IRAN-UNITED STATES CLAIMS TRIBUNAL

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 127

CHAMBER THREE

AWARD NO. 143-127-3

MORRISON-KNUDSEN PACIFIC LIMITED,

Claimant,

and

THE MINISTRY OF ROADS AND TRANSPORTATION and THE ISLAMIC REPUBLIC OF IRAN,

Respondents.

AWARD

Appearances:

For Claimant:

Mr. Barry L. Bunshoft
Mr. Aubin K. Barthold
Attorneys of Claimant
Mr. Kenneth W. Smith
Counsel of Claimant

For Respondents:

Mr. Mohammad K. Eshragh
Deputy Agent of the Islamic Republic of Iran
Dr. Abu Said Rahbari
Legal adviser to the Agent of the Islamic Republic of Iran
Mr. Mohammad Ali Lotfalian
Mr. J. Sadeghi
Attorneys of the Ministry of Roads
Mr. Yadollah Ghosayri
Financial adviser to the Ministry of Roads

Also Present:

Mr. Arthur W. Rovine
Agent of the United States of America
Ms. Jamison M. Selby
Deputy Agent of the United States of America

I. THE PROCEEDINGS

Claimant MORRISON-KNUDSEN PACIFIC LIMITED ("MKP" or "Claimant") filed its Statement of Claim on 19 November 1981, naming as respondents both the MINISTRY OF ROADS AND TRANSPORTATION ("MORT") and the ISLAMIC REPUBLIC OF IRAN ("Iran"). The Statement of Claim contains claims based upon the alleged breach by MORT of a contract for engineering services and upon the alleged expropriation of certain property by Iran. On 23 April 1982, MORT, on its own behalf and on behalf of Respondent Iran, filed a Statement of Defence and a Statement of Counterclaim naming as Counter-Respondents both Claimant and a French company identified as COFRARAN, S.A.R.L. ("Cofraran"). The counterclaims were based upon the alleged breach by Claimant and Cofraran of three contracts, including the contract which is the basis of certain of the claims, and upon certain allegedly unpaid social insurance obligations and taxes.

Claimant filed a Reply to the counterclaims on 8 June 1982. A Pre-Hearing Conference was held on 15 October 1982. The Tribunal thereafter ordered the Parties to submit, by 15 January 1983, Memorials and evidence on certain legal issues, including the question of whether the Tribunal had jurisdiction over each of the counterclaims. The Tribunal also specified that a Hearing would be held on all remaining issues in the case on 8-10 June 1983.

On 14 January 1983, Claimant filed its Memorial on the above mentioned legal issues. On 27 January 1983, MORT filed its Memorial, together with amendments to the counter-claims.

On 26 April 1983, the Tribunal ordered the Parties to submit Memorials and evidence on all remaining issues in the case and confirmed the Hearing scheduled for 8-10 June 1983. In an Order dated 13 May 1983, the Tribunal announced that it had determined that it had no jurisdiction over the counterclaims to the extent to which they did not arise out of the particular contract which constituted the subject matter of certain of the claims. The Order also indicated, inter alia, that its decision would, in due course, be incorporated in an award and that the remaining preliminary issues would be decided in the course of rendering a final award.

Claimant filed its Memorial and exhibits on 6 June 1983. The Hearing was held on 8-10 June 1983. On 9 June 1983, the second day of the Hearing, MORT filed its Memorial and other documents.

After the Hearing, by Order dated 14 June 1983, the Tribunal permitted the Parties "to file by 25 July 1983 post-hearing memorials addressing the legal issues of the case".

Claimant submitted a brief on 25 July 1983. On 26 July 1983, MORT filed a brief together with a volume of written

evidence. MORT filed an additional exhibit on 27 July 1983 and, on 24 August 1983, an additional volume of evidence in support of the counterclaim concerning taxes.

Following the Hearing, the member of the Tribunal appointed by the Islamic Republic of Iran resigned. A new member was appointed. The Tribunal has hereby determined not to repeat the prior hearing (see Article 14 of the Tribunal Rules). As from 15 January 1984, the member appointed by the United States of America also resigned. Pursuant to an amendment to Article 13 of the Tribunal Rules, provisionally adopted on 7 October 1983 and definitively adopted on 7 March 1984, the resigned member participated in the award.

II. FACTUAL BACKGROUND

Claimant and Cofraran are consulting engineering firms, the head offices of which are located in the United States and France, respectively. In 1974, they engaged in negotiations with MORT concerning work on a proposed motorway connecting Tehran with the Persian Gulf. On 9 February 1975, MORT issued a letter of intent formally proposing the project. This letter indicated MORT's desire to award responsibility for all studies relating to the construction of the motorway, including the design of the project, to a consortium consisting of Claimant and Cofraran. Furthermore, the letter of intent stated that the consortium would be given priority, "under equal conditions", in the selection of the construction contractor. The letter also stated MORT's requirement that the consortium perform "preliminary

works for the purchase of machinery and mobilization of work-shop and training technical workers ... and, furthermore, if working designs are prepared, to commence the construction of part of the road on cost-plus-fee basis which will be specified in the agreement between the parties...."

Continued negotiations between the parties resulted in the issuance by MORT of a second letter of intent on 18 April 1976. By this letter MORT indicated its decision "to assign the complete construction of the highway" to the consortium, including responsibility for design, machinery purchase, mobilization and actual construction. The letter indicated MORT's instruction that the first three of these responsibilities would be carried out under "three basic contracts" to be executed "[a]s soon as the credit facilities are provided", and that MORT and the consortium would negotiate the "main contract for the construction of the highway" as soon as the basic contracts were signed.

On 1 May 1976, the Claimant and Cofraran executed a consortium agreement establishing their respective rights and duties in the event that MORT entered into contracts with the consortium. The agreement set forth a division of responsibilities with respect to any contracts which might be executed by the consortium and MORT in connection with the motorway project and provided that the parties' responsibilities "will be carried out separately by each party".

(Art. 6). It also provided for the division between the parties of any payments received by the consortium. (Art. 9). The agreement stipulated that it "shall be governed by and construed in accordance with Swiss Law of the Canton of Geneva" (Art. 17) and that:

> Under no circumstance can this Agreement be considered as a deed of partnership. Each party acts for its own interest and the concept of "affectio societatis" is expressly excluded. (Art. 3).

On 28 July 1976, MORT, on the one part, and the Claimant and Cofraran as "contractor", on the other part, executed a contract for the design of two sections of the motorway project ("Contract 81" or "the Contract"). Article 1 of the Contract provided that the "subject of the Contract" was the performance of "all Engineering Services necessary for the complete design" of the two sections, designated Section A and Section C, respectively.

Under Article 2 and Enclosure No. 2 of the Contract, the consortium's duties included, inter alia, the design of Sections A and C of the motorway itself, as well as for various appurtenances and construction drawings and calculations for such items as interchanges, bridges, tunnels, and culverts. Also included was the design of certain ancillary motorway facilities, such as police centers, first-aid posts, public service complexes, service stations and facilities for the future maintenance of the motorway.

(Art. 2(1), Encl. 2, Para. 7). The work was divided into two phases; Phase I was devoted to data collection, preliminary studies and a working program for the design work and Phase II to the preparation of construction drawings, specifications and a target cost estimate. Under Article 2(4), the consortium was to submit four copies (one reproducible and three copies) of all drawings and reports at its own expense; extra copies were to be for MORT's account.

Article 2(3) stated a general limitation upon MORT's obligations to the consortium (see Part III.2 of this Award). MORT's specific duties with regard to the design were stated in Article 9 of the Contract, under which it was responsible for providing cartographic photography and mapping data (actually to be done by the National Cartographic Organization but ordered and paid for by MORT; under the Addendum others could do that work) according to a schedule set forth in Enclosure No. 5. (See also Addendum Par. 13). Moreover, MORT was obligated, subject to Iranian law, to "take all the necessary measures to facilitate the CONTRACTOR's functions ...." (Art. 8, Encl. 4). Also the Consortium's work was dependant on certain decisions of MORT. (Encl. No. 2, Pt. 3 and Design Time Schedule).

The time limits for the "completion of the work" under the Contract were set forth in Article 3, under the terms of which Phase I was to be completed five months after the effective date of the Contract and Phase II ten months after

the date of the approval of the Phase I reports. (Art. 3(1)). Extensions of these limits were to be granted upon MORT's agreement and if required for reasons not the fault of the consortium. (Art. 3(2)). The actual schedule of work for Phase I was set forth in Enclosure No. 2 to the Contract; the work schedule for Phase II was to be submitted with the Phase I report. (Art. 4; Encl. No. 2).

Article 5 established the procedure for and the implications of the approval of reports, including drawings and other documents. Article 5(1) required MORT to comment upon reports and documents subject to its approval within 30 days of receiving them. Article 5(2) provided that reports and documents "shall be regarded as approved" unless MORT, within the 30 day period of Article 5(1), declared them to be defective, delineating in detail any perceived departures from the contract's requirements. Article 5(4) provided, however, that the approval of reports did not remove the consortium's responsibility "as to the soundness and correctness of the design or drawings". Finally, Article 5(5) required the consortium to correct any deficiencies resulting from negligent performance in the work reported to it by MORT within 2 years "from the date of completion of its services hereunder", which time limit was to be automatically extended under certain specified circumstances.

The actual compensation to be paid to the consortium was set forth in Article 11 of the Contract and had two

components. First, the consortium was to be paid 1,320,000 rials for each kilometer of motorway designed, including facilities for future maintenance. (See Encl. 2, Par. 7(c)) Second, the consortium was to receive a standard percentage of the target estimate value in connection with certain ancillary or service motorway facilities designed by the consortium.

The mechanism for the payment of compensation was provided for in Article 12. Payment was to be effected in six interim payments and a final balance payment. Each of the six interim payments was to be a specified percentage of an estimate of the actual compensation based upon an assumed motorway length of 450 kilometers and an assumed cost of the ancillary facilities of 350,000,000 rials.

The first interim payment was to be 10% of the estimated compensation payable in advance against a bank guarantee. (Art. 12(1)(a)). The second and third interim payments were each to be 5% of the estimated compensation payable upon submission of two successive interim reports. (Art. 12(1)(b) and (c)). The fourth interim payment was to be 30% of the estimated compensation payable upon submission of the Phase I general report. (Art. 12(1)(d)). The fifth interim payment was to be 30% of the estimated compensation payable in monthly installments as Phase II services progressed in accordance with the Phase II work and schedule. (Art. 12(1)(e)). The sixth interim payment was to be the

final 20% of the estimated compensation payable against a bank guarantee 30 days "after submittal of the Report for Phase II". (Art. 12(1)(f)). The final balance payment was to be the difference between the actual compensation as provided for in Article 11 and the total of the six interim payments made on the basis of the estimated compensation. (Art. 12(1)(g)).

Also under Article 12, each of the payments was to be made 20% in Rials, 40% in French Francs and 40% in United States dollars (Art. 12, Note 3) and effected within 10 days after the "date prescribed". (Art. 12, Note 2). MORT was obligated to obtain any necessary Iranian government approvals for the foreign currency exchanges. Under Article 12(1)(h), the bank guarantees for the first and sixth interim payments were to be "released upon the approval of the Report for Phase II".

Article 13 of the Contract provided that the payment of taxes, social insurance obligations and other government levies "will be on the Contractor's charge". The article stated that the Contract's compensation provisions were based on rates of government taxes or other charges in effect on the date the Contract was concluded and provided that, "in the event of any change in the rate" of any such charge, "the remuneration shall be appropriately adjusted". Finally, the article authorized MORT to deduct from payments

an amount for taxes as provided in law, which was 5.5% of all payments.

Article 14 of the Contract provided that, in lieu of MORT's retaining 10% of all payments as security for good performance, the consortium could provide bank guarantees for this percentage of each payment. (Art. 14(1) and (3)). Under Article 14(2), this security was to be released "after the approval of the report and documents of Phase II".

Article 16(1) provided that in the event of any default or negligence by the consortium, MORT was to give notice, and the consortium was required to take corrective action within a reasonable time, not exceeding 1-1/2 months. If the items were still not corrected, upon 15 days' notice MORT could cancel the Contract. In such an event, MORT could deduct from payments due 5% of the value of the consortium's services and any reasonable damages resulting from the defaults, as limited by Article 5(5), and the consortium would surrender all rights in the good performance security. Article 16(2) provided, inter alia, that the consortium could terminate the Contract if, after MORT received notice that it was in breach of the Contract, MORT failed to remedy the breach within 10 days.

Article 28 stated that MKP and Cofraran bound themselves "to be jointly and severally liable to the EMPLOYER for the Consortium's obligation under this Agreement". It

also provided that the Contract would become effective when MORT made the first interim payment.

Finally, Article 7 of the Contract required the parties to designate official representatives with respect to the motorway project. Accordingly, on the same day that the Contract was executed, i.e. 28 July 1976, MORT entered into a contract with the consulting engineering firm of Howard Needles Tammen & Bergendorf - Iran ("HNTB"), designating this firm as the owner's representative for the project and specifying its duties and authority.

On 29 September 1976, the consortium supplied bank guarantees for the advances to be made in the first interim report. MORT made the first interim payment on 21 December 1976, thereby bringing the Contract into effect. The two interim reports and the general report for Phase I of Sections A and C were submitted by the consortium and approved by MORT and, accordingly, MORT made the second, third and fourth interim payments.

On 4 June 1977, the parties executed two additional contracts relating to the motorway project. Under the first, the consortium agreed to procure equipment for the construction of the motorway ("Contract 87"). Under the second, the consortium agreed to mobilize workers and to construct work camps for the construction of the motorway ("Contract 88"). These contracts were to become effective

upon the arrangement of financing by MORT (Cont. 87, Art. 18, Cont. 88, Art. 26), which eventually occurred on 2 March 1978.

During 1977, there were problems in the delivery of mapping data necessary for Phase II of the work on Sections A and C. Moreover, in late 1977, MORT decided to proceed with the design of a third section of the motorway, Section D. Therefore, on 19 November 1977, the parties executed Addendum No. 1 to Contract 81 which altered the terms in a number of respects.

First, Addendum No. 1 added to the consortium's duties that of designing Section D of the motorway. (Add. No. 1, Preamble and Paras. 1 and 2). Second, the addendum extended the Article 3 time limits for Phase II of Sections A and C by 2 months and established time limits for both phases of Section D. (Para. 3) Third, the Article 12 payment mechanism was made applicable to Section D services except that the estimated compensation for the six interim payments for Section D was to be based on an estimated length of that section of 120 kilometers; separate invoices and payments were to be made for Section D. (Paras. 7 and 8). Fourth, the time limit for MORT's submission of mapping data for Sections A and C was extended to seven months after the approval of Phase I and the due date for mapping data for Section D was set at five months after the approval of Phase I of that section. (Para. 13, subp. (f)). Finally, in

consideration of the addition of Section D to the Contract and of the time extension for Phase II, the consortium waived any and all possible claims for compensation caused by MORT's previous delays in meeting its obligations under the Contract. (Para. 14).

MORT made the first interim payment for Section D on 2 January 1978. The two interim reports and the general report for Phase I of Section D were submitted by 9 May 1978 and were approved by MORT. MORT made the second, third and fourth interim payments.

Work progressed on Phase II of all three sections of the motorway throughout 1978. During this period, there were some difficulties connected with the supplying of the mapping data, as well as with the completing of the drawings for the ancillary motorway facilities. The Phase II report for Section A was delivered by 19 September 1978, that for Section C on 30 October 1978 and a summary of the overall report on 5 December 1978. The Phase II report for Section D was delivered on 23 February 1979. The actual length of Sections A and C of the motorway totalled 398 kilometers. The length of Section D totalled 125 kilometers.

At various times during the months following the submission of each of the reports, HNTB made comments concerning needed revisions, and the consortium periodically submitted revised drawings. The review and revision process

continued throughout 1979. Final phase II reports for Sections A, C and D were received on or about 26 September 1979, and no objections were made to them within 30 days or otherwise. Late in 1979, MORT requested that new copies of all drawings be submitted with new title blocks to reflect a change in the name of the motorway.

In a letter dated 10 January 1980, HNTB informed the consortium that all Phase II reports had been received, stating, "[t]he Reports are complete and have our approval in all respects except for designs and plans for facilities for future maintenance which have not been completed." The letter also stated that HNTB would "strongly recommend that [MORT] approve your work and the Phase 2 Reports." HNTB made such a recommendation to MORT in a letter dated 16 February 1980. In that letter it was noted that the design of the facilities for future maintenance were not completed "due to the decision to phase out the Contractor's work on this project". On 13 February 1980, the consortium submitted a complete set of drawings with revised title blocks.

During the period in which work on Phase II of the motorway progressed, the consortium submitted invoices for the monthly installments of the fifth interim payment. Some of these invoices were paid in full but, in other cases, MORT paid only the rial portion of the invoice. Nothing at all was paid on invoices submitted after March 1979. Invoices were approved by HNTB.

On 7 February 1979, the consortium submitted an invoice for the final balance payment of the per kilometer portion of the compensation for Sections A and C. MORT refused to pay this invoice on the ground that unspecified items were missing from the Phase II reports and because the estimated length of the motorway, upon which the interim payments were based, exceeded the actual length designed by 15%. MORT has not paid this invoice.

On 26 September 1979, the consortium submitted an invoice for the final balance payment of the per kilometer portion of the compensation for Section D. On 20 August 1979 and 5 February 1980, the consortium submitted invoices for Phases I and II, respectively, of the work done on the ancillary facilities for all three sections of the motorway, the second of which invoice included a credit to MORT for the uncompleted work on future maintenance facilities. These invoices remain unpaid.

On 24 April 1980, the consortium submitted three invoices for compensation which it claimed to be due for MORT's delays in supplying mapping data, for delays in the review process and for supplying the additional set of drawings with revised title blocks. These invoices also remain unpaid.

III. THE CLAIMS

1. Contentions of the Parties

Claimant presents three sets of claims in relation to its work under Contract 81 and Addendum No. 1 thereto. First, Claimant maintains that the consortium fully performed all of its duties under the Contract; that all of its work was either explicitly approved by MORT acting through its representative, HNTB, or constructively approved by operation of Article 5(2) of the Contract; and that MORT wrongfully failed to pay invoices due for the fifth interim payments and for the final balance payments for the per kilometer portion of the compensation. Claimant claims U.S. $943,935 for its 50% share of amounts allegedly owing under these invoices. Claimant makes no claim for invoice Nos. 14 and 16 relating to work performed on the ancillary facilities.

Second, Claimant claims for reimbursement of certain extra expenses it purportedly incurred. Claimant alleges that MORT delayed in supplying mapping data in breach of the agreed-upon schedule and that the review and revision process was delayed beyond the requirements of the Contract. Claimant contends that, due to these delays, it was forced to incur costs for which MORT is liable. Claimant also contends that MORT is liable for the cost of providing the additional complete set of drawings with revised title blocks. For the costs of the delays and the additional set of drawings, Claimant seeks reimbursement of a total of U.S. $618,098.

Third, Claimant alleges that MORT has wrongfully failed to release the bank guarantees which Claimant supplied in accordance with the Contract. Claimant seeks an award requiring the release of these guarantees, and corresponding back-up letters of credit, or, in the alternative, an award of damages equal to the total face amounts of the guarantees totalling U.S. $930,227. Claimant also seeks reimbursement of U.S. $9,123 in bank commissions it alleges to have incurred in order to maintain the corresponding letters of credit beyond dates on which the bank guarantees were to have been released.

In addition to its contract claims, Claimant alleges that Iran has confiscated funds it maintained in a bank account in Iran and items of minor equipment which it owned in Iran. Claimant also alleges that Iran is liable for certain refundable deposits which it paid for utility services, apartment-leases and similar purposes. Claimant seeks a total of U.S. $19,497 as damages for these miscellaneous claims.

Claimant also seeks interest on the principal amounts of each of the above claims and its costs of arbitration.

MORT, on its own and on behalf of Respondent Iran, defends by asserting that Claimant has not submitted adequate proof that it is a United States national and entitled

to present the claims under the Claims Settlement Declaration.

MORT defends against the claim for compensation under Contract 81 by contending that it was justified in stopping payments because of disputes between the parties under Contracts 87 and 88, that the consortium failed to submit completed Phase II drawings, that the consortium did not perform within the time provided in the Contract, that the consortium's work was defective and that the consortium failed to pay certain tax and social insurance obligations. In its 26 July 1983 submission, after the Hearing, MORT also contended, for the first time, that the consortium delayed in designating official representatives and in supplying required bank guarantees, that the consortium's Phase II work was not approved within the meaning of the Contract and that the consortium's invoice for the final balance payment for Sections A and C incorrectly states the total payments made by MORT.

MORT also denies liability for each of the claims for reimbursement of expenses. MORT contends that Claimant waived, in Addendum No. 1 to the Contract, claims for compensation for losses caused by MORT's delays in the supply of mapping data. In its 26 July 1983 submission, MORT also asserts that the exclusive remedy for such delays is the right to terminate the Contract pursuant to Article 16. MORT contends that the delays in the review and

revision of drawing was caused by the incompleteness of and deficiencies in the consortium's work. MORT argues that the Contract does not provide for extra compensation for the submission of the additional sets of drawings with revised title blocks and that the consortium was, in any event, bound to obtain MORT's prior approval of the estimated cost of supplying the additional copies.

MORT contends that it is not obligated to release any of the bank guarantees on the ground that the conditions for release have not yet been met. MORT argues that some of the guarantees were to be released upon approval of the Phase II work, and others upon the expiration of the warranty period under Article 5(5), neither of which event, MORT suggests, has yet occurred.

Finally, MORT denies that Iran has confiscated any of Claimants' funds or property or is liable for the refundable deposits. MORT argues that Claimant has failed to submit evidence sufficient to support these claims.

2. Jurisdiction over the Claims

Claimant has submitted an affidavit of the Secretary of State for the State of Nevada, U.S.A., certifying that it is a corporation which was, at the relevant times, and continues to be organized under the laws of that State. Claimant has also submitted affidavits of a member of the

accounting firm of Coopers and Lybrand and the acting assistant secretary of Morrison-Knudsen Company, Inc., stating that Morrison-Knudsen Company, Inc. owns 100% of MKP's shares.

An affidavit of the Secretary of State of the State of Delaware, U.S.A., also submitted by Claimant, states that Morrison-Knudsen Company, Inc. was at the relevant times and continues to be organized under the laws of that state. The affidavit of the above-mentioned assistant secretary states that approximately 99.8% of the voting stock of Morrison-Knudsen Company, Inc., was held by shareholders with addresses in the United States as of 31 December 1980. Attached copies of proxy statements issued in connection with shareholder meetings held on 2 May 1980 and 8 May 1981 do not indicate that any shareholders owning more than 5% of the stock of Morrison-Knudsen Company Inc. were not United States citizens.

It is clear from the Consortium Agreement that the members of the consortium were not partners and that each had its own individual rights. Indeed, both Claimant and Cofraran were individual parties to the Contract. Claimant submitted evidence that under applicable Swiss law, which governed the Consortium Agreement, the consortium was not a juridical person that could maintain a claim. Without expressing any views on the rights of partners to assert individual claims, the Tribunal concludes on the basis of

the submitted evidence in this case that Claimant, as a United States national, could assert its claim before this Tribunal.

On the basis of the above, and in the absence of any evidence to the contrary, the Tribunal holds that the claims are all claims of nationals of the United States within the meaning of Article VII, paragraph 2, of the Claims Settlement Declaration.

The claims all arise out of alleged debts, contracts, expropriations or other measures affecting property rights and were outstanding on 19 January 1981. Moreover, it is uncontested that MORT is an agency of the Government of the Respondent Iran. Therefore, the Tribunal concludes that it has jurisdiction over all of the claims, pursuant to Article II, paragraph 1, of the Claims Settlement Declaration.

3. Reasons for the Award with Regard to the Claims: the Merits

a) The Claim for Contract Fees

The evidence demonstrates that the consortium rendered invoices for fees under the Contract which remain unpaid. Respondents have asserted a number of defences to liability for further payment.

The Respondents first maintain that MORT ceased to pay the consortium's invoices under Contract 81 because of its "financial dispute" with the consortium under Contracts 87 and 88. Respondents argue that "so long as the status of the former payments [made under Contracts 87 and 88] was not cleared" MORT was "not in a position to make any payment with respect to any of [the three Contracts]." Article 12 of Contract 81 does not make performance of Contracts 87 or 88 a condition to payment of compensation. The obligations of Contract 81 are not interdependent with the obligations of Contracts 87 or 88. A claim under one independent contract is not a defence to liability under another, and, therefore, this defence must be rejected.

Respondents also raise defences based upon defective performance under Contract 81. The first such allegation is that the consortium breached Contract 81, "with respect to supplying and perfecting the drawings", by failing to submit completed Phase II documents. However, the only such failure specified by Respondents was the absence among the submissions of certain drawings for ancillary highway facilities.

Evidence has been presented to the Tribunal regarding the problems which arose in connection with the ancillary facilities. That evidence demonstrates that the consortium was always prepared to provide designs for these facilities once MORT notified it of the type of facilities desired. At

MORT's request, the consortium, at its own expense, conducted a special study of the appropriate alternatives and continually requested a decision from MORT. MORT's failure to make a decision is documented by reports of HNTB; indeed, there is some evidence that MORT eventually decided to cancel this part of the project. Based upon this evidence, the consortium's failure to complete work on the ancillary highway facilities must be excused due to MORT's own failure to give required instructions.

It should be noted that, while the consortium submitted separate invoices for work which was performed on the ancillary facilities, Claimant does not seek the amounts due under these invoices (Nos. 14 and 16) on the ground that the work was actually performed by Cofraran. It is also clear, however, that compensation for work on one type of ancillary facilities, consisting of facilities for future maintenance, was to be included in the per kilometer portion of the fee. Because this work was only 10% completed, the consortium credited MORT, in one of the invoices for which no claim is made, with 4,859,619 rials against prior invoices for which Claimant does make a claim. This credit is understated by 539,957 rials, which amount the consortium deducted as a penalty for termination under Article 16, even though there is no evidence that either party formally terminated the Contract. Therefore, MORT is entitled to a credit for the uncompleted portion of the work on the future maintenance facilities against the amount due to the consortium for the

per kilometer fee. Also, since Claimant agrees that it is not entitled to any monies for certain ancillary work billed under the target invoice, it must credit MORT with 875,000 rials, which is one-half of the advance payments made in this respect. The above deductions amount to 3,574,788 rials.

Respondents note that the consortium received payment for certain work covered under the target fee provision of paragraph 2, article III of the Contract. Some of the terms covered by such work were not completed at the instance of MORT. The Consortium was at least entitled to payment for work completed. In this regard, the Consortium completed the work through the Phase I report. It billed and received payments through some scheduled Phase II work. The evidence shows that it did some Phase II work on the ancillary facilities.* Indeed the Phase II billing was to be consistent with progress, and there is no indication of an objection to such billing or to such progress having been accomplished. The consortium does not seek payment for the total amount that would be due if the work had been completed. MORT has not shown that the amount billed for the

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* A detailed description of the work completed on the ancillary facilities is contained in Claimant's memorandum from January 1980 (Exhibit 25 to Statement of Claim). See also HNTN's letter to the consortium on 10 January 1980 (Statement of Claim, Exhibit 18).

non-per kilometer fee did not represent payment for actual work done. Accordingly, no further deduction is appropriate. The Tribunal deducts the advance payment referred to above because it was apparently not credited until the final billing and thus can be deemed allocable to work not performed.

Respondents have also generally alleged that the consortium delayed in its performance of the Contract. However, except for the delay inherent in the consortium's inability to complete work on certain ancillary facilities, Respondents did not provide sufficient evidence of the consortium's alleged wrongful failure to perform on time or any demand by MORT with respect to any alleged delay. The Contract contemplated the possibility of delays in the Consortium's performance (Art. 3(2)). Finally, the evidence before the Tribunal does not demonstrate that MORT suffered any damage attributable to any alleged delays on the part of the consortium. Therefore, this defence must fail for lack of proof.

Respondents also allege that the drawings and specifications submitted by the consortium contained numerous technical defects which were discovered by MORT long after HNTB completed its review of all final submissions. They now argue that these alleged defects excuse MORT from any further payment obligations.

Article 12 of the Contract, which sets forth the schedule and conditions for the payment of fees, provides that the final contract payment, consisting of the balance of the fees due after deducting the six provisional payments, is due "upon approval of Report for Phase II." Article 5 of the Contract establishes both the criteria for approval of reports and the effect of later discovered defects. In Article 5(2), the parties agreed that a report "shall be regarded as approved" unless MORT declared the report to be defective within 30 days of receiving the report and unless "such defects are delineated in detail as to the departure from Contract requirements." Article 5(4) makes clear, however, that such approval does not "remove the responsibility of the CONTRACTOR as to the soundness and correctness of the design or drawings." Article 5(5) which elaborates the consortium's liability states that it is limited to actual loss or damage. Thus, the parties provided that the right to payments under Article 12 was conditioned only upon the absence of notification of patent defects in the work within 30 days following receipt of the work.

The Respondents themselves concede that the alleged defects upon which they base their defence were not discovered, much less brought to the attention of the Consortium, within 30 days after any particular submission of the consortium's work. Therefore, even if the Respondents' allegations with regard to later discovered defects are

true, MORT's duty to make the payments required by Article 12 would not be affected, and such defects could not provide a defence to the claim for such payments. The remedies provided by the parties for later discovered, latent defects was the consortium's promise to correct deficiencies and money damages for the "loss or damage" caused if it failed to do so, assuming timely notice of the defects was given. Obviously, any award of damages for such defects would offset any payments held to be due; the right to have such payments declared due in the first place is, however, unrelated to this question. The Respondents seek these damages as a remedy in a counterclaim, the merits of which are dealt with hereinafter.

The last defence raised by the Respondents against the Claim is based upon the allegation that Claimant and Cofraran failed to satisfy tax and social insurance obligations to the Government of Iran. Whether or not the consortium complied with government tax requirements does not affect its right to fees under the Contract and was not raised by MORT as an excuse for a non-payment at the time the payments were due. Possible offsets against such fees are discussed in the part of the Award dealing with the counterclaims.

By the Tribunal's Order of 14 June 1983, the Parties were permitted to file "post-hearing briefs addressing the legal issues of the case." MORT submitted a brief and one

volume of documentary evidence on 26 July 1983, an additional exhibit on 27 July 1983, and an additional volume of evidence on 24 August 1983. In their brief, Respondents raise for the first time a number of new defences to the claim for fees. The Tribunal notes that, to the extent that they introduce new evidence and raise new legal defences, the 16 July, 27 July and 24 August 1983 submissions are unauthorized. Fairness and orderliness would require, therefore, that the Tribunal disregard the submissions insofar as they do not constitute written arguments on legal issues previously raised in the case, in accordance with the Order of 14 June 1983.

The Tribunal further notes, however, that it does not consider any of the late-filed defences to be meritorious in any event. Respondents allege that the consortium wrongfully delayed both in appointing authorized representatives pursuant to Article 7 of the Contract and in providing bank guarantees for the advance to be made in the first interim payments. However, neither provision establishes a deadline for the consortium's actions and no evidence of undue delay has been presented.

The second defence is based upon the contention that the sixth interim payment of 20% of the estimated compensation for each section of the motorway is not due because the Phase II work was not approved and because the consortium did not arrange for the required bank guarantees.

Respondents argue, therefore, that the actual payments made by MORT total more than 80% of fee they maintain MORT was required to pay, based upon the actual kilometer length of the three sections of the motorway as finally designed.

However, the sixth interim payments were due upon "submittal" of the respective Phase II reports and not, as Respondents allege, upon their "approval". It appears that the Consortium did not invoice for the sixth interim payments (not to be confused with sixth installment invoice which was partially paid). Apparently, the sixth interim payments were included in the final balance payments for Sections A and C and Section D, respectively, which payments were to become due upon approval of the Phase II reports but which were invoiced earlier (Invoice No. 13). The statements reflect an amount for the actual kilometer length of the roadway designed. Because the guarantee was to be released on this same condition, it turned out that it did not matter that a term of the Contract provided that it be supplied at an earlier date. Moreover, MORT raised no issue at the time the bank guarantee was allegedly due. As certain payments by MORT had not been made, the consortium was not unreasonable in not providing the guarantee.

The third defence is based upon MORT's contention that, in the consortium's invoice for the final balance payment for Sections A and C (Invoice No. 13), the consortium understated the payments which MORT had already made. A

review of this invoice indicates, however, that it relates only to the per kilometer portion of the fee and even credits MORT with amounts previously invoiced which had not been paid. Also MORT's computations only take into account the per kilometer portions of interim payments and not the portions referred to in Article 12, Note 1 to the Contract. Furthermore, although MORT's interim payments in connection with the design of certain ancillary facilities are not reflected in the invoice, these payments are reflected in the subsequent invoices for which no claim is made. And even though no claim is made for this portion of the work, it is clear that a substantial amount is still owed for work under the related invoice for the final balance payment. Any issue as to such amount which might be owing for certain ancillary facilities does not affect the amounts paid and owing under the per kilometer fee.

In light of the above, it is clear that MORT was not justified in failing to pay invoices due for interim payments which were due prior to and upon submission of the Phase II reports. The final question is whether the Phase II reports were approved and, thus, whether the final balance payments also fell due. The answer depends on whether the Phase II reports were "approved" within the meaning of the Contract.

Claimant contends that the latest date upon which the Phase II reports could be deemed to have been approved is 10

January 1980, the date of the letter from HNTB to the consortium giving HNTB's approval to the Phase II reports, except for the uncompleted facilities plans. The extra set of Phase II drawings with revised title blocks was submitted on 13 February 1980, but revising the title blocks was not a contractually required service. Claimant contends that HNTB had authority under its own contract with MORT to approve formally the work and that, therefore, these letters constitute approval of the work within the meaning of Article 12. Respondents deny that HNTB had authority to approve formally the work, citing as evidence HNTB's own conduct in merely "recommending" approval.

The extent of HNTB's authority to act on behalf of MORT is defined in the Consulting Agreement between those two entities. In that agreement the role of HNTB is generally described as one of an "agent for" and "alter ego of the Employer". (Enclosure No. 2). According to the same agreement all the correspondence between the Contractor and the Employer MORT was to take place through HNTB which was to respond to all queries, communications and demands "without [,however,] necessarily securing the approval of the Employer". From this and HNTB's above-mentioned conduct in merely recommending the approval of reports the Tribunal concludes that HNTB was free to decide in which cases it preferred to seek the approval of MORT. HNTB did so with regard to the Phase II reports.

On the other hand, it also seems clear that HNTB did have authority to "receive" reports on behalf of MORT, with all the consequences connected with such a receipt. The most important of such consequences is that in view of the events that took place, the "reports shall be regarded as approved" by virtue of Article 5(2) so as to make the final balance payment due. Respondents contend that any such "constructive" approval provided for in Article 5(2) does not apply to the approval of the final Phase II report, but has a more limited application.

Such a limited interpretation has some support from the wording of the provision itself. In Article 5(2) it is stated that the "reports shall be regarded as approved and shall become the basis of next studies and actions". This could be interpreted to mean only approval for the purpose of continuing the work, i.e. approval of <u>interim</u> reports. Such an interpretation, however, is not the only possibility, for the reference to "next studies and actions" can also be understood as specifying certain consequences of the approval mechanism rather than as a limitation on that which is to be approved. This latter interpretation seems more persuasive in view of the fact that, apart from the reference to the next phases, the two alternative modes of approval provided for in Article 5, paragraphs 1 and 2, are on their face general and all-inclusive; moreover, there is no provision in the Contract which would define other criteria for the approval of the final Phase II report.

Therefore, the Tribunal concludes that the constructive approval mechanism in Article 5(2) applies to the approval of the final Phase II report for the purpose of Article 12(1)(g).

The evidence also shows that the Phase II reports were actually approved by operation of Article 5(2) of the Contract. The Phase II report for Section A was submitted on 19 September 1978, and for Section C on 30 October 1978, and a summary was submitted on 5 December 1978. The Phase II report for Section D was initially submitted at the end of February 1979. After these dates the review and revision process continued so as to postpone the approval dates based on Article 5(2). There is no evidence that any revisions of Phase II reports that were required were not corrected. There were no further objections within the 30 day periods. There is no indication that MORT raised any objection to the final invoices when they were submitted or at that time contended that they were untimely or were unjustified. There was a continuing review and revision process. The revised final phase II reports were received on 26 September 1979. One month passed with no objections by MORT. Accordingly under the Contract the date of approval of these reports is 26 October 1979. It is from 10 days after this date that interest must run from defaults related to payments to be made upon approval of these reports. Even if the extra work on the title blocks was relevant to the limitations period, Claimant finished that work by 13

February 1980. Consequently, both the Phase II final reports for Sections A and C and for Section D were approved as of at least 13 February 1980. Finally, it should be noted that the invoices were sent and recapitulations and summaries of amounts owing were sent. There is no evidence that Respondents objected to the fact that the invoices were sent or to the statements of payments made.

For the above reasons, Claimant is entitled to receive one half of the 132,811,729 rials total amount outstanding on the invoices under which it claims, or 66,405,864 rials, less 3,574,788 rials credit due to MORT. The major portion of the amount due was to be paid in United States dollars, and, consequently, this portion has to be converted into dollars at the exchange rate in effect when it became due and payable, which, according to International Monetary Fund statistics, was 70.475. On the other hand, as regards those portions of the invoices which were to be paid in rials Claimant itself has indicated that the funds were intended to be used in Iran during the project. Such rial obligations are not necessarily convertable into dollars at the official rate of exchange in effect when they became payable. Compare William L Pereira Associates, Iran v. Islamic Republic of Iran, Award No. 116-1-3, 19 March 1984. Nevertheless, in the instant case, the rial obligations in issue accrued near or at the termination of the work and were outstanding at the termination of the work. Claimant must, in the absence of contrary evidence, be deemed to have

intended to have also these rial portions converted into dollars and transferred from Iran. Thus the rial portion of the money awarded must be converted into dollars at the rate of exchange generally in effect when each amount became due. The difference in dates has no practical consequences, as the exchange rate at all the relevant dates was 70.475 rials per dollar. The application of this rate yields a total principal amount due of U.S. $891,537.09. The Tribunal holds that Claimant is also entitled to interest on the principal amount due under each of the outstanding invoices from the date 10 days after the date of each invoice, except for the invoices for the final balance payments which were payable 10 days after the deemed approval of the Phase II reports. Such interest must be calculated at a reasonable rate, which the Tribunal determines shall be 10% per annum.

b) The Claims for Reimbursement of Expenses Caused by Delays and Extra Work

Claimant has presented three claims for payments allegedly due outside of the Contract's fee provisions. First, Claimant seeks the payment of the invoices which it submitted to MORT based upon MORT's delay in supplying mapping data necessary to the performance of the consortium's work and allegedly in violation of the work schedule set forth in Enclosure No. 5 of Addendum No. 1 to the Contract.

Claimant alleges that it was required to incur costs for maintaining offices and personnel in Iran for 3½ months longer than required for scheduled services under the Contract and for demobilizing and remobilizing personnel in the United States as data were eventually supplied by MORT.

In defense, Respondents have contended that the consortium waived all claims for delays by MORT in Addendum No. 1 to the Contract. Paragraph 14 of the Addendum expressly provides, however, that the waiver was limited to "any and all possible claims for additional compensation under this contract resulting form [sic] delays prior to the date of signing of this ADDENDUM No. 1" (emphasis added). The claim here relates to delays subsequent to the execution of the addendum in connection with the new schedule set forth in the addendum itself. Thus, the Respondents' defence in this regard must be rejected.

In their submission of 26 July 1983, Respondents also argued for the first time that the Contract provides that the exclusive remedy for any delayed performance by MORT is the right to terminate under Article 16. As explained above, this contention should be disregarded as untimely raised. The Tribunal notes, however, that, in any event, the termination provision of Article 16 is not by its terms exclusive and that, as a general principle of law, a party may recover for losses suffered as a consequence of contract breach irrespective of whether a right also exists to

terminate the contract. See Treitel, Remedies for Breach of Contract in VII Contracts in General, Int'l Ency. of Comp. Law 140 (1976). Nothing in Iranian law has been called to the Tribunal's attention that contradicts this general legal principle. Indeed, in requiring Claimant, in Addendum No. 1, to waive claims to compensation for prior delays, MORT has, in effect, conceded the non-exclusivity of the provisions of Article 16. Also the fact that the consortium could have requested delays for its own performance does not excuse a breach by MORT causing Claimant damage.

Respondents do not sufficiently contradict Claimants' position that MORT provided the mapping data behind schedule; nor do they question the validity of Claimant's calculations of resulting costs. However, HNTB correspondence at the relevant times suggests that some delays in the project may, in part, have been attributable to the consortium. Some delay is to be expected in projects of this nature. The Tribunal does not find that Claimant is entitled to all of its one-half of the consortium's share of the consortium's calculated costs for the mapping delays. The Tribunal does, however, award Claimant some damages for such mapping delays.

Claimant's second claim for reimbursement relates to costs which it incurred due to delays in the process of reviewing the Phase II reports. Claimant claims U.S.

$55,451, representing Claimant's share of the costs of maintaining a chief project engineer and a structural engineer for four months and twelve months, respectively, beyond the schedule set forth in the Contract.

Respondents rely upon the contention, asserted earlier, that the Phase II reports were incomplete and therefore could not serve as a basis for approval. This argument has already been disposed of above by the Tribunal's decision that the Phase II reports were approved by operation of Article 5(2). At the same time, however, Article 5(4) provided that approval of reports "does not remove the responsibility of the CONTRACTOR as to the soundness and correctness of the design or drawings" and Article 5(5) required the consortium to correct later reported latent defects. Thus, it is reasonable to assume that, in continuing to make revisions in the drawings after the dates of approval under Article 5(2), the consortium was merely fulfilling its contractual duty under Article 5(5). As such, it was clearly the parties' intention that such corrective work be performed at no additional cost to MORT. For this reason, this claim must be denied.

The third claim for reimbursement relates to the expenses incurred in supplying an additional complete set of all drawings with new title blocks reflecting a change in the name of the motorway. It is undisputed that MORT, through HNTB, expressly requested the additional drawings in

letters dated 31 December 1979 and 4 January 1980. Respondents deny, however, that MORT is obligated to pay for these costs on the ground that the Contract does not provide for payments over and above the Contract's fee provisions. This contention is not correct. Article 2(2) of the Contract deals with the revision of required services, providing that "[i]n such cases, the duration of the Contract and the CONTRACTOR's remuneration under this Contract ... shall be decreased or increased as mutually agreed by both parties based upon the proportion of decrease or increase in the required services, expenses and obligations." The article is thus clearly based on the assumption that extra services as mutually agreed upon between the parties (and here they were agreed upon) also presuppose corresponding payment adjustments.

Respondents contend further that, despite the fact that MORT requested the revised drawings, the consortium was obligated to obtain MORT's prior approval of the estimated cost of supplying them. This contention is in fact supported by the above-mentioned Article 2(2) which requires that also the payment adjustments caused by increased work should be mutually agreed upon by the parties. There is, however, no indication of such an agreement; nor is there any evidence that the Consortium submitted any preliminary estimation of the costs involved. Accordingly, Claimant is not necessarily entitled to the amount the Consortium unilaterally set for such work. Nevertheless, MORT requested

and accepted the additional work. Thus Claimant is entitled to its share of a reasonable sum for such work on the basis of quantum meruit. See Article 336 of the Civil Code of Iran. There is no indication of how to value the work, but an observation of the changed title blocks would suggest that such work was not insubstantial.

In light of the above the Tribunal holds that Claimant is entitled to the total amount of $400,000 covering its share of damages it suffered by virtue of the mapping delays and for the extra work. Such amount became due as of 4 May 1980 - i.e. 10 days after the relevant invoices were sent, to which invoices there was no timely objection.

Claimant is also entitled to interest on the above two principal amounts awarded at the reasonable rate of 10% per annum from 4 May 1980.

c) The Claims Relating to Bank Guarantees

Claimant contends that MORT has wrongfully failed to release certain bank guarantees supplied by Claimant in accordance with the Contract to secure payments made to it by MORT. Claimant now seeks the release of these bank guarantees, along with the release of corresponding back-up letters of credit, or, in the alternative, an award of damages equal to the face amount of the guarantees, which is alleged to be U.S. $930,227.

Claimant originally asserted that the bank guarantees were supplied against MKP's share of the advances made in the first interim payments for the work on Sections A and C and Section D, respectively, and against the sixth interim payments. The evidence discloses, however, that no guarantees were issued with respect to the sixth interim payment because this payment was not invoiced separately. Rather, some of the bank guarantees were supplied in lieu of MORT's retention of 10% of MKP's share of payments as a guarantee of good performance in accordance with Article 14.

The bank guarantees were all issued by the Foreign Trade Bank of Iran and the corresponding back-up letters of credit were all issued by the Bank of America. The serial numbers of the bank guarantees and letters of credit, the payments to which they relate and the face amounts of each, are as follows:

Guarantee No.	Letter of Credit No	Interim payment and Motorway Section	Amount in Rials
2423	8921	1st, Secs. A&C	30,575,000
2651	11247	2nd, Secs. A&C	1,528,750
2686	11661	3rd, Secs. A&C	1,528,750
2775	12872	4th, Secs. A&C	9,172,500
2989	14650	5th, Secs. A&C	9,172,500
3151	16524	1st, Sec. D	7,920,000
3214	16950	2nd,3rd,4th, Sec.D	3,168,000
3508	19982	5th, Sec. D	2,376,000
		Rials	64,441,500

Under Article 12(1)(h) of the Contract, bank guarantee nos. 2423 and 3151 were to be released "upon the approval of the Report[s] of Phase II" for Sections A and C and Section D of the motorway, respectively. Under Article 14(2) of the Contract, bank guarantee nos. 2651, 2686, 2775 and 2989 were to be released "after the approval of the report and the documents of Phase II" for Sections A and C. Also under Article 14(2), bank guarantee nos. 3214 and 3508 were to be released after approval of the Phase II report and documents for Section D.

Respondents concede that all of the bank guarantees were releasable upon "approval" of the Phase II reports for the respective sections of the highway. They contend however, that the term "approval" has different meanings as it is used in each of Articles 5(2), 12(1)(h) and 14(2). First, they argue that the advance payment guarantees supplied in connection with the first interim payment (i.e. bank guarantee nos. 2423 and 3151) are releasable under Article 12(1)(h) only upon express approval by MORT of the Phase II reports and that the constructive approval provision of Article 5(2) is inapplicable. Second, they argue that all of the remaining guarantees, which were supplied under Article 14, are releasable only upon the expiration of the consortium's warranty under Article 5(5), which they contend has not yet occurred.

Neither of the Respondents' contentions is supported by the language of the contract or by the apparent intention of the parties. As seen above, the parties agreed upon a two-tier system of securing the consortium's performance. MORT's protection against patent defects in performance was secured by its right to review and comment upon the work within 30 days of receiving it and its corresponding right to withhold progress payments and draw upon the bank guarantees in the event that the consortium failed to correct defects which were brought to its attention in a timely manner. Protection against latent defects was provided by the consortium's warranty under Article 5(5). In accordance with this scheme, both the final balance payments and the release of the bank guarantees were conditioned upon the MORT's "approval" of the work, which the parties carefully defined in Article 5(2). In contrast, the consortium was to be released from its warranty obligations only upon correction of any later-discovered, latent defects reported by MORT within the period of time specified in Article 5(5).

The approval mechanism under Article 5, paragraph 1 and 2, has a general application. The language of Article 12(1)(h) does not suggest that, in the use of the term "approval", a meaning different from that used in Article 5 was intended. The Tribunal therefore interprets the contract to the effect that the advance payment guarantees were to be released either upon the timely, express approval by MORT of the Phase II work or by the operation of the

approval mechanism of Article 5(2), whichever occurred earlier.

Similarly, nothing in the language of Article 14(2) suggests that the parties intended the term "approval" to mean the expiry of the consortium's warranty period. The use of the term "approval" in Article 14(2) is entirely consistent with the mechanism of Article 5(2), and, thus, no alternative or special meaning of "approval" should be inferred.

Therefore, MORT was obligated to release all of the bank guarantees upon the approval of the Phase II report for the motorway section work to which each relates, which, as held above, occurred on 26 October 1979. Because MORT has failed to release the guarantees when required to do so, Claimant is now entitled to an award which declares that such guarantees and related letters of credit are not enforceable and that Respondents are required to take all necessary steps to relieve Claimant from any possible liability in connection with those guarantees and letters of credit. In light of this holding, the Tribunal need not consider Claimant's alternative plea for damages.

Claimant has also claimed for reimbursement by MORT of U.S. $9,123 which it alleges to have paid in commissions and bank charges in order to maintain the back-up letters of credit beyond the dates upon which the corresponding bank

guarantees were to be released. The only evidence produced in support of the claim is an affidavit of Claimant's business manager. The method by which the charges were calculated has not been presented, nor have documents been submitted which would verify the bills or payments made. The Tribunal therefore dismisses this claim for lack of evidence.

d) The Claims Relating to MKP's Miscellaneous Funds in Iran

Claimant alleges that Iran confiscated certain revolving bank funds which it maintained in Iran and certain minor equipment used in its operations. Claimant also alleges that it is owed certain refundable deposits for apartment leases, utility services and other purposes. Claimant seeks a total of U.S. $19,497 for these items.

However, Claimant has produced no evidence whatsoever that any of its property was confiscated by Iran. Indeed, no evidence either of the existence of the property or its value was presented by Claimant, except for the affidavit of its business manager. The conclusions of Claimant's business manager as to the identity of the property are based exclusively upon inferences drawn from Claimant's "normal accounting procedures" rather than from specific records of ownership or other relevant documents. No reason is given for the unavailability of more specific evidence. Moreover,

Claimant has not alleged any legal basis upon which Iran would be liable for the return of Claimant's refundable deposits. In light of this insufficient record, the Tribunal dismisses this claim for lack of proof.

e) Summary of Damages

The Tribunal has found MORT liable for damages in the following principal amounts:

1. Claims for Contract Fees	US$	891,537.09
2. Claims for Expenses Due to Delays and Extra Work	US$	400,000.00
TOTAL PRINCIPAL	US$	1,291,537.09

The Tribunal has also held that MORT owes interest on the principal amounts due at 10% per annum from the date on which each element of the claims was due and payable. As on 4 May 1980 the accrued simple interest from the due dates amounted to $80,004.11.

III. THE COUNTERCLAIMS

1. Contentions of the Parties

In its Statement of Counterclaims, as amended by the submission of 27 January 1983, Respondent MORT has presented seven counterclaims on its own behalf and an eighth on behalf of the Social Insurance Organization of Iran, all naming as respondents both Claimant and Cofraran. In its

Post-Hearing Memorial of 26 July 1983, MORT presented a counterclaim on behalf of the Iranian Ministry of Economic Affairs and Finance ("MEAF").

First, MORT seeks moral damages in the amount of U.S. $49,575,070 due to the consortium's allegedly wrongful termination of Contracts 87 and 88 before discharging its duties and obligations thereunder.

Second, MORT seeks reimbursement of 70,610,446 rials allegedly paid by MORT to the consortium's employees both prior to and after the consortium ceased its work in Iran, either at the request of the consortium or in accordance with administrative determinations by the Government of Iran. MORT contends that, as the employer, the consortium is liable for these costs.

Third, MORT seeks the face value of certain bank guarantees supplied by the consortium which subsequently expired allegedly due to the wrongful failure of the consortium to extend them. The amounts claimed equal U.S. $8,000,000, French Francs 40,836,000 and 1,128,000,000 rials.

Fourth, MORT seeks the reimbursement of U.S. $31,769,121, which it alleges was advanced and expended by the consortium for the purchase of machinery on the ground that only a portion of the machinery has been delivered.

Fifth, MORT seeks reimbursement of U.S. $4,310,188 in fees allegedly paid to the consortium for its procurement services on the ground that the machinery covered by the fee paid has not been delivered.

Sixth, MORT seeks reimbursement of all amounts it has paid on account to the consortium in the implementation of Contracts 87 and 88 on the ground that the consortium has failed to document its expenditure of the funds in accordance with the terms of these contracts.

Seventh, MORT seeks reimbursement of approximately 30% of the payments made under Contract 81 on the ground that the consortium's work was incomplete in approximately this same proportion. The amounts sought are U.S. $963,172, French Francs 4,250,000 and 34,000,000 rials.

In addition to presenting its own counterclaims, MORT's Statement of Counterclaims, as amended by its submission of 27 January 1983, states that 687,134,492 rials "is claimed by the Social Security Organization of Iran". This eighth counterclaim is based upon the allegation that the consortium failed to pay certain social insurance obligations.

The counterclaim presented by MORT in its Post-Hearing Memorial filed on 26 July 1983, seeks payment of taxes allegedly owing to MEAF.

The Claimant contests jurisdiction over the counterclaims to the extent that they are directed against Cofraran on the ground that the Tribunal's counterclaim jurisdiction extends only to those which are directed against claimants, who must be nationals of the United States or Iran.

The Claimant also challenges the Tribunal's jurisdiction over the counterclaims to the extent that they arise out of Contracts 87 and 88 on the ground that they do not arise out of the same contract which is the subject matter of the claim. The Tribunal having announced its decision upholding the Claimant's objections in its Order of 13 May 1983, the reasons therefore are given below.

Moreover, Claimant objects to jurisdiction over the counterclaim of the Social Insurance Organization for allegedly unpaid premiums on a number of grounds. First, it contends that a counterclaim may only be presented to the Tribunal by a respondent against whom a claim has been brought. Second, it argues that the counterclaim does not arise out of the same contract, transaction or occurrence which is the subject matter of the claim.

Claimant also generally denies liability on the merits of all of the counterclaims, except for the counterclaim presented on 26 July 1983, to which Claimant did not have an opportunity to respond.

2. Reasons for the Award With Regard to the Counterclaims

Article II, paragraph 1, of the Claims Settlement Declaration gives the Tribunal jurisdiction over certain claims of nationals of the United States or Iran and over counterclaims which "arise out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim."

It is clear from both this language and from the Tribunal Rules that the Tribunal's jurisdiction extends only to counterclaims which are presented against claimants. Therefore, to the extent that the counterclaims seek recovery from Cofraran, they must be dismissed.

At the same time, it is clear that the parties to Contract 81 agreed that MKP and Cofraran were bound, under Article 28, "to be jointly and severally liable to the EMPLOYER for the consortium's obligations under this Agreement." Any breach by the consortium of Contract 81 which is attributable to Cofraran would be an obligation of MKP and any counterclaim which arises out of such breach arises out of the subject matter of the claim. Therefore, to the extent that counterclaims relate to breaches of obligations of Cofraran for which MKP is jointly and severally liable, the Tribunal has jurisdiction to hear them.

Claimant also contends that Contract 81 constitutes the subject matter of its claim and that the Tribunal's jurisdiction is limited to counterclaims which arise out of the same contract. Consequently, Claimant argues, counterclaims based on Contracts 87 and 88 do not fall within the Tribunal's jurisdiction.

MORT contends that Contracts 81, 87 and 88 are all part of the same "transaction", that the claims arise out of this transaction and, therefore, that the counterclaims arise out of the same transaction which constitutes the subject matter of this claim.

The Tribunal, however, cannot share the view that Contracts 81, 87 and 88 are part of one single transaction. Although an early intention, as reflected in MORT's letter of intent of 14 April 1976, was to treat the whole motorway project as one whole in the sense that all the four contracts contemplated were to be given to the consortium, this intention was later abandoned. Thus, by the time that Contract 81 was signed, the prospects for the remaining contracts was a matter to be negotiated. This is supported by the language of Article 2(3) of Contract 81, which provides as follows:

> After the performance of this Contract, the EMPLOYER will have no other obligation towards the CONTRACTOR, except what may derive from EMPLOYER's Letters of Intent to the CONTRACTOR, No. 6155 of 9 February 1975 and No. 1045/2 of 14 April 1976 to the

> CONTRACTOR, and from any subsequent contracts or agreements the parties hereto may have entered into. (Emphasis supplied.)

Neither party has suggested that either of the letters of intent created obligations on the part of MORT. Indeed, MORT appears to have taken the position that it was not obligated to award the construction contract to the consortium, even though this is what was contemplated in the letter of intent of 14 April 1976. Moreover, the reference in Article 2(3) to contracts which "may" be entered into clearly suggests that it was possible that they "may not" be entered into.

The contracts were executed on different dates, and involved different services to be performed at different times. There is no relation between the disputes concerning Contract 81, on the one hand, and those concerning Contracts 87 and 88 on the other hand. Findings with respect to Contract 81 would have no effect on claims and defences made in connection with Contracts 87 and 88. That the Contracts may refer to one another or may even contemplate the execution of one another does not necessarily make the linkage between them sufficiently strong so as to make them form one single transaction within the meaning of the Claims Settlement Declaration. Compare American Bell International Inc. and the Government of the Islamic Republic of Iran Interlocutory Award No. 41-48-3 (11 June 1984). Therefore the Tribunal concludes that, to the extent that they arise

out of Contracts 87 and 88, the counterclaims do not arise out of the same contract, transaction or occurrence which constitutes the subject matter of any of the claims.

The precise effect of this holding on some of the counterclaims is clear. MORT's first counterclaim, for moral damages, relates only to the allegedly wrongful termination of Contracts 87 and 88. A comparison of the serial numbers of the bank guarantees, which are the basis for MORT's third counterclaim, with those of bank guarantees obtained in accordance with Contract 81 demonstrates that all of the former must relate either to Contract 87 or 88. Similarly, the specific items of allegedly undelivered equipment, for which reimbursement is sought in MORT's fourth counterclaim, are all of a type usable either for construction or for worker campsites, rather than for engineering services, and, therefore, this counterclaim also relates only to Contracts 87 and 88. The fees allegedly paid for equipment purchase, for which reimbursement is sought in MORT's fifth counterclaim, relate to Contracts 87 and 88 rather than to Contract 81. MORT's sixth counterclaim expressly arises out of Contracts 87 and 88. Because none of the above counterclaims arises out of Contract 81, they do not arise out of the contract, transaction or occurrence which constitutes the subject matter of any of the claims and must therefore be dismissed for lack of jurisdiction.

While less clear, MORT's second counterclaim, for reimbursement of payments allegedly made by MORT to employees of the consortium, also appears to be unrelated to Contract 81. MORT submitted into evidence a list of these purported payments, a majority of the entries of which refer expressly to Contract 88. The Respondents have not alleged, and the evidence does not suggest, that any of the remaining payments were made to employees performing engineering services pursuant to Contract 81. In view of the failure to allege or prove that the remaining payments relate to Contract 81, the Tribunal also dismisses this counterclaim for lack of jurisdiction.

MORT's seventh counterclaim seeks damages under the warranty provided in Article 5(5) of Contract 81 for defects which MORT alleges were discovered by its experts after the consortium's performance ended. This counterclaim arises out of the contract which is the subject matter of claims in the case, is directed against the Claimant and is therefore within the Tribunal's jurisdiction.

In support of the counterclaim, MORT submitted a detailed specification, prepared by its highway superintendent, of what it considers to be defects in the drawings, along with excerpts of what appear to be standard texts on highway construction. Claimant denies the counterclaim on the merits and has submitted the affidavit of a highway

engineer employed by one of its subsidiaries rebutting in detail the statements made by MORT's highway superintendent.

Claimant also contends that MORT's counterclaim is precluded by the terms of Article 5(5) on the ground that MORT did not give the required notice of defects within the time period provided for therein.

In relevant part, Article 5(5) provides as follows:

> CONTRACTOR agrees to correct any deficiencies resulting from negligent performance of its services which are discovered and reported to CONTRACTOR within two (2) years from the date of completion of its services hereunder. This limit is extended to the period of the construction of the motorway, i.e., forty (40) months starting from the date at which both Procurement Services and Mobilization Services contracts referred to in EMPLOYER's Letter No. 1045/2 of 14 April 1976 will become effective, plus twelve (12) months, in case the construction of the motorway is entrusted to the CONTRACTOR...

MORT first argues that the Article 5(5) warranty has not yet expired because the consortium's services have never been completed, due to the failure to provide drawings for the ancillary facilities. As the Tribunal held above, however, any absence of drawings for the ancillary facilities was due to MORT's failure to give necessary instructions. Their absence does not, therefore, render the consortium's services incomplete.

In the alternative, MORT contends that the warranty period had not expired by the time it notified Claimant of the alleged defects, arguing in the alternative either that the period was extended under the provisions of Article 5(5) to 40 months after the effective date of Contracts 87 and 88 plus 12 months or that the period ran at least for 2 years after the 10 January 1980 letter of HNTB by which, under Claimants contention, the work was formally approved. MORT's position on the question of when it first gave notice of the defects is unclear, with MORT first alleging that the defects were specified during settlement negotiations in November 1981. MORT's later position, however, can be understood to the effect that the defects were first presented in the Statement of Defence filed in this case on 23 April 1982.

In response, Claimant contends that it was first notified of the alleged defects in the Statement of Defence and thus, after the warranty had expired. Claimant bases its argument on the view that the "completion of its services" occurred with the last submission of work actually scheduled in the contract or, at the latest, when it submitted the extra set of the Phase II drawings with revised title blocks on 13 February 1980. Claimant argues that any extension of the warranty period provided for in Article 5(5) was conditioned upon the construction contract being awarded to the consortium and, therefore, did not become effective. Claimant further argues, however, that even if

the extension could be construed to apply, it would have prolonged the warranty period only up to 40 months after the execution of Contracts 87 and 88, and not by the additional 12 months mentioned; the 40 month period ended on 2 July 1981.

Although Article 5(5) may be subjected to various interpretations the Tribunal believes that the extra 12 month extension period was dependent on the award of the construction contract to the consortium.

Furthermore, the applicable period of the warranty is two years after the completion of all of the services which the consortium was obligated to provide under the contract, and not only upon completion of scheduled submissions, as suggested by Claimant. Although Article 3 uses the phrase "completion of the work" in terms of the scheduled submissions, the context of Article 5(5) suggests that the relevant services to be completed for purposes of the warranty was not limited, as Claimant contends, to those scheduled in the contract to the exclusion of other obligations which the consortium was bound to perform beyond such periods.

Thus the Tribunal concludes that Claimant "completed its services" in the meaning of Article 5(5) on 13 February 1980, i.e. on the date of the submission of the extra set of Phase II drawings. Therefore the warranty period must be deemed to have expired at the latest on 13 February 1982.

Even if the 40 month period should apply, that period had expired on 2 July 1981.

No significant evidence has been presented to the effect that notice of the alleged defects was given prior to the Statement of Defence filed on 23 April 1982. Thus the Tribunal concludes that the notification did not take place during the two year period described above.

Thus, since the notice was not given within the two year period, Claimant has no obligation by virtue of Article 5(5). Even if the two year period had not run, the consortium's only obligation was to "correct any deficiencies resulting from negligent performance" of which it was given notice. The consortium was never given the opportunity to correct any deficiencies so that it could not be held responsible therefor. The later clause limiting Claimant's liability does not impose any liabilities, duties or time limits not provided for elsewhere in the contract.

Thus, claim for negligent performance by the consortium is barred by the provisions of the Contract.

Accordingly, the Tribunal need not determine whether MORT's allegations of defective performance are true. The counterclaim is therefore dismissed. It should be noted that the work was approved by HNTB. HNTB did not routinely approve all of the Consortium's work. There is ample

evidence showing that HNTB disapproved certain work, thereby requiring the Consortium to correct it -- which it did.

The eighth counterclaim presented by MORT seeks the payment of social insurance obligations allegedly owing to SIO. Claimant contends that the Tribunal lacks jurisdiction over this counterclaim on the grounds that it does not arise out of the same contract, transaction or occurrence that constitutes the subject matter of any of its claims and that it seeks recovery on behalf of SIO, which is not a party to the proceedings. The ninth and final counterclaim seeks the payment of 1,880,768,585 rials allegedly owed back taxes by the consortium.

It is unclear whether the Tribunal's jurisdiction extends to counterclaims for social insurance obligations or whether a counterclaim of a governmental agency not a respondent in a case, such as SIO in this case, may be presented by another governmental agency which is a respondent. The Tribunal, however, need not reach this jurisdictional issue for the reasons set forth below.

Submitted along with the Statement of Defence was a letter to MORT from "Incomes General Administration" stating that the consortium's total outstanding social insurance obligation was 34,999,089 rials. To its 27 January 1983 supplemental statement Respondent had attached as an exhibit a letter to MORT from SIO's Chairman dated 21 August 1982 in

which the total amount owed by the consortium was said to be 687,143,492 rials. In the exhibits submitted with its Memorial, MORT included a second letter from SIO's Chairman stating that because the consortium has not received a SIO clearance receipt, "this means that they have not complied with [their] legal obligation". The letter further indicates that, on the basis of payments made under Contract 81 of 560,361,942 rials the consortium's total SIO indebtedness, including penalties, is 34,999,089 rials.

The documents presented vary substantially as to the amount owing. Moreover, the letter neither specifies the basis and method for the calculations made nor provides any supporting material which would allow the Tribunal to make an independent judgment of the obligations due. There is no indication of what taxes or fees are attributable to Contract 81 as compared with the other contracts. It is clear that a large portion did arise out of Contracts 87 and 88. Also Claimants submitted evidence of payment. Such a record is inadequate to prove liability. There is no indication that MORT has had to make any of the payments. Therefore, even if the Tribunal had jurisdiction over the counterclaim, it must be dismissed for lack of proof. The Award takes into account witheld amounts for such obligations.

In the Statement of Counterclaim of 23 April 1982 there was a general reference to Claimant's tax liability. This reference does not fulfill the basic conditions of a

counter- claim as set forth in Article 19, para. 4 of the Tribunal Rules, read in conjunction with Article 18, para. 1. The tax counterclaim was not elaborated in the way required by these provisions until the Post-Hearing Memorial of 26 July 1983. According to Article 19, paragraph 3, of the Tribunal Rules, however, a counterclaim should be filed in "the Statement of Defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances..." The Tribunal fails to discern any circumstance which would justify the presentation of a counterclaim after the Hearing in a case has been closed and in a submission which was to be limited, in accordance with the Tribunal's Order, to a written argument on the legal issues in the case. All of the exhibits filed were dated prior to 1982, so there was no reason why they could not have been submitted in a timely fashion. Therefore, this counterclaim must be dismissed as untimely filed. It should be noted that those documents do not disclose how the figures were obtained and to which contract they purport to relate.

VI. COSTS OF ARBITRATION

Pursuant to Article 38 of the Tribunal Rules, the Tribunal concludes that Claimant is entitled to an award for its costs of arbitration in the total amount of U.S. $25,000.

VII. AWARD

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

The Counterclaims are dismissed.

Respondents MINISTRY OF ROADS AND TRANSPORTATION and THE ISLAMIC REPUBLIC OF IRAN are obligated to pay and shall pay to the Claimant MORRISON-KNUDSEN PACIFIC LIMITED the following sums: ONE MILLION THREE HUNDRED SEVENTY ONE THOUSAND FIVE HUNDRED FORTY ONE UNITED STATES DOLLARS and TWENTY CENTS (US.$1,371,541.20) which constitutes principal and interest up to and including 4 May 1980; simple interest on the amount of ONE MILLION TWO HUNDRED NINETY ONE THOUSAND FIVE HUNDRED THIRTY SEVEN UNITED STATES DOLLARS and NINE CENTS (US.$1,291,537.09) at the rate of ten per cent (10%) per annum (365 day year) from and including 5 May 1980 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Agreement; costs of arbitration in the amount of TWENTY FIVE THOUSAND UNITED STATES DOLLARS (U.S. $25,000.)

Such payment shall be made 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.

The Guarantees Nos. 2423, 2651, 2686, 2775, 2989, 3151, 3214 and 3508 issued by the Foreign Trade Bank of Iran have no further purpose, and Respondent MINISTRY OF ROADS and TRANSPORTATION is hereby ordered to withdraw any and all demands for payment in connection with the above mentioned guarantees and to refrain from making any further demand thereon.

The Tribunal hereby orders Respondents MINISTRY OF ROADS and TRANSPORTATION and THE ISLAMIC REPUBLIC OF IRAN to take any and all actions which are necessary to assure that the Foreign Trade Bank of Iran cancels the above mentioned guarantees, releases Letters of Credit Nos. 8921, 11247, 11661, 12872, 14650, 16524, 16950 and 19982 issued by the Bank of America, withdraws any and all demands for payment made in connection with the mentioned letters of credit and refrains from making any further demand thereon.

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

Dated, The Hague
13 July 1984

Nils Mangård
Chairman
Chamber Three

Richard M. Mosk

In the name of God,

Parviz Ansari Moin
Dissenting Opinion