No. 135-33-1, p. 22 (22 June 1984), reprinted in 6 Iran-U.S. C.T.R. 149, 165. ICC faced the force majeure conditions that had arisen as a result of strikes, riots and other civil strife in the course of the Revolution. See Gould Marketing, Inc. and Ministry of National Defense of Iran, Interlocutory Award No. ITL 24-49-2, p. 11 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 147, 152-53. The occurrence of force majeure in the Moghan area is confirmed by the supervisors' statement in their report of 6 January 1979 that "[o]wing to industrial strikes, the officials of ... Moghan ... were not available in the area." Obviously, these conditions affected ICC's Tehran office as well.

103. The force majeure circumstances hindered ICC's operations in various ways. The strikes caused ICC to replace part of the work force. The supervisory reports further bear out that, as was the case in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1, p. 17, reprinted in 8 Iran-U.S. C.T.R. 298, 310 ("Sylvania"), force majeure prevented "cooperation by the Respondent that the Claimant needed in order to continue its performance under the Contract." For example, the absence of Moghan officials frustrated ICC's efforts to achieve provisional acceptance of part of the

work. It also prevented the processing and payment of ICC's invoices, as is reflected by the supervisors' reference to non-payment of wages and salaries. See id. at p. 16, reprinted in 8 Iran-U.S. C.T.R. at 309. The Tribunal notes that, as the record bears out, ICC, having requested Moghan on 8 August 1978 to make payment "to cover essential expenses of this company," on 18 October 1978 had U.S.\$770,400 transferred to Iran.⁸

104. There are indications in the record confirming that the revolutionary disturbances not only delayed the project, but also caused damages to the work performed. The supervisors' letter of 4 May 1979 refers to "broken pressure-regulator taps" and appears to identify certain assignments that according to the supervisors' progress report of 24 December 1978 had previously been accomplished. These damages increased ICC's work load and caused ICC to incur restoration costs, which article 43 of the General Conditions required Moghan to compensate. See para. 73, supra. As to the delays incurred as a result, although there is no extension notice in the record and the Respondents at the Hearing contended that the Revolution caused a delay of only one month, in the Tribunal's view the foregoing factors warranted a substantial extension of the Contract period. See article 31 of the General Conditions. In this connection, the Tribunal also notes the absence of

⁸Here, the Tribunal also is mindful of the observation made by the Tribunal in Levitt I about the evidence of expenditures claimed in that case, i.e., that the "concurrent [Moghan] project raises a serious problem of determining what costs are to be attributed to each of ICC's projects in view of the general character of much of the Claimant's evidence which often fails to identify costs as being related to a particular project." Levitt I, Award No. 297-209-1 at para. 42, reprinted in 14 Iran-U.S. C.T.R. at 204. When the Tribunal raised this issue at the Hearing in the present Case, the Claimant alleged that the expenses claimed exclusively related to the Moghan project.

evidence in the file that Moghan ever exercised its right pursuant to article 50 of the General Conditions to charge delay penalties.

105. Article 31 also allowed for an extension of time in case of changes in the quantity or nature of the work. The Claimant contends that Moghan frequently changed the specifications and issued new work orders. The plausibility of the Claimant's contentions is enhanced by the fact that articles 29 and 30 of the General Conditions anticipate an increase in the quantity of work by up to 25 percent of the initial amount and new works up to ten percent of the amount. The record contains evidence of a number of further causes of delay attributable to the Respondents. For example, Mr. Green's letter of 14 September 1979 mentions the blow-up of the asbestos lines put in by Moghan, and Mr. Della Ratta gave testimony at the Hearing about improper handling by Moghan of drip head filters. Incidents such as these probably caused additional damages and delays. The Tribunal further notes that the distribution of authority and the supervisory structure as regulated in the Contract were unclear and must have interfered with the efficient implementation of the Contract.

106. Moghan's radio message of 29 March 1979 shows that by that time, having undertaken repairs and further work, ICC considered the project ready for provisional acceptance. The limited list of remaining defects identified by the supervisors indicates that the project was indeed nearing completion again, a conclusion that is supported by the supervisors' selection of 10 June 1979 as the meeting date of the acceptance commission. That Moghan nevertheless did not accept the work must have aggravated the funding problems discussed in paragraph 103, supra. The Tribunal notes that on 26 April 1979 ICC transferred U.S.\$49,705 to Iran.

107. The funding problems referred to suggest that ICC has not been compensated in full for the costs incurred as a consequence of the delays, the damages and the extra work. The record contains several other signs leading to this conclusion. ICC's 1978 and 1979 tax returns indicate that ICC received approximately Rls. 221,000,000 during the Contract period. The Respondents' contention that ICC should in fact have collected Rls. 191,481,044 enhances the credibility of this income figure. The Claimant contends that ICC's total expenditures during the Contract period amounted to Rls. 311,200,346. This figure includes administrative and indirect costs that the Claimant attributes to the project. Even if, for the sake of conservatism, one only considers the direct costs,⁹ the tax returns still appear to reflect expenditures of approximately Rls. 271,000,000. Based on this figure ICC's expenses exceeded its income under the Contract by Rls. 50,000,000. Moghan's argument that ICC was actually overpaid is contradicted by the fact that, pursuant to article 37 of the General Conditions, all invoices were to be approved for payment by the supervisors. Overpayment would have required a lack of vigilance on the part of the supervisors, a failing not evident in the record. Furthermore, even though this article allowed the employer to correct the invoices so submitted, there is no evidence of contemporaneous objection by Moghan to the amounts charged. The notion that ICC was overpaid is even less likely in the light of the observation that the conditions of force majeure for a period prevented the processing and hence payment of ICC's invoices; see para. 103, supra. Moreover, articles 40 and 52 of the General Conditions

⁹ Given the problems of attribution inherent in indirect costs, in particular where more than one project is involved, it appears appropriate to exercise caution in relation to the indirect and administrative costs relied upon by the Claimant.

specify the procedure for the submission, evaluation and payment of a final invoice upon provisional acceptance of the work. Given this framework, the fact that the work had nearly been completed but not provisionally accepted supports the inference that at that stage ICC had not yet been paid for all the work performed.

108. Thus, the Tribunal concludes that ICC performed work under the Contract for which it did not receive payment. Whether the amount involved is recoverable in this proceeding, however, depends upon the application of certain adjustments favoring the Respondents and more fully discussed in paragraphs 109 through 116, infra.

(2) Considerations in favor of the Respondents

109. The considerations set out in paragraphs 100 through 108, supra, support the Claimant's position. The record, however, also gives rise to certain doubts, some of which go to the same issues as those discussed above. As an initial observation, the Tribunal generally notes that the Respondents' failure to comply with its production Orders -- see para. 64, supra -- does not relieve the Claimant of his obligation to muster all the evidentiary support at his disposal. This obligation derives from Article 24 of the Tribunal Rules, which provides that "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence." The statements made by the Claimant and Mr. Della Ratta were to a considerable extent based on information they had received from other ICC executives and experts, none of whom appeared at the Hearing or submitted evidence. Apparently a financial dispute with the Claimant prevented Mr. Green from testifying on behalf of ICC. In this context, however, that must be regarded as the Claimant's internal problem; the net effect is that presumably valuable testimony is missing from the record. Moreover, misunderstandings between the Claimant and Mr. Green do not

explain the absence of testimony from other informed sources.

110. ICC's performance under the Contract appears to have been far from flawless. The Tribunal has the impression that ICC underestimated the demands of this project. In particular, it committed itself to an unrealistically short completion schedule. As demonstrated by various communications from Moghan and the supervisors, ICC made a slow start. The contractually agreed one-month mobilization period proved too brief for the purchase and importation of all the required materials and the recruitment and instruction of suitable personnel. The Claimant, with his experience in carrying out projects in a foreign environment, should have realized this.

111. The initial delays also affected the implementation of the second phase of the work. The letters and reports sent from November 1977 through the spring of 1978 indicate that Moghan and the supervisors, closely scrutinizing the developments at the site, regularly urged the contractor to expedite the work, pointed out defects, and identified work remaining to be done. The minutes of the meeting held on 9 April 1978, which were signed also by Mr. Green, attest to ICC's acknowledgement of the defects and delays mentioned therein. While Moghan accepted ICC's revised completion schedule of 13 May 1978, on several occasions it also reserved the right to claim compensation for damages resulting from ICC's performance delays.

112. The extra costs incurred by Moghan in connection with the fruit trees are in part¹⁰ attributable to ICC. ICC's

¹⁰ Several factors operate to limit ICC's liability for these costs. As noted in paragraph 101, supra, in violation of the agreed schedule Moghan had planted not some, but most
(Footnote Continued)

assertion at the Hearing that it was only notified about the planting of the trees in the winter of 1978 is contradicted by the record. The work schedule to which Mr. Green committed ICC on 21 September 1977 sets out the order in which the project sections were to be completed, specifying the exact type of tree and the completion date for each separate area. The resulting inference is that by 21 September 1977 ICC was, or should have been, aware of Moghan's plans to plant the trees. ICC also argued at the Hearing that the Respondents apparently required the trees to be planted even before the project was scheduled to be completed. The Tribunal finds, however, that the planting schedule was not incompatible with the envisaged date of completion of the work, because the project was to be completed area by area in the order indicated by the schedule.

113. The problems resulting from the delays were compounded by management problems on the part of ICC that caused the project to suffer from a lack of direction. As borne out by the testimony presented at the Hearing, ICC's American executives operated mostly from or via its Tehran office and were not involved in the day-to-day operations. The project would probably have benefitted from more direct, "hands-on" involvement; Mr. Green noted that while he was organizing work groups at the camp from 16 May through 3 June 1978, "a great improvement has been attained in the work habit of the individuals as well as an organized satisfactory quality of work which has been checked by the Engineer on the site." Also, as summarized in the next paragraph, ICC went through numerous replacements of site managers and staff reorganizations, leaving the impression that at least through the

(Footnote Continued)

of the trees by 23 January 1978. The Tribunal furthermore fails to understand why Moghan, in the face of postponements and delays during the start-up phase of the project, proceeded to order and import 650,000 saplings. The Respondents generally appear to suggest that the contract for their purchase had already been signed with the French supplier.

first half of 1978 ICC's project management was fragmented and improvised.

114. On 3 October 1977 ICC introduced Mr. Neshat as representative for the execution of the project. Around 10 October 1977 Mr. Lari was presented as acting head of ICC. The Israeli supervisory personnel did not arrive until after one year later. A communication of 8 November 1977 confirmed Mr. Green's authority; around January 1978 he was reportedly abroad for private reasons. On 6 January 1978 Mr. Birjani and Mr. Tavafoghi were hired to assist Mr. Neshat. On 6 February 1978 Mr. Azar-Pey introduced "once again" Mr. Lari as fully authorized representative. On 13 May 1978 Mr. Green announced that ICC had terminated the employment of Mr. Tavafoghi and Mr. Birjani. He also reported that Mr. Yovel, "who has recently returned from Israel and was previously familiar with the project, has started working in Moghan." Mr. Green further stated that "[t]he Project Engineer, after studying the project, will take the necessary steps to complete the staff he requires;" the supervisors refer to a commitment by ICC to "change all its present executive staff in Moghan and Tehran." On 3 June 1978 ICC introduced Mr. Karakash as the new project manager and Mr. Yovel as his assistant. Additional managers and a group of experts were presented on 5 June 1978. On 19 June 1978 Mr. Yovel was appointed as project manager. The foregoing sequence of events gives rise to doubts whether ICC's management structure was capable of meeting ICC's contractual responsibility for the good performance of the work.

115. Mr. Della Ratta contended at the Hearing that it was the local workforce that proved insufficiently capable, forcing ICC to recruit outside assistance. However correct this contention may be, the Tribunal finds it largely irrelevant. As recorded in article 16 of the General Conditions, ICC had contractually confirmed that "[i]t has

ensured the possibility of supply of an adequate number of skilled and unskilled workers." Article 17 furthermore made ICC "responsible for hiring sufficient numbers of skilled and unskilled workers" and required it to carry out the work "by drawing on adequately skilled workers in its staff." The fact that this article also provided that Moghan was entitled to introduce fifteen percent of the workforce does not affect ICC's predominant responsibility in this regard. Moreover, nothing in the record suggests that it was largely those workers introduced by Moghan who proved incapable.

116. The Tribunal also notes ICC's contractual acknowledgment that it had "taken the climate, precipitation and the geography of the site ... as well as the possibilities of operations in different seasons, in view of the duration of executing the works, into consideration." The postponement of the envisaged start-up date of the project from the spring to the fall of 1977 -- see para. 100, supra -- should have been a reason for ICC to reconsider this commitment before it signed the Contract.

117. The Tribunal notes that the current liabilities per 31 December 1979 stated in the balance sheet attached to ICC's 1979 tax return include a provision of Rls. 32,955,822 for advance receipts. Also, as noted in paragraph 107, supra, calculated conservatively ICC's expenses under the Contract appear to exceed its income thereunder by Rls. 50,000,000. This shortfall forms the basis of the claim. The Tribunal notes, however, that the total sum of accounts receivable reported by ICC in its 1979 balance sheet is actually less, i.e., Rls. 31,750,138. The Tribunal further notes that the Claimant conceded at the Hearing that Moghan may have made a payment in early 1979 relating to repairs. Also, as the record establishes, Moghan has supplied certain materials for ICC's account; it is not clear whether these items have been deducted from Moghan's payments to ICC.

(3) The Tribunal's Conclusions

118. The foregoing analysis enables the Tribunal to apportion the amounts due under the Contract on the basis of the Parties' performance. In this connection the Tribunal notes that it is established Tribunal practice that when the circumstances militate against calculation of a precise figure, the Tribunal is obliged to exercise its discretion to determine equitably the amounts involved. See, e.g., Starrett Housing Corporation, et al. and The Government of the Islamic Republic of Iran, et al., Award No. 314-24-1, para. 339 (14 Aug. 1987), reprinted in 16 Iran-U.S. C.T.R. 112, 221. The Tribunal's Award in the Levitt I Case also reflects this practice.

119. The Tribunal perceives that there is a general balance between the sums owed to the contractor for work performed and the damages and credits due to Moghan. The Tribunal finds, subject to the decisions stated below, that ICC is not entitled to a net recovery for the unpaid work it has performed under the Contract. Bearing in mind the contractual provisions relating to the letters of credit, the Tribunal further finds that the principles set out in paragraphs 74 through 76, supra, require that the payment requests under the letters of credit still outstanding be withdrawn and these instruments be released.

120. These findings dispose of all the claims and counterclaims before the Tribunal, with the exception of those for reimbursement of expenses made by the Claimant's New York office and for compensation for the alleged taking of ICC's equipment. Listing attorney's fees, office and miscellaneous expenses, travel costs and wire transfers to Iran, the Claimant asserts that "a total of U.S.\$1,894,719.27 of ICC's losses in the United States are recoverable as damages." In Levitt I the Tribunal awarded an amount to the Claimant in respect of similar categories

of expenses. See Levitt I, Award No. 297-209-1 at para. 42 et seq., reprinted in 14 Iran-U.S. C.T.R. at 204 et seq.

121. Leaving aside the fact that the legal basis for that Award was different, the Tribunal finds no grounds upon which to grant further compensation for the Claimant's United States expenses. At the Hearing the Claimant explained that, as he did in other foreign projects, he had set up a "full service office" in Tehran, including secretaries, engineers and accountants. This statement undermines the credibility of the Claimant's claim for United States expenses. As demonstrated by his production requests, the Claimant apparently did not even keep a copy of the Contract documents in his New York office. The Claimant has explained that his wire transfers were to cover the costs of ICC's Iranian operations. Given the Tribunal's other findings, separate reimbursement of the amounts transferred would thus lead to double recovery.

122. According to the Claimant, the "Respondents expropriated all of ICC's equipment and machinery, including a complete plant for the manufacture of pipes, a backholer, several four-wheel drive vehicles, power generators, small engines, a complete camp with trailers, a warehouse containing spare parts, and thousands of meters of irrigation pipe." At the Hearing, Mr. Della Ratta gave specific additional testimony regarding a number of these items.

123. The Tribunal sees no convincing evidence in the file of measures of expropriation affecting ICC's property. This, however, does not preclude the Tribunal from considering whether liability exists on another basis. See United Painting Company, Inc. and The Islamic Republic of Iran, Award No. 458-11286-3, para. 61 (20 Dec. 1989), reprinted in

23 Iran-U.S. C.T.R. 351, 369.¹¹ The Respondents have stated that "in case the Contractor owned any property it delivered same at the site against receipt." The Tribunal notes that an undated schedule from Moghan's Accounts Department makes reference to "the goods of [International Construction Company] at our disposal," whose value was to be credited to ICC. This confirms that Moghan had come into possession of ICC's equipment. At the Hearing, the Respondents acknowledged that the project eventually was completed and is now working.

124. In the context of the apportionment principles set out in paragraphs 74 through 76, supra, it is reasonable that ICC be reimbursed for the equipment at the Respondents' disposal. As recorded in the aforementioned schedule, Moghan estimated the equipment's value to be Rls. 12,563,300. The Claimant has stated that he was informed at the time that the materials were worth at least Rls. 40,000,000. The Tribunal notes that a table attached to ICC's balance sheet per 31 December 1979 attributes to the fixed assets historical costs (after correction for assets sold) of approximately Rls. 17,000,000. Taking into account all factors, the Tribunal awards the Claimant U.S.\$214,285.71 as the equivalent¹² of Rls. 15,000,000 on this claim, together with simple interest thereon at the rate of ten percent per annum from 1 January 1980.

¹¹The Tribunal also found that the force majeure conditions existing in Iran in late 1978 and early 1979 "were of such a nature that the Claimant's failure to remove the property ... cannot be deemed to constitute abandonment of the property." Id. at para. 66, reprinted in 23 Iran-U.S. C.T.R. at 371.

¹²Converted at the exchange rate of 70 rials to the dollar.

V. COSTS

125. On 26 February 1990 the Claimant filed an affidavit stating that through 31 January 1990 he had incurred legal fees of at least U.S.\$156,300 and expenses of at least U.S.\$20,100 in connection with these proceedings. By submission of 8 March 1990 the Agent of Iran questioned the probative value of the Claimant's statement. On 29 March 1990 the Claimant filed a supplemental affidavit seeking an additional U.S.\$30,200 plus U.S.\$9,890 as fees and expenses incurred in February 1990. On 18 April 1990 Moghan and the Ministry submitted a claim for legal costs and expenses totaling U.S.\$197,227; on 16 May 1990, Bank Melli filed a similar claim for U.S.\$63,000. Finally, on 19 June 1990 Moghan and the Ministry petitioned the Tribunal to deny Levitt's claim for legal fees and costs.

126. In determining the appropriate amount of costs to award, the Tribunal has on several previous occasions taken into account a party's conduct during the arbitral proceedings. See The Ministry of National Defence of the Islamic Republic of Iran and The Government of the United States of America, et al., Award No. 247-B59/B69-1, pp. 5-6 (15 Aug. 1986), reprinted in 12 Iran-U.S. C.T.R. 33, 36; International Schools, Award No. 290-123-1 at para. 49, reprinted in 14 Iran-U.S. C.T.R. at 80. The Tribunal observes that the Respondents' failure to comply with the Tribunal's production Orders has caused the expenditure of far higher costs of arbitration than would otherwise have been necessary. See para. 64, supra. The Tribunal finds it appropriate to award to the Claimant U.S.\$60,000 as compensation for its extra costs.

127. Considering the outcome of the Award, the Tribunal, applying the criteria outlined in Sylvania, Award No. 180-64-1 at pp. 35-38, reprinted in 8 Iran-U.S. C.T.R. at

323-24, finds no reasons to award any further costs of arbitration to either Party.

VI. AWARD

128. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

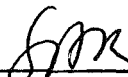
- a. The Respondent MOGHAN AGRO-INDUSTRIAL AND LIVESTOCK DEVELOPMENT CORP. is obligated to pay to WILLIAM J. LEVITT the sum of Two hundred fourteen thousand two hundred eighty-five United States Dollars and Seventy-one Cents (U.S.\$214,285.71), plus simple interest at the rate of ten percent (10%) per annum (365-day basis) from 1 January 1980 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 Respondents the MINISTRY OF AGRICULTURE AND NATURAL RESOURCES OF THE ISLAMIC REPUBLIC OF IRAN and MOGHAN AGRO-INDUSTRIAL AND LIVESTOCK DEVELOPMENT CORP. are obligated to pay to WILLIAM J. LEVITT the sum of Sixty thousand United States Dollars (U.S.\$60,000) in respect of his costs of arbitration.
- c. The above-stated 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. The Tribunal hereby orders the Respondents the ISLAMIC REPUBLIC OF IRAN, the MINISTRY OF AGRICULTURE AND NATURAL RESOURCES OF THE ISLAMIC REPUBLIC OF IRAN,

MOGHAN AGRO-INDUSTRIAL AND LIVESTOCK DEVELOPMENT CORP.
and BANK MELLI IRAN to take any and all actions that
are necessary to assure that Bank Melli Iran releases
letters of credit Nos. 70085 and 70087 issued by
American Express International Banking Corporation and
cancels the corresponding performance bonds.

e. All other claims and counterclaims are dismissed.


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

Dated, The Hague
29 August 1991



Gaetano Arangio-Ruiz
Chairman
Chamber Three

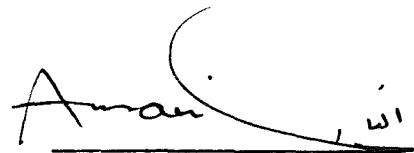
In the name of God



Richard C. Allison

Concurring in part

Dissenting in part



Parviz Ansari Moin

Concurring in part

Dissenting in part