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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 367
CHAMBER TWO
AWARD NO. 548-367-2

KAYSONS INTERNATIONAL CORPORATION,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
THE MINISTRY OF INDUSTRIES AND MINES,
THE ALBORZ INVESTMENT CORPORATION,
THE TOLID DARU COMPANY,
THE KAYVAN COMPANY,
THE TOLYPERS COMPANY,
THE PAYEGOZAR COMPANY,
THE PAKHSH ALBORZ COMPANY, and
THE KBC COMPANY,

Respondents.

AWARD

Appearances:

For the Claimant:

Mr. Francis X. Markey,
Ms. Agnès Tabah,
Attorneys
Mr. Walter Dougherty,
Witness
Dr. Nasrollah Khosrowshahi,
Ms. Phyllis Ball,
Mr. Richard Blancato,
Mrs. Faith Lita Khosrowshahi,
Representatives
Ms. Susanne Pari Khosrowshahi,
Mr. Cameron Kamran Khosrowshahi,
Observers

For the Respondent:

Mr. Ali H. Nobari,
Agent of the Government of the Islamic Republic of Iran
Dr. Bijan Izadi,
Deputy Agent of the Government of the Islamic Republic of Iran
Mr. S. Mohammadi,
Legal Advisor to the Agent of the Government of the Islamic Republic of Iran
Dr. Seyed Hossein Safaei,
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Attorneys for Alborz Investment Company and KBC
Mr. Farhad Toupshekan,
Mr. Seyed Nasser Shajareh,
Mr. Abolhossein Razavi,
Representatives
Mr. Garrosi,
Mr. Amouzadeh,
Mrs. Afshari Rad,
Observers

Also present:

Mr. D. Stephen Mathias,
Agent of the Government of the United States of America
Ms. Mary Catherine Malin,
Deputy Agent of the Government of the United States of America

I. PROCEEDINGS

1. On 18 January 1982, the Claimant KAYSONS INTERNATIONAL CORPORATION ("Kaysons" or "the Claimant") filed a Statement of Claim against THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN and its agencies and instrumentalities THE MINISTRY OF INDUSTRIES AND MINES, THE ALBORZ INVESTMENT CORPORATION, and THE KBC COMPANY ("the Respondents"). Kaysons alleges that the Respondents breached a series of technical assistance, technology transfer, and procurement contracts that Alborz's subsidiaries[1] and the KBC Company had entered into with Kaysons. As finally pleaded, the Claimant seeks compensation totalling not less than U.S.$6,012,054,[2] plus interest and costs.

2. On 1 November 1982, the Respondents each filed Statements of Defense, and Alborz and KBC also filed Statements of Counterclaim on the same date. On 12 April 1984, Pakhsh Alborz Company, a member of the Alborz Group, filed a Supplementary Statement which it submitted to be considered as Counterclaim Statement.

3. In their Statements of Defense, the Respondents disputed the Tribunal's jurisdiction over the Claim, arguing that the Claim does not meet the requirement of United States nationality under Article II, paragraph 1 of the Claims Settlement Declaration. The Respondents argued that because natural persons who own more than 50% of the stock of Kaysons are Iranian nationals by virtue of Article 976, sub-section 2 of the Civil Code of Iran, the Tribunal lacks jurisdiction over the Claim.

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[1]The Alborz Group consists of wholly-owned subsidiaries Kayvan, Tolid Daru, Tolypers, Payegozar, Payevar, and Pakhsh Alborz.

[2]The amount originally sought by the Claimant was U.S.$3,442,592; this amount was increased by subsequent amendments.

4. The Tribunal's determination that the Claimant's majority shareholders were dominant and effective United States nationals dismissed, in effect, the Respondents' argument. See Faith Lita Khosrowshahi, et al., and Government of the Islamic Republic of Iran, et al., ITL No. 76-178-2 (22 Jan. 1990), reprinted in 24 Iran-U.S. C.T.R. 40 ("Khosrowshahi"). Thus, the Tribunal in its Order of 3 May 1990, after noting that the relevant period in Khosrowshahi coincided with the period alleged to be relevant by Kaysons, concluded that it "does not have to determine the dominant and effective nationality of the [Claimant's] shareholders in this Case." In this connection, the Tribunal also joined the remaining jurisdictional issues to the merits.

5. A Hearing in this Case was held on 19 October 1992. After the Hearing, on 6 November 1992, the Claimant submitted certain additional documents, some of which already had been presented for the Tribunal's inspection at the Hearing. In the absence of any objections by the Respondents, the Tribunal in its Order of 16 December 1992 admitted those documents.

6. On 31 December 1992, the Respondents filed a submission requesting the Tribunal to accept an additional document attached thereto. On 15 January 1993, the Claimant objected to the Respondents' submission and, in the event the Tribunal decided to accept the Respondents' submission, responded to the arguments made therein. By its Order of 22 January 1993 the Tribunal admitted those documents.

II. FACTS AND CONTENTIONS

7. Kaysons was established more than 40 years ago under the laws of the State of New York, allegedly for the purpose of providing coordination, planning, representation, and project management services in the United States for an Iranian company which was the predecessor of the KBC Company. This predecessor company was initially involved in the import and distribution in Iran of pharmaceutical products and, allegedly by Kaysons'

efforts, obtained exclusive distributorship in Iran for several American pharmaceutical companies, including Lederle and McKesson. The KBC Company subsequently expanded these activities to the manufacture of pharmaceuticals as well as household cleaners and detergents, packaged food products, and the like.

8. In 1975, KBC reorganized and became the KBC Company and the Alborz Investment Company. Alborz was the parent company for a group of wholly-owned subsidiaries known collectively as the Alborz Group. The extended Khosrowshahi family owned the majority of shares both in KBC and Alborz. Kaysons for its part continued to supply raw materials, machines, spare parts and other goods to Alborz, as well as to provide other types of technological and technical assistance to Alborz.

9. The Claimant asserts that the contractual and business relations between Kaysons and Alborz were disrupted in the summer of 1979, when the Government of Iran appointed a manager to take control of Alborz and KBC. This disruption allegedly led to a full take-over of the companies in the fall of 1979 when the Iranian Government, acting through the Ministry of Industries and Mines, issued a series of directives removing the existing Alborz management and ordering the appointment of Government officers and directors. The Claimant contends that the Iranian Government also effectively took control of the KBC Company at the same time, although it never formally issued a decree. Following Iran's takeover, the Alborz Group companies ceased to perform their agreements with Kaysons. Similarly, KBC allegedly failed to pay its debts to Kaysons and breached its supply agreement with Kaysons.

10. The Respondents argue that the various contracts on which Kaysons bases its claims were dissolved by reason of force majeure. According to the Respondents, the Islamic Revolution and the subsequent United States trade embargo against Iran created conditions under which it became impossible for the Parties to perform under the contracts at issue in this Case. The Respondents also invoke the theory of changed circumstances

or the frustration of purpose, arguing that the performance of the contracts became impracticable to the extent that they eventually dissolved. Finally, the Respondents argue that the contracts are null and void under Iranian law which they argue is the applicable law.

III. JURISDICTION

A. The Claimant's Nationality

11. In order to establish its standing before this Tribunal, the Claimant has presented the Tribunal with the following evidence:

a) Kaysons' amended certificate of incorporation dated 25 July 1960, showing that Kaysons was organized under the law of the State of New York and was authorized to issue up to 600 shares;

b) a Certificate of Good Standing issued by the Department of State of the State of New York on 23 August 1985, showing that Kaysons has maintained its status as a corporation of the State of New York until that date;

c) a copy of Kaysons' share register, showing that from 1956 to 1976 Nasrollah Khosrowshahi and his wife Faith Lita Khosrowshahi each owned 100 shares and that on 20 April 1976 an additional 100 shares were issued to Faith Lita Khosrowshahi and 40 shares were issued to each of the four children, Susanne, Marcene, Kayvan, and Cameron;

d) copies of the share certificates dated 20 April 1976, showing that Faith Lita Khosrowshahi owns 200 shares of Kaysons and the children each own 40 shares of the company;

e) Kaysons' unredacted 1975 and 1976 corporate income tax returns, indicating that the paid-in capital of Kaysons had increased in 1976 from U.S.$200,000 at the beginning of the year to U.S.$448,000 at the end of the year, and that the ownership of Nasrollah Khosrowshahi had decreased from 50% to 16 and 2/3% during that period;

f) copies of Kaysons' redacted corporate income tax returns filed for the years 1979 and 1980, showing that Kaysons had

paid-in capital of U.S.$448,000 and that Nasrollah Khosrowshahi owned 16 and 2/3% of total shares;

g) Kaysons' 1976-77 and 1979-80 Annual Reports, each showing Kaysons with paid-in capital of U.S.$448,000.

12. In this connection, the Tribunal also notes that the Claimant presented the originals of the share certificates for the Tribunal's inspection at the Hearing.

13. The Respondents argue that notwithstanding the Tribunal's determination in Khosrowshahi, supra para. 4, that Faith Lita Khosrowshahi and her four children are dominant and effective United States nationals, the Claim in this Case does not meet the requirement of United States nationality. According to the Respondents, "the documents pertaining to the shareholding of the Claimants in Case No. 178 in Kaysons [are] doubtful or at least insufficient." Instead, they assert that "the actual [majority] shareholder is Dr. Nasrollah Khosrowshahi, and that, however, since by reason of his being of Iranian nationality ... he has thought that by assigning his shares to his wife and children, Kaysons would be able to assert claim against Respondents." In effect, the Respondents suggest that, as indicated in its Order of 1 October 1991, the Tribunal should draw adverse inference and conclude that Kaysons is merely the alter ego of Nasrollah Khosrowshahi, an Iranian national.[3]

14. Article VII, paragraph 1 of the Claims Settlement Declaration establishes a two-pronged test for determining corporate nationality: first, the corporation must be organized under the laws of Iran or of the United States, as the case may be; and second, natural persons who are citizens of such country must hold, directly or indirectly, an interest in such

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[3]Here, the Respondents refer to the Tribunal's determination in Nasrollah Khowsrowshahi and Government of the Islamic Republic of Iran, et al., Award No. 341-371-3 (18 Dec. 1987), reprinted in 17 Iran-U.S. C.T.R. 266 (dismissing the Claim for lack of jurisdiction, due to the sole Iranian nationality of the Claimant during the relevant period).

corporation equivalent to fifty percent or more of its capital stock.[4]

15. The Tribunal is satisfied, on the basis of the evidence before it, that Kaysons meets both tests. First, there is no dispute between the Parties that Kaysons is organized under the laws of New York. Second, the Claimant has shown, at least prima facie, that Faith Lita Khosrowshahi and her children have owned at all relevant times 60% of Kaysons' capital stock. Although the Respondents suggest that Nasrollah Khosrowshahi is the true owner of Kaysons, they have failed to present any evidence to that effect.

16. Based on the above, the Tribunal is satisfied that the Claimant is a United States national within the meaning of Article VII, paragraph 1 of the Claims Settlement Declaration. The Tribunal is also satisfied that the Claim has been owned continuously by a national of the United States during the requisite period, in accordance with Article VII, paragraph 2 of the Claims Settlement Declaration. Consequently, the Tribunal finds that the Claimant has standing to bring its claim before this Tribunal.

B. The Attributability of the Claim

17. The Respondents have raised the objection that "[t]he Claimant has asserted its claim against Alborz, while Alborz is not party to the contract with the Claimant, but the alleged

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[4]Article VII, paragraph 1 of the Claims Settlement Declaration provides, in relevant part, as follows:

> A "national" of Iran or of the United States,as the case may be, means ... (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

claims of the Claimant relate to the Alborz subsidiaries, not Alborz itself." The Respondents also argue that, those subsidiaries being independent legal personalities, the claims should have been brought against them, not Alborz.

18. The Tribunal finds this objection to be without merit. The Statement of Claim was directed against the Government of Iran "for itself and on behalf of its agencies and instrumentalities; the Ministry of Industries and Mines; the Alborz Investment Corporation; and the KBC Company." The Statement of Claim then proceeded to outline claims against Tolid Daru, Tolypers, Kayvan, Pakhsh Alborz, and Payegozar, all wholly-owned subsidiaries of Alborz. In 1982, Alborz Investment Corporation and the KBC Company filed their initial response, stating that "[t]he Kayvan, Tolid Daru, Tolypers, Payegozar and Payevar companies are members of the Alborz Group whose defenses are included in this Statement of Defense." In that Statement of Defense, Kayvan, Payevar, KBC, and Payegozar also filed counterclaims against Kaysons on their own behalf. The Payegozar counterclaim, for example, is captioned, "Payegozar Company (PVT Ltd) ... Claimant, and Kaysons International Corporation ... Respondent." Only in 1991 did the Respondents suggest that the claims against the subsidiaries should be rejected because they had not been included by the Claimant in the list of Respondents. Such an objection, however, is far too late. Consequently, as the Alborz subsidiaries were covered by the Statement of Claim, which identified each of them, and the Respondents waived any objection they might have raised for nine years before objecting, the Tribunal holds that the Alborz subsidiaries, referred to in the Statement of Claim, are proper Respondents in this Case.

19. Insofar as the Statement of Claim is directed against the Government of the Islamic Republic of Iran, the Ministry of Industries and Mines, and Alborz Investment Corporation, the Tribunal notes that the Claimant has not stated any cause of action against these Respondents. Consequently, the claims against them must be dismissed.

C. Other Jurisdictional Issues

20. The Respondents argue that the claims against Alborz and its subsidiaries as well as KBC are outside the Tribunal's jurisdiction because neither Alborz nor KBC was under control of the Government of Iran on 19 January 1981. The Respondents further submit that, even assuming Alborz was taken over by Iran in the summer of 1979 as alleged by the Claimant, a major portion of the Claimant's claims arose after 19 January 1981 and therefore was not outstanding on that date, as required by the Claims Settlement Declaration.

21. The Tribunal will consider whether Alborz and KBC were controlled by the Government of Iran on 19 January 1981, as a preliminary issue. Whether the claims against the Respondent companies arose prior to or after 19 January 1981 is an objection closely related to the merits of the claims. Therefore, the Tribunal will address that issue when considering the merits of the claims.

22. The Tribunal will address the jurisdictional issues relating to the Respondents' counterclaims together with the merits of the counterclaims.

1. Alborz

23. The Claimant argues that Iran assumed control over the Alborz Group in the summer of 1979 by appointing a government manager to supervise the companies. The Claimant submits that the involvement of the Iranian Government led to full expropriation of the companies in the fall of 1979, when the Government issued a series of directives removing the existing Alborz management and ordering the appointment of Government officers and directors pursuant to Bill No. 6738 dated 16 June 1979 and Bill No. 8780 dated 7 July 1979. The Claimant has produced as evidence copies of the Government's announcements in the Official Gazette, citing the pertinent Government directives numbered 208266 through 208270, dated 22 September 1979, and

number 209724, dated 16 October 1979. The Government also appointed directors to Alborz's subsidiaries Tolid Daru, Payevar, Payegozar, and Pakhsh Alborz.

24. Based on the evidence before it, the Tribunal is satisfied that the Alborz Group companies were under the control of the Government of Iran by the end of October 1979 at the latest. In view of the fact that the cause of action in each of the individual claims in this Case is breach of contract, the Tribunal need not decide whether the governmental control amounted to an expropriation of the Respondent companies. To determine jurisdiction, the Tribunal need only establish that the Respondent companies were under the control of the Government of Iran on the relevant date, 19 January 1981. See Kimberly-Clark Corp. and Government of the Islamic Republic of Iran, et al., Award No. 46-57-2, p. 9 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334, 338. Consequently, the Tribunal determines that it has jurisdiction over the Alborz subsidiaries under Article VII, paragraph 3 of the Claims Settlement Declaration.

2. KBC

25. The Claimant contends that although no formal decree was ever issued, Iran effectively took over KBC through a series of acts between June and October 1979. The Claimant alleges that the representatives of the Ministry of Industries and Mines announced themselves as the new managers and directors at KBC, took physical possession of KBC's operating offices, removed KBC's books and records, and eventually took control of all aspects of KBC's business activities.

26. The Claimant has failed to produce evidence sufficient to support its allegation of government control over KBC on 19 January 1981. Indeed, it appears that the evidence submitted by the Respondents suggests that measures were taken by the Government with respect to KBC only in April 1981. Consequently, the Tribunal must dismiss the claim against KBC for lack of jurisdiction. See Eastman Kodak Co., et al., and Government of

the Islamic Republic of Iran, et al., Award No. 329-227/12384-3, para. 55 (11 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 153, 168 (finding that on 19 January 1981 one of the Respondent companies was not an entity controlled by Iran and therefore dismissing the claim for lack of jurisdiction).

IV. THE MERITS OF THE CLAIM

27. The Tribunal first addresses the two general defenses raised by the Respondents, namely, that the contracts and agreements at issue in this Case were dissolved due to the circumstances prevailing at the time of the Islamic Revolution, and that the applicable law in this Case is Iranian law, under which the contracts are null and void. The Tribunal then will proceed to address the merits of the individual claims.

28. In their first argument, the Respondents contend that their contracts with Kaysons were nullified by force majeure or changed circumstances on either of two grounds: (a) that the United States-imposed economic embargo of Iran and the subsequent break in diplomatic relations between the two countries rendered performance under the contracts impossible; or, alternatively, (b) that the Iranian Government's implementation of the "Generic Project" prevented the Respondents from fulfilling their contractual obligations.[5]

29. In view of the Tribunal's findings on the merits of the claims, infra, the Tribunal need not decide whether the Respondents were, by reason of force majeure, prevented from fulfilling their obligations under the supply agreements between the Parties.

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[5]The Tribunal notes that the Respondents do not appear to argue that force majeure or changed circumstances also apply to Kaysons' claim for unreimbursed costs. See infra paras. 32-34, 43-45, and 49-51.

30. The Respondents also allege that force majeure conditions relieved Tolid Daru of its obligations under the Technology Transfer Agreement. According to that Agreement, Kaysons performed a valuable service by negotiating for Tolid Daru to become the owner of certain trademarks. As compensation for that and future services, Tolid Daru agreed to pay Kaysons a "technology transfer fee" of 2 and 1/2% on net sales of products associated with those trademarks. Although the Respondents allege that the economic embargo made fulfillment of the contract impossible, the Tribunal notes that the embargo, which was imposed in November 1979, could not have affected Tolid Daru's obligation to pay technology transfer fees due up to the end of October 1979; see infra paras. 37-39. Nor has Tolid Daru shown that the implementation of the "Generic Project" had by the end of October 1979 affected its obligation to pay technology transfer fees; indeed, Tolid Daru has acknowledged that up to the end of October 1979 such fees were due and owing. See infra paras. 37-39.

31. The Respondents also argue that under Iranian law the contracts and agreements relied on by the Claimant are null and void. On this issue, the Tribunal agrees with the Claimant's submission that, even if Iranian law were held determinative in this Case, the Respondents have failed to produce any evidence to establish their allegation. Consequently, the Respondents' defense is dismissed.

A. Claims with Regard to Tolid Daru

1. Unreimbursed Costs

32. The Claimant seeks U.S.$54,519 for costs it incurred on behalf of Tolid Daru in 1979 and early 1980. The Claimant contends that the Government-appointed directors and management of Alborz and Tolid Daru have refused to settle these debts. This claim is not based on a written contract, but on a longstanding understanding and agreement between the Parties to settle the debts and credits on a periodic basis. The Claimant

has produced as evidence an annual summary of debit and credit items sent to Tolid Daru, together with a cover letter dated 7 May 1980, requesting payment of the amounts outstanding.

33. The Respondents deny this claim, arguing that Tolid Daru's records indicate no such debts. The Respondents also argue that the credits referred to by the Claimant were cancelled because of Kaysons' failure to carry out the orders within the time limit specified in the credits, owing to the severance of economic links between Iran and the United States. The Respondents, however, provide no evidence to support their assertions and no contemporaneous evidence calling into question the 1980 billing.

34. The Tribunal finds that the Claimant has established a prima facie case that the amounts it seeks were due and owing. Although the Respondents have submitted an affidavit by an employee of Tolid Daru, they have failed to submit any contemporaneous evidence to rebut the Claimant's case. Consequently, the Claimant is awarded the amount sought, U.S.$54,519.

2. Technology Transfer Fees

35. Under a Technology Transfer Agreement between Tolid Daru and Kaysons dated 21 March 1977,[6] the Claimant seeks a total of U.S.$1,209,799. This amount consists of U.S.$109,799 in fees allegedly acknowledged by Tolid Daru to be due Kaysons for the April-October 1979 period; U.S.$325,000 for the period from November 1979 to January 1982; and U.S.$775,000 that accrued from February 1982 through the original term of the Agreement expiring on 21 March 1987. The Claimant subsequently amended this claim, seeking additional fees accruing from April 1987 through 1 August 1990, equal to U.S.$500,000 and arguing that, as the Technology

[6]The Claimant characterizes this Agreement as a Royalty Agreement. However, as pointed out by the Respondents, the Agreement establishes that Kaysons acted as a "technology transfer representative" and did not itself own the trademarks or other property rights at issue.

Transfer Agreement has not been terminated by either Party, additional fees continue to accrue at the rate of U.S.$12,500 per month.

36. The Respondents deny the validity of the Technology Transfer Agreement because the contract does not bear the seal of the company, as allegedly required by the applicable corporate regulation. The Respondents also generally refute the claim, arguing that after the Islamic Revolution Kaysons rendered no services under the Agreement. In addition, the Respondents invoke the Iranian Government's Generic Project under which, inter alia, trade names of medicines were to be changed into their chemical denominations. As a result, they allege that after the revolution no drugs were produced or sold under the license at issue and there is no basis for a claim for any technology transfer fees. As to the U.S.$109,799 sought by the Claimant as fees due up to October 1979, the Respondents argue that the claim fails for lack of proof; in any event, the Respondents dispute the authenticity of the documents submitted by the Claimant. The Respondents also contend that the books of Tolid Daru show no such debit.

37. With respect to the Respondent's argument that the Technology Transfer Agreement is invalid, the Tribunal agrees with the Claimant that the parties must be held to have accepted the agreement by their subsequent operations thereunder and by abiding by its terms and conditions for over two years. Consequently, the Tribunal finds that Tolid Daru has in fact agreed to the Technology Transfer Agreement and is now estopped from arguing that the Agreement was not initially validly entered into. See, e.g., PepsiCo., Inc., and Government of the Islamic Republic of Iran, et al., Award No. 260-18-1, pp. 39-40 (13 Oct. 1986), reprinted in 13 Iran-U.S. C.T.R. 3, 33; Pomeroy and Government of the Islamic Republic of Iran, Award No. 50-40-3, p. 17 (8 June 1983), reprinted in 2 Iran-U.S. C.T.R. 372, 380.

38. As to the substance of the claim, the Tribunal notes that the Claimant acknowledges that part of the claim arose after

19 January 1981, the date of the Algiers Declarations. In the absence of any allegation on the Claimant's part that the Respondents are liable for anticipatory breach, the Tribunal dismisses this part of the claim for lack of jurisdiction. See Kimberly-Clark, supra para. 24, pp. 9-10, 2 Iran-U.S. C.T.R. at 338.

39. As for the period prior to 19 January 1981, the Tribunal notes that the last partial payment of U.S.$50,000 was made in December 1978 for the period ending 21 July 1978 and that Tolid Daru has acknowledged the amount of Rls. 5,023,229, the equivalent of U.S.$70,750, less taxes,[7] as owed by it up to March 1979, and additional U.S.$33,131 up to November 1979. There is no evidence which would support the Claimant's claim for fees accrued after the latter date. Accordingly, the Tribunal awards Kaysons U.S.$56,600, which is the net amount owed up to March 1979, plus U.S.$33,131, which is the amount owed up to November 1979, adding up to U.S.$89,731.

3. Handling Fees

40. Under a Supply Agreement between Tolid Daru and Kaysons, dated 21 March 1975, Kaysons seeks not less than U.S.$233,120 for alleged handling fees. The Agreement provided that Tolid Daru would exclusively purchase from and through Kaysons all its requirements for imported raw materials, equipment, and supplies originating from the United States and specified other countries. The Agreement also provided that Tolid Daru would pay Kaysons a handling fee 2% to 5% of the value of the invoice, and that Tolid Daru should credit Kaysons for at least the minimum 2% handling fee if Tolid Daru decided to purchase its requirements directly. Kaysons' claim covers the period from 21 March 1980, after which Tolid Daru stopped placing orders under the Supply Agreement, until the present.

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[7] It appears from the evidence submitted by the Claimant that the applicable tax rate was 20%. In the absence of any rebuttal by the Respondents, the Tribunal will apply this tax rate.

41. The Respondents deny this claim on various grounds, arguing, inter alia, that the claim is based on the erroneous assumption that Tolid Daru has procured products from other companies in the Western Hemisphere. The Respondents also contend that Kaysons is not entitled to any handling fees because it failed to meet its own contractual obligations.

42. This claim is dismissed for lack of proof. The Claimant has failed to produce any credible evidence to show that Tolid Daru made purchases in breach of the Supply Agreement. The Claimant's witness, Mr. Walter Dougherty, testified at the Hearing that beginning in mid-1979 the Alborz companies stopped placing orders through Kaysons, and that some of Kaysons' regular suppliers had advised him that they had been contacted directly by the Alborz companies to try to procure supplies directly. Mr. Dougherty's testimony, however, is hearsay and, in the absence of any contemporaneous evidence or supporting documentary proof, cannot be credited sufficiently to establish the claim.

B. Claims with Regard to Kayvan

1. Unreimbursed Costs

43. Kaysons seeks U.S.$6,605 in unreimbursed costs that Kayvan allegedly owes it according to debit and credit notes covering the fiscal year of 1979. The annual summary of the debit and credit notes is part of the record, as well as the cover letter dated 7 May 1980, enclosing the notes and requesting payment of the amount outstanding.

44. The Respondents do not accept this claim, arguing that the costs were taken into account in the original invoices. The Respondents also contend that Kayvan's books do not reflect such amounts as being due to Kaysons.

45. The Tribunal notes that the Respondents have produced an affidavit by the managing director of Kayvan. However, in the absence of any contemporaneous documentary support, the Tribunal

finds this statement insufficient to rebut the Claimant's case. Consequently, the Claimant is entitled to recover the amount sought, U.S.$6,605.

2. Handling Fees and Know-How Fees

46. Under a Purchase and Sales Agreement between Kayvan and Kaysons dated 21 March 1977, Kaysons seeks U.S.$1,120,500 as lost handling fees since February 1980 and U.S.$750,000 as know-how fees from 21 March 1980 through the filing date, and an as-yet undetermined amount of know-how fees accrued to date. Kaysons argues that Kayvan has failed to meet its obligations under the Agreement by failing to direct its procurement through Kaysons.

47. The Respondents challenge the Tribunal's jurisdiction over this claim, arguing that pursuant to Article 16 of the Purchase and Sales Agreement any dispute between the Parties is exclusively within the jurisdiction of the Iranian courts.[8] Thus, they allege that the present claim is covered by the exception set forth in Article II, paragraph 1 of the Claims Settlement Declaration.[9] The Respondents also dispute the validity of the Purchase and Sales Agreement because it carries only the signature of the managing director. Under the company's Articles of Association a contract must be signed by both the managing director and a member of the board of directors and carry the seal of the company. The Respondents also argue that the amount sought by Kaysons is exaggerated, and deny that Kayvan made any purchases from the United States after January 1980. The Respondents finally argue that Kaysons did not provide any

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[8]Article 16 provides that the Agreement "is entered into under the laws of the Empire of Iran."

[9]Article II, paragraph 1 of the Claims Settlement Declaration excludes from the Tribunal's jurisdiction "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position."

services after the Islamic Revolution and failed to submit any new project which would entitle it to know-how fees.

48. Although Kaysons claims to have information that suppliers it introduced to Kayvan continue to do business with the company directly, it has not produced any evidence to that effect. The Tribunal has already determined that the testimony of the Claimant's witness Mr. Walter Dougherty is not sufficient to establish Kaysons' claim. See supra para. 42. Consequently, this claim is dismissed for failure of proof, and the Tribunal need not consider the other grounds for dismissal proffered by the Respondents.

C. Claims with Regard to Tolypers

1. Unreimbursed Costs

49. Kaysons claims U.S.$813 in unreimbursed costs for shipping and freight charges for deliveries to Tolypers in 1979. The Claimant has produced as evidence an annual summary of debit and credit notes (seven debit notes and one credit note), and a cover letter dated 7 May 1980, enclosing the notes and requesting payment of the amount outstanding.

50. The Respondents generally refute this claim on the same grounds as they deny Kaysons' claim against Tolid Daru. Other than an undated affidavit by the managing director of Tolypers, the Respondents have not produced any evidence in rebuttal.

51. The Claimant has established a prima facie case that remains unrebutted by the Respondents. Consequently, the Claimant is entitled to the amount sought, U.S.$813.

2. Handling Fees

52. Under a Supply Agreement dated 21 March 1975 between Kaysons and Tolypers, Kaysons seeks U.S.$728,108 as lost handling fees.

This Agreement is, in substance, analogous to that between Tolid Daru and Kaysons; see supra para. 40.

53. The Respondents deny the claim, arguing that Tolypers has not made any purchases from the United States or other Western Hemisphere countries. The Respondents also generally refer to defenses employed by Tolid Daru and Kayvan.

54. This claim must be dismissed. The Claimant has failed to produce any specific evidence to substantiate its claim that Tolypers made purchases in breach of the Supply Agreement. As before, the testimony of the Claimant's witness Mr. Walter Dougherty is not sufficient to establish the claim; see supra para. 42.

D. Claim with Regard to Payegozar

55. Under a Technology Agreement dated 21 March 1976 between Kaysons and Payegozar, Kaysons seeks U.S.$320,000 in unpaid monthly fees for services rendered by Kaysons under the Agreement. Kaysons contends that in 1978 Payegozar stopped making the monthly payments and, instead, made lump sum payments for aggregated monthly payments of varying duration. The last payment was made in March 1979 covering payments due up to the end of February 1979. Kaysons argues that Payegozar has never terminated the Agreement and therefore the monthly fees will continue to run at the rate of U.S.$2,000 per month.

56. The Respondents reply that from March 1979 onwards Kaysons failed to discharge any of its obligations under the Technology Agreement and therefore is not entitled to any remedy.

57. The Tribunal finds that Kaysons has not produced any evidence to show that it continued to provide its services after February 1979, when the last payment was made. Consequently, the Claimant has failed to establish the factual basis of its claim.

E. Claim with Regard to Pakhsh Alborz

58. Against Pakhsh Alborz, Kaysons claims no less than U.S.$30,000. Kaysons argues that in June 1979 Pakhsh Alborz placed two orders of corn oil with Kaysons, which then ordered the corn oil from Balbo Oil Company of Brooklyn, New York, and arranged for shipment. The first order was shipped on 7 November 1979 without incident. The shipment of the second order, however, was prevented by the longshoremen's union boycott in New York of all shipments to Iran, including food and medicines, in response to the seizure of the United States Embassy in Tehran and the detention of United States nationals. Kaysons argues that it attempted to secure Pakhsh Alborz's agreement to allow indirect shipment, but Pakhsh Alborz ignored these requests and failed to extend the letter of credit issued for the second order by Bank Melli. As a consequence, the letter of credit expired on 30 January 1980, without shipment of the second order, and Kaysons allegedly lost a U.S.$30,000 deposit which it had paid to Balbo to secure the second shipment.

59. The Respondents first deny that Pakhsh Alborz ever placed the disputed order. Alternatively, the Respondents insist that the prevailing circumstances, not Pakhsh Alborz, caused the loss of Kaysons' deposit. Finally, the Respondents argue that there is no evidence that the Claimant ever paid the U.S.$30,000 deposit or, assuming it was paid, that it was not refunded by Balbo.

60. This claim is prima facie without merit because the Claimant does not allege that Pakhsh Alborz is in breach of contract; rather, the Claimant blames Pakhsh Alborz for not entering into a subsequent contract that would have allowed the Claimant to deliver the oil. Consequently, the claim is dismissed.

F. Claim for Additional Damages

61. Kaysons seeks U.S.$342,860 for additional damages it has allegedly incurred or which it will incur in reducing its

operations, to the extent such damages were or will be incurred in reliance on the Respondents and could not be reasonably anticipated. These damages consist of U.S.$112,860 for two years' office rental through lease termination; termination, severance and payroll costs for employees of not less than U.S.$180,000; and unrecoverable additional overhead costs of not less than U.S.$50,000, consisting primarily of wasted assets, including office furnishings.

62. The Respondents deny any responsibility for these damages, arguing that Kaysons is an international corporation "which did not come into existence merely to render services to companies in the Alborz Group." The Respondents also argue that the Claimant has not produced any documentary proof to support its claim, and that in any event there is "no causal relation whatsoever between the purported damages and the Respondents' acts."

63. The Tribunal agrees with the Respondents. There is no contractual or any other basis for the damages sought by the Claimant under this heading. Accordingly, this claim is dismissed.

V. COUNTERCLAIMS

A. Kayvan Counterclaim

64. Kayvan seeks U.S.$1,500,000, plus interest, which it argues is the amount by which Kaysons overpriced bakery equipment purchased by Kayvan in 1976. Kayvan argues that the overcharge was detected only after the Islamic Revolution, when the Khosrowshahi brothers were no longer in control of the Alborz Group companies.

65. In response, Kaysons argues that the counterclaim was not timely made, and that even assuming it was timely made, the Tribunal lacks jurisdiction because the counterclaim is not

related to Kaysons' claim. Kaysons also denies the merits of the claim, arguing that the overcharge transaction was structured by Kayvan and that in any event the overcharge was eventually refunded by Kaysons at Kayvan's request.

66. The Tribunal notes that Kaysons claims against Kayvan for unreimbursed costs covering the years 1979 and 1980, and for handling and know-how fees since February 1980, whereas Kayvan's counterclaim arises out of a transaction which took place back in 1976. Consequently, because the counterclaim does not arise "out of the same contract, transaction or occurrence that constitutes the subject matter of [the Claimant's] Claim," as required by Article II, paragraph 1 of the Claims Settlement Declaration, Kayvan's counterclaim must be dismissed for lack of jurisdiction.

B. Payevar Counterclaim

67. Payevar seeks U.S.$463,222, plus interest, which is the amount Kaysons allegedly owes it as a result of Kaysons' failure to dispatch raw materials ordered and paid for by Payevar.

68. Kaysons argues that this counterclaim falls beyond the Tribunal's jurisdiction because it does not arise out of the same contract or transaction as the claim -- indeed, Kaysons has not even brought a claim against Payevar. Kaysons also denies that the counterclaim has any merit, stating that the funds at issue were sent Kaysons with instructions to be paid to a third party, which Kaysons did.

69. The Tribunal agrees with the Claimant that this counterclaim be dismissed as outside the Tribunal's jurisdiction. It is clear that Payevar's counterclaim cannot be in response to a claim because Kaysons has not brought a claim against Payevar.

c. Payegozar Counterclaim

70. Under a Technology Agreement dated 22 November 1975, Payegozar seeks U.S.$277,422, the equivalent of Rls. 19,419,585, plus interest, as damages resulting from Kaysons' alleged failure to fulfil its obligations under the contract.

71. Kaysons disputes the Tribunal's jurisdiction over the counterclaim, arguing that its claim against Payegozar relates to a different contract entered into on 21 March 1976. Kaysons also denies that the counterclaim has any merit, stating that "Payegozar has calculated its damages by submitting what appear to be excerpts from its unaudited, internally prepared profit and loss statement and similar financial documents which on their face purport to show financial results of company-wide operations with no distinction or designation of projects in which Kaysons was involved."

72. It appears that the counterclaim arises out of the same contract as the claim, and therefore that the Tribunal has jurisdiction over the counterclaim.[10] However, the Tribunal agrees with the Claimant that this counterclaim suffers from a complete failure of proof. Other than an affidavit from the managing director of Payegozar and the vague documents noted above, there is nothing in the record to support the Respondents' calculations. Consequently, this counterclaim must be dismissed for lack of proof.

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[10]The Parties appear to agree that although the Claimant bases its claim on an agreement dated 21 March 1976, and the Respondent bases its counterclaim on an agreement dated 22 November 1975, they are in substance the same contract. Although the Claimant disputes the Tribunal's jurisdiction over the counterclaim, it states elsewhere that "the Technology Agreement was executed in duplicate original copies, which were signed by each of the parties and exchanged by mail, and thus it is possible that the two duplicate originals bear different signature dates." At the Hearing, the Claimant's counsel also acknowledged that the contract relied on by the Respondents appears to be the same as that relied on by the Claimant. The Respondents do not dispute the Claimant's account.

D. Pakhsh Alborz Counterclaim

73. Pakhsh Alborz counterclaims U.S.$28,752 which sum Kaysons allegedly owes it under an Agreement dated 20 October 1976. Pakhsh Alborz argues that "[b]y the inception of Islamic Revolution in Iran, Kaysons Corporation terminated the Agreement without settling its accounts with Pakhsh Alborz." Pakhsh Alborz bases its counterclaim on a default judgment No. 580 rendered by Bench 5 of Tehran Public Court of 24 October 1983, upholding the claim and awarding Rls. 2,012,605, the equivalent of U.S.$28,752. The Respondents argue that this debt is still outstanding.

74. Kaysons disputes the admissibility of the Pakhsh Alborz counterclaim, arguing that the counterclaim is not timely, coming more than one and a half years after the submission of other counterclaims by the Respondents. The Claimant also argues that the Tribunal lacks jurisdiction over the counterclaim. According to the Claimant, the counterclaim falls beyond the Tribunal's jurisdiction because it does not arise out of the same contract, transaction or occurrence that constitutes the subject matter of the claim; and because it was not outstanding on 19 January 1981, the judgment of the Tehran Public Court having been handed down on 27 October 1983. The Claimant also denies the merits of the counterclaim, and argues that Pakhsh Alborz should not be allowed to pursue its counterclaim before the Tribunal once it had chosen to press its claim in Tehran courts.

75. It is clear that the counterclaim does not arise out of the same contract as any of the claims. Consequently, it must be dismissed for lack of jurisdiction.

E. KBC Counterclaim

76. It is well established in the Tribunal's jurisprudence that if the Tribunal lacks jurisdiction over the claim, it also lacks jurisdiction over the counterclaim. See, e.g., Reliance Group, Inc. and Government of the Islamic Republic of Iran, et al.,

Award No. 15-90-2, p. 3 (8 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 384, 385. Accordingly, the Tribunal having found that it lacks jurisdiction over Kaysons' claim against KBC, KBC's counterclaim against Kaysons must also be dismissed.

VI. INTEREST

77. Kaysons seeks interest at the U.S. prime rate prevailing from time to time from the date on which the amounts sought became due through the date of actual payment in full of any award.

78. In order to compensate the Claimant for the damages it has incurred as a result of delayed payment, the Tribunal awards interest from the date on which the claims arose. These dates, and the rates of interest, are established as follows:

a) As to Kaysons' claim against Tolid Daru for unreimbursed costs, the Tribunal awards simple interest at the rate of 9.5% per annum on U.S.$54,519 from 7 June 1980, one month after the date of the cover letter enclosing the annual summary of debit and credit notes and requesting payment;

b) As to Kaysons' claim against Tolid Daru for technology transfer fees, the Tribunal awards simple interest at the rate of 9.7% on U.S.$56,600 from 21 April 1979, on U.S.$18,648 from 21 August 1979, and on U.S.$14,483 from 21 December 1979, in each case one month after the date on which the amount became due under Article 6 of the Technology Transfer Agreement;

c) As to Kaysons' claim against Kayvan for unreimbursed costs, the Tribunal awards simple interest at the rate of 9.5% on U.S.$6,605 from 7 June 1980, one month after the date of the cover letter enclosing the annual summary of debit and credit notes and requesting payment;

d) As to Kaysons' claim against Tolypers for unreimbursed costs, the Tribunal awards simple interest at the rate of 9.5% on U.S.$813 from 7 June 1980, one month after the date of the cover letter enclosing the annual summary of debit and credit notes and requesting payment.

VII. COSTS

79. Each Party shall bear its own costs of arbitration.

VIII. AWARD

80. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a) The Respondent THE TOLID DARU COMPANY is obligated to pay the Claimant KAYSONS INTERNATIONAL CORPORATION:

1. The sum of fifty-four thousand five hundred nineteen United States dollars and no cents (U.S.$54,519), plus simple interest at the rate of 9.5% per annum (365-day basis) from 7 June 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

2. the sum of eighty-nine thousand seven hundred and thirty-one United States dollars and no cents (U.S.$89,731), plus simple interest at the rate of 9.7% per annum (365-day basis), calculated as follows: on U.S.$56,600 from 21 April 1979; on U.S.$18,648 from 21 August 1979; on U.S.$14,483 from 21 December 1979, up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

b) The Respondent THE KAYVAN COMPANY is obligated to pay the Claimant KAYSONS INTERNATIONAL CORPORATION the sum of six thousand six hundred and five United States dollars and no cents (U.S.$6,605), plus simple interest at the rate of 9.5% per annum (365-day basis) from 7 June 1980 up to an including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

c) The Respondent THE TOLYPERS COMPANY is obligated to pay the Claimant KAYSONS INTERNATIONAL CORPORATION the sum of eight hundred thirteen United States dollars and no cents (U.S.$813), plus simple interest at the rate of 9.5% per annum (365-day basis) from 7 June 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

d) These obligations shall be satisfied by payment out of the Security Account established by paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981.

e) The Claim of the Claimant KAYSON INTERNATIONAL CORPORATION against the Respondents THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF INDUSTRIES AND MINES, and ALBORZ INVESTMENT CORPORATION is dismissed for failure to state a cause of action.

f) The Claim of the Claimant KAYSONS INTERNATIONAL CORPORATION against the Respondent THE KBC COMPANY is dismissed for lack of jurisdiction.

g) The Counterclaims brought by the Respondents THE KAYVAN COMPANY, THE PAYEVAR COMPANY, THE PAKHSH ALBORZ COMPANY, and THE KBC COMPANY are dismissed for lack of jurisdiction.

h) The Counterclaim brought by the Respondent THE PAYEGOZAR COMPANY is dismissed for lack of proof.

i) Each Party shall bear its own costs of arbitrating this Case.

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

Dated, The Hague
28 June 1993

José María Ruda
Chairman
Chamber Two

In the Name of God

George H. Aldrich

Koorosh H. Ameli
Dissenting as to jurisdiction over Claimant; concurring as to the remaining. See Separate Opinion.