IRAN-UNITED STATES CLAIMS TRIBUNAL

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CASE NOS. B-59,B-69
CHAMBER ONE
AWARD NO. 247 -B59/B69-1

THE MINISTRY OF NATIONAL
DEFENCE OF THE ISLAMIC
REPUBLIC OF IRAN,
Claimant

and

THE GOVERNMENT OF THE
UNITED STATES OF AMERICA,
BOWEN-MCLAUGHLIN-YORK COMPANY
DIVISION OF HARSCO CORPORATION,
Respondents.

AWARD

I. Introduction

The Claimant, THE MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN ("MOD") filed two Statements of Claim with the Tribunal on 19 January 1982, both against the same Respondents, THE GOVERNMENT OF THE UNITED STATES OF AMERICA ("the United States") and BOWEN MCLAUGHLIN YORK CO. ("BMY"). Although based on different contracts, the two claims raise the same issues of jurisdiction. A joint pre-hearing conference was held on 29 August 1983 and the two Cases are now made the subject of one Award.

The first, Case No. B-59, seeks an award of $14,726,599 against BMY as damages for the alleged breach of a contract known as "BMY-4" entered into between MOD and BMY on 9 May 1978 for the supply of certain military equipment and the repair and modernisation of tanks in connection with a project known as "Arya". The damages sought by MOD include reimbursement of an advance payment of $7,500,000, interest thereon to January 1982, and alleged incidental costs. Relief is also sought against the United States which, it is alleged, was under an obligation to procure certain of the items designated in the contract. No Foreign Military Sales contract was ever concluded with the United States in respect of the Arya project, and it was ultimately cancelled by the Iranian government. However, MOD asserts in its Statement of Claim that the claim against BMY is "entirely related to and indivisable [sic] from" that against the United States. In other words, as was confirmed at the pre-hearing conference, MOD seeks to hold both Respondents jointly and severally liable.

Both BMY and the United States have petitioned for dismissal of the claim on the ground that it falls outside the Tribunal's jurisdiction. Relying on Case No. A2, Decision No. DEC 1-A2-FT (26 January 1982), reprinted in 1 Iran-U.S. C.T.R 101, they argue that BMY, as a non-governmental corporate entity and a United States national, cannot

be a Respondent to a claim brought by an Iranian governmental entity. Moreover, they argue, there is no basis for an official claim "arising out of contractual arrangements between [the two Governments] for the purchase and sale of goods and services", as provided by Article II, paragraph 2 of the Claims Settlement Declaration, as there is no contractual nexus here between MOD and the United States.

Without prejudice to the issues of jurisdiction, BMY has filed a defence on the merits, raises a counterclaim for $11,040,621, and claims a set-off of $4,216,576, exclusive of interest and costs.

The second Claim, filed as Case No. B-69, seeks relief in the form of damages of $22,990,705 against BMY, including accrued interest of $15,773,347, arising out of alleged breaches of contracts known as "BMY-2" and "BMY-3" entered into between MOD and BMY on 27 September 1973 and 9 February 1975 respectively for operational services and tank repair and overhaul in connection with a military project known as "Phoenix". Here, too, the Claimant seeks to hold the United States jointly and severally liable on the theory that BMY required governmental co-operation, and in particular, export licences, to carry out its obligations under the contract. This case differs from Case No. B-59 in that Foreign Military Sales contracts were concluded with the United States in respect of the Phoenix project. However, the Claimant made clear at the pre-hearing conference that no relief was sought here against the United States in respect of these FMS contracts, which are among the subjects of Case No. B-1. MOD takes the position, instead, that the FMS contracts provide evidence of the indivisible relationship that existed between BMY and the United States in the performance of the contracts BMY-2 and BMY-3.

Petitions for dismissal on grounds of jurisdiction have, likewise, been filed by both Respondents in this Case. BMY has repeated the counterclaim and set-off raised in Case No. B-59, without prejudice to the issue of jurisdiction.

In its Order of 9 September 1983, after the pre-hearing conference, the Tribunal requested the MOD to file documentary evidence in support of the alleged legal nexus between MOD and the United States Government in relation to the three contracts with BMY. MOD filed a legal brief and evidence, and the Respondents thereafter filed submissions in response.

In its Order of 29 May 1985, the Tribunal indicated that it would decide the jurisdictional issues in both Cases on the basis of the written submissions and evidence then before it.

II. Reasons for Award

The Tribunal is called upon to decide whether, in the context of the present Cases, it has jurisdiction first, over BMY, and second, over the United States as Respondents. Different considerations apply to each.

i) BMY

Whether BMY is itself a separate legal entity or whether it is more correctly characterised as a division of Harsco Corporation is a question the Tribunal need not reach here. In either case, it is a non-governmental corporate entity the United States nationality of which is not in dispute.

In one of its earliest interpretative rulings on the meaning of the Claims Settlement Declaration, the Tribunal held that the General Declaration and Claims Settlement Declaration did not confer jurisdiction over claims by Iran against

United States nationals. See Case No. A2, supra, pp. 2-4. The Tribunal observed that the Declaration was quite specific in listing the types of claim which could be brought before the Tribunal, that the Tribunal's jurisdiction was limited to the grant contained in its constitutive instrument, and that the reference in the General Declaration to "the purpose of both parties to terminate all litigation as between the Government of each party and the nationals of the other" must be read subject to, and in the context of, the wording of Article II, paragraph 1 of the Claims Settlement Declaration, which refers specifically to "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States ...". Id. See also Case No. A14, Award No. 88-A14-2 (6 December 1983), reprinted in 4 Iran-U.S. C.T.R. 74. There is thus no basis on which the Tribunal can entertain the present claims which MOD seeks to bring against a United States national, BMY, in either of the two Cases in question here.

In these Cases, BMY has raised counterclaims for $11,040,621 and $4,216,576 representing damages allegedly arising out of breaches of the same contracts. However, a jurisdictionally invalid claim may not give rise to a valid counterclaim. Computer Sciences Corp. and Islamic Republic of Iran, Award No. 221-65-1, p. 56 (16 April 1986). Accordingly, the Tribunal dismisses BMY's counterclaims, as BMY had in any event requested if the Tribunal should find it lacked jurisdiction over the claims.

In dismissing the claim against BMY, the Tribunal considers that an award of costs of arbitration in favour of BMY is appropriate in the circumstances. While it is not the Tribunal's practice to award costs in "official" claims as between the respective Governments, this particular Respondent is a United States national. MOD filed these claims

after the rendering of the decision in Case No. A-2, which conclusively disposed of the question whether jurisdiction existed over claims against such nationals. BMY has, nonetheless, been constrained to take part in the proceedings and to attend a pre-hearing conference. It has asked for costs in the amount of U.S. $55,153.04. In awarding costs in ordinary, as opposed to official claims, the Tribunal has been guided by the principles of reasonableness described in Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985). Since some of the same considerations apply with equal force to the present Case, the Tribunal makes an award of U.S. $25,000.

ii) United States

In order for either of the present claims to qualify as "official claims", MOD has to establish the existence of "contractual arrangements ... for the purchase and sale of goods and services" within the meaning of Article II, paragraph 2 of the Claims Settlement Declaration. These contracts must form the basis of its respective claims. In other words, MOD must satisfy the Tribunal that the United States was bound by a contract with MOD to perform certain obligations under contracts BMY-2, BMY-3 and BMY-4.

The first, and most obvious, factor in the Tribunal's consideration is that the United States was not named as a party to any of the three contracts in question. It was a party to three FMS contracts in connection with BMY-2 and BMY-3, but it is clear that these do not form the basis of the present claim.

MOD has submitted a number of documents on the basis of which it seeks to establish the necessary contractual links. The most significant of these is a Memorandum of Understanding ("MOU") entered into between the two Governments on 5

October 1973. In it, the United States undertook to support a program of the Government of Iran to rebuild all tracked vehicles of United States origin in its inventory. The program was to be carried out by means of a direct contract with BMY (in the event, BMY-2) which company was in turn to negotiate for any necessary licences and components which might become necessary. The program support contemplated was to involve the United States in providing technical services, inspection and testing "on a reimbursable basis and subject to the terms and conditions of the Foreign Military Sales Act and Standard United States Government Form DD 1513...". Thus it was clearly envisaged that separate contracts would be concluded as necessary. The MOU does not of itself operate to render the United States liable for the performance by BMY of its obligations under contracts collaterally entered into, which contracts alone are the subject matter of the present claims.

Rather than lending support to MOD's contentions, the other documents it has submitted tend to confirm the separate nature of these contracts. A United States Memorandum of 16 January 1978 referring to the BMY-4 contract states that it was the Iranian Army's intention to enter into FMS agreements in order to obtain certain materials from the United States. No such contract was ever concluded. Similarly, a letter from BMY to an Iranian Army general on 27 May 1975 contains a reference to the need for BMY to obtain United States governmental approval to implement the BMY-3 contract. This falls far short of what would be needed to establish a binding obligation on the part of the United States.

The Tribunal thus concludes that there is no basis in either of the present cases for an "official claim" against the United States.

III. AWARD

i) The claims of THE MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN against THE GOVERNMENT OF THE UNITED STATES OF AMERICA and BOWEN-MCLAUGHLIN-YORK COMPANY DIVISION OF HARSCO CORPORATION are dismissed for lack of jurisdiction.

ii) The counterclaims of BOWEN-MCLAUGHLIN-YORK COMPANY DIVISION OF HARSCO CORPORATION are dismissed.

iii) The Claimant THE MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay BOWEN-MCLAUGHLIN-YORK COMPANY DIVISION OF HARSCO CORPORATION costs of arbitration in the amount of U.S. $25,000. This obligation 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.

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

Dated, The Hague
14 August 1986

Karl-Heinz Böckstiegel

In the Name of God

Mohsen Mostafavi
Concurring in part,
Dissenting in part
See separate opinion

Howard M. Holtzmann