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CASE NO. 48
CHAMBER THREE
AWARD NO. ITL 41-48-3

AMERICAN BELL INTERNATIONAL INC.,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN; MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN; MINISTRY OF POST, TELEGRAPH AND TELEPHONE OF THE ISLAMIC REPUBLIC OF IRAN; and THE TELECOMMUNICATIONS COMPANY OF IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دادگاری دادگاری ایران - ایالات متحده
FILED - ثبت شد	
Date	۱۳۶۳ / ۲ / ۲۱
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No.	48

DUPPLICATE
ORIGINAL
نسخه برای اصل

Appearances:

- For Claimant: Mr. Lee R. Marks,
 Mr. Alan Weitz,
 Mr. John Grabow,
 Attorneys for Claimant
 Mr. Peter Lumia,
 Counsel of Claimant
 Mr. Hamid Sabi,
 Legal Counsel
- For Respondents: Mr. Mohammad K. Eshragh,
 Agent of the Islamic Republic of
 Iran
 Mr. Khosrow Tabasi,
 Legal Adviser to the Agent
 Mr. Ahmad Reza Sherafat,
 Telecommunications Company of Iran
 Dr. Behrouz Akhlaghi,
 Dr. Javad Vahedi,
 Attorneys for Telecommunications
 Company of Iran
 Mr. Hossein Shahriari,
 Telecommunications Company of Iran
- Also present: Mr. John R. Crook,
 Agent of the United States of
 America
 Mr. John B. Reynolds,
 Department of State

I. THE PROCEEDINGS

Claimant, AMERICAN BELL INTERNATIONAL INC. ("ABII") filed its Statement of Claim against the ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF DEFENSE OF IRAN, THE MINISTRY OF POST, TELEGRAPH AND TELEPHONE OF IRAN and THE TELECOMMUNICATIONS COMPANY OF IRAN ("TCI")¹ on 16 November 1981.

On 14 May 1982, TCI filed a Statement of Defence and a Statement of Counterclaim. On 30 September 1982, ABII filed a Reply to TCI's Statements of Defense and Counterclaim to which TCI filed a Rejoinder on 8 February 1983.

TCI's Statement of Counterclaim filed on 14 May 1982 named, inter alia, American Telephone and Telegraph Company ("AT&T") as Counter-Respondent; AT&T, the parent company of ABII, had not been included as a claimant in the ABII Statement of Claim. By its Order of 1 July 1982, the Tribunal requested the Respondents to submit a statement clarifying the grounds upon which AT&T should be named as Counter-Respondent. TCI filed its statement on 30 November 1982, and Claimant filed a reply memorial on 31 January 1983.

A Pre-Hearing Conference was held on 15 February 1983.

On the basis of the Pre-Hearing Conference, the Tribunal, on 15 March 1983, ordered the parties to address nine

¹ TCI has in effect appeared on behalf of the Ministry of Defense of Iran and the Ministry of Post, Telegraph and Telephone of Iran.

preliminary legal issues (issues "a" through "i") by 3 June 1983. The Tribunal's Order also stated that additional issues could be proposed until no later than 8 April 1983. On 8 April 1983 Claimant filed a motion to expand the preliminary issues. The Tribunal, by an Order dated 25 April 1983, modified issue "i", added a new issue "j" and extended the time limit for proposing additional issues to 2 May 1983.² On 2 May 1983, TCI requested that the time limit for proposing additional issues be extended one month. In its Order dated 11 May 1983, the Tribunal denied this request, noting that additional issues could be addressed at a later stage of the proceedings. On 12 May 1983, TCI filed a Statement in which it presented TCI's position on the preliminary issues.

On 3 June 1983, ABII filed a Memorial addressing the preliminary issues, and, on 14 June 1983, TCI did likewise. Claimant's Counter-Memorial was filed on 14 July 1983. TCI filed its Counter-Memorial on 28 July 1983.

A Hearing on the preliminary issues was held on 18 October 1983.

² Issues "a" through "j" are set forth in full in Section III infra.

II. FACTS AND CONTENTIONS

In May 1975, Iran selected AT&T from several possible contractors to assist Iran in the overall coordination of a program to modernize the civilian and military telecommunications systems of Iran ("Seek Switch Program"). AT&T and the Government of Iran thereupon negotiated a lengthy partial description of the intended work to be carried out under the project (Statement of Work IR-100) and signed that Statement on 11 August 1975.

Shortly thereafter, AT&T formed a wholly-owned subsidiary, ABII, to undertake the project contemplated by the Statement of Work ("SOW IR-100"). ABII did not, however, contract directly with the Government of Iran. The United States and Iran instead treated the project as a part of the Foreign Military Sales Program existing between the United States and Iran. Therefore, initially, the United States, not Iran, contracted with ABII by way of a domestic Foreign Military Sales ("FMS") Contract concluded on 31 December 1975. Paragraph 41 of Section J of this FMS contract implemented SOW IR-100 and provided, inter alia, that ABII , as Contractor, would "diligently pursue the objectives of" SOW IR-100 and that ABII would, "within the level of effort specified in the contract, execute the provisions of" the SOW. AT&T, in an Agreement dated 31 December 1975, guaranteed to the Government of the United States the full and satisfactory performance by ABII of the FMS contract.

ABII alleges that it provided services under the FMS contract until 31 March 1977. While such work proceeded, it was agreed by the two governments and ABII that ABII and the Government of Iran would contract directly with one another in the future on the basis of a series of one-year contracts. To cover work performed by ABII after 31 March 1977 and during the direct contract negotiations with Iran, the parties agreed on 19 March 1977 to a short-term interim contract, Contract No. 112, which took effect on 1 April and expired on 15 July 1977. The first of the one-year contracts, Contract No. 118, became effective 16 July 1977 and expired 15 July 1978. At that time ABII and the Government of Iran entered into Contract No. 138 which was to expire on 15 July 1979. Modified SOWs signed by ABII and the Government of Iran were incorporated into Contract Nos. 118 and 138 through Articles 2.1 and 16.1 of each of these contracts. Performance under Contract No. 138 ceased prior to 15 July 1979. The parties disagree on the reasons for this termination.

ABII bases its claims on Contract Nos. 118 and 138. Under these contracts, ABII's basic task was to provide consulting services to the Government of Iran for the modernization of Iran's telecommunications system. ABII alleges that it is owed US \$63,819,369 for its services, for equipment and services obtained from other vendors on Respondents' behalf, for other expenditures and termination costs as provided for in Contracts Nos. 118 and 138, and for damages caused by Respondents' allegedly wrongful

repudiation and breach of Contract No. 138. ABII also seeks interest and its costs of arbitration.

Respondent TCI contends that the Tribunal does not have jurisdiction over the claim on the following grounds: (a) that Claimant has not submitted sufficient evidence of its nationality and (b) that Article 8 of Contract Nos. 118 and 138 provides for disputes to be settled in accordance with Iranian law and in Iranian courts, thereby divesting the Tribunal of jurisdiction by virtue of the exclusion clause of Article II, paragraph 1 of the Claims Settlement Declaration.

TCI sets forth a number of defences on the merits of the claim. TCI contends that only two of Claimant's invoices remain unpaid, the reason for non-payment being that the invoices did not meet formal contractual requirements and did not truly reflect actual performance. TCI also maintains that ABII's claims for equipment purchases lack merit in that some equipment has not yet been delivered to Iran, that other delivered equipment cannot be utilized as desired and that the Claimant breached a contractual obligation to make such purchases from Iranian sources. Finally, TCI asserts that it was, in fact, ABII which ceased performance under Contract No. 138 and later repudiated that Contract. TCI originally asserted that the Contracts were invalid, but later withdrew this contention.

ABII, as an alternative in the event that the contracts are held unenforceable, claims damages on the basis of unjust enrichment, and also alleges a wrongful and fraudulent demand by Iran of a Bank Guarantee and letter of credit associated with Contract No. 138 and an expropriation of ABII property by Iran. TCI denies the validity of these claims by asserting that the performance of ABII did not benefit Iran; that the funds claimed by the Bank were owned by Iran and therefore were not wrongfully demanded; and that Iran did not expropriate property but rather conducted a sale of property in order to settle outstanding obligations of Claimant within Iran. ABII has not pursued these alternative contentions in view of TCI's position that the contracts in issue are valid and enforceable.

TCI also presents a number of counterclaims. First, TCI seeks compensation in an amount left to the discretion of the Tribunal for alleged violations of Iranian law and regulations, fraud, and improper influence exercised and bribes offered to acquire contractual privileges.

Second, TCI seeks indemnification of US \$42,000,000 for claims against TCI by other contractors with whom ABII allegedly did not fulfil obligations and concerning which ABII has allegedly not cooperated in TCI's preparation of defences.

Third, TCI claims an amount of US \$213,307,025 and 14,846,117,000 rials for various alleged breaches of Contract Nos. 112, 118 and 138.

Fourth, TCI seeks US \$28,681,828 for alleged violations of Iranian foreign exchange regulations.

Fifth, TCI claims 356,025 rials for alleged violations of residence and employment regulations for foreign nationals.

Sixth, TCI seeks 3,433,668,443 rials for alleged violations of tax and social insurance laws.

Seventh, TCI seeks 960,988 rials for allegedly unpaid phone and telex bills.

Finally, TCI requests the Tribunal to award interest and its costs of arbitration.

III. ISSUES TO BE DEALT WITH IN THIS AWARD

As stated earlier, the Tribunal has invited the parties to address in written memorials and oral pleadings at the 18 October 1983 Hearing a number of legal issues to be resolved as preliminary issues at an early stage of the proceedings. These issues were the following:

- a. Are the claims the "claims of nationals" of the United States within the meaning of Article VII, paragraph 2, of the Claims Settlement Declaration?

- b. Does the Tribunal lack jurisdiction over any claim under Article II, paragraph 1, of the Claims Settlement Declaration by virtue of an Iranian courts clause?
- c. Does the Tribunal have jurisdiction over the counterclaims against AT&T?
- d. Does the Tribunal lack jurisdiction over any of the counterclaims on the ground that they do not arise out of the same contracts, transactions or occurrences which constitute the subject matters of the claims?
- e. Are Respondents estopped from asserting that the contracts in issue are invalid, and, if not, are rights under the contracts enforceable?
- f. In the event that rights under the contracts are not enforceable for any reason, may Claimant recover under its alternative theories?
- g. Have any of the alleged defects in performance by Claimant been waived under Articles 2.15, 2.16, 2.18 and 2.20 of the contracts or on any other grounds?
- h. To what extent is Claimant's liability for defective performance limited by Article 2.21 of the contracts?
- i. In the event that the Tribunal has jurisdiction over the counterclaims relating to obligations to pay employment and other security taxes and social security premiums, what is the effect of Article 5.12 of the contracts upon such obligations?
- j. Are Respondents' claims for employment and other taxes and social security premiums precluded by any other provision of the contracts or by applicable law?

Having in its earlier pleadings contested the enforceability of Contract Nos. 118 and 138, TCI subsequently modified its position so that it now concedes that these contracts were valid and enforceable. Consequently, issues e and f above are moot.

IV. REASONS FOR AWARD

1. Issue a: Are the claims "claims of nationals" of the United States within the meaning of Article VII, paragraph 2, of the Claims Settlement Declaration?

Claimant has submitted evidence, including, inter alia, certificates from government officials, showing that at all relevant times it has been a United States corporation which is a wholly-owned subsidiary of AT&T, another United States corporation.

Claimant further relies on a sworn statement by the Corporate Secretary of AT&T, certifying that as of 27 February 1981, 98.9 per cent of the voting stock of AT&T was held by shareholders reporting addresses in the United States. Appended to that statement are copies of the pertinent pages of AT&T's proxy statements for that company's Annual Meetings on 19 April 1978 and 15 April 1981, showing that none of AT&T's voting shares was held by shareholders with 5 per cent or more voting stock. On the basis of this material and in the absence of any valid challenge by Respondents in this respect, the Tribunal finds it reasonable to infer that more than 50 per cent of AT&T's stockholders have been at the relevant points in time citizens of the United States.

The Tribunal thus concludes that Claimant is a United States corporation and that at all material times natural persons who are citizens of the United States did indirectly own interest equivalent to more than 50 per cent of its capital stock. Consequently, the claim is a claim of a national of the United States so as to give the Tribunal jurisdiction over it by virtue of Article VII, paragraph 2, of the Claims Settlement Declaration.

2. Issue b: Does the Tribunal lack jurisdiction over any claim under Article II, paragraph 1, of the Claims Settlement Declaration by virtue of an Iranian courts clause?

Article II, paragraph 1, of the Claims Settlement Declaration excludes from the jurisdiction of the Tribunal "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position".

Contract Nos. 118 and 138 contain an identical dispute settlement clause (Article 8) which reads as follows:

All differences and disputes which may arise between the two parties resulting from interpretation of the Articles of the Contract or the execution of the works which can not be settled in a friendly way, shall be settled in accordance with the laws of Iran and with referring to the competent Iranian Courts.

The issue now before the Tribunal is whether, as contended by Respondents, this article excludes the Tribunal from jurisdiction over claims based on Contract Nos. 118 and 138, by operation of the above-mentioned provision in the Claims Settlement Declaration.

In its Interlocutory Award ITL-6-159 FT (Ford Aerospace and Communications Corporation, et al. and The Air Force of the Islamic Republic of Iran, et al.) the Full Tribunal ruled on a forum-selection clause (Article 9 of the contract at issue) which provided:

All disputes and differences between the two parties arising out of interpretation of the Contract or execution of the Works which can not be settled in a friendly way, shall be settled in accordance with the rules provided by the Iranian laws, via referring to the competent Iranian Courts.

The Full Tribunal noted that, in order to exclude the Tribunal's jurisdiction, the contractual choice of Iranian Courts must cover any claims arising under the contract. In this connection the Full Tribunal held:

In the present case, the jurisdiction of the Iranian courts has been expressly limited to disputes arising from the interpretation of the contract and the execution of the works. Important aspects of the contract including some of the Claimant's obligations to be performed outside Iran and all the Respondents' obligations such as payment have been left outside the jurisdiction of the selected courts. Such limitation of the jurisdiction places Article 9 of the contract outside the requirement that the Iranian courts must be solely

competent for any disputes arising under the contract. Therefore, the Tribunal is not prevented by Article 9 [of the contract at issue] from asserting jurisdiction over all claims arising under this contract.

The forum-selection clause now at issue is expressly limited to disputes arising from the interpretation of the articles of the contract and the execution of the works. For the same reasons as stated in the above-mentioned Full Tribunal ruling, the clause therefore cannot be regarded as covering any claims arising under the contracts. The Tribunal thus concludes that Article 8 in Contract Nos. 118 and 138 does not exclude the Tribunal from jurisdiction over claims based on the said contracts.

3. Issue c: Does the Tribunal have jurisdiction
over the counterclaims against AT&T?

Respondents argue that they are entitled to assert their counterclaims not only against ABII but also against AT&T, because AT&T was in effect the company to which the former Government of Iran entrusted the project by signing the SOW IR-100. Respondents suggest this document to be the "original and principal contract". Respondents further refer to the fact that ABII was introduced as a wholly-owned subsidiary of AT&T and that ABII was "merely organized for the purpose of performing the project in Iran". According

to Respondents, AT&T was always recognized by the former Government of Iran "as the performer truly and solely responsible for the contract entered into". Respondents further assert that AT&T guaranteed good performance of the project services. Against this background, Respondents argue that the counterclaims can be asserted against both ABII and AT&T.

Claimant argues that under the Claims Settlement Declaration, as well as under generally accepted principles of legal procedure in municipal systems, a counterclaim may only be asserted against a claimant, not against a party who is not before the Tribunal. According to Claimant, AT&T did not guarantee the good performance of ABII to Respondents, but even if it did, this fact would not be sufficient to entitle Respondents to assert any counterclaims against AT&T as guarantor. Moreover, Claimant contends that even if one could pierce the corporate veil of ABII to obtain jurisdiction over AT&T, there is no ground for doing so in the present case.

Article II of the Claims Settlement Declaration states that the Tribunal was

"... established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counter-claim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim..." (emphasis added).

The above-quoted language of Article II supports the position that a counterclaim can be raised only against a claimant. This conclusion is fortified by Article 19 of the Tribunal Rules, Note 3, which provides:

"In the event of a counterclaim or claim relied on for the purpose of a setoff, the claimant against whom it is made will be given the right of reply" (emphasis added).

The Tribunal must therefore conclude that Respondents are barred from asserting any counterclaims against any person or entity other than Claimant itself - i.e. other than ABII.

The issue has been raised by Respondents as to whether the circumstances surrounding the formation of ABII and its performance of the project were such so as to justify piercing its corporate veil and holding AT&T, as parent company, liable for ABII's obligations. Since AT&T cannot be named as a respondent in the counterclaim, that issue cannot be resolved in the present arbitral proceedings.

Thus the Tribunal concludes that it does not have jurisdiction over the counterclaims insofar as they are directed against AT&T.

4. Issue d: Does the Tribunal lack jurisdiction over any of the counterclaims on the ground that they do not arise out of the same contracts, transactions or occurrences which constitute the subject matter of the claims?

(i) Counterclaims based on Contract No. 112

Respondents base their counterclaims in part on Contract Nos. 112,³ 118 and 138; however, they do not specify which amounts are sought under each of these contracts.

ABII has not challenged the Tribunal's jurisdiction over the counterclaims insofar as they are based on the latter two contracts. The dispute concerns whether or not

³ Contract No. 112 was not submitted by either side. It is, however, referred to at some length in a letter of 26 March 1978 from ABII to Ministry of War of Iran, submitted by Claimant. That letter indicates, inter alia, that Contract No. 112 was concluded so that efforts of the Seek Switch Program would continue without interruption until the "implementation program" would begin. According to the letter it was estimated that ABII would, under Contract No. 112, provide 800 man-months of technical effort "on tasks defined in Statement of Work IR-103"; that man month figure was subsequently increased. As stated earlier, Contract No. 112 expired when Contract No. 118 took effect.

any counterclaim can be asserted on the basis of Contract No. 112. More specifically, the issue is whether such a counterclaim can be held to arise out of "the same contract, transaction or occurrence that constitutes the subject matter of that national's claim", as required under Article II, paragraph 1, of the Claims Settlement Declaration.

The three contracts now mentioned were entered into successively. The first contract, No. 112, was a short term contract intended to cover ABII work under the Seek Switch Program during the negotiations of Contract No. 118. The Government of Iran entrusted the carrying out of that program to one company only, originally AT&T and later in actual fact ABII. Thus it was apparently foreseen that all the successive contracts would go to ABII. The subject matters of the three contracts were closely interrelated, within the framework of the Seek Switch Program.

In light of these particular circumstances, the Tribunal finds that the linkage between all three contracts must be considered sufficiently strong so as to make them form one single "transaction" within the meaning of the Claims Settlement Declaration.

Accordingly, the Tribunal concludes that it has jurisdiction over the counterclaims in so far as they are based on Contract No. 112.⁴

(ii) Counterclaims alleging violations of Iranian
penal laws or tortious conduct

Portions of Respondents' counterclaims are based on alleged violations of Iranian penal laws or certain tortious conduct not arising under any of the three contracts mentioned above. The Tribunal concludes that, as a consequence of the jurisdictional requirements set out in Article II, paragraph 1, of the Claims Settlement Declaration, these portions of the counterclaims are outside the jurisdiction of the Tribunal.

(iii) Counterclaims for social security premiums
and taxes

With regard, finally, to the counterclaims for social security premiums and taxes, it is noted that Chamber Two of

⁴ ABII, in its 3 June 1983 Memorial and 14 July 1983 Counter-Memorial, challenges the Tribunal's jurisdiction with regard also to counterclaims related to the FMS contract. As no counterclaims appear to have been asserted on that basis, the Tribunal need not now make a ruling in that respect.

the Tribunal has resolved a similar issue in Award No. 114-140-2 T.C.S.B., Inc., and Iran. In that Award the Tribunal held that under Article II, paragraph 1,

"a distinction must be made, in particular, between legal relationships arising out of the application of the law to a situation in which either party individually finds itself and the contractual relationship between the parties to the contract inter se. In the present case, the Tribunal holds:

- (i) that only the 5.5 percent tax withholdings referred to ... [earlier in the Award] may be said to arise out of the contractual relationship between the parties to the contract; and
- (ii) that the remaining part of the taxes and social insurance contributions referred to in the counterclaim, in the absence of satisfactory evidence establishing the contrary, must be deemed to arise out of the application of the law to the contractor's particular situation and hence to be outside the jurisdiction of the Tribunal".

In the light of this holding (the precedential value of which is not determined here) the Tribunal finds it appropriate in the present case that the parties should be afforded the opportunity to submit further pleadings at the final hearing with regard to the question of jurisdiction over the counterclaims for social security premiums and taxes. Therefore, this issue will not be disposed of in this Interlocutory Award.

5. Issue g - Have any of the alleged defects in performance by Claimant been waived under Articles 2.15, 2.16, 2.18 and 2.20
of the contracts or on any other grounds?

In response to TCI's allegations concerning defects in performance, ABII asserts that its responsibilities were limited by Contract Nos. 118 and 138. ABII argues that Article 2.18 places the following three limits on any claims against ABII: the claim must arise from the negligence of ABII; the error must be attributable solely to ABII; and the claim must be limited to the cost of alteration, replacement or modifications. On the basis of these limitations, ABII asserts that a number of the alleged defects do not involve instances of negligence or matters which can be attributed solely to ABII.

ABII further contends that both contracts provided time limitations and other remedies for the assertion of defects, or other breaches of contract and that TCI failed timely to avail itself of these time limits and remedies, thereby waiving these defects. In this regard ABII argues as follows: under Articles 2.15 and 2.16 TCI had a 45 day period to disapprove, inter alia, of the professional judgments of ABII; under paragraph 5 of Appendix 3 TCI had a 30 day period to object to ABII invoices submitted for payment; under Articles 3.3 and 3.6 TCI had the right to disapprove of specific ABII employees before they were sent to Iran and

to dismiss them with or without cause after they arrived; and under Article 6 TCI had the right, if dissatisfied with ABII performance, to terminate the contracts subject to certain contractual conditions.

Lastly, ABII contends that Respondents' counterclaims concerning alleged negligent supervision of other contractors are misplaced because Article 2.18 states that ABII is responsible only "for going back and seeing" that other contractors correct "their deficiencies under their contracts".

Respondents argue that by Article 2.20, which states that "the Contractor is responsible and liable for deficiencies and errors according to article 2.18", the parties intended that Article 2.18 provide liability not only for negligence attributable solely to ABII but also for "deficiencies and errors" in not "going back and seeing" that other contractors correct deficiencies under their contracts.

Respondents also deny that their counterclaims alleging defects in buildings and switching centers are excluded by the language of Article 2.18 specifying that the negligence must be attributable solely to ABII. Instead Respondents contend that Article 2.19 makes ABII responsible for those SOW tasks for which it is directly responsible.

Articles 2.15 and 2.16 state:

2.15. The performance of all works, as well as the related programs must be approved by the Employer before commencement. Also, confirmation or nonconfirmation of the works rendered by the Contractor will be within the prerogative of the Employer.

If within 45 days the Employer does not notify the Contractor of disapproval, it is approved.

2.16. If work acceptance certificates submitted by the Contractor are not answered in 45 days of submission, they will be automatically approved.

If acceptance certificates are disapproved the Employer will notify the Contractor in writing of the specific reasons for disapproval within 45 days of submission.

These articles gave the Government of Iran the right to approve or disapprove of tasks both before commencement and upon performance. They provide that approval is deemed to have been given unless there is a specific express disapproval within 45 days.

It has not been argued that Respondents formally disapproved of Claimant's performance within the 45 day period set forth in Articles 2.15 and 2.16. In view of this, the Tribunal must hold that, unless any circumstances that may constitute a valid, legal excuse for not transmitting their objections to ABII are brought to light and considered at a later stage of the proceedings, Respondents are precluded from asserting any objections and counterclaims with regard to actions proposed by ABII and the content of tasks completed by ABII.

Later discovered negligence is dealt with in Articles 2.18 and 2.20. Article 2.18 states:

The Contractor shall be responsible for all cost of alteration, replacement or modifications that occur solely from his error caused by not doing his job carefully in the studies and preparation of technical specifications, executive drawings and similar works. . . . For its errors in its other functions of supervision and installation, test, acceptance, the Contractor without any cost to the Employer for the Contractor's efforts will be responsible for going back and seeing that the responsible sellers and consultants correct their deficiencies under their Contracts.

Article 2.20 provides:

The Employer's approval of the reports, plans and drawings prepared by the Contractor [ABII] shall not relieve the Contractor from his responsibilities regarding the accuracy of this project and in any case, the Contractor is responsible and liable for deficiencies and errors according to article 2.18 which because of his defaults would be observed within two years after each individual project was placed in service.

Article 2.20 thus provides, inter alia, that approval of ABII's work by the Government of Iran does not relieve ABII from responsibility and liability for the deficiencies and errors outlined in Article 2.18 as long as such deficiencies and errors are observed within two years after a project is placed in service.

Article 2.18 divides ABII's responsibilities into two categories: "studies and preparation of technical specifications, executive drawings and similar works" and "other functions of supervision and installation, test, acceptance". With regard to the first category of work, the article places three limits on ABII's liability: ABII is only liable for not doing its job carefully, i.e., for negligence; ABII is only liable when such negligence is solely attributable to ABII; and any such liability is limited to the "cost of alteration, replacement or modifications."

Secondly, Article 2.18 provides that in connection with any ABII errors, i.e. negligence, in its "other functions of supervision and installation, test, acceptance", ABII is responsible for going back and seeing that responsible sellers and consultants correct these deficiencies without any cost to the Government of Iran. Thus if ABII had committed such errors but failed to go back and see to it that the resulting deficiencies were corrected, it could then be responsible for a breach of Article 2.18, so long as it had no legally valid excuse for not seeing that the deficiencies were corrected. ABII would also be liable only if it had knowledge or should have had knowledge of such deficiencies. Furthermore, ABII's liability would arise only if the default were observed within two years after an individual project was placed in service.

Other possible limiting effects of Articles 2.15 and 2.16 than those dealt with above, as well as any possible limiting effect of Article 6.1 and other provisions of the contracts are not addressed in this Interlocutory Award.

Other provisions of the contracts are also relevant to the question of waiver of alleged defects. Paragraph 5 of Appendix 3 to both contracts provides that

All payments to the Contractor shall be against monthly qualified invoices substantiated by the Contractor approved by the Employer, if they are not approved by Employer within 30 days after presentation to the Employer and there is not any objection in writing then they should also be paid....

Although this provision does serve to waive alleged defects in performance as a defence to the invoice for payment, it does not waive TCI's right to allege defects in performance by way of counterclaim.

Articles 3.6 and 3.3 of both contracts gave Iran a 10 day period for disapproval of ABII employees before they were sent to Iran and the right to dismiss, without cause, ABII employees in Iran. If Respondents failed to avail themselves of the remedies provided by Articles 3.3 and 3.6, they are now precluded from asserting counterclaims in such matters, unless there is evidence of circumstances constituting a valid, legal excuse for not availing themselves of such remedies.

In conclusion, the Tribunal holds as follows:

- (i) Unless there is evidence of circumstances constituting a valid, legal excuse for not complying with the 45 days time limit set forth in Articles 2.15 and 2.16 of Contract Nos. 118 and 138, Respondents, if they have not complied with that time limit, are precluded by these articles from asserting objections or counter-claims with regard to defects in actions proposed by ABII or in tasks completed by ABII, except as provided for in Articles 2.18 and 2.20.
- (ii) Under Articles 2.18 and 2.20 of Contract Nos. 118 and 138, ABII's liability for defects in "studies and preparation of technical specifications, executive drawings and similar works" is limited in the following respects:
 - (a) ABII is liable only for not doing its job carefully, i.e. for negligence;
 - (b) ABII is liable only if such negligence is solely attributable to ABII;
 - (c) ABII can be liable only for the cost of alteration, replacement or modification; and

- (d) ABII is liable only for errors which are observed within two years after an individual project is placed in service, unless there is evidence of circumstances legally justifying an extension of that period.
- (iii) Under Articles 2.18 and 2.20 of Contract Nos. 118 and 138, ABII's liability for "its errors in its other functions of supervision and installation, test, acceptance" is limited in the following respects:
 - (a) ABII is liable only for its errors, i.e. negligence;
 - (b) ABII is liable only if it had knowledge or should have had knowledge of resulting deficiencies and thereafter failed without a legally valid excuse to go back and see that responsible sellers and consultants correct such deficiencies; and
 - (c) ABII is liable only for deficiencies which are observed within two years after an individual project is placed in service, unless there is evidence of circumstances legally justifying an extension of that period.
- (iv) Unless there is evidence of circumstances constituting a valid, legal excuse for not complying with the 30 days time limit set forth in Appendix

3, paragraph 5, of Contract Nos. 118 and 138, Respondents are precluded under that provision from asserting objections with regard to invoices submitted to TCI by ABII but not objected to within 30 days; but that provision does not preclude Respondents from their right to allege defects in ABII's performance by way of counterclaim.

(v) Unless there is evidence of circumstances constituting a valid, legal excuse for not complying with the time limits set forth in Articles 3.3 and 3.6 of Contract Nos. 118 and 138, Respondents are, if they have not so complied, precluded from asserting objections or counterclaims with regard to the qualifications and performance of ABII personnel.

6. Issue h - To what extent is Claimant's liability for defective performance
limited by Article 2.21 of the contracts?

Article 2.21 of Contract Nos. 118 and 138 reads:

The total cost of all damages, alterations, replacement and modifications for deficiencies, errors and defaults under this Contract shall not exceed 7% of the amount paid by the Employer for the price of services. . . .

This 7% will be accumulated over the contract years and will be proportionately reduced according to the completion of tasks and liabilities for individual projects.

ABII contends that this clause places a ceiling on its liability under the contracts.

Respondents contend that Article 2.21 limits ABII's liability only where ABII is exclusively in charge of planning and executing a task. In this regard, Respondents argue that ABII's duty to integrate and coordinate the many contractors involved in the Seek Switch Program, in particular its duties under Articles 2.1, 2.2 and 2.3, are outside of the scope of Article 2.21. They further contend that intentional breaches of the contracts, such as the alleged destruction of records in violation of Article 15.1, are outside of the limitation of Article 2.21. Respondents submit that the 7% figure of Article 2.21 reduced proportionately is US \$12,725,288. Respondents argue that this sum should have been deducted by the Employer and that it must be regarded as an extra payment to ABII which should be refunded to Respondents.

Since the language of Article 2.21 limits the "total costs of all damages, alterations" etc. to 7% of the contract price proportionately reduced, the Tribunal cannot share the Respondents' opinion that the limitation pertains to ABII's liability in certain respects only. However, under principles of law acknowledged in many legal systems, limitation-of-liability clauses in general will not be given effect for a specific default when that default arose

through an intentional wrong or gross negligence on the part of the one invoking the limitation.⁵

In conclusion, the Tribunal holds that Article 2.21 of Contract Nos. 118. and 138 limits Claimant's liability for defective performance under these contracts but that the clause will not be given effect to defects if it is proved that such defects were caused by an intentional wrong or by gross negligence on the part of Claimant.

7. Issue i - In the event that the Tribunal has jurisdiction over the counterclaims relating to obligations to pay employment and other taxes and social security premiums, what is the effect of Article 5.12 of the contracts upon such obligations?

ABII contends that Article 5.12 in Contract 118 exempted ABII and its employees from all taxes and social security premiums. ABII further argues that in Contract 138 Article 5.12 was amended to exclude Iranian employees from the exemption and Article 2.27 was added, making ABII responsible for payment of taxes for those Iranian employees. ABII originally argued that it did not have any Iranian employees but rather gained the services of Iranian

⁵ It would appear that the law governing the contracts in question takes that position. The Parties are free to submit arguments on the issue in the course of the further proceedings.

workers through Iranian employment agencies which served as the employer of the workers. During the Hearing, however, ABII modified its position by stating that it now regarded the Iranian employees of independent contractors utilized by ABII as ABII "personnel" within the scope of Article 2.27.

Respondents contend that the tax exemption in Article 5.12 is null and void as contrary to Iranian law. ABII argues in response that there is no such inconsistency between the article and Iranian law, that Iran cannot plead its own lack of authority in order to invalidate the grant of a tax exemption to an alien and that in any event the reimbursement provision of Article 5.12 is not contrary to Iranian tax laws and instead reflects a price adjustment provision.

Article 5.12 of Contract No. 118 states:

The Contractor [ABII] and its employees are hereby exempt from the payment and/or the obligation to pay all Iranian taxes of any kind whatsoever and the obligation to contribute to the Iranian Social Security premium. However, if ... the Contractor or its employees are held to be liable for the payment of any Iranian taxes of any nature whatsoever, ..., the Employer will reimburse the Contractor and its employees for such taxes ... plus the Contractor's associated expenses for record keeping and preparation of tax papers, plus 12% on such total reimbursement to the Contractor

In Contract No. 118, ABII is by the clear language of Article 5.12 exempt from all Iranian taxes and social

security premiums. Moreover, if ABII in any way became liable for such taxes and premiums, Article 5.12 provides for their reimbursement plus costs and 12% of the total reimbursement. Respondents have not established that this exemption is contrary to Iranian law.

In Contract No. 138, Article 5.12 was altered slightly exempting only ABII and its non-Iranian employees from taxes and social security premiums. A new provision, Article 2.27, was added to address any Iranian personnel of ABII. Article 2.27 states:

Payment of any kind of taxes, social security insurances, charges, fees and government and nongovernment fees of Iran for the Iranian personnel of the Contractor will be undertaken by the Contractor which are included in his price.

Article 3.1 of both contracts states:

All personnel rendering permanent or temporary services on behalf of the Contractor [ABII] ... are regarded as personnel or employees of the Contractor.

Under Article 3.1, ABII concedes the Iranian workers rendering services on behalf of ABII to be ABII personnel within the meaning of Article 2.27.

Thus Article 5.12 does not preclude an obligation to pay such taxes in connection with Contract No. 138.

In conclusion, the Tribunal finds that, in the event the Tribunal has jurisdiction over the counterclaims relating to obligations to pay employment and other taxes and social security premiums, Article 5.12 of Contract No. 118 precludes an obligation to pay such taxes and premiums with respect to that contract; and Article 5.12 of Contract No. 138 precludes such obligation in connection with that contract only with regard to ABII and its non-Iranian employees.

8. Issue j - Are Respondents' claims for
employment and other taxes and social
security premiums precluded by any other
provision of the Contracts or by appli-
cable law?

ABII argues that several provisions of Iranian law preclude the TCI counterclaims for taxes, social security premiums and foreign exchange regulations violations. TCI has not submitted written arguments or presented oral arguments on this issue.

In view of the Tribunal's decisions with regard to issues d and i, the Tribunal does not find it necessary now to address the present issue.

IV. INTERLOCUTORY AWARD ON PRELIMINARY LEGAL ISSUES

The Tribunal rules as follows on the preliminary legal issues:

Issue a

ABII's claims are claims of a United States national within the meaning of Article VII, paragraph 2, of the Claims Settlement Declaration.

Issue b

Contract Nos. 118 and 138 do not contain an Iranian courts clause of the kind described in Article II, paragraph 1, of the Claims Settlement Declaration, and the Tribunal therefore does not lack jurisdiction over any of ABII's claims by virtue of that paragraph.

Issue c

The Tribunal lacks jurisdiction over Respondents' counterclaims against AT&T.

Issue d

(i) The Tribunal has jurisdiction over counterclaims arising under Contract No. 112;

(ii) The Tribunal lacks jurisdiction over counterclaims alleging violation of Iranian penal laws and certain counterclaims alleging tortious conduct by ABII.

(iii) The question of jurisdiction over counterclaims for social security premiums and taxes shall be joined to the merits of the case, the parties having the opportunity to submit further pleadings at the final hearing.

Issue g

(i) Unless there is evidence of circumstances constituting a valid, legal excuse for not complying with the 45 days time limit set forth in Articles 2.15 and 2.16 of Contract Nos. 118 and 138, Respondents, if they have not complied with that time limit, are precluded by these articles from asserting objections or counterclaims with regard to defects in actions proposed by ABII or in tasks completed by ABII, except as provided for in Articles 2.18 and 2.20.

(ii) Under Articles 2.18 and 2.20 of Contract Nos. 118 and 138, ABII's liability for defects in "studies and preparation of technical specifications, executive drawings and similar works" is limited in the following respects:

(a) ABII is liable only for not doing its job carefully, i.e. for negligence;

- (b) ABII is liable only if such negligence is solely attributable to ABII;
 - (c) ABII can be liable only for the cost of alteration, replacement or modification; and
 - (d) ABII is liable only for errors which are observed within two years after an individual project is placed in service, unless there is evidence of circumstances legally justifying an extension of that period.
- (iii) Under Articles 2.18 and 2.20 of Contract Nos. 118 and 138, ABII's liability for "its errors in its other functions of supervision and installation, test, acceptance" is limited in the following respects:
- (a) ABII is liable only for its errors, i.e. negligence;
 - (b) ABII is liable only if it had knowledge or should have had knowledge of resulting deficiencies and thereafter without a legally valid excuse failed to go back and see that responsible sellers and consultants correct such deficiencies; and
 - (c) ABII is liable only for deficiencies which are observed within two years after an individual project is placed in service, unless there is evidence of circumstances legally justifying an extension of that period.

- (iv) Unless there is evidence of circumstances constituting a valid, legal excuse for not complying with the 30 days time limit set forth in Appendix 3, paragraph 5, of Contract Nos. 118 and 138, Respondents are precluded under that provision from asserting objections with regard to invoices submitted to TCI by ABII but not objected to within 30 days; but that provision does not preclude Respondents from their right to allege defects in ABII's performance by way of counterclaim.
- (v) Unless there is evidence of circumstances constituting a valid, legal excuse for not complying with the time limits set forth in Articles 3.3 and 3.6 of Contract Nos. 118 and 138, Respondents are, if they have not so complied, precluded from asserting objections or counterclaims with regard to the qualifications and performance of ABII personnel.

Issue h

Article 2.21 of Contract Nos. 118 and 138 limits ABII's liability for defective performance under these contracts, but the article will not be given effect to defects if it is proved that such defects were caused by an intentional wrong or by gross negligence on the part of ABII.⁶

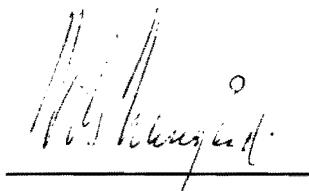
⁶ See, however, supra footnote 5.

Issue i

In the event that the Tribunal has jurisdiction over the counterclaims relating to alleged obligations to pay employment and other taxes and social security premiums, Article 5.12 of Contract No. 118 precludes an obligation to pay such taxes and premiums with regard to that contract; and Article 5.12 of Contract No. 138 precludes such obligation in connection with that contract only with regard to ABII and its non-Iranian employees.

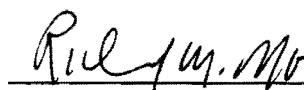
Dated, The Hague

31 May 1984

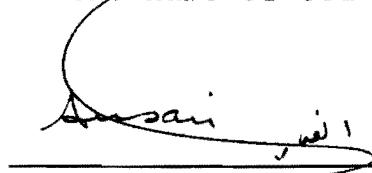


Nils Mangård
Chairman
Chamber Three

In the name of God



Richard M. Mosk
Dissenting as
to issues d(i) & h
Concurring as
to the remaining
issues.
See separate opinion



Parviz Ansari Moin
Concurring as to
issues d(i) & h
For the remaining
issues concurring
in part and dissent-
ing in part.
See separate opinion