IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

DUPLICATE ORIGINAL

دیوان داوری دعاوی ایران - ایالات متحده

دونسخه برابر اصل

CASE NO. 394
CHAMBER ONE
AWARD NO. 519-394-1

MERRILL LYNCH & CO. INC.,
MERRILL LYNCH INTERNATIONAL, INC.,
Claimants,

and

GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN,
FOREIGN TRANSACTIONS COMPANY ("FTC"),
BANK MELLI IRAN,
INDUSTRIAL AND MINING DEVELOPMENT
BANK OF IRAN ("IMDBI"),
Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
DATE 19 AUG 1991
تاریخ ۱۳۷۰ /۵/ ۲۸

AWARD

Appearances:

For the Claimants : Mr. Richard A. Cirillo,
Mr. Michael F. Coyne, Attorneys

For the Respondents : Mr. Ali H. Nobari, Agent of the Government of the Islamic Republic of Iran,
Dr. Ali Akbar Riyazi,
Mr. Seyed Javad Fatemi, Legal Advisers to the Agent,
Mr. Ali Ghassemi, Legal Assistant,
Mr. Jawad Laleh Parvaran, Representative of the Government Trading Company,
Mr. Mohammad Taghi Sadeghi,
Mr. Mohammad Raza Jamali, Representatives of Bank Melli

Also present : Ms. Lucy F. Reed, Agent of the Government of the United States of America,
Mr. Michael F. Raboin, Deputy Agent

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I. INTRODUCTION

1. On 18 January 1982 the Claimants MERRILL LYNCH & CO., INC. ("Merrill") and MERRILL LYNCH INTERNATIONAL, INC. ("MLI") filed a Statement of Claim against IRAN, THE FOREIGN TRANSACTIONS COMPANY ("FTC"), BANK MELLI IRAN and THE INDUSTRIAL AND MINING DEVELOPMENT BANK OF IRAN ("IMDBI"). Merrill and MLI assert two separate claims. The first allegedly arises out of a contract entered into with FTC, and seeks payment of the balance of FTC's alleged indebtedness to them for unpaid demurrage and other charges in the amount of US$186,528.52[1], plus interest. FTC has filed a Counterclaim in which it seeks a refund of certain amounts it paid to MLI and payment of compensation for damages incurred. The second claim arises out of Merrill's lost investment in the Iran Financial Services Company S.S.K. ("IFSC"). The Claimants are seeking Merrill's proportionate share of the value of IFSC, amounting to $5,580,000 including compound interest through 31 December 1988, plus further interest and costs. Bank Melli has asserted a Counterclaim for damages incurred as a result of the Counter-Respondents' allegations in the proceedings before the Tribunal and for the costs of liquidating IFSC. A Hearing was held on 6 June 1990.

II. FACTS AND CONTENTIONS

1. The Demurrage Claim

2. First, the Claimants assert that they are both United States nationals as defined in Article VII, paragraph 1 of the Claims Settlement Declaration ("CSD"). MLI, a corporation organized under the laws of the State of

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[1] All references to dollars in this Award are to United States dollars.

Delaware, states that it has wholly-owned this claim directly and continuously since the date on which it arose. Pursuant to the Order filed on 15 May 1984, the Claimants filed detailed evidence in support of their United States nationality. The Claimants assert that FTC is covered by the term Iran as defined in Article VII, paragraph 3 of the CSD.

3. The Claimants state that in 1975 MLI and FTC entered into an agreement for the purchase and delivery of approximately 30,000 metric tons of sulphate resisting cement at a price of $60.50 per ton; C & F conditions were applicable. The Claimants assert that the agreement provided for the cement to be delivered to the Iranian port of Bandar Shahpour, and that FTC would pay for any demurrage which might become payable. MLI agreed to provide FTC with a three per cent performance bond, and FTC agreed to open a letter of credit in MLI's favour within ten days of its receipt of the performance bond. FTC also was, allegedly, responsible for arranging priority berths at the port. The Claimants submit that pursuant to the agreement, MLI chartered three vessels - the M.V. Paris ("the Paris"), the M.V. Capetan Alecos ("the Alecos"), and the M.V. Demos ("the Demos") - to transport the cement to Bandar Shahpour. The charter party for each of the ships provided that the rate of demurrage would be $3,500 per day. On 19 December 1975 MLI gave FTC its performance bond; however, the Claimants allege that soon thereafter FTC requested the first of a series of modifications to the agreement, all of which caused delays in MLI's ability to carry out the transaction. On or about 24 December 1975, FTC notified MLI that it would be unable to indemnify MLI for demurrage every thirty days, as agreed, and requested that it be allowed instead to make a lump sum demurrage payment after the completion of the shipment. MLI agreed to this request and amended the performance bond accordingly. Then, on or about 26 January 1976, FTC allegedly notified MLI that due to a regional development agreement it would be unable to fulfill its

contractual obligation to obtain a letter of credit issued to MLI's bank, but would have to deal with the Turkish Central Bank directly. The Claimants assert that as a consequence of FTC's failure to issue the letter of credit the owners of the three ships refused to load the cement until the financial arrangements were settled. They add that, in an effort to avoid further delay, MLI agreed to reimburse the shipowners for all interest charges resulting from the delay caused by FTC's failure to obtain the proper financing for the transaction. MLI states that after it took these steps loading commenced at Darica in Turkey.

4. According to the Claimants the three ships had been loaded and were en route to Bandar Shahpour, when on various dates in February, March and May 1976 FTC requested that each be diverted to another port. The Claimants allege that MLI sought to accommodate FTC's request to change destinations although MLI was not obligated to do so, and passed the requests on to the owners of the three ships. In response, the owners of the Paris, pursuant to their rights under the Charter Party, declined to re-route the ship to Bandar Bushehr, as requested by FTC, and directed the Paris to continue to Bandar Shahpour. When the Paris arrived in Bandar Shahpour on 5 March 1976, FTC allegedly did not accept the ship at the port until 15 March 1976. The ship finally started discharging its cargo on 15 April 1976, and completed unloading on or about 3 June 1976. The Claimants submit that the total demurrage charges by that time amounted to $272,066.66.

5. The owners of the Alecos also refused to divert the vessel to a new destination; the vessel arrived at Bandar Shahpour on 21 March 1976. The Claimants allege that at the request of FTC, MLI negotiated and reached an agreement with the ship's owners that provided that a portion of the cargo would be discharged at Bandar Shahpour and a portion at Bandar Bushehr. After unloading a portion of the cement at Bandar Shahpour, the Alecos proceeded to Bandar Bushehr,

where it discharged the remainder of its cargo on 17 July 1976. The total demurrage charges for the Alecos allegedly amounted to $358,195.63.

6. With respect to the third vessel, the Demos, the Claimants state that its owners also refused to re-route the cargo to Bandar Chahbahar, as initially requested by FTC. Later, FTC altered its demand by requesting that the Demos be re-routed to Bandar Bushehr. According to the Claimants, the shipowners finally agreed to a proposal whereby the Demos would first travel to Bandar Abbas to discharge part of the cargo and then proceed to Bandar Chahbahr to deliver the balance. The Claimants allege that FTC also reaffirmed its agreement to pay all demurrage costs contractually agreed upon. In accordance with the amended Charter Party, the Demos then proceeded first to Bandar Abbas to partially unload and then to Bandar Chahbahar, where according to the Claimants it completed its discharge on 29 August 1976. The total demurrage for the Demos allegedly amounted to $460,104.17.

7. The Claimants further allege that, during meetings in July 1976 with Mr. Alam, an associate of MLI and Mr. Ian Somerville, assistant vice-President of MLI, the Chairman of FTC confirmed to MLI that FTC would satisfy its contractual obligations, including paying the demurrage charges. They state that MLI confirmed the parties' understanding regarding the demurrage obligation in a letter to FTC dated 17 July 1976, which reads in relevant part

> We trust that your Excellency will accept that we have done and will do all in our power to honour the letter and spirit of this and future contracts with you, and that we will be indemnified against the extraordinary costs that have arisen from a situation that was beyond our control. We greatly appreciate your assistance in expediting your agents' completion of the requisite documents, without which we would be unable to recoup the substantial amounts of demurrage already paid by us; our preliminary estimate of total demurrage is of the order of a million dollars.

Then, by letter dated 23 November 1976, MLI informed FTC that it had completed its contractual obligations as of 29 August 1976. MLI specified the claim for demmurrage and other charges for the three vessels as follows:

	M/V "Paris"	
10850 tons,	completed June 3, 1976,	$ 293,695.84;
	M/V "Capetan Alecos"	
11200 tons	completed July 17, 1976,	$ 421,157.39;
	M/V "Demos"	
9500 tons	completed August 29, 1976,	$ 515,847.92
31550 tons	Total claim	$1,230,701.15

8. In this letter MLI requested FTC to give early consideration to the above claims and stated that it was looking forward to the remittance. Thereafter, the Claimants submit that Mr. Richard Miles, corporate counsel to MLI, travelled to Iran in order to meet directly with representatives of FTC. Although the FTC representatives were not willing to meet with him immediately, he was able to see them on or about 14 December 1976. At that meeting, Mr. Miles presented FTC with invoices and supporting documentation detailing the claim for $1,230,701.15 representing demurrage, interest and port costs, allegedly incurred as a result of FTC's failure to obtain timely financing and its repeated requests for diversion from the port destinations agreed upon by the parties and provided for in the charter parties. The Claimants allege that FTC at no time objected to the amount of the invoices, to MLI's calculations, or to the supporting documentation. Then, almost a year after the December 1976 meeting, on or about 27 November 1977, FTC made a payment to MLI in the amount of $1,044,172.63. The Claimants submit that FTC at no time offered any explanation for the discrepancy between the amount claimed and the amount paid. They state that for several years thereafter MLI made various efforts to recover the amounts still due. In 1978, MLI representatives

allegedly attempted in vain to meet with FTC officials. Furthermore, on 14 August 1981, a letter was sent by MLI to FTC, stating, inter alia, that "...[a]n amount of $1,044,172.63 was received leaving a balance of $186,528.52 unpaid." MLI in the same letter also requested simple interest at an annual rate of 10 per cent from August 1976, bringing the total to $279,972.78. An affidavit in support of the Claimants' contentions has been presented by Mr. Richard Miles, MLI's corporate counsel.

9. The Claimants conclude that since FTC received full documentation for all the invoiced charges its failure to object to any of them, coupled with its substantial partial payment, should be considered an admission that all charges were valid and due. In support of their arguments, the Claimants refer to the Tribunal's findings in R.J. Reynolds Tobacco Co. and The Government of the Islamic Republic of Iran et al., Award No. 145-35-3 (6 Aug. 1984), reprinted in 7 Iran-U.S. C.T.R. 181 190, International Schools Services Inc. and The Islamic Republic of Iran, et al., Award No. 290-123-1 (29 Jan. 1987), reprinted in 14 Iran-U.S. C.T.R. 65, 76 and Henry F. Teichmann, Inc. et al. and Hamadan Glass Co., Award No. 264-264-1 (12 Nov. 1986), reprinted in 13 Iran-U.S. C.T.R. 124, 136, cases in which the Tribunal awarded the payment of the unpaid invoices which had not been objected to when received. In their Statement of Claim the Claimants requested the Tribunal to award $279,972.78 plus interest from 14 December 1976 through the date of payment at a rate of 10.5 per cent. At the Hearing, the Claimants sought to amend the amount of the relief sought to the effect that they now claim $186,528.52, representing the amount of the unpaid balance, together with interest on the principal amount at a rate in conformity with the criteria set forth in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985) pp. 30-34, reprinted in 8 Iran-U.S. C.T.R. 298, 320, 322 ("Sylvania").

10. The Respondent FTC disputes the claim both with respect to the Tribunal's jurisdiction and the merits. First, FTC argues that the jurisdictional requirements with respect to this claim are not met, because the real owner of the claim and the principal to the contract concluded with FTC is Khalifeh Investment and Trading Company ("KITC"), a Turkish company which is not a United States national, as required by Article 2, paragraph 1 of the CSD. FTC further alleges that the contract was between FTC and Merrill Lynch & Co. Ltd., London, which was acting as an agent for KITC, and that the Claimants have provided no proof concerning their control over the British Merrill Lynch & Co. Ltd. FTC therefore argues that the claim must be dismissed since neither KITC nor Merrill Lynch & Co. Ltd. have locus standi in proceedings before the Tribunal.

11. FTC further argues that the claim was not outstanding before 19 January 1981, the jurisdictional deadline set by Article II, paragraph 1 of the CSD. FTC states that it was not until 14 August 1981 that the Claimants, by a letter, demanded payment from FTC.

12. As to the merits, FTC confirms that the parties entered into an agreement in 1975, by which FTC agreed to purchase 30.000 metric tons of cement from Merrill Lynch & Co. Ltd. FTC also agrees that C & F conditions applied. However, FTC denies that any agreement obligating FTC to pay the demurrage charges existed. It submits that the contract is silent in regard to demurrage and that therefore the invoices for demurrage charges have no contractual basis. FTC further argues that under a C & F contract the costs, including those incurred in the port of discharge, must be borne by the seller. Moreover, FTC claims that according to the contract the cement was to be delivered in a southern Iranian port as designated by FTC. It argues that the demurrage claim is solely the result of MLI's own non-compliance with FTC's instructions for unloading the cargo at the southern port designated by it. FTC denies

that Bandar Shahpour had been designated as the port of discharge and submits that the Claimants have provided no evidence to that effect. FTC argues that, at any rate, the ports designated by FTC, i.e. Bandar Bushehr and Bandar Abbas, are located at a distance closer than Bandar Shahpour; therefore, no extra charges should have been incurred on that account.

13. FTC further submits that the documentary evidence relied upon by the Claimants not only fails to show that there was an agreement to pay demurrage charges, but rather indicates that there was no such agreement. FTC particularly refers to a letter dated 18 October 1976, addressed to Mr. Harry B. Anderson, an officer of MLI, and signed by Mr. Paul H. Franklin, an MLI associate. FTC argues that Mr. Franklin's statements make it clear that MLI had not ruled out the possibility that FTC might deny demurrage or other claims. The letter, in relevant part, reads as follows:

> I have suggested to Dick that we present the entire bill of about $1.2 million plus at one time. Only if an objection develops as regards the non demurrage and shipping costs should we alter this "entire bill" approach. If, however, the FTC seems to feel that the $1.1 million of shipping and demurrage costs are acceptable, but the remaining $100M to $200M of related items is controversial, then perhaps Dick should press for an immediate settlement of the $1.1 million, while we continue to negotiate for the remaining smaller amount. This decision should be in Dick's hands.

The "Dick" referred to in the above quoted paragraph is Mr. Richard Miles, MLI's corporate counsel.

14. FTC disputes that its payment of $1,044,172.63 on or about 27 November 1977 proves its acceptance of the invoices in the amount of $1,230,701.15. The payment at most proves only that FTC accepted its indebtedness in the amount as paid, but no more.

15. FTC states that it effected the payment with no commitment to pay any alleged balance and that the Claimants accepted the amount paid as settlement in full; this acceptance also is demonstrated by the fact that for almost four years, from November 1977, the time of payment, until 14 August 1981, the Claimants at no time raised any objection to the amount paid. It was only by a letter dated 14 August 1981 that MLI sought to recover an additional amount of $279,972.28. FTC argues that since the Claimants agreed to the initial payment by FTC there is no legal basis for any further claim before the Tribunal.

16. Moreover, FTC asserts that it is entitled to recover the amount of the payment it made and asserts a Counterclaim for $1,118,937.66 for those payments and for damages suffered. It argues that it had no contractual obligation towards MLI in respect to demurrage charges and therefore did not owe it anything; its payment was simply due to an error. FTC alternatively argues that it is at any rate entitled to an amount of $943,471.34 plus damages incurred as a result of the delay in payment. The amount encompasses $879,264.34, which it asserts is the difference of demurrage charges due to FTC and such charges which FTC accepts might be due with respect to the vessels chartered by MLI if the Tribunal were to consider that FTC is liable for any demurrage charges. The amount for which FTC states it might be liable consists of $141,895.83 for the Demos, representing charges as of the date FTC allegedly agreed to delivery of the cargo at the port of Bandar Abbas; and $33,570.83 for the Alecos, also representing such charges as of the date FTC directed the delivery of the cement to Bandar Shahpour. The remaining amount FTC is claiming consists of damages allegedly incurred due to short delivery or failure to deliver the cement within the prescribed period. Further, in its Statement of Defense FTC raised an additional Counterclaim in the amount of $471,805.81 as compensation for the alleged delay in depositing its overseas assets in the Federal Reserve Bank.

17. In response to the Counterclaims, the Claimants deny that they owe any amount to FTC. They argue that FTC, after having made a payment of approximately $1 million in 1977, is estopped from arguing that it overpaid the Claimants. Further, they argue that any alleged damages incurred by FTC arose from FTC's own conduct in derogation of its contractual obligations, including its requests for deviations to ports other than the agreed-upon destination, Bandar Shahpour. Therefore, the Claimants request the Tribunal to dismiss the Counterclaims.

2. The IFSC Claim

18. The second claim asserted by the Claimants is based on the alleged expropriation of their forty per cent shareholding interest in IFSC in July 1979. The Claimants explained that the forty per cent shareholding was directly owned by Merrill Lynch International Bank, Inc. ("MLIB"), a corporation organized under the laws of Panama, and that the Claimant, Merrill, owned one hundred per cent of MLIB during the relevant period, i.e. from the time the claim arose until 19 January 1981, the date of the conclusion of the CSD. The Claimants state that IFSC (originally Irano Merrill Lynch S.S.K.) was organized in August 1974 under the laws of Iran as a joint stock company designed to provide commodities and securities brokerage services in Iran. Specifically, MLIB, Bank Melli and IMDBI by agreement dated 31 August 1974 adopted the Articles of Association for IFSC, pursuant to which Bank Melli and IMDBI together took ownership of sixty per cent of the capital stock of IFSC and MLIB took ownership of forty per cent. MLIB paid Rls 56,000,000.00 (allegedly over $790,000.00), for these shares. The Claimants submit that between 1974 and July 1979, IFSC successfully conducted its brokerage business, servicing individual and institutional investors and transacting up to 30 per cent of the total volume traded on the Tehran Stock Exchange. In July 1979, when the

expropriation allegedly took place, the Claimants assert that IFSC was a profitable, growing company.

19. Concerning the expropriation, the Claimants first note that all banks in Iran, had been nationalized by a government decree of 7 June 1979. Next they outline events beginning with a telex MLIB received on or about 9 July 1979 notifying them that the ordinary annual meeting for IFSC was scheduled for 21 July 1979 at the offices of Bank Melli. One of the items of the agenda to be discussed was the future of the company. MLIB arranged to be represented at the meeting by Miss Aida Avanessian as proxy. However, by telex dated 25 July 1979, Mr. Jalil Shoraka, President of Bank Melli, notified MLIB that the meeting scheduled for 21 July 1979 had been adjourned, and that an extraordinary meeting would be held on 18 August 1979. The same telex also stated that after the annual meeting was adjourned the Board of Directors held a meeting. The Claimants state that they received no notice of this unscheduled meeting, and were not represented at it. The Board at that meeting made various decisions, which according to the Claimants substantially altered the corporation's status. First, Mr. Mohammad Reza Moghaddasi, an officer of Bank Melli, was appointed to 'oversee' the affairs of IFSC until the 18 August 1979 shareholders meeting. Second, the lease of the building in which IFSC was located was terminated and IFSC's offices were transferred to Bank Melli. Third, all IFSC's employees were discharged and most of them were then hired by Bank Melli.

20. The Claimants allege that as a result of the actions by the Board of Directors, IFSC had, by 18 August 1979, become a part of Bank Melli. They also point out that the Government of Iran had become the sixty per cent shareholder in IFSC after the nationalization of Bank Melli and IMDBI. They argue that in light of the conditions existing at that time, MLIB was unable to find anyone to serve as a proxy for the extraordinary meeting of 18 August 1979, and was in no

position to protect its minority shareholding in IFSC. According to Claimants, MLIB had no choice but to submit to the dictates of Iran as the majority shareholder, and it therefore proffered a proxy to Bank Melli for the 18 August meeting, executing the proxy in favour of Mr. Aziz Azimi, Bank Melli's nominee and senior officer. By telex of 29 August 1979, Mr. Azimi informed MLIB that during the 18 August meeting the shareholders had unanimously voted in favor of IFSC's dissolution and that the liquidation was entrusted to Bank Melli. However, due to alleged irregularities in the notice provided by Bank Melli and IMDBI for the 18 August meeting, another extraordinary meeting was scheduled for 17 November 1979. The Claimants allege that since they still had no alternative, MLIB again executed a proxy in favor of Mr. Azimi. The Claimants assert that they have received no communications from Mr. Azimi or Bank Melli informing them about what transpired at or after the meeting. By a letter dated 28 September 1981, MLIB attempted to obtain information concerning IFSC and to reach an amicable resolution of their claim. In support of their contentions, the Claimants presented an afffidavit of Mr. Frederick J. Sears, a former Executive Vice-President of MLI, who states that during the years 1974 through 1985 he had the responsibility of overseeing many of the legal and financial aspects of MLI's international business.

21. The Claimants argue that even assuming that a vote in favor of liquidation occurred on 17 November 1979, the Government of Iran already had taken over IFSC in its entirety in July 1979, by taking its offices, business and profits. Therefore, any purported liquidation was in reality part of an effective expropriation of MLIB's interest in IFSC without compensation. Even if the Tribunal were to find that the evidence does not warrant a finding of expropriation, the Claimants argue that the level of state interference exercised entitles them to relief.

22. The Claimants also argue that by disposing of the Claimants' shareholder rights in IFSC the Respondents acted contrary to basic legal principles imposing upon directors the obligation to act in the best interests of their corporation and all of its shareholders. The Claimants argue that the Government of Iran, as the majority shareholder, owed the Claimants a duty not to take actions to freeze MLIB out of its shareholders' rights, and that the Government of Iran, through Bank Melli and IMDBI, breached this duty. However, at the Hearing the Claimants stated that they no longer pursued this theory of recovery.

23. In their Statement of Claim the Claimants requested the Tribunal to award them an amount not less than $1,000,000 plus interest for the value of their shares in IFSC. Based on a report prepared by the accounting firm, Deloitte, Haskins & Sells ("D,H&S"), the amount was substantially increased in the Hearing Memorial filed on 28 March 1989. In their report, D,H&S determined that the fair market value of the Claimants' forty per cent share in IFSC on 21 July 1979 was $1,913,000 plus compound interest amounting to $3,667,000 calculated at 10.5 per cent, in accordance with the criteria for the rate of interest used in Sylvania, see supra, para. 9, through 31 December 1988. Therefore, the Claimants argue that they are entitled to recover a total of $5,580,000 together with additional interest through the date of payment of the amount, as well as the costs and fees related to the proceedings.

24. The Respondents to this part of the claim, the Government of Iran, Bank Melli and IMDBI, raise a number of jurisdictional objections. They allege that since the owner of the forty per cent shareholding interest in IFSC is MLIB, a Panamanian corporation which is not a party to the proceedings in this Case, sufficient proof of the Claimants' standing to sue has not been presented. They argue particularly that the Claimants have not met their burden of

proving that MLIB is not a United States national which could have brought the claim itself.[2]

25. The Respondents Bank Melli and IMDBI argue that an additional jurisdictional requirement has not been met. According to Article II, paragraph 1 of the CSD a claim must be outstanding as of 19 January 1981, i.e. the date the CSD was concluded. The Respondents first rely on the Claimants' own statement that MLIB made no attempt to obtain information on IFSC and an amicable resolution of their claim prior to the letter of 28 September 1981, see supra, para. 20. Second, the Respondents argue that even if the Claimants had properly demanded their share of the capital of IFSC, the request could not have been granted; IFSC has been a company in liquidation since 17 November 1979 and the process of liquidation is still not finished; an outstanding claim could only have existed if the company's liquidation had been finished before 19 January 1981.

26. The Government of the Islamic Republic of Iran argues that the Government should be dismissed from the Case because the Claimants have not identified any actions taken by the Government which amount to an expropriation or other measures affecting property rights. Both Bank Melli and IMDBI draw attention to the fact that their only involvement

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[2]Article VII, paragraph 2 of the CSD provides:

"Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement (emphasis added).

with IFSC was that each had a thirty per cent shareholding interest in IFSC, and that an expropriation claim can only be raised against the Government of Iran and not against shareholders. Regarding the other legal basis argued by the Claimants', i.e., that Bank Melli and IMDBI acted in violation of MLIB's shareholding rights, the Respondents argue that the Claimants had no contractual relationship with them. They assert that the Claimants should have brought such a claim against IFSC itself, and not against the individual shareholders. Proceeding directly against the Corporation would have been the proper approach according to Iranian law, particularly the Iranian Commercial Code and its 1969 amendment.

27. Regarding the merits of the claim, all Respondents deny the Claimants' contentions. The Respondents, Bank Melli and IMDBI, have described the events leading to the liquidation of IFSC in some detail. They allege that stock market activities in Iran had been declining since 1977, and came completely to an end in late 1978, at the verge of the Islamic Revolution. Due to the reduction and subsequent abandonment of stock exchange activities in Tehran, virtually all brokerage companies active on the stock exchange were either dissolved or closed down. Turning specifically to the profitability of IFSC, the Respondents allege that from its inception in 1975 the company incurred only losses. During 1979 the financial situation of the company deteriorated to such an extent that the future of the company was put on the agenda as one of the main items to be discussed at the annual ordinary shareholders meeting scheduled for 21 July 1979. According to the Respondents, during that meeting all of the shareholders agreed that the only solution to IFSC's financial problems was to dissolve the company; however, since a decision of dissolution could only be made at an extraordinary general meeting of shareholders, the meeting of 21 July was adjourned.

28. As it was clear that all the shareholders, including Miss Avanessian, who represented MLI as proxy, would favor dissolution of the company, the Board of Directors met immediately after the annual ordinary meeting of 21 July 1979 and took the decisions set forth by the Claimants, see supra, para. 19, in order to minimize the company's costs. At the extraordinary general meeting of the company held on 18 August 1979, the representatives of all the three shareholders, including Mr. Azimi for MLIB, voted in favour of the dissolution of the company. At the next meeting, held on 17 November 1979, the three shareholders again voted for dissolution of the company and Bank Melli was chosen as liquidator to take the necessary steps in conformity with the relevant provisions of the Iranian Commercial Code, as amended. The Respondents state that the decision was taken in observance of both the laws and regulations concerning commercial companies in Iran and IFSC's Articles of Association. A notice was published in the Official Gazette of Iran No. 10132 dated 5 December 1979 concerning IFSC's dissolution and the appointment of Bank Melli as liquidator. The minutes of the meeting and the notice are presented in evidence. The Respondents state that while IFSC's liquidation has been in progress, MLIB has shown no interest in its affairs. They assert that the liquidation process is still continuing, but add that should there remain any assets after the liquidation process they will be distributed among the shareholders on a pro-rata basis.

29. Further, the Respondents dispute the validity of the D,H & S Report, submitted by the Claimants. The Respondents conclude that the claim has no merit and that the Claimants have failed to prove any legal basis for their claim, be it expropriation or improper or fabricated liquidation. The Respondent, the Government of the Islamic Republic of Iran, adds that there is no factual or legal basis to hold it liable for whatever happened to IFSC. The Respondents conclude with a request that the Tribunal dismiss the Case on jurisdictional grounds or, otherwise, on the merits, and

reimburse them for the costs incurred in defending the Claim.

30. Bank Melli has asserted a Counterclaim for damages incurred as a result of the Counter-Respondents' allegations in the proceedings before the Tribunal and for liquidation fees, representing MLIB's pro-rata share in the costs incurred during IFSC's liquidation process.

III. REASONS FOR THE AWARD

1. Procedural Issue

31. At the Hearing, the Claimants objected to the late-filing of the Respondents' Documents Nos. 148, 149, 150 and 151, which are rebuttal memorials from three of the Respondents and a rebuttal brief and evidence from Bank Melli. These submissions were filed on 12 April 1990, ten days after the time limit set for such filing. In support of their objection, the Claimants refer to the criteria for the admissibility of late-filed documents set forth in Harris International Telecommunications, Inc. and The Islamic Republic of Iran, et al., Award No. 323-409-1 (2 Nov. 1987), pp. 22-31, reprinted in 17 Iran-U.S. C.T.R. 31, 45-52. In response, the Respondents noted that the delay in filing was only ten days and explained that the delay had been caused by the Iranian New Year, which had started on 21 March. By its Order filed on 3 May 1990, the Tribunal postponed any decision as to the admissibility of the late filed submissions until after the Hearing scheduled for 6 June 1990. In view of the conclusions reached below, see infra, paras. 45 - 50, and the fact that the Tribunal did not find it necessary to rely on the late filed documents, it is not necessary to decide their admissibility.

2. The Demurrage Claim

2.1 Jurisdiction

32. The Claimants have submitted evidence which satisfies the requirements for proof of corporate nationality established by the Order of 20 December 1982 in Case No. 36, Flexi-Van Leasing, Inc. and Islamic Republic of Iran, reprinted in 1 Iran-U.S. C.T.R. 455, and the 21 January 1983 Order in Case No. 94, General Motors Corp. et al., and Government of the Islamic Republic of Iran et al., reprinted in 3 Iran-U.S. C.T.R. 1. Consequently, the Tribunal is satisfied that the Claimants are nationals of the United States within the meaning of Article VII, paragraph 1, of the CSD.

33. The Respondents argue that the jurisdictional requirements under Article II, paragraph 1, of the CSD are not met for three reasons.

34. First, FTC argues that the principal to the cement contract and owner of the claim is KITC, a Turkish company, which does not have locus standi under the terms of the CSD. In this regard the Tribunal notes the following. FTC has submitted a copy of a telex from Merrill Lynch London dated 12 November 1975 offering "... in the name of seller Khalifa Investment and Trading Company 30.000 metric tons plus or minus 20 percent of sulphate resistant cement..." The Claimants have submitted a copy of an internal telex between MLI executives dated 13 July 1976, in which this cement transaction is discussed, and after a reference to the above-mentioned offer dated 12 November 1975 the telex states, "FTC agreed to accept our offer subject to ML acting as principal and our provision of a three per cent performance bond." On the basis of this telex and other documentary evidence, including correspondence between MLI and FTC and the Charter Parties, which show that MLI entered into the contracts with the ships' owners, it is clear to

the Tribunal that MLI was acting as the principal in dealing with FTC. There are, moreover, no indications in the record that FTC objected to this course of action. On the contrary, as appears from the contents of the above-mentioned telex dated 13 July 1976, it was FTC who insisted that the cement transaction be concluded with MLI. There is some indication in the documentary evidence that Khalifa may have been providing financing for the transaction. In this respect the Tribunal refers again to MLI's telex of 13 July 1976, which reads in relevant part:

> As Khalifa was agreeable to financing the deal with he and MLI Inc. splitting the profits and presumably the losses 50-50, we agreed to these terms by telex of November 25th.

The remaining evidence does not provide any further information about Khalifa's role. Therefore, in light of the existing record in this Case, the Tribunal feels that only MLI should be considered as the contracting party and principal in the cement transaction with FTC.

35. The second jurisdictional objection raised by FTC is based on its assumption that it was a British company, Merrill Lynch & Co. Ltd., that concluded the cement deal with FTC. The Respondents request the Tribunal to dismiss the claim since the Claimants have not filed any evidence demonstrating their control over the British company, as required by Article VII, paragraph 2 of the CSD. The Tribunal notes that the Respondents in support of their argument rely on the telex dated 12 November 1975, see supra, para. 34, which is from "Merrill Lynch IDD London" to FTC. However, the only reference to a Merrill Lynch & Co. Ltd. in the record is in the caption and introduction of the Claimants' Hearing Memorial and Reply Memorial. The Claimants explained at the Hearing that this was an error and that the caption should have read, as stated correctly in the other pleadings, "Merrill Lynch & Co. Inc.", which is a United States corporation. The Claimants explained

further that MLI did have an office in London, but that a company named Merrill Lynch & Co. Ltd. did not play any role in the transaction at issue. Moreover, based on several communications between MLI and FTC, which were exchanged during the course of the transaction and form part of the documentary evidence in this Case, the Tribunal finds that FTC knew and accepted that it was dealing with MLI and not with the British company, Merrill Lynch & Co. Ltd.

36. FTC presents the further argument that no demand for relief had been made prior to 19 January 1981, the jurisdictional deadline set in Article II, paragraph 1 of the CSD, and that consequently the claim was not outstanding on 19 January 1981. The Tribunal notes that the claim is for a debt arising out of a contract concluded in 1975 and allegedly payable before 19 January 1981.[3] The Tribunal has previously held that such a debt owed and payable prior to 19 January 1981 constitutes an outstanding claim, even though payment of the debt had not been demanded prior to that date. See Linen, Fortinberry and Associates, Inc. and The Islamic Republic of Iran et al., Award No. 372-10513-2 (28 June 1988), reprinted in 19 Iran-U.S. C.T.R. 62, 68 and Reliance Group, Inc. and Oil Service Company of Iran, et al., Award No. 315-115-3 (10 Sept. 1987), reprinted in 16 Iran-U.S. C.T.R. 257. The Tribunal is therefore satisfied that it has jurisdiction over the claim.

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[3]For the purpose of determining this jurisdictional question and in accordance with its established practice, the Tribunal will proceed on the basis of the Claimants' formulation of their claim. See, e.g., Reza Said Malek and The Government of the Islamic Republic of Iran, Award No. ITL 68-193-3, para 22 (23 June 1988), reprinted in 19 Iran-U.S. C.T.R. 48, 54 and Stephen G. Shifflette and The Islamic Republic of Iran, Award No. 423-10645-1, para. 17 (12 June 1989), reprinted in 22 Iran-U.S. C.T.R. 111, 115. The merits of the claim will be considered separately, infra paras. 37-41.

2.2 The Merits

(a) Claims

37. Although there are significant gaps in the evidence presented in this Case, it is clear that FTC agreed to buy cement from MLI, that the cement was eventually delivered, and that FTC paid the amount it had agreed to pay for the cement. It is also clear that when MLI chartered three ships to transport the cement from Turkey to Iran it obligated itself to pay demurrage at a rate of $3,500 per day to the shipowners.[4] The issue which must be determined is whether FTC had an obligation to reimburse MLI for the demurrage it was required to pay to the shipowners, and, if so, what the amount of that reimbursement should have been.

38. MLI has not submitted a copy of a contract governing the transaction, or proof of trade practice that might have clarified the extent of MLI and FTC's respective obligations, nor has it adequately explained its reasons for not doing so. The copies of correspondence that MLI has submitted are, at best, equivocal, in that they appear more to express MLI's hope that FTC would make reimbursement out of fairness than to assert any contractual obligation of FTC to do so. See supra, paras. 7-8.[5] In any event, the issue of whether FTC had a legal obligation to reimburse MLI largely

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[4]The three charter parties, to which FTC has not been a Party, were submitted by the Claimants. Article 18 of each one deals with demurrage, and reads, in relevant part; "demurrage, if any, at the loading port and at the discharging port to be paid at the rate of U.S.$3,500 ... per day or pro rata for part of the day. ... Demurrage and dispatch money always to be settled directly between Owners and Charterers. ... Discharging demurrage will be paid by Charterers every 30(thirty) days in arrear as incurred."

[5]The absence of a clear contractual basis for the amount claimed distinguishes this case from those awards relied upon by the Claimants, see supra, para. 9. In each

(Footnote Continued)

became moot when FTC made a payment to MLI of $1,044,172.63, either in recognition of a contractual obligation or out of a sense of fair-dealing. MLI now claims that FTC should have paid more. The evidence, however, shows that before the payment was made there were discussions between MLI and FTC as to the exact amount due, and that when payment was eventually made MLI did not formally protest that additional amounts were owed to it until more than three years had passed. In light of the record before it, the Tribunal can only conclude that MLI accepted $1,044,172.63 as a fair settlement of the invoices.

39. Specifically, MLI has submitted copies of the invoices it presented to FTC, of internal telexes discussing FTC's partial payment, and a letter dated 14 August 1981 in which MLI requested FTC to pay the amount outstanding on invoices, plus interest. None of these documents proves that FTC had ever agreed to compensate MLI for all demurrage charges, or that FTC ever accepted the invoices as an accurate statement of their indebtedness. To the contrary, the Claimants have submitted evidence which suggests that there was no specific agreement. An internal MLI telex, dated 12 July 1976, describing a meeting with the Chairman of FTC and MLI officials states that the Chairman

> refused to make any formal commit[ment] to reimburse ML for any expenses but said that ML would be paid what was due after completion discharge on presentation of necess[ary] documents he would not expand on what was due.

(Footnote Continued)
of those cases the Tribunal concluded that the unpaid invoices were supported by the underlying contract, and that the failure to register any contemporaneous objection to the invoices demonstrated that each was accepted as valid. However, the lack of certainty over the parties precise contractual obligations in this Case presents a materially different situation.

40. This telex also implies that there was no express contractual obligation for FTC to pay the demurrage charges, but rather a general understanding on the part of FTC that it would provide MLI with some compensation for its additional costs. Similarly, there is no conclusive proof that FTC accepted MLI's invoices of 23 August 1976. Rather, the fact that FTC's representatives at first refused to meet with Mr. Miles to allow him to deliver the invoices for demurrage, and also the subsequent meeting held between the Parties' representatives in December 1976, suggest that some disagreement existed concerning the existence of the obligation and the extent of the demurrage charges. As noted above, there are in the record telexes that indicate that persons at MLI were aware that they would likely be required to negotiate with FTC over the demurrage claims and other charges, see supra, para. 13, and that FTC's Chairman refused to make any formal commitment to reimburse MLI for the demurrage charges, supra, para. 39. The fact that FTC made a payment eleven months later, in November 1977, indicates that they finally accepted that they were obligated to pay MLI that amount. The other relevant contemporaneous evidence consists of two telexes sent by Mr. Miles to Mr. Somerville, another MLI executive. In the first one, dated 4 January 1978, Mr. Miles states "I'm afraid some decisions still [have] to be made re cement deal". The second telex, dated 26 January 1978, and captioned "Re proposed claim for more [from] FTC on cement deal", reads in relevant part:

> You suggest we go back to FTC with further claim enumerating [additional] claims but in view of discrepancies this is difficult without calculation of how they arrived at their fig[ures].... Note FTC advices dd Nov. 27 1977 note payments in full and final settlement and adressed to MLI Inc at OLP. Do you know if originals were received and if so when and what response.

The Tribunal concludes that these telexes demonstrate that disputes existed between the Parties as to the demurrage

claim, and that FTC by paying the amount of $1,044,172.63 felt it had paid in full and final settlement. In addition, the Tribunal finds that the Claimants have not adequately supported their assertion that they made attempts to recover the amounts they thought FTC still owed them. In support of their contention, the Claimants rely on the testimony in the affidavit of Mr. Richard Miles, who was a corporate counsel to MLI involved in the contractual relations between the parties. This testimony is not supported by any corraborating evidence. The Claimants have not presented any contemporaneous documentary evidence after the above-mentioned telexes, with the exception of a letter dated 14 August 1981, in which MLI, inter alia, requested FTC to pay the outstanding balance plus interest. The apparent failure of the Claimants to communicate with FTC until over three years after FTC's payment strongly suggests that MLI had decided to accept it as settlement in full.

41. Given both the lack of evidence concerning the original obligations of the parties concerning demurrage, and the course of conduct and apparent understandings of FTC and MLI with regard to the partial payment of the invoiced amounts, the claim for the outstanding balance is dismissed.

(b) Counterclaims

42. Regarding the demurrage claim, FTC has asserted a Counterclaim in the alternative amounts of $1,118,937.66 or $943,471.34, see supra, para. 16. FTC states that it is entitled to be reimbursed the amount it paid on 27 November 1977, since the payment was based on an error. The record in this Case shows, however, that FTC paid the amount since it accepted its indebtedness to that amount, see supra, para. 38 - 40. There is no indication in the evidence that the payment was due to an error. The Counterclaim is therefore dismissed.

43. FTC has asserted a second Counterclaim for payment of $471,805,81 representing damages and interest incurred as a result of the failure of the Counter-Respondents to deposit certain overseas assets into the Federal Reserve Bank in a timely manner. FTC asserts that for jurisdictional purposes Merrill is covered by Article VII, paragraph 4 of the CSD, arguing that it is covered by the term "United States" meaning "the Government of the "United States, any political subdivision of the United States and any agency, instrumentally or entity controlled by the Government of the United States or any political subdivision thereof". The Tribunal notes that the Counterclaim has not been substantiated. In addition, Merrill has presented proof that it is a corporation organized under the laws of the State of Delaware of the United States and is a national of the United States. It is not a controlled entity as defined in Article VII, paragraph 4 of the CSD. Further, the Counterclaim does not arise out of the same contract, transaction or occurrence that constitutes the subject matter of the claim, which is a jurisdictional requirement as set forth in Article II, paragraph 1 of the CSD. This Counterclaim is therefore dismissed for lack of jurisdiction.

3. The IFSC Claim

3.1 Jurisdiction

44. The Respondents have raised a jurisdictional objection regarding the Claimants' locus standi. Based on the fact that the forty per cent shareholding interest in IFSC was owned by MLIB, a Panamanian corporation, they argue that the Claimants have presented insufficient proof of their standing to sue on behalf of MLIB. However, the Tribunal finds that the Claimants have presented sufficient proof as part of their evidence regarding their corporate nationality, see supra, para. 32, and also established that during the relevant period MLIB was wholly owned by Merrill

indirectly through MLI's direct ownership of shares in MLIB, see supra para. 18.

3.2 The Merits

(a) Claims

45. The Claimants are seeking to recover $5,580,000, allegedly representing the value of their forty per cent shareholding interest in IFSC. At the Hearing the Claimants clarified the legal basis of their claim stating that it was solely based on the expropriation or taking of the Claimants' shareholding interest as of 21 July 1979. They asserted that the proper Respondents to this claim are the Government of Iran, Bank Melli and IMDBI. They explained that the Government of Iran had acted through the two banks, which are its controlled entities within the definition of Article VII, paragraph 3 of the CSD. To prove such an expropriation claim, the Claimants must establish that (1) acts occurred giving rise to a claim of expropriation of the Claimants' shareholding interest and (2) that such acts can be attributed to the Government of the Islamic Republic of Iran acting through Bank Melli and IMDBI.

46. The Claimants have asserted that their interest in IFSC was expropriated by one or two actions taken by the directors of IFSC, acting on behalf of the Respondents. First, the Claimants argue that the steps taken by the directors during and following the special directors meeting of 21 July 1979 resulted in Bank Melli taking IFSC's offices, its business prospects, and its profits, thereby destroying the value of its shares. Second, the Claimants assert that IFSC was expropriated by the liquidation vote of 17 November 1979. The Tribunal does not find either argument persuasive.

47. Turning first to the special directors meeting of 21 July 1979, it is undisputed that the meeting was held

immediately following the adjournment of the ordinary annual meeting, at which MLIB was represented by proxy. The evidence shows that MLIB's proxy for the annual meeting also attended the special directors meeting, and that, although she did not have a proxy to participate and vote in that meeting, she raised no objection to the decisions taken. Further, the evidence shows that MLIB was informed of the actions taken by the directors. In addition, there is no evidence which suggests that MLIB voiced any opposition to the decisions. It also appears, given the situation in Iran at that time, that the steps taken by the directors to reduce costs were reasonable and appropriate. The Tribunal concludes that MLIB apparently agreed with the vote of the directors.

48. The evidence also shows that MLIB was informed that the meeting scheduled for 18 August 1979 would deal with the question of IFSC's dissolution, and that MLIB appointed a proxy with full power to vote on its behalf for that extraordinary meeting, and again for the 17 November 1979 extraordinary meeting, which apparently had to be held because of some irregularities in the notice of the earlier meeting. The proxies for both meetings state specifically that the proxy is authorized to decide about the future of the company and

> specifically requested [the proxy] to vote in favor of any proposal for the dissolution and liquidation of the company.

The evidence shows that MLIB's proxy attended both the 18 August 1979 and 17 November 1979 meetings and voted in favor of dissolution of IFSC on behalf of MLIB, and for the appointment of Bank Melli as liquidator. A notice of these decisions was published in the official Gazette of Iran, No. 10132, dated 14 December 1979.

49. Although the Claimants have asserted that they did not have any choice but to accede to the demand of the majority

shareholders to liquidate IFSC, the evidence submitted does not show that the liquidation was unlawful and not in conformity with the Articles of Association of the company or with any provision of Iranian law, or that the shareholders Bank Melli and IMDBI acted in any capacity other than that of a shareholder. Rather, the minutes of the meeting indicate that the company was disolved because it had shown losses during the entire period of its activity and at the time there seemed no hope for the company to become profitable. Further, there is no contemporaneous evidence presented by the Claimants showing their disagreement with the decisions taken by the Board of Directors of 21 July 1979 or with the dissolution resolution adopted by the shareholders in their meeting of 17 November 1979. The letter of 28 September 1981 sent by the President of MLI which sought information on the status of IFSC and to recover its investment came too late to have had any impact on the decisions made by the directors and the shareholders. Therefore, the Tribunal finds that the Claimants have failed to prove that either the decision taken by the Board of Directors on 21 July 1979 or the decision of liquidation taken unanimously by all shareholders at the meeting of 17 November 1979 constitute an act of expropriation or taking of the Claimants' shareholding interests by the Government of Iran through Bank Melli and IMDBI.

50. In view of the conclusions reached, the Tribunal need not address the contested matter of the value of IFSC's shareholdings in 1979. The Tribunal, however, adds that the Claimants have presented no convincing proof in support of their assertion that IFSC was a profitable growing company in July 1979. With respect to the D,H&S valuation report relied upon by the Claimants in support of their relief sought, the Tribunal notes that the value reached is of a rather speculative nature, and in particular does not take into account the effect on the stock brokerage business of the political and economic situation in Iran.

(b) Counterclaims

51. Regarding Bank Melli's counterclaim for damages suffered as a result of the Counter-Respondents' allegation in the proceedings before the Tribunal, the Tribunal finds that because this counterclaim was not in existence before 19 January 1981 - the Tribunal's jurisdictional deadline - there is no need to address it further. With respect to the counterclaim for liquidation fees, the Tribunal similarly is without jurisdiction. The Counter-Respondents asserted that Bank Melli's term as liquidator expired on 17 November 1981, while Bank Melli stated that the liquidation process still has not come to an end. At any rate, the Tribunal concludes that the Counterclaim was not outstanding as of 19 January 1981. Therefore, both of Bank Melli's Counterclaims are dismissed for lack of jurisdiction.

4. Costs

52. Both the Claimants and the Respondents requested the Tribunal in their pleadings to make an award compensating them for the costs incurred in respect of the proceedings in this Case. The Claimants in a Post-Hearing submission filed a specification of these costs in the amount of $261,491.20. The Respondents also filed a Post-Hearing submission, specifying their total costs in the amount of $57,560. In view of the outcome of the proceedings in this Case, the Tribunal finds it reasonable to award the Respondents jointly costs of arbitration in the amount of $9,000.

IV. AWARD

53. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a) The claims of MERRILL LYNCH & CO. INC., and MERRILL LYNCH INTERNATIONAL, INC., are dismissed;

b) The Counterclaim of THE FOREIGN TRANSACTIONS COMPANY based on the cement contract is dismissed; the Counterclaim for damages in the amount of $471,805.80 is dismissed for lack of jurisdiction;

c) The Counterclaims of BANK MELLI IRAN are dismissed for lack of jurisdiction;

d) The Claimants MERRILL LYNCH & CO. INC., and MERRILL LYNCH INTERNATIONAL, INC., are obligated to pay the Respondents THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE FOREIGN TRANSACTION COMPANY OF IRAN, BANK MELLI IRAN and THE INDUSTRIAL AND MINING DEVELOPMENT BANK OF IRAN jointly costs of arbitration in the amount of $9,000.

Dated, The Hague
19 August 1991

Bengt Broms
Chairman
Chamber One

In the Name of God

Assadollah Noori

Howard M. Holtzmann