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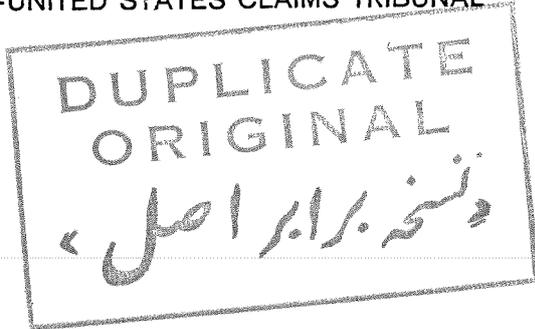
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داورى دعاوى ایران - ایالات متحدہ



CASE NO. 476

CHAMBER TWO

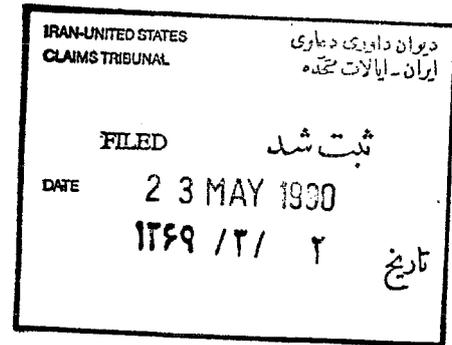
AWARD NO. 479-476-2

ITEL INTERNATIONAL CORPORATION,  
Claimant,

and

THE SOCIAL SECURITY ORGANIZATION OF  
IRAN, BANK TEJARAT, THE ISLAMIC  
REPUBLIC OF IRAN,

Respondents.

AWARDAppearances

For the Claimant:

Mr. Jonathan I. Blackman,  
Mr. Lawrence B. Friedman,  
Mr. James Knox,  
Representatives of the  
Claimant,  
Mr. John Kovich,  
Witness.

For the Respondents:

Mr. Ali H. Nobari,  
Agent of the Islamic  
Republic of Iran,  
Mr. Jafar Niaki,  
Legal Adviser to the  
Agent,  
Mr. Ali Kamayestani,  
Legal Assistant to the  
Agent,  
Dr. Abolhassan Mohamadi,  
Attorney for the Social  
Security Organization,

Mr. Javad Bahar Shanjani,  
Assistant to the Attorney  
for the Social Security  
Organization,  
Mr. Morteza Nassira,  
Mr. Mahmoud Davtalab,  
Representatives Social  
Security Organization,  
Dr. Mohammad Ali Amini,  
Representative of Bank  
Tejarat,  
Mr. Mohammad Taghi Akbarzadeh,  
Witness.

Also present:

Mrs. Lucy. F. Reed,  
Agent Designate of the  
Government of the United  
States of America,  
Mr. Michael F. Raboin,  
Deputy Agent of the  
United States of America.

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I. INTRODUCTION

1. ITEL INTERNATIONAL CORPORATION ("Itel") filed this Claim on 18 January 1982. The Respondents are the SOCIAL SECURITY ORGANIZATION OF IRAN ("SSO"), BANK TEJARAT and the ISLAMIC REPUBLIC OF IRAN. The SSO is the successor of the Social Security Fund of Iran ("Fund"), an affiliated organization of the Iranian Ministry of Health and Social Welfare; Bank Tejarat is the successor of the Bank of Iran and the Middle East ("BIME"). The Claim arose from two contracts: (1) an Advanced System & Equipment Sales Agreement (the "Sales Agreement") between Itel and the Fund, and (2) a Maintenance Agreement between IMEC Engineering Services Company Ltd. ("IMEC"), an Iranian company formed by Itel, and the Fund. Itel sought an award declaring that it had performed its obligations under the Sales Agreement and that a guarantee and a counterguarantee securing Itel's performance under that agreement should accordingly be cancelled. Itel also sought a declaration that the Maintenance Agreement should be deemed terminated and the guarantee and counterguarantee securing IMEC's performance under that agreement should be cancelled. Finally, Itel sought a declaration that a call upon the counterguarantees made by Bank Tejarat on 31 December 1981 was null and void.

2. The SSO filed its Statement of Defence on 13 December 1982. The SSO also submitted a counterclaim for 28,917,031 rials for allegedly unpaid social security contributions, plus 15,012,759 rials in delayed payment charges.

II. PROCEEDINGS

3. The SSO argued in its Statement of Defence that both the Sales Agreement and the Maintenance Agreement contained forum selection clauses that excluded Itel's Claim from the

jurisdiction of the Tribunal. The Tribunal held a Hearing on this preliminary jurisdictional issue on 30 January 1984. The Tribunal then decided that the forum selection clause in the Maintenance Agreement did vest jurisdiction exclusively in the Iranian courts. Under Article II, paragraph 1, of the Claims Settlement Declaration, therefore, the Tribunal did not have jurisdiction over Itel's Claims to the extent they were based upon the Maintenance Agreement. On the other hand, paragraph 13(f) of the Sales Agreement recognized the competence of the Iranian courts but did not vest jurisdiction exclusively in those courts. Accordingly, the Tribunal held that the forum clause did not exclude from its jurisdiction the claims that arose from the Sales Agreement. Itel International Corp. and Social Security Organization of Iran, et al., Interlocutory Award No. ITL 43-476-2 (22 June 1984), reprinted in 7 Iran-U.S. C.T.R. 31.

4. The Respondents submitted two additional counterclaims while this Case was pending. On 7 June 1985, the SSO presented a counterclaim for losses allegedly suffered as a result of defects in the computer equipment and Itel's failure to fulfill its obligations -- in particular, the obligation to install the equipment. The SSO sought compensation for the expense of renting equipment to substitute for the Itel equipment and for its extra costs in eventually putting the Itel equipment into operation. Itel objected to this Counterclaim as untimely.

5. On 30 September 1986, Bank Tejarat filed a counterclaim against Itel and Crocker National Bank ("Crocker"). It sought payment of the full amount of the Crocker counterguarantee, plus damages arising from Crocker's alleged wrongful refusal to honor Bank Tejarat's call upon the guarantee in 1981. This Counterclaim was originally a direct claim, Case No. 610, filed by Bank Tejarat against Crocker. By an Order of 27 June 1985, Chamber Three terminated Case 610, pursuant to the Full Tribunal's holding

in Case No. A16, Award No. 108-A16/582/591-FT (25 Jan. 1984), reprinted in 5 Iran-U.S. C.T.R. 57. The Tribunal stated in its Order that, if Bank Tejarat's claim was related to a claim in some other case, it could be submitted as a counterclaim in that case. The Tribunal indicated that it would offer some "guidance" for the submission of such a counterclaim, but it set no deadline for submitting the counterclaim.

6. ITEL objected to the admission of Bank Tejarat's counterclaim on the grounds that it was untimely and that it named a non-party, Crocker, as a counter-respondent. In an Order filed on 10 February 1987, the Tribunal decided that the counterclaim against Crocker was inadmissible because Crocker was not a party in the case. However, the issue of the admissibility of the Counterclaim against ITEL was joined to the merits of this Case. The Tribunal's order also announced that the admissibility of the SSO's 1985 Counterclaim would be considered with the merits of this Case.

7. The Full Tribunal indicated in Case No. A16 that Iranian bank claims on standby letters of credit could be submitted as counterclaims in cases brought by the relevant United States account party; it would then be a matter for each Chamber to decide whether a given counterclaim fell within the jurisdiction of the Tribunal. Award No. 108-A16/582/591-FT, at 21; 5 Iran-U.S. C.T.R. at 71-72. This procedure would apply equally to performance guarantees such as those at issue in the present Case. With respect to the timeliness of Bank Tejarat's counterclaim, then, the points of reference are not the date of the original Statement of Defence, but the dates of the Full Tribunal's Award in Case No. A16 supra, para. 7, and of Chamber Three's termination of Case No. 610 (27 June 1985). Fifteen months (from Chamber Three's Termination Order in Case No. 610 to Bank Tejarat's submission of the Counterclaim in this Case) is still a long time, especially where the counterclaim merely repeats a claim filed in 1982. However, Chamber

Three set no deadline for submitting the counterclaim; nor, apparently, did it provide the guidance that was mentioned in its 27 June 1985 Order. Consideration of this Counterclaim will not prejudice ITEL, for the Counterclaim concerns the same issues as ITEL's Claim. In short, the Tribunal concludes there are circumstances here that make it appropriate to admit this late Counterclaim. See Tribunal Rules, Article 19(3) & Note 1(iii).

8. There is less justification for admitting the SSO's late Counterclaim. However, it was filed more than four years before the Hearing and was fully briefed by the Parties; accordingly, it will not prejudice the Claimant at this stage of the proceedings for the Tribunal to examine its jurisdiction and the merits of the Counterclaim. The Tribunal therefore decides to admit the SSO Counterclaim filed on 7 June 1985.

9. A Hearing for this Case was held on 24 January 1990.

### III. FACTS

#### A. The Sales Agreement

10. The Sales Agreement was a contract for the sale of computer equipment by ITEL to the Fund; it was signed on 7 June 1978. ITEL undertook to deliver the equipment to the Fund's computer facility in Tehran and to install it. The Sales Agreement classified the equipment as either Phase I equipment or Phase II equipment. There was ITEL, Storage Technology Corporation ("STC") and IBM equipment in each Phase. However, for purposes of acceptance testing and reducing the bank guarantees, the ITEL Phase II equipment was considered part of Phase I.

11. The Sales Agreement provided for the equipment to be shipped and paid for in installments. The Fund was to establish an irrevocable letter of credit in ITEL's favor

for U.S.\$6,067,995. Itel would immediately draw U.S.\$400,000 upon the letter of credit. After delivery of the Phase I and Itel Phase II equipment, Itel would collect U.S.\$3,591,380. Itel would receive the balance of that letter of credit, U.S.\$2,076,615, after delivering the STC Phase II equipment. For the final shipment, the Fund would have to open another letter of credit for U.S.\$388,082. Itel would collect the full amount of this second letter of credit upon delivery of the IBM Phase II equipment.

12. The fulfillment of Itel's obligations was contingent upon acceptance of the equipment; Appendix 6 of the Sales Agreement specified how the equipment was to be accepted. The Fund was to conduct tests of the equipment after it was installed. Then, "immediately after the successful completion of such testing," the Fund was obliged to submit to Itel an Acceptance Certificate. Appendix 6 also provided for acceptance without the successful completion of acceptance testing. If Itel delivered the equipment to Mehrabad Airport but was prevented by "any cause outside [its] control" from delivering or installing it at the Fund's facility, then "deemed acceptance" would occur fifty days after the arrival of the equipment at Mehrabad Airport. However, if force majeure affected the Fund's performance of its obligations and Itel was unable to deliver or install the equipment, then the "deemed acceptance" date would be eighty days after the arrival of the equipment at Mehrabad Airport.

13. The Sales Agreement also provided for maintenance of the equipment by IMEC, an Iranian company formed by Itel for this purpose. IMEC and the Fund entered into an agreement that required IMEC to maintain the equipment sold by Itel. As explained supra, para. 3, this Maintenance Agreement is no longer an issue in this Case.

14. The Sales Agreement required Itel to secure its performance by arranging for a guarantee to be issued by the

Bank of Iran and the Middle East (or another bank) in favor of the Fund. The agreement specified in detail how the amount of the bank guarantee was to fluctuate as the parties performed their obligations. Schedule I of Appendix 6 summarized these changes as follows:

- receipt of letter of credit by Itel . . . . .	U.S.\$613,750
- negotiation of letter of credit . . . . .	2,351,250
- fifteen days after delivery of Phase I equipment to Mehrabad Airport . . . . .	2,137,500
- acceptance of Phase I equipment . . . . .	1,800,000
- 165 days after acceptance of Phase I equipment . . . . .	1,200,000
- acceptance of Phase II equipment . . . . .	900,000
- four months after acceptance of Phase II equipment . . . . .	800,000
- five months after acceptance of Phase II equipment . . . . .	700,000
- six months after acceptance of Phase II equipment and thereafter until five years after the installation of the Phase I equipment . . . . .	600,000

Thus, since the Phase I equipment was installed in August 1978, the guarantee was scheduled to expire in August 1983.

15. The Sales Agreement stated that Itel would not be liable for incidental or consequential damages unless they were expressly included in the Sales Agreement itself. The Agreement also provided that the Fund's "sole and exclusive remedy" for any breach of contract by Itel was its "proper encashment" of the bank guarantee established pursuant to the Sales Agreement.

16. The Fund agreed to "exercise its rights over the Bank Guarantee reasonably and in strict accordance with [its] terms and conditions." The Agreement specified in considerable detail what those terms and conditions were.

In case the Phase I equipment failed its acceptance test, the Fund was required to give written notice to Itel and to assist in the re-export of the equipment to Itel. To make a call upon the bank guarantee after acceptance of the Phase I equipment (i.e., after the guarantee had been reduced to U.S.\$1,800,000), the Fund was required, as in the first case, to assist in the re-export of the equipment to Itel.

17. The Sales Agreement also contained a separate provision for a refund: This applied after acceptance testing of the Phase II equipment and required six months' written notice to Itel. If the Fund then returned the equipment to Itel, it could collect the U.S.\$600,000 remaining in the bank guarantee as a refund. Thus, in no event could the Fund claim the guarantee without giving up the equipment to Itel.

B. The Parties' Performance

18. At first, everything went according to plan. The Fund established the first letter of credit in Itel's favor; Itel arranged for the BIME to issue a guarantee in favor of the Fund. This sales guarantee incorporated the relevant provisions of the Sales Agreement, including the schedule of reductions in the amount of the guarantee. Itel also arranged for Crocker to issue a counterguarantee under which Crocker would reimburse the BIME in case the latter was obliged to pay the Fund any amount under the sales guarantee.

19. The first shipment of equipment, consisting of Phase I and Itel Phase II equipment arrived in Tehran in August 1978. Itel collected payment under the letter of credit. The equipment was delivered to the Fund's facility, but its installation was delayed briefly because of the need to complete preparations at the facility and to repair minor damage to the equipment. Acceptance testing began in late August or early September. This testing was supervised by employees of Electronic Data Systems Corporation Iran

("EDS"), a company that provided computer consulting services to the Fund.

20. The declaration of martial law in Tehran on 8 September 1978 interrupted the acceptance testing. Irregularities in the supply of electricity also caused problems. Nevertheless, acceptance testing continued. According to evidence presented by the Claimant, the equipment passed its acceptance test sometime in the autumn -- in November at the latest. The Respondents have submitted no evidence that contradicts the Claimant's evidence concerning acceptance testing. See infra, para. 43.

21. The EDS employee who supervised the testing, Mr. John M. Kovich, testified that EDS recommended to the Fund and to the Ministry of Health and Social Welfare that an acceptance certificate be issued. Despite repeated recommendations, as well as requests from Itel personnel, no acceptance certificate was ever issued. According to the Claimant's evidence, the apparent reason for this was the revolutionary turmoil in Tehran: Officials at the Fund and the Ministry assured Itel that an acceptance certificate would be issued, but no one was willing to take personal responsibility for signing the certificate.

22. The turmoil in Tehran caused Itel to withdraw its personnel from Iran in December 1978. Mr. Ernest Lister, a representative of Itel's agent in Iran, remained in Tehran and continued to meet with officials at the Fund and the Ministry in an effort to obtain the acceptance certificate and to arrange for shipment of the STC Phase II equipment. Despite the Fund's failure to provide an acceptance certificate for the first shipment of equipment, Itel was willing to send the second shipment to Tehran. However, in view of the disruptions caused by the Revolution in Iran, Itel wished to change the procedures for shipping and payment to ensure that it would receive its money. Itel shipped the STC Phase II equipment to Schiphol Airport in

The Netherlands and held it there as the negotiations continued. When satisfactory arrangements for shipment and payment had been made, Itel forwarded the STC Phase II equipment to Iran. According to Itel's evidence, it arrived at Mehrabad Airport in April 1979, and Itel received payment from the letter of credit. The Respondent questions whether the equipment arrived at Mehrabad Airport but has produced no evidence of an inquiry about the non-delivery of the STC Phase II equipment nor, for example, any evidence of a request for refund of the money paid for that equipment.

23. Performance under the Sales Agreement came to a halt at this point. Its personnel having been withdrawn from Iran, Itel was unable to install the STC Phase II equipment at the Fund's computer facility. There is no evidence that the Fund requested Itel to return its personnel or to install the equipment at that time. That equipment apparently did not undergo acceptance testing. The second letter of credit was never opened, and the IBM Phase II equipment was never shipped to Iran.

24. There was apparently no communication between the Parties from mid-1979 until early 1981. Itel claims to have learned indirectly during that time that the SSO (the successor to the Fund) was using the computer equipment that Itel had sold to the Fund. Then, in February 1981, Itel received a "Declaration" from the SSO. This declaration noted that performance under the Sales Agreement had been "suspended" and called upon Itel to state whether it was willing to carry out certain commitments under the Sales Agreement. On 4 July 1981, Itel received a telex from an Iranian company, Data Processing Field Engineering ("DPFE"). The telex informed Itel that DPFE was responsible for "making operational and maintenance [sic] of Itel AS5 Systems at Social Security Fund of Iran" and inquired whether Itel could supply spare parts and technical assistance.

25. Itel responded to these communications in July 1981. In a telex to DPFE, Itel sought further information about DPFE's involvement in the matter. Itel sent a letter dated 23 July 1981 to the SSO. In it, Itel agreed that performance by both parties to the Sales Agreement had been "suspended" and expressed an interest in "reactivating" the agreement. Itel then described what, in its view, had occurred in 1977-1979 and inquired about the SSO's position on various points, including reduction of the bank guarantee.

26. There is no dispute that the bank guarantees were not reduced in accordance with the schedule in the Sales Agreement. The first reduction, from U.S.\$2,351,250 to U.S.\$2,137,500, was scheduled to occur fifteen days after the arrival of the first shipment at Mehrabad Airport. That shipment arrived in August 1978; the Fund and the BIME finally agreed to the reduction on 30 November 1978. No further reductions were ever made after that.

27. Itel argues that the bank guarantees should have been reduced as scheduled because it fulfilled all of its obligations except as excused by force majeure and/or the Respondents' breach of contract. Specifically, the Phase I and Itel Phase II equipment should have been accepted since that equipment passed its acceptance tests; and the STC Phase II equipment was accepted under the automatic acceptance provision of the Sales Agreement. The Respondents assert that Itel failed to fulfill its obligations under the Sales Agreement and that, consequently, they were not obliged to reduce the bank guarantees.

28. In October 1981, representatives of Itel and the SSO met in Vienna to negotiate. They failed to resolve their differences. Then, on 31 December 1981, Bank Tejarat demanded payment of U.S.\$2,851,250 from Crocker. This represented the full amount of the sales guarantee, plus U.S.\$500,000 for IMEC's maintenance guarantee. According to Itel, Crocker refused to honor this call upon the

counterguarantees because Bank Tejarat's demand for payment was nonconforming on its face. Apparently recognizing that under the Sales and Maintenance Agreements the two guarantees were not cumulative, Bank Tejarat later reduced its demand to U.S.\$2,351,250. Crocker maintained its refusal to pay.

#### IV. JURISDICTION

29. In addition to the forum selection clause questions which were decided as described supra, para. 3, the Respondents have raised several jurisdictional objections to Itel's claim. They assert that Itel has failed to prove its United States nationality. They question whether Itel is entitled to declaratory relief, having suffered no financial loss. Finally, in its Memorial of 7 June 1985, the SSO claimed that it was not an "instrumentality" of the Government of Iran, as required by Article VII, paragraph 3, of the Claims Settlement Declaration.

30. Based on the evidence submitted by Itel, the Tribunal is satisfied that Itel is a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration under the standards set in Flexi-Van Leasing, Inc. and Islamic Republic of Iran, Case No. 36 (Order of 20 Dec. 1982), and General Motors Corp. and Islamic Republic of Iran, Case No. 94 (Order of 21 Jan. 1983). With respect to the second objection, it is well established that the Tribunal has jurisdiction to grant declaratory relief in cases involving bank guarantees. See, e.g., Ford Aerospace & Communications Corp., et al., and Air Force of the Islamic Republic of Iran, et al., Award No. 236-159-3, at 23, 36 (17 June 1986), reprinted in 11 Iran-U.S. C.T.R. 184, at 200, 209. Finally, the evidence in this Case shows that the SSO is an instrumentality of the Government of Iran. For example, the Sales Agreement identified the SSO's predecessor, the Social Security Fund, as "an affiliated organization of the Ministry of Health and

Social Welfare." Ministry officials participated in the discussions in late 1978--early 1979 concerning the issuance of an acceptance certificate and arrangements for shipment of the STC Phase II equipment.

31. The Tribunal must address another jurisdictional issue that received little attention from the Parties: Were the Claims and Counterclaims outstanding on 19 January 1981, as required by Article II, paragraph 1, of the Claims Settlement Declaration?

32. For a claim to have been "outstanding" on 19 January 1981, it must have been "ripe," so that a cause of action existed on that date. See Electronic Systems International, Inc. and Ministry of Defence of the Islamic Republic of Iran, et al., Award No. 430-814-1, at 20 (28 July 1989). Performance under a contract before 19 January 1981 may entitle a party to the cancellation of a bank guarantee. See e.g., Ford Aerospace & Communications Corp., supra, at 23; 11 Iran-U.S. C.T.R. at 200. On the other hand, bank guarantee controversies that arose after 19 January 1981 are outside the Tribunal's jurisdiction. E.g., Avco Corp. and Iran Aircraft Industries, et al., Award No. 377-261-3, at 19 (18 July 1988), reprinted in 19 Iran-U.S. C.T.R. 200, at 211-212 (claim dismissed); Houston Contracting Co. and National Iranian Oil Co., et al., Award No. 378-173-3, at 107-08 (22 July 1988), reprinted in 20 Iran-U.S. C.T.R. 3, at 78-79 (counterclaim dismissed).

33. In its Statement of Claim, ITEL sought a declaration that Bank Tejarat's demand on 31 December 1981 for payment under the Crocker counterguarantee was null and void. This Claim could not have arisen before the demand was actually made and hence was not outstanding on 19 January 1981. It must be dismissed.

34. The Counterclaim submitted by Bank Tejarat on 30 September 1986 suffers from a similar jurisdictional flaw.

Counterclaims, like claims, must have been outstanding on 19 January 1981 to be within the jurisdiction of this Tribunal. Bank Tejarat complains of the losses it suffered as a result of Crocker's refusal to honor its call upon the counterguarantee. This call occurred on 31 December 1981; thus, even if Itel were determined to be a proper Respondent to that Counterclaim, the Counterclaim was not outstanding on 19 January 1981. It, too, must be dismissed.

35. Itel's principal Claim seeks a declaration that the bank guarantees securing its performance under the Sales Agreement should have been reduced to U.S.\$600,000 by the end of 1979 and should also have been cancelled at some unspecified date because Itel was excused from further performance. The reduction in the Sales Agreement guarantees was to occur in successive stages from the delivery date of Phase I equipment until six months after the acceptance of the Phase II equipment - i.e., before the date of the Algiers Accords. Thereupon, the guarantees would remain at U.S.\$600,000 until their final expiry five years after the installation of the Phase I equipment - i.e., after the date of the Algiers Accords. According to the terms of the Sales Agreement, then, Itel's Claim for the reduction of bank guarantees was outstanding on 19 January 1981.

36. The question remains whether Itel's claim for the full cancellation of the bank guarantees was also outstanding on 19 January 1981. The provisions of the Sales Agreement show that the parties had rights and obligations that continued well after the transactions of 1978-1979: Itel's warranty on the hardware extended for three years after delivery. The SSO was entitled to upgrade the equipment and to purchase new equipment at guaranteed prices at any time within three years of the date of the agreement. The SSO's right to a refund (which was contingent upon returning the equipment to Itel) was to be satisfied from the bank guarantee; the guarantee, in turn, would expire five years after the installation of the Phase I equipment -- i.e., in August 1983. The

SSO's sole remedy in case of any breach by Itel was encashment of the bank guarantee. All of these rights and obligations ran past the date of the Claims Settlement Declaration. In short, actions by the Parties after 19 January 1981 could affect the bank guarantees.

37. Itel's Claim for the cancellation of the bank guarantees was not outstanding on 19 January 1981, therefore, if the Sales Agreement was still a valid contract on that date. If, on the other hand, the Sales Agreement had been terminated by then, Itel would have had a claim outstanding for full cancellation of the guarantees, regardless of the terms of the agreement. Thus, the resolution of this jurisdictional issue depends, in part, upon the merits of the Case. Itel has not argued, nor has the evidence shown, that the Sales Agreement was terminated by frustration. Itel has instead argued that it was excused from performing its remaining obligations under the Sales Agreement because of the Respondents' breach of contract and/or force majeure.

38. The Parties' behavior strongly suggests that they did not consider the Sales Agreement terminated at that time. While Itel clearly believed that the Fund should have issued an acceptance certificate when the first shipment of equipment passed its acceptance test in the autumn of 1978, it nevertheless persevered with the deal despite this failure by the Fund to act in conformity with the Sales Agreement and despite the conditions in Tehran that caused Itel to withdraw its personnel from Iran. The Parties modified their arrangements for delivery and payment; this permitted Itel to deliver the STC Phase II equipment to Mehrabad Airport and to draw upon the balance of the first letter of credit. At this point, performance by the Parties did stop. Itel sought to have the bank guarantees reduced according to the schedule in the Sales Agreement, but it did nothing to indicate that it considered the Sales Agreement terminated. On the contrary, in July 1981, Itel agreed with the SSO that the Sales Agreement had been "suspended"; and

Itel briefly entertained hopes of "reactivating" it. The Tribunal holds that the Sales Agreement was still in effect on 19 January 1981.

39. The final U.S.\$600,000 of the bank guarantees secured Itel's performance of its residual obligations. Therefore, Itel did not have a claim outstanding on 19 January 1981 for the full cancellation of the guarantees, and that claim must be dismissed for lack of jurisdiction.

V. THE MERITS

A. Itel's Claim

40. As shown in detail supra, para. 14, the level of the bank guarantees was to fluctuate with performance under the Sales Agreement. The establishment and negotiation of the first letter of credit determined the initial levels of the guarantees. Delivery of the Phase I and Itel Phase II equipment triggered the first reduction in the guarantees. (This reduction actually occurred, albeit tardily.) After that, the Sales Agreement linked reductions to the acceptance of Phase I or Phase II equipment and, ultimately, to the mere passage of time. Thus, the sole issue to be decided here is whether that equipment was accepted.

41. Itel claims that the first shipment, consisting of Phase I and Itel Phase II equipment, passed its acceptance test and should therefore have received its acceptance certificate by November 1978. It further claims that the second shipment, consisting of STC Phase II equipment, was delivered to Mehrabad Airport on 2 April 1979 and, because of force majeure conditions, qualified for "deemed acceptance" eighty days later. Itel supported its Claim with shipping and banking documents. It submitted affidavits from employees and representatives who negotiated the sale and who installed and tested the Phase I and Itel Phase II equipment.

The EDS employee who supervised the acceptance testing also gave an affidavit and testified at the Hearing.

42. In opposition to Itel's Claim, the SSO denies that force majeure conditions existed, or at least continued for long, in Tehran. The SSO has also denied that Itel's equipment was, in fact, installed; and it claims that Itel's 23 July 1981 letter refutes Itel's own Claims about delivery and installation. The Respondents thus deny that Itel was entitled to an acceptance certificate or deemed acceptance for any equipment. They assert, too, that they had unfettered discretion in deciding to demand payment under the bank guarantees.

43. The Respondents submitted affidavits and witness testimony. For example, Mr. Morteza Nassira, a representative of the SSO, asserted in his affidavit that Itel "failed to fully install" the equipment. However, none of those who presented evidence on behalf of the Respondents had any personal knowledge of the delivery, installation or testing of the Phase I and Itel Phase II equipment in 1978. Only one, Mr. Seyed Abutorabi, claimed to have seen any of Itel's equipment before 1981. Mr. Abutorabi described a visit to the computer facility in "early 1979" during which he observed equipment that had not yet been installed. He provided the names and quantities of some of that equipment. A comparison with the lists of equipment in the Sales Agreement and the shipping invoices shows, however, that the equipment seen by Mr. Abutorabi could have been the STC Phase II equipment which, according to Itel, was delivered to Mehrabad Airport but could not be installed because of force majeure conditions. Thus, Itel's evidence concerning the acceptance testing of the Phase I and Itel Phase II equipment is essentially un rebutted.

44. At the Hearing on 24 January 1990, the Respondents presented a new defense: They claimed that there were discrepancies between the amounts shown in the shipping invoices

and the amount of the letter of credit, and they alleged that discrepancies in the documents suggested that some of the equipment may not, in fact, have been delivered to Tehran. Accordingly, they argued that the bank guarantees should be maintained at a level to cover these discrepancies. The Respondents claimed that a letter of 25 January 1979 from Itel to Bank of America supported this new defense. In the letter, Itel requested Bank of America to honour the letter of credit, in return for which Itel promised to indemnify the bank for any loss, "notwithstanding any discrepancies in the documents to accompany [the letter of credit]."

45. The Tribunal finds the Respondents' new arguments implausible and unpersuasive. The Parties structured the transaction so that their interests -- the Fund's interest in receiving the equipment and Itel's interest in being paid -- were protected. And when the revolutionary turmoil threatened those interests, the Parties modified the procedures for payment and delivery so that the second shipment could go ahead. If the documents had not been in order, it is unlikely that the relevant banks would have paid Itel. Had Itel drawn more money than was its due, or had it failed to deliver equipment as promised, it is likely that the Fund would have discovered the discrepancy and complained. However, there is no evidence of any complaint by the Fund in 1978-1979, or later. Nor have the Respondents offered any explanation or justification for waiting until the Hearing -- eight years after the Statement of Claim was filed -- to allege for the first time that some of the equipment that had been paid for may not have been delivered.

46. The Tribunal concludes that the Phase I and Itel Phase II equipment was delivered and installed at the Fund's computer facility in August 1978. The Respondents' argument that Itel admitted in its 23 July 1981 letter that this equipment was not installed ignores the provisions of the Sales Agreement that classified the Itel Phase II equipment

as part of Phase I for certain purposes. Supra, para. 10. Itel also asserts that many of its personnel had changed between 1979 and 1981 and that those who wrote the July 1981 letter were not fully familiar with the facts. In any event, acceptance testing was disrupted but not prevented by events in Tehran in September 1978. The EDS employees who were supervising the test recommended that an acceptance certificate be issued. The Tribunal finds that the equipment should have been accepted and that the Fund had no valid grounds under the terms of the Sales Agreement for refusing to issue the acceptance certificate.

47. The acceptance of the Phase I and Itel Phase II equipment should have occurred by November 1978. This, in turn, should have triggered an immediate reduction in the bank guarantees to U.S.\$1,800,000. Another reduction should automatically have followed 165 days later: By mid-May 1979, then, the bank guarantees should have been reduced to U.S.\$1,200,000.

48. Conditions in Tehran by the end of 1978 forced Itel to withdraw its personnel from Iran. These force majeure conditions persisted through the spring of 1979. Itel was able to ship the STC Phase II equipment to Iran; the evidence, unrebutted by the Respondents, indicates that the equipment arrived at Mehrabad Airport on 2 April 1979. However, Itel was prevented by causes outside its control from delivering and installing the equipment at the Fund's computer facility. This situation fulfilled the Sales Agreement's requirements for "deemed acceptance." See supra, para. 12. Since the force majeure conditions affected the Fund's performance of its obligations, "deemed acceptance" of the STC Phase II equipment occurred eighty days after arrival of the equipment at Mehrabad Airport -- i.e., on 21 June 1979.

49. The Tribunal accepts the Parties' later description of the situation after April 1979: The Sales Agreement was "suspended." Neither side took any action to terminate the

contract or to hold the other in breach of contract. Their rights and obligations under the Sales Agreement still existed; the final shipment of equipment might still have been arranged, but it was never ordered. Under these circumstances, the Tribunal concludes that the deemed acceptance of the STC Phase II equipment met the Sales Agreement's requirements for acceptance of the Phase II equipment. The bank guarantees should, accordingly, have been reduced to U.S.\$900,000 on 21 June 1979. The next three reductions followed automatically four, five and six months after the acceptance of the Phase II equipment. As a result, the bank guarantees should have been reduced to U.S.\$600,000 in December 1979.

50. The bank guarantees were to remain at U.S.\$600,000 until five years after the date when the Phase I equipment was installed -- i.e., until August 1983. In order to demand payment from the sales guarantee while it stood at U.S.\$600,000, the Fund could either (a) assist in the re-export of the equipment, supra, para. 16, or (b) return the equipment to Itel and collect the U.S.\$600,000 as a refund, supra, para. 17. Thus, on 19 January 1981, the sales guarantee and the Crocker counterguarantee should have stood at U.S.\$600,000, and the Respondents remained subject to the provisions of the Sales Agreement if they wished to demand payment from the bank guarantee.

B. The SSO's Counterclaims

51. The SSO submitted a counterclaim for 28,917,031 rials, for unpaid social security contributions, plus 15,012,759 rials in delayed payment charges. As in previous cases before this Tribunal, the "asserted obligation to pay social security premiums . . . is imposed not by the contract that is the subject matter of the claim, but by operation of the applicable Iranian Social Security law." Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran, 191-59-1, at 39 (25 Sept. 1985), reprinted in 9

Iran-U.S. C.T.R. 107, 135. The only distinguishing feature of this Counterclaim is that the SSO is more directly involved in the claim than it is when merely seeking social security contributions. Its role as a party to the Sales Agreement -- and hence as a Respondent in Itel's Claim -- does not, however, change the nature of this counterclaim for social security contributions: It remains a counterclaim that arises from the operation of law, not from the Sales Agreement. The Counterclaim must therefore be dismissed.

52. The Counterclaim that the SSO filed in 1985 does fall within the Tribunal's jurisdiction. The SSO claims that it suffered losses as a result of defects in the equipment and Itel's failure to fulfill its obligations to install the equipment. These losses included the cost of renting other computers to take the place of the inoperative Itel equipment and money paid to DPFE to put the Itel equipment into operation in 1981. The SSO has presented documents, affidavits and testimony from a witness to show that various items were missing or defective in 1981.

53. Itel has presented plausible explanations why the computer equipment might not have functioned properly when the SSO attempted to put it into operation in 1981. For example, the equipment was likely to malfunction if left in a dusty environment. However, it is unnecessary for the Tribunal to determine whether, or why, any equipment failed to function properly in 1981. To the extent that the Counterclaim seeks damages for what Itel did or did not do after 19 January 1981, it was not outstanding on that date and thus is not within the jurisdiction of the Tribunal. To the extent that compensation is sought for earlier damage to the equipment, it is clear that Itel cannot be held responsible for what might have happened to that equipment between 1979 and 1981. Moreover, much of what the SSO seeks in this Counterclaim are consequential damages. Under paragraph 13(a) of the Sales Agreement, Itel was not liable for

consequential damages. Finally, the Sales Agreement provided that the SSO's "sole and exclusive remedy" for any breach of contract by Itel was its "proper encashment" of the bank guarantee. Thus, for both jurisdictional and substantive reasons, this Counterclaim must be dismissed.

VI. COSTS

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

VII. AWARD

55. For the foregoing reasons,

THE TRIBUNAL DETERMINES AS FOLLOWS:

a. The sales guarantee issued by Bank Tejarat's predecessor, the Bank of Iran and the Middle East, in support of the Advanced System & Equipment Sales Agreement between Itel International Corp. and the Social Security Fund of Iran, as well as the counterguarantee issued by Crocker National Bank, should have been reduced to U.S.\$600,000 in accordance with the provisions of the Sales Agreement. Accordingly, the Parties shall recognize this reduction and take no actions inconsistent with it or with the Sales Agreement.

b. Itel's claim for a declaration with respect to Bank Tejarat's demand on 31 December 1981 for payment from the Crocker counterguarantee is dismissed for lack of jurisdiction.

c. Bank Tejarat's Counterclaim arising from the bank guarantee is dismissed for lack of jurisdiction.

d. The Social Security Organization's Counterclaim for social security contributions and delayed payment charges is dismissed for lack of jurisdiction.

e. The Social Security Organization's Counterclaim for damages arising from the Sales Agreement is dismissed partly for lack of jurisdiction and partly on the merits.

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

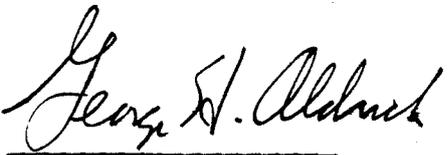
Dated, The Hague

23 May 1990

  
\_\_\_\_\_  
Robert Briner  
Chairman  
Chamber Two

In the name of God

  
\_\_\_\_\_  
Sayed Khalil Khalilian

  
\_\_\_\_\_  
George H. Aldrich