IRAN-UNITED STATES CLAIMS TRIBUNAL

ایالات متحده -

34-130
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ORIGINAL DOCUMENTS IN SAFE

Case No. 34 Date of filing: 19.12.85

** AWARD - Type of Award Final
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of Mr Mostafavi
- Date 19 Dec 85
26 pages in English 23 pages in Farsi

** OTHER; Nature of document: _____
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- Date _____
_____ pages in English _____ pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

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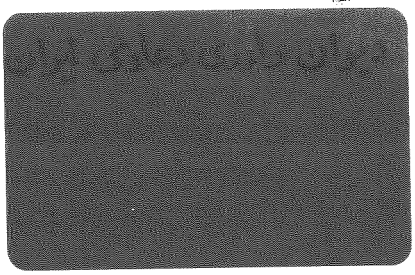
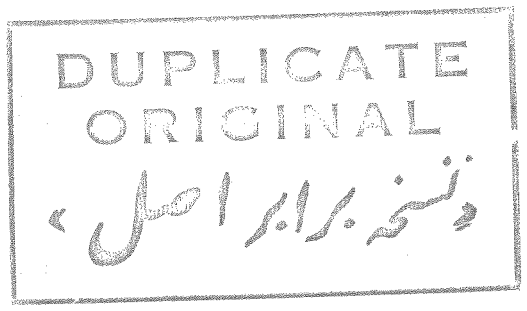
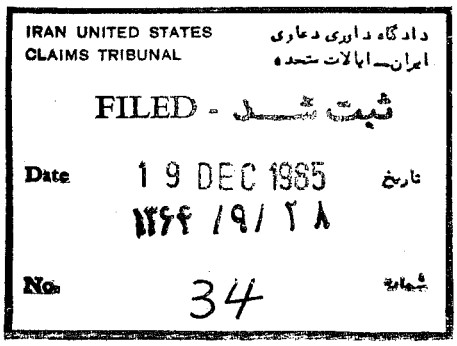




In the Name of God

CASE NO. 34
CHAMBER ONE
AWARD NO. 206-34-1



FIRST TRAVEL CORPORATION
(doing business as TRANSPORTATION CONSULTANTS INTERNATIONAL),
Claimant,

-and-

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, IRAN NATIONAL AIRLINES CORPORATION ("Iran Air"),

Respondents.

DISSENTING OPINION OF MOHSEN MOSTAFAVI

It is with great regret that I am compelled to dissent to the Award issued in Case No. 34, because the express meaning of terms, established trade practices and sound logic are therein rejected, and because the facts are there dismissed and the case made to pivot upon one or two minor points having no bearing upon the underlying issue. There is call for regret, because pure-intentioned persons have spent long years striving to put logic and justice on a firm footing in some part of international relations through the establishment of the principles of arbitration; and I now see clearly that this exalted goal is in grave jeopardy.

submitted in this case([Claimant's] Memorial of 29 April 1985, Exhibit 1, which is a Certification by the Office of the Secretary of State of the State of California, dated 3 April 1985), TCI was incorporated as a firm under California law and continues to exist; and it must therefore bring claim on its own behalf. Nonetheless, it has still not been made clear in this case why TCI, which could have brought claim itself, did not do so independently but only as a division of FTC. The majority has hastily closed the issue with a single sentence wherein it finds in favor of jurisdiction, without having considered these points or the necessity of having the issue clarified as required by the Order of 29 November 1982.

2. The acceptance of FTC as the Claimant, and the method adopted by the majority in this connection, are incompatible with the provisions of Article VII, paragraph 2 of the Claims Settlement Declaration, because FTC could become a claimant in this case only if TCI were, as a division thereof, unable to bring claim before the Tribunal independently and on its own behalf. In view of the Certification submitted in this case in connection with TCI's incorporation, TCI could have brought claim itself, and it is therefore improper to admit this claim on behalf of the parent corporation, since this falls outside the provisions of Article VII, paragraph 2 of the Claims Settlement Declaration. The majority's decision contains no justification of its finding in favor of jurisdiction, and the majority totally ignores Article VII, paragraph 2 of the Claims Settlement Declaration in treating FTC as the Claimant.

B The Merits of the Case

3. The basic dispute is over Article V of the Agreement. The said Article reads as follows:

"ARTICLE V
Remuneration

1. Amount of Remuneration
As full compensation for the services, functions, facilities, competence, and ability of TCI provided to IRAN AIR hereunder, IRAN AIR shall pay TCI as follows:

(a) monthly fee of US $3,600.00 (Three Thousand Six Hundred Dollars);
(b) an additional amount, if any, calculated as 3% (Three Percent) of the revenue actually earned in the areas covered hereunder which is in excess of the agreed base. For purposes of computation of the additional amount payable hereunder, the agreed base shall be US $3,200,000 (Three Million Two Hundred Thousand Dollars)."(1)

In order to resolve the issue of whether the "agreed base" was to be deducted from the annual revenues or the monthly revenues, the majority correctly points to the necessity of having recourse to two criteria: trade usage and the conduct of the Parties over the period that the Agreement was in force. On principle, however, it does not take into account the express language of the Agreement, a factor which should be considered before either of the other two or at least simultaneously with them. The word "annual" clearly does not appear in Article V. The Article is constructed as a single sentence, which has been divided into two parts ("a" and "b") for ease in discerning its meaning, and which ends with the same period which comes at the end of the Article. Therefore, it should be noted, first, that its clear language points us in the direction of revenues calculated on a monthly basis, and as a result any interpretation to the contrary will conflict with the express terms of the Article; second, trade usage and the conduct of the Parties brings us to precisely the same conclusion, one which is both reasonable and logical.

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(1) The Farsi text is quoted verbatim from the translations submitted to the Tribunal, and the errors in terminology and the ambiguities engendered therein are necessarily retained in the quote.

4. The majority believes that in view of the nature of the Agreement, there is no trade usage clearly pointing to any customary practice in this connection, and as a result it does not take this factor into account in its interpretation, adding that the Parties each "sought to draw varying conclusions from the different examples they presented". Next, in order to disentangle itself from this issue, it states that "it does not, in any event, appear to the Tribunal that the practice of the airline industry as to override commissions was so settled and unvarying as to yield much guidance." Firstly, however, the Respondent did not present any examples of customary practice in the airline industry; rather, it was the Claimant who sought recourse to trade usage in order to rebut the express language of Article V of the Agreement. Secondly, neither of the two sample contracts (with Aero Mexico and Aero Peru) submitted, to which the Claimant was itself a party, substantiates an annual base; instead, in both sample contracts, commissions were paid on a monthly basis. When Mr. Sargent stated in his Affidavit that "In addition to the monthly retainer, TCI proposed that, consistent with the common practice in the travel industry, Iran Air would pay TCI a commission calculated at 3% of Iran Air's gross passenger revenues in TCI's areas of responsibility" (emphasis added), he had in mind precisely those earlier agreements which have now been submitted as sample contracts; therefore, the Tribunal should not ignore these facts.

5. The majority justly deems the Parties' conduct over the life of the Agreement as constituting a valid basis for interpretation, but it hastily raises an excuse on behalf of the Claimant, one which is in no way justifiable. The majority simply quotes the Claimant's allegation, to the effect that Iran Air's revenue figures, on the basis of which it could have determined and demanded the amount of the incentive commission, were not placed at the disposal of TCI; and that as soon as TCI obtained these figures it

computed and demanded the amounts which it is now claiming. This point is precisely the unproved assertion [of the Claimant], which the majority has accepted as axiomatic and made the basis for its own argument. I quote the Award verbatim in order that the majority's exact reasoning may be seen:

> "... Iran Air has argued that, because TCI never made any demand for override commission throughout the life of the contract until November 1979, the inference to be drawn from such conduct is that TCI recognised that no commission was due. But this fails to take account of one essential fact: that TCI could not know what, if any, commission was due until Iran Air supplied its revenue figures to enable the calculations to be made. There was no other source from which this information could be derived. TCI claimed to have made oral requests for the figures, and was ready to acknowledge the inbuilt delays which Iran Air would experience in the course of the data-gathering process. However, once TCI was in possession of the figures, it made a prompt request for payment of commission.
>
> "The Tribunal is left, then, with the task of examining what each Party intended and believed the terms to mean at the time the Agreement was signed..." [emphasis added]

This language reveals that even though the majority itself explicitly states that "TCI claimed to have made oral requests for the figures," it immediately thereafter draws its conclusions on the basis of that very allegation, without testing its validity and thereby accepting this allegation as though it were an established principle. In this way, the majority gives its seal of approval to this baseless allegation, without the least effort and without even a single line of argumentation. That is, it accepts that a "prompt request" for payment was made as soon as TCI received the figures, and that TCI had previously made "oral requests" for the revenue figures. Firstly, pursuant to Article IV, paragraph 3 of the Agreement,

> "TCI shall, at least every three (3) months, evaluate the success and performance of the final marketing plans and other sales programs and shall submit in writing a report to IRAN AIR on such evaluations."

Pursuant to paragraph 4 of the said Article,

> "TCI shall submit monthly reports on all phases of the marketing and sales activities in the areas covered hereunder and on such other related functions as mutually agreed upon in the final marketing plans."

In light of these obligations, and since the majority is of the opinion that TCI carried out its contractual obligations, how could TCI possibly have remained uninformed of the level of Iran Air's revenues but nonetheless able to "evaluate the... sales programs" or "submit... reports on all phases of the marketing... activities"? Secondly, how, in an international commercial relationship involving millions of dollars in revenues, could "oral requests" alone have been deemed sufficient? The majority seems to be highly credulous in this respect, in having accepted this very allegation from the outset without argument. In its Memorial of 18 October 1982, the Respondent responds as follows to this allegation:

> "TCI first requested the override commission in September 1979. In its letter to the Respondent, TCI pointed out that on 30 September 1979, the company's accountants had required TCI to provide them with accurate figures for TCI's income and expenses in order to "close the fiscal year." If TCI really believed that the said figure constituted an annual revenues base, then it ought to have raised this matter by September 1977 at the very latest; TCI's accountants would have needed the above-mentioned information every year, in order to "close the fiscal year." Despite this, no such request was made prior to September 1979, because TCI knew that this figure had been set in connection with computation of monthly revenues. United States trade usage requires that claims and demands be submitted in a timely manner, rather than be concealed (even from the adverse party) for a number of years, in hopes of bringing the matter before the courts."

In addition to needing those monies allegedly due it, the Claimant also needed these figures in order to carry out its contractual duties. It is unacceptable for a commercial establishment which is liable to its shareholders and/or the other party to the contract, to content itself with making

only an oral request in a matter of this sort. Moreover, the Claimant has not adduced any evidence in proof of its allegation, and the majority has unfortunately accepted this mere allegation on its face. This Agreement was in force from 1976 through 1978, and while the monthly fee provided for in Article V (a) was regularly paid, there were no payments for override commission. This being the case, it is absurd to suppose that the Claimant would have contented itself with making a few oral requests and have resorted to no further measures, if it actually considered itself entitled to the override commission provided for in Article V(b). In addition, after the Agreement was terminated on 30 January 1979, and until 16 November 1979-- ie., approximately ten months, during which all contractual relations between the Parties were severed and they were no longer in contact whereby an "oral" request for the revenue figures might be made-- it would have been quite natural, if the Claimant had deemed itself to be owed monies, for it to have set forth its remaining entitlements in a letter, in accordance with customary usages, immediately after the Parties' contractual relations were severed; and if it had not yet received the figures by that date, it should have formally demanded them. Nothing prevented the Claimant from requesting these figures in writing as is natural, and there is nothing to confirm its allegation that it had relied upon oral requests throughout this long period of time. Just as the underlying claim has been demanded in writing, so too, naturally, should the figures have been demanded in writing earlier, and the existence of a claim-- and the basis thereof-- set forth at that time; and if no answer were forthcoming to this request, there might, to some degree, have been some justification for seeking recourse to Mr. Shamilzadeh in order to obtain the figures in an unofficial and irregular manner. In his Affidavit, Mr. Donald Hough, a witness for the Claimant, states:

> "Shortly after Iran Air's termination of the Agreement in January 1979, it became apparent that, in view of the continuing turmoil in Iran, TCI's relationship with Iran Air had been severed indefinitely. I therefore decided that it was imperative that TCI attempt to obtain Iran Air's revenue figures for the term of the Agreement, so that it could bill Iran Air for any override commissions that TCI had earned."

These representations are an attempt, in actuality, to justify the Claimant's failure to request the revenue figures directly from Iran Air; yet they in no way justify TCI's failure, despite its knowledge as to its "entitlement," to make such efforts to obtain the figures earlier. The fact is, however, that its correspondence with Iran Air was routed through the latter's New York office, and the Claimant's letter of 16 November wherein it demanded the alleged commission was also sent to Iran Air's New York office. Moreover, its contents reveal that there had previously been correspondence between TCI and Iran Air, and so the Iranian Revolution cannot be used as a justifiable excuse for this delay. What is astonishing here, is that the majority has satisfied itself, despite all these deficiencies, that the failure to request the commission was due to TCI's nonaccess to the revenue figures, that these figures had also been requested orally, and that a commercial firm would have refrained for over three years from taking any further steps in order to obtain monies owed it.

6. Without examining the validity or invalidity of the aforementioned claim, the majority has merely accepted it as if it were axiomatic, and then made it the basis for its own following argument, namely that:

> "The Tribunal is left, then, with the task of examining what each Party intended and believed the terms to mean at the time the Agreement was signed, in order to identify whether a common intention existed..."

It adds that in order to achieve this objective, the majority deems it necessary to examine both the "written and oral

evidence. In the present case, we do not have any filed record of the witnesses' statements and their responses to the queries posed to them. It does not seem valid to invoke the witnesses' statements, given that no written record has been prepared of them and that the arbitrators' memories and notes are not even in agreement in that connection. It is natural and inevitable that lapses of memory would occur with respect to all these issues and matters; furthermore, a witness' statements should be invoked in the full context of his comments and responses to queries. Considering one portion of a witness' testimony in isolation, without taking his other comments into account, is neither valid nor in harmony with judicial principles. In the majority's Reasons for the Award, which shall be treated below, reference has been had to witnesses' oral statements which do not, according to my own notes, come to an end with the comments thus invoked, and whose ambiguities, if any, are removed by their following explanations. Nonetheless, in relying on their own memories, the majority arbitrators invoke only that portion of those statements which they remember, whereas this very disparity in notes and recollections and the lack of a reliable transcript of witnesses' statements require, at the very least, that the majority refrain from invoking those statements whose exact wording is not totally clear, and that it equally refrain from using such undetermined points as the basis for its reasoning and award.

7. According to Mr. Sargent's testimony, the Parties conducted negotiations for the purpose of concluding the Agreement throughout 1975 and until May of 1976. Most probably, Article V of the Agreement was the basic issue over which the Parties had to negotiate, not only because this Article specifies the Agreement's consideration but also because we fail to encounter any other point of contention in the Parties' statements. Apparently the final draft was submitted and discussed at the April 1976 meeting,

which the Parties' representatives attended. We are confronted with two contradictory statements as to which of the two Parties actually submitted the draft. The Claimant asserts that the draft was prepared and submitted by the Respondent at the said meeting, and according to Mr. Sargent's testimony, "an official of Iran Air" (he does not specify which official) "orally confirmed his previous understanding"(2) that the $3.2 million figure was an annual base figure. On the other hand, the Respondent repudiates this assertion, stating that "The Agreement was prepared and drafted by TCI and proposed to Iran Air. Therefore, any ambiguities which it may contain must be interpreted to the prejudice of TCI" (Respondent's Memorial of 18 October 1982). Nonetheless, the majority accepts the Claimant's allegation without the slightest argumentation and makes it one of its two main premises in arriving at its decision. The other premise of the majority's reasoning is that in the April 1976 meeting, Mr. Vaziri, Iran Air's representative, did not explain to TCI's representatives how the figure of $3.2 million had been arrived at:

> "... although Mr. Vaziri was of the view that TCI was aware of the derivation and nature of the "agreed base", a proposal which Iran Air had introduced, he admitted at the hearing that he himself did not discuss either the base itself, or the underlying quota, with Mr. Sargent. He did not consider it necessary for Mr. Sargent to know about the quota, as it related to Iran Air's own performance, and had nothing to do with TCI's."

After setting forth the above, the majority goes on directly to add:

> "Mr. Tajadod, in his evidence at the hearing, confirmed Mr. Vaziri's understanding of Iran Air's internal

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(2) These statements conflict with Mr. Sargent's written testimony. In paragraph 11 of his Affidavit, he said that "the Iran Air officials" stated that the $3.2 million figure was an annual figure.

> expectations. But he, too, had not communicated them to TCI."

The majority then goes on immediately to conclude as follows:

> "Thus it is, in the Tribunal's analysis of what occurred, entirely possible-- and it is an interpretation consistent with the evidence of both [sic] Mr. Sargent, Mr. Vaziri and Mr. Tajadod-- that each Party understood the 'agreed base' to mean something entirely different at the time the agreement was concluded between them."

First of all, as the case file reveals, Mr. Tajadod never participated in the negotiations. Moreover, he has explained in his Affidavit that, as Business Manager and Assistant General Manager of Iran Air, he authorized the signing of the Agreement on the assumption that the $3.2 million figure was to be calculated on a monthly basis. Therefore, he did not take part in the negotiations and he was, on principle, not in any position where he could have been expected to communicate his intentions to TCI and nonetheless refrained from doing so. Therefore, the majority should not have adduced the argument that Mr. Tajadod also failed to communicate his views to TCI, in order to buttress its position.

Secondly, it cannot be inferred from the majority's statement:

> "Mr. Vaziri was emphatic that he said nothing that would have altered TCI's belief, because he regarded the company's expected sales performance as an internal matter,"

that he failed to express his understanding that the $3.2 million figure was to be a monthly figure, [3] because TCI

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(3) One of the queries directed to Mr. Vaziri at the Hearing was, whether or not he had communicated his understanding that the $3.2 million figure was to be a monthly figure, and he replied unequivocally, Yes. However, because the majority unfortunately does not recall that exchange, for those reasons already set forth above, I am not invoking it.

did not need to know about Iran Air's internal accounts, or about how the base amount had been calculated, in order for it to know Iran Air's expectation that the base amount was to be a monthly figure. Moreover, in paragraph 11 of his Affidavit, Mr. Sargent states that

> "During the meeting, we continued our discussion of Iran Air's objectives and goals in North America, as set forth in Iran Air's 1976 Marketing & Sales Plan for North America." [emphasis added]

There can thus be no doubt that when the 1976 Marketing and Sales Plan was discussed, the figure of $35 million, Iran Air's target for 1976 revenues, must also have been communicated, and that Mr. Sargent must surely have been informed of this $35 million figure. Furthermore, it was for this very reason that Mr. Vaziri emphasized that it was not necessary to inform TCI of the method used for arriving at the $3.2 million figure. In addition to the foregoing, Mr. Vaziri expressly states in paragraph 5 of his Affidavit that "during the negotiations, we discussed monthly revenue figures only." Therefore, the issue is clear and obvious, and any reasoning and argumentation in conflict with this written testimony constitutes an intentional avoidance of the facts. The majority should not break down a witness' statements and use only one portion thereof out of context as the basis for its reasoning, without reference to the witness' other written and recorded statements-- unless it be to make a reasoned rejection of the said portion of his statements. However, not only was this last not done, but as evidenced by Mr. Sargent's statements and by his knowledge of the 1976 Marketing and Sales Plan, there exists no doubt with respect to this part of the witness' statements.

8. The rules applied to the interpretation of the Parties' conduct must be reasonable and conventional, and they must be workable as well. Two large international commercial establishments such as Iran Air and TCI would not possibly have based their financial relations in connection with the most critical aspect of the Agreement upon mere verbal assurances, and at that, in the manner set forth by the majority as the basis for its interpretation- namely, that one of the four individuals present at the April 1976 meeting (just which one, it doesn't recollect) orally confirmed that what was intended by the $3.2 million figure was an annual base amount; and further, that these oral assurances should have been deemed sufficient even though the word "annual" does not appear anywhere in the text of the relevant Article and though there was only one copy, in English, of the Agreement. There is no trade usage which accepts that the responsible officers of a commercial establishment should jeopardize their financial interests so casually, or that they should rest content with the oral assurances of a single individual and not request that this ambiguity be eliminated through the addition of the one word, "annual". Nor is there any trade usage which accepts that a commercial establishment trying to make a profit would have refrained for over two years from demanding several millions of dollars owed it and have contented itself merely with making several oral reminders. Given that the word "monthly" appears in the text of Article V, and that there is no other stipulation as to time in the second paragraph of that Article, it would be unthinkable, if the other party believed that the base figure was annual, for it not to have entertained misgivings and thus requested that this fact be set forth in the text of the Agreement. It would also be unthinkable that the oral statement by one among the several representatives present at the meeting, to the effect that the given text conveyed the meaning intended, should have been deemed sufficient. Commission of such

acts of carelessness is foreign to trade usage. It is to be expected of an international tribunal, whose awards form the basis of international law, that it base the arguments in its awards upon a sound, logical foundation, and not upon assumptions which are on principle incapable of being materialized in the real world.

What is surprising, is that we are confronted with an Award whose basis is not only illogical but, on principle, incorrect as well. It is illogical, in that it is impossible, in the case of an Agreement arrived at through negotiations, that the Parties would not have stated their aims and intentions in connection with its most crucial part -- viz., the consideration. It is incorrect, in that the Tribunal breaks down Mr. Vaziri's testimony: it sets aside that part wherein he expressly states, in writing, that "during the negotiations, we discussed monthly revenue figures only"; and it alludes to a portion of his oral testimony in the Hearing conference, where he said that he did not consider it necessary for TCI to be told the basis of calculations and the method by which the $3.2 million figure had been arrived at, since the negotiations were conducted over the issue of the monthly revenue figures and since the former was an internal matter. The fact that the method for arriving at the said $3.2 million figure was not explained, cannot in any possible way have prevented TCI from being informed that this was a monthly figure, because this expectation did not have to be communicated through such an explanation alone; rather, this point could have been conveyed at any point in the discussions. It is for this very same reason that Mr. Vaziri, according to the majority's words,

> "... did not consider it necessary for Mr. Sargent to know about the quota, as it related to Iran Air's own performance, and had nothing to do with TCI's."

9. Finally, in order to support its contention that at the time they signed the Agreement the Parties were ignorant of one another's views on the agreed base, the majority argues that

> "Mr. Sargent already had a clear understanding by the time of the April meeting, obviously derived from his discussions with Mr. Shamilzadeh of Iran Air, that the base was to be an annual one. This would have been an entirely reasonable view; and the evidence seems to confirm that nothing was said at the April meeting to cause him to doubt its correctness. This, then, was the basis on which TCI concluded the contract."

This line of argumentation and deduction is founded squarely upon the assumption that every assertion of the Claimant, and every statement by its witnesses, is well-founded and acceptable, whereas the comments of the witnesses for the Respondent are acceptable only to the degree that they lead to the same conclusion-- and no further. As stated above, aside from the fact that such a method of concluding an agreement between two large commercial firms would be contrary to trade usage, so too is it contrary to the principles of judicial procedure to break down a witness' statements in this way. In paragraph 5 of his Affidavit, Mr. Vaziri expressly states that "during the negotiations, we discussed monthly revenue figures only." Therefore, even if the Tribunal disregards both trade usage and standard practice, when it is faced with two conflicting testimonies it should not rely upon one of them alone, and reject the other without any reason or justification. In the present instance, the majority has not actually rejected the testimony of any of the witnesses, but it has permitted itself to quote a witness out of context, in violation of judicial principles, or else it has consciously disregarded this portion of Mr. Vaziri's testimony.

10. After arriving at this deduction, which is at least derived from a part of the witness' statements, albeit in isolation, the majority finds as follows:

> "In such circumstances, Iran Air must be held to be bound by the interpretation which it had induced in TCI, which remained uncontradicted, and which appears to have been an entirely reasonable understanding of the words themselves. Of the two alternative interpretations which have been advanced, the Tribunal is bound to favor the one which was communicated to, and accepted by, the other Party."

This finding is based upon two unproven assumptions, and two incorrect assumptions. The majority states, (1) that Iran Air "induced in TCI" the belief that the base amount in question was to be an annual one, and that this "interpretation... remained uncontradicted." Paragraph 5 of Mr. Vaziri's Affidavit, wherein he states that "during the negotiations, we discussed monthly revenues figures only," has also remained uncontested, and it consequently contradicts the majority's statement. Furthermore, if we compare the witnesses' statements, it is clear that this ground for the majority's finding has not been proved. (2) The second unproven point in this discussion is the allegation that Article V of the Agreement was proposed by Iran Air. This allegation has been made by the Claimant, but denied by the Respondent; yet, the majority has accepted it as if it were axiomatic, and made it the basis of its argument, without offering the least justification therefor.

As for the incorrect assumptions: (1) The assertion that this interpretation derives from "an entirely reasonable understanding of the words themselves" is astonishing, given that there is not only absolutely no mention of the word "annual" in Article V, but the only stipulation as to time employed in that Article is the word "monthly." Just how, then, can "the words themselves" possibly indicate that this "understanding" is "entirely reasonable"? The

majority's Award contains no justification for that position; instead, it has been employed in the majority's Award without any argumentation and as a principle, albeit one without basis. (2) Even assuming, in arguendo, that Article V of the Agreement was drafted and proposed by Iran Air, the rule of contra proferentem does not apply in this instance, because this rule applies to cases where

> "the terms of a written contract have been chosen by one of the parties and merely assented to by the other."
> (See Corbin on Contracts, vol.3, § 559, at p.149)
> [emphasis added]

Therefore, this rule applies, not to contracts like the present one which the Parties negotiated before signing, but to contracts whose terms are set forth in standard form by a firm and the party wishing to enter into the contract merely accepts it.

11. At the same time, the majority also fails to arrive at a reasonable conclusion through this interpretation. In his Affidavit, Mr. Tajadod stated that

> "Homa's [Iran Air's] aim and purpose in concluding the Agreement which I approved was, to create new markets and increase revenues. In view of the fact that Homa's revenues in the year prior to conclusion of this Agreement exceeded $10 million, it goes without saying that the figure of $3.2 million had been intended as a projection of monthly revenues."

Nor did the Claimant dispute the fact that Iran Air's income in 1975 (ie. in the year prior to conclusion of the Agreement) exceeded $10 million. In light of the fact that Iran Air inaugurated its flights to the United States in May 1975, this income relates to only seven months of that year, and therefore it cannot possibly be justifiably maintained that Iran Air would have paid TCI over $200,000 per annum for no reason whatever. There can be no doubt that Iran Air's purpose in concluding this Agreement was to increase

an income already over $10 million, and it is unreasonable to suppose that Iran Air would have paid a commission on an amount that it had already exceeded by a factor of three in the normal course of business. Moreover, simultaneous with the negotiations relating to conclusion of this Agreement, Iran Air increased the number of its flights from three to seven per week, in order to attract Iranian students and Government employees entitled to discounts of 40, 60 and 65%. Therefore, it was obvious that the 1976 revenues were going to be several times greater than those for 1975. Thus the Tribunal's interpretation, which agrees with that of the Claimant, will lead to a strange and unreasonable conclusion; that is, that Iran Air would for no reason whatsoever have made TCI its partner in profits which it could easily have realized by itself. Of course the Claimant has stated for its part that if the Respondent's position be upheld, this means that TCI could have received the incentive commission only if Iran Air's revenues increased by 600%, and TCI would never have been able to consent to such a base amount since the major part of its income was to have been provided under paragraph (b) of Article V, and not paragraph (a) thereof. However, the point is that, in addition to the fact that it would have been unreasonable for Iran Air to share with TCI in its definite and existing profits without TCI having to make any efforts leading to an increase in revenues, TCI also accepted, pursuant to Article I, paragraph 2 of the Agreement, that:

> "The objective of this Agreement is to further and ensure, to the maximum extent possible, a substantial and significant development of and increase in IRAN AIR business and revenue earned from the 'Contract Areas'... at the lowest possible cost to revenue ratio."

TCI had thereby clearly and explicitly undertaken to ensure a "substantial and significant... increase" in Iran Air's revenues, and it was required to perform on this

undertaking. Moreover, this substantial and significant increase was supposed to be "at the lowest possible cost to revenue ratio"; it was not intended that charges for the incentive commission be imposed from the very outset on Iran Air's then-current revenue level, without any increase in revenues whatever. Thus the Respondent's interpretation is more in consonance with the facts from this angle as well, especially since the phrase, "if any" in Article V, paragraph (b) signifies the Parties' acknowledgement that the incentive commission might, on principle, possibly not accrue to TCI at all. The Tribunal's interpretation, therefore, whereby it holds that TCI is entitled to receive the incentive commission under any circumstances, is not in conformity to the express language of Article V.

12. In arriving at this conclusion, the majority has also overlooked a well-established principle of law and logic. Here, that is, it has expressly made the finding that the principle that there must be an identity of intentions on the part of both Parties in order for there to be a contract, does not apply. The majority holds as follows:

> "... each Party understood the 'agreed base' to mean something entirely different at the time the agreement was concluded between them." (emphasis added)

This divergence of intentions, coming in the most crucial part of the Agreement-- viz., the consideration-- invalidates the Agreement: "What was intended did not materialize, and what materialized was not intended." Thus:

> "But if the parties had materially different meanings, and neither one knew or had reason to know the meaning of the other, there is no contract." (See: Corbin on Contracts, 1963, vol.I, §104, at pp.465-6);
>
> "L'offre et l'acceptation doivent être complémentaires: l'acceptation ne concourt a la formation du contrat que lorsqu'elle est conforme à l'offre... Quand le défaut de concordance est total-- par exemple, loin d'accepter

> le prix exigé par le pollicitant, l'autre parties propose un prix différent--, le contrat n'est certainement pas formé." (Mazeaud, Lecons de droit civil, 6th ed., Tome 2ème, Premier volume, §138, at p.120); and
>
> "Tout dépend, bien entendu, de l'intention exprimée ou tacite des parties elles-mêmes. L'analyse de la jurisprudence permet cependant de faire les observations générales suivantes:
>
> 1° Si le destinataire de l'offre exprime d'autres conditions que celles contenues dans l'offre relativement aux éléments essentiels du contrat (sa nature, la chose qui peut en être l'object, l'obligation principale de chacune des parties), il peut y avoir là une proposition nouvelle, mais il n'y a pas d'ores et déja contract." (Alex Weill & Francois Terré, Précis Dalloz, Droit Civil - Les obligations, 1980, §146, at p.169)(4)

The invalidity of such an agreement is reflected even in that very paragraph of Corbin which the majority cites in part in invoking the rule of contra proferentem. I shall here quote this section in its entirety in order to clarify the issue:

> "When the terms of a written contract have been chosen by one of the parties and merely assented to by the other, this fact will in some cases affect the interpretation that will be given to these terms by the court. After applying all of the ordinary processes of interpretation, including all existing usages, general local, technical, trade and the custom and agreement of two parties with each other, having admitted in evidence and duly weighed all the relevant circumstances and communications between the parties, there may still be doubt as to the meaning that should be given and made effective by the court. The doubt may be so great that the court should hold that no contract exists. If, however, it is clear that the parties tried to make a valid contract and the remaining doubt as to the proper interpretation is merely as to which of two possible and reasonable

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(4) Article 138 of the Iranian Civil Code defines a "contract" as follows:

> "A contract is made when one or more persons make a mutual undertaking with some other person or persons on a certain matter, and this be agreed to by the latter." (emphasis added)

meanings should be adopted, the court will adopt that one which is the less favorable in its legal effect to the party who chose the words." (§559, at pp. 149-50, emphasis added)

If, then, it becomes clear that the Parties to the Agreement have failed to come to an understanding as to the consideration, which constitutes one of the most important parts of a transaction, and that "each Party understood [the 'agreed base'] to mean something entirely different..." then such an agreement is invalid and cannot be regarded as a "valid contract," such that its terms and provisions might be susceptible to interpretation. For this reason, once the majority has come to the "entirely possible" conclusion, in connection with the consideration in the transaction, that "each Party understood [it] to mean something entirely different," it should declare the Agreement invalid, instead of interpreting its terms and provisions.

13. Finally, the majority arrives at its final decision in reliance on the above-cited passage from Corbin, in fine. The fact is, however, first, that since the subject-matter of the instant Agreement was subjected to negotiations and it was not the kind of contract whose terms "have been chosen by one of the parties and merely assented to by the other," it does not fall under the rule of contra proferentem; and second, that the agreement interpreted by the Chamber majority is in actuality invalid, in view of the fact that "it is, in the Tribunal's analysis of what occurred, entirely possible... that each Party understood the 'agreed base' to mean something entirely different at the time the agreement was concluded between them" (emphasis added), and since a differing understanding as to the consideration invalidates the Agreement. It is cause for the utmost of regret that this Chamber should have proceeded to render an Award on the basis of such mutually contradictory and flagrantly incorrect arguments, when it is aware that such an Award is executed within a few days and there then exists no means of remedying the error.

14. The Award and Reasons therefor can be summed up as follows:

* Despite the fact that it has been alleged that TCI was dissolved in December 1980 and its rights and properties transferred to FTC, but it has on the other hand been established from available documents that TCI, which was incorporated under the laws of the State of California, continues to exist and could thus have filed claim itself, the claim brought on behalf of FTC has been accepted;

* Despite the fact that the word "annual" not only does not appear in Article V of the Agreement, but the only stipulation as to time found therein is the word "monthly," the Chamber majority makes a presumption that the word "annual" is intended in one part thereof;

* Despite the fact that the Claimant alleges that trade usage confirms its claim and has submitted two other agreements as examples in order to prove its assertion, the majority argues, in order to evade the ramifications of the fact that the stipulation as to "monthly" commissions occurs in both of these earlier agreements, that no usage exists which can be relied upon;

* Despite the fact that the Claimant failed to demand the fees allegedly due it throughout the life of the Agreement and even for nearly a year thereafter, the majority sustains its allegation that it made an "oral" demand for payment, simply on the basis of the said allegation, which has been denied-- and without offering reasons;

* Despite the fact that making merely oral demands over the course of this long period is contrary to established trade usage, the majority has accepted it as valid;

* Despite the fact that over the life of the Agreement the Claimant failed to comply with its duty to submit marketing and sales plans despite its obligation to do so, and is now alleging that it refrained from carrying out this obligation as a result of an oral request by the Respondent, the majority accepts this allegation without invoking the slightest evidence;

* Despite the fact that each of the Parties asserts that it was the other Party that drew up the text of the Agreement, the majority bases its reasoning upon the assumption that it was the Respondent that drew up and proposed the text of Article V, without adducing any evidence or justification in that respect;

* Despite the fact that the witness for the Respondent stated that "during the negotiations, we discussed monthly revenue figures only," the majority relies on the excuse that he said in the Hearing conference that he did not consider it necessary to explain to the Claimant how the $3.2 million base amount had been arrived at, and it thus concludes that the Respondent's intention as to the duration of time to which the 'agreed base' was to relate was never communicated to the Claimant, even though this conclusion amounts to a non sequitur;

* Despite the fact that the majority holds that at the time that they signed the Agreement, the Parties were unaware of each other's intention in connection with a major part of the consideration, it nonetheless holds that the Agreement was valid;

* Despite the fact that it holds that agreement was never reached with respect to an important part of the consideration, and although it has not adduced any evidence that it was the Respondent that drew up Article V and that the Claimant merely assented thereto, the majority has

resorted to the rule of contra proferentem in arriving at a conclusion which is prejudicial to the Respondent;

* Despite the fact that an interpretation should lead to a logical conclusion, this interpretation leads to the conclusion that the Respondent was required to pay large sums of money to the Claimant on a regular basis, out of its independently-earned income which it was able to realize without any help from the Claimant.

I am astonished to see such statements so boldly submitted as legal arguments in an international arbitration. Although this Award may have been executed already, even now as I pen these lines, I at any rate have no doubt that when some learned researcher and seeker after truth comes across this Award, he will be touched and moved to sympathize with me.

15. If the Tribunal's jurisdiction had been established by means of submission of further documentation, my opinion in this case would have been as follows:

WHEREAS the only stipulation as to time mentioned in Article V of the Agreement is the word "monthly";

WHEREAS this Agreement was not one proposed by one party and merely assented to by the other, but rather one whose terms underwent discussion and negotiations so that the allegation of misunderstanding is inadmissible, and thus there is no reason to apply the rule of contra proferentem;

WHEREAS agreeing that the 'agreed base' was monthly does not lead to any unreasonable conclusions and is not inconsistent with the facts in the case or with the supporting evidence embodied in Article V;

WHEREAS it cannot be imagined that two large commercial firms with access to the assistance of legal advisers would have been so careless with respect to the import and meaning of the terms employed in an agreement which they negotiated before signing;

WHEREAS it is certain that the Parties knew the import and meaning of the terms of the Agreement and are required to comply with them, and the allegation of noninformation is not admissible, especially since the Agreement was drawn up and signed in English;

WHEREAS the word "annual" does not occur in this Article and would surely have been inserted had it been intended that it be there,

THEREFORE, the $3.2 million figure must necessarily have been a monthly figure.

Sayyed Mohsen Mostafavi
Member of the Tribunal