IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 54
CHAMBER THREE
AWARD NO. 97-54-3

DAMES & MOORE,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN, THE ATOMIC ENERGY ORGANIZATION OF IRAN, THE NATIONAL IRANIAN STEEL COMPANY, THE IRANIAN MEDICAL CENTER and THE NATIONAL IRANIAN GAS COMPANY,

Respondents.

AWARD

APPEARANCES:

For Claimant:
Mr. Stephen Howard,
Mr. Jeffrey Hamerling,
Attorneys

For Respondents:
Mr. Mohammad K. Eshragh,
Deputy Agent of the
Islamic Republic of Iran
Mr. Khosrow Tabasi,
Legal Adviser to the Agent
Mr. Mohammad Adib Nazari,
Attorney of the Atomic
Energy Organization of
Iran
Ms. Farzin Faridani,
Attorney of the National
Iranian Steel Company
Mr. Reza Ashraf,
National Iranian Steel
Company
Mr. Allahyar Mouri,
Attorney for National
Iranian Gas Company
Mr. Moinee,
Attorney of Ministry of
Health of the Islamic
Republic of Iran

Also Present:
Mr. Arthur W. Rovine,
Agent of the United
States of America
Ms. Elisabeth Keefer,
Assistant to the Agent

I. THE PROCEEDINGS

On 17 November 1981, Claimant, DAMES & MOORE, filed its claims before the Tribunal against the Respondents, the ISLAMIC REPUBLIC OF IRAN ("Iran"), the ATOMIC ENERGY ORGANIZATION OF IRAN ("AEOI"), the NATIONAL IRANIAN STEEL COMPANY ("NISCO"), the NATIONAL IRANIAN GAS COMPANY ("NIGC") and the IRANIAN MEDICAL CENTER ("IMC").

AEOI filed a Statement of Defence, including a counterclaim, on 13 April 1982, in response to which Claimant filed a Reply on 27 May 1982.

Statements of Defence were filed on 2 July 1982 by Iran, NIGC and the Iranian Ministry of Health. On the same date, NISCO and IMC filed Statements of Defence, including counterclaims.

On 23 August 1982, Claimant filed a general denial to the NISCO and IMC counterclaims. The Ministry of Health submitted a Supplemental Statement of Defence on 24 August 1982. Claimant filed certain affidavits and a Pre-Hearing Conference Statement on 3 November and 8 November, respectively.

A Pre-Hearing Conference was held on 17 November 1982. On the same day, AEOI filed a Memorial and NISCO filed a Supplemental Statement of Defence, both of which included additional counterclaims.

On 13 January and 27 January 1983, respectively, AEOI and Claimant submitted Memorials on the issue of subject matter jurisdiction. Supplemental Statements of Defence were filed by NISCO on 3 February 1983 and by IMC and AEOI on 18 March 1983. On the latter date, NISCO submitted certain documents. AEOI filed an additional statement on 4 April 1983. On 16 March 1983, the Tribunal ordered that the issue of jurisdiction, originally to be decided as a preliminary matter, should be joined with the merits.

On 14 April 1983, Claimant filed affidavits, exhibits and its Hearing Memorial, in which it offered to withdraw its claims against IMC and NISCO. NISCO filed exhibits on 25 April 1983, a further supplement to its Statement of Defence and Counterclaim on 5 May 1983 and a Hearing Memorial on 9 May 1983. AEOI filed its Hearing Memorial on 10 May 1983.

The Iranian Ministry of Economic Affairs filed a Statement of Counterclaim on 11 May 1983 relating to taxes allegedly due in connection with services performed for AEOI.

On 12 and 13 May 1983, a Hearing was held at which all parties were present except IMC. On the first day of the Hearing, IMC filed its consent to the withdrawal of the claims against it and its own counterclaims and NISCO filed a further supplemental statement. On the second day of the Hearing, AEOI and NISCO filed supplemental exhibits.

Following the Hearing, the member of the Tribunal appointed by the Islamic Republic of Iran resigned. A new member was appointed. The Tribunal has hereby determined not to repeat the prior Hearing (see Article 14 of the Tribunal Rules.)

On 10 June 1983, Claimant filed an additional affidavit, additional documents and written objections to certain of NISCO's counterclaims.

On 27 July 1983, NISCO filed additional materials. AEOI filed a Post-Hearing Memorial on 8 August 1983 and NIGC made an additional filing on 31 August 1983, presenting new evidence and introducing a counterclaim for taxes and social security premiums.

On 16 September 1983, NIGC filed a further written submission and an additional exhibit. Claimant filed on 3 October 1983 its objections to the 31 August and 16 September filings of NIGC. On 14 December 1983, NIGC filed a submission containing further evidence and arguments.

Fairness, orderliness and possible prejudice to the other party in the case require that the Tribunal disregard the unauthorized filings made by the parties after the Hearing. Consequently, the counterclaim asserted by NIGC for taxes and social security premiums cannot be admitted.

In light of Claimant's withdrawal of its claim against IMC, and with IMC's consent, the Tribunal dismisses this claim and the counterclaim of IMC. The remainder of this Award relates only to the remaining claims and counterclaims.

II. AN OUTLINE OF THE CONTENTIONS OF THE PARTIES

Claimant contends that the Tribunal has jurisdiction over all of the claims, asserting that they are all claims of a national of the United States against Iran arising out of contracts, debts, expropriations or other measures affecting property rights. Iran and AEOI dispute that the claims against them are the claims of a national of the United States.

Claimant claims against AEOI for breach of a contract between AEOI and Dames & Moore International S.R.L. ("D & M International"), a Venezuelan limited liability company, or, in the alternative, for quantum meruit for services rendered, or for amounts allegedly due under an account stated. AEOI contends that the Tribunal is divested of jurisdiction over the claim under the final exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration.[1] AEOI also contends that the Tribunal lacks

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[1] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims By the Government of the United States of America and the Government of the Islamic Republic of Iran dated 19 January 1981.

jurisdiction to hear claims for quantum meruit or for amounts due under an account stated. On the merits, AEOI denies liability on grounds of defective performance, other contract breaches and invoicing discrepancies.

AEOI asserts counterclaims against Claimant for damages allegedly incurred as a result of the claimed defective performance, for taxes and social insurance premiums allegedly due and for the release of a United States court attachment. Claimant denies the allegation of defective performance and objects to the Tribunal's jurisdiction over the counterclaims for taxes and social insurance premiums. Claimant also contends that the attachment has been released thereby rendering this counterclaim moot.

The claim against The Government of the Islamic Republic of Iran is based upon Claimant's contention that certain of its equipment has been expropriated. This Respondent defends by contending that the Claimant was not the owner of the equipment in issue, having conveyed it to various Iranian nationals.

With regard to the claim against NISCO, Claimant seeks, alternatively, payments due, but not paid, in breach of a contract with D & M International, quantum meruit for services performed and amounts due under an account stated. NISCO pleads that it has made all the payments in dispute.

NISCO counterclaims for damages for breach of contract, unpaid social insurance premiums, defective performance and

injury to reputation. Claimant denies that D & M International breached the contract or that NISCO suffered damage as the result of any such breach and objects to jurisdiction over the counterclaim for social insurance premiums. Claimant also denies the allegation of defective performance and maintains that the counterclaim was improperly filed.

Claimant claims against NIGC, in the alternative, for failure to pay invoices in breach of a contract with D & M International, for quantum meruit for services rendered and for amounts due under an account stated. NIGC denies the existence of a contract and maintains that the Tribunal lacks jurisdiction over claims for quantum meruit or for amounts due under an account stated.

All parties seek their costs of arbitration.

III. JURISDICTION: OWNERSHIP OF THE CLAIMS AND JURISDICTION OVER RESPONDENTS

Article II, paragraph 1, of the Claims Settlement Declaration established the Tribunal for, inter alia, "the purpose of deciding claims of nationals of the United States against Iran...". Article VII, paragraphs 1, 2 and 3, of the Declaration define the relevant terms as follows:

> 1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under

> the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.
>
> 2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement. Claims referred to the Arbitral Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.
>
> 3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

Claimant alleges that, from the time each of the claims arose to the present, it has been a partnership organized under the laws of the United States, that more than 50 per cent of the partnership has been owned by natural persons who are United States citizens and that it has been a United States national within the meaning of Article VII, paragraph 1. In support of these allegations, the Claimant submitted an affidavit of its chief financial officer stating such and enumerating the ownership interests in Dames & Moore to demonstrate that approximately 90 per cent of its partners

have been United States citizens during the relevant period. Also submitted were documents which Claimant was required by law to file with the United States Department of Defense on 26 June 1979 and 16 December 1981 listing the name and citizenship of each of its partners in confirmation of the facts attested to. Finally, Claimant has submitted a report by an independent accountant indicating that the ownership interests of persons who are not United States citizens did not exceed 9 per cent of Claimant's equity on 30 March 1979, 29 March 1980 and 27 March 1981.

While Respondents have contested the adequacy of the above evidence on nationality, they have introduced no evidence to the contrary. The Tribunal finds, therefore, that Claimant is a United States national.

Claimant further alleges that it held an ownership interest in D & M International which was, during the relevant period, sufficient to control that company, that D & M International is itself ineligible to bring claims before the Tribunal and that D & M International assigned its full title to the claim against AEOI to Claimant. Claimant's evidence in relation to these allegations consists of the affidavit referred to above, an affidavit of a Dames & Moore partner who serves as Chief Administrator of D & M International, excerpts from the latter company's articles of association and an undated document executed by officials of D & M International confirming the assignment of its claim against AEOI to Claimant.

This evidence shows that 5 per cent of the equity in D & M International was held in the name of its Chief Administrator, who is a partner in Dames & Moore and a United States citizen, 5 per cent in the name of a Venezuelan national and 90 per cent in the name of Claimant. Further evidence has been submitted consisting of two trust instruments by which the two 5 per cent owners indicated that their interests were purchased with funds provided by Claimant. Respondents have neither contested nor offered evidence to contradict these allegations. The Tribunal finds, therefore, that Claimant has been the owner of at least 90 per cent of all outstanding interests in D & M International since the claim arose. In light of this finding, it is unnecessary to determine the effect, if any, of the purported assignment of the claim against AEOI to Claimant.

Respondents have argued that Claimant does not meet the provision of Article VII, paragraph 1, requiring that its ownership interest be "sufficient at the time the claim arose to control" D & M International. Respondents cite Article 10 of the latter's articles of association, which Article provides that decisions may be taken at meetings of the company only when at least two owners holding at least 60 per cent of the company's equity are present. On the basis of this provision, the Respondents maintain that, even though the Claimant has been the legal owner of 90 per cent of D & M International company, it could not itself cause decisions to be taken and thus cannot be said to have controlled the company.

The Tribunal is unable to accept this contention. The two nominal 5 per cent owners, by their own agreement, serve as trustees for the Claimant and as such they could not prevent the convening of a company meeting. Moreover, even if the nominal majority shareholders could prevent a quorum from being achieved at a company meeting, this would have little bearing on the issue of whether the majority shareholder in fact controlled the company. It has not been suggested that quorum requirements were not in fact met. In addition, all actions taken by the company could still be dictated by majority holders who could, in any event, cause the quorum requirement to be amended. In view of the above, the Tribunal is satisfied that Claimant had a sufficient interest to control D & M International during the relevant period.

In light of the above, the Tribunal concludes that all of the claims are claims of a national of the United States within the meaning of Article VII, paragraph 2, of the Claims Settlement Declaration.

It is not contested that AEOI, NISCO and NIGC are entities controlled by the Government of Iran and, therefore, all of the claims are against "Iran" as that term is defined in Article VII, paragraph 3, of the Claims Settlement Declaration.

IV. THE CLAIM AGAINST AEOI

a. Factual Background

On 8 December 1977 D & M International and AEOI entered into a contract ("AEOI Contract") retroactive in application to 16 July 1977. Under the contract , D & M International agreed to perform site validation and environmental studies in connection with a proposed nuclear power plant project in the province of Isfahan, Iran. AEOI agreed to pay invoices for these services, including costs incurred, at rates which were spelled out in the contract. The AEOI Contract provided that such invoices were to be payable subject to review and approval by AEOI within 60 days after receipt by AEOI and that invoices not objected to within that period of time were to be deemed approved by AEOI.

AEOI terminated the AEOI Contract on 30 June 1979 prior to its completion, in accordance with the terms of the contract.

D & M International submitted 21 invoices for services which it performed under the three phases of the contract for a total amount of US $7,090,971. AEOI made payments on the first 14 invoices in excess of US $3.6 million but objected to other amounts sought thereunder. D & M International issued credits in response to AEOI's objections.

With regard to Invoice Nos. 1, 2, 4, 5, 6, 8, 10, 12, and 14 Claimant contends that the amount of US $595,259 still remains owing after deducting all amounts to which AEOI objected when the invoices were rendered and deducting all other payments by AEOI and credits to which AEOI is entitled.

Invoices Nos. 15, 16, 17, 18 and 19 were submitted to AEOI between August 1978 and March 1979. On 23 July 1979, after the AEOI Contract had been terminated, D & M International submitted a final statement to AEOI. As of that date, AEOI had not paid, nor objected to, any of these five invoices. The final statement included a relisting and resubmission of the invoiced amounts. In addition, the final statement included certain charges that had not been previously billed and certain costs of termination. On 27 August 1979, Dr. Nowroozi, then the Nuclear Regulatory Director of AEOI, wrote to D & M International and acknowledged receipt of the final statement; he did not object to any of the amounts listed and promised final settlement of "all claims due and total amounts due". AEOI made no payments on any of the amounts listed. In a letter dated June 1980, after Claimant had commenced litigation for breach of contract in a United States court, AEOI stated objections to all outstanding invoices.

Claimant seeks (a) the amount of US $3,437,553.02 representing the sum of the unpaid invoices allegedly remaining due under the Contract and (b) the amount of US $40,000 "for defending against a warranty claim asserted by AEOI", together with interest on these amounts.

With regard to the claim for the amount under (a) above Claimant seeks, in the alternative, recovery of the same amount, US $3,437,553.02, under the theory of quantum meruit, arguing that this amount represent the reasonable value of services rendered and costs incurred.

As a further alternative basis for its claim, Claimant argues that the sum of US $2,069,268 is owing under the theory of account stated. This claim consists of US $1,474,006, representing the aggregate amounts of Invoice Nos. 15-19 and 21, and US $595,262, representing amounts unpaid on Invoice Nos. 1, 2, 4, 5, 6, 8, 10, 12 and 14 (see above). Claimant argues that AEOI by its conduct assented to pay these amounts and that a new agreement was thereby made, which is separate and distinct from the AEOI Contract.

b. Jurisdiction over the Claim

(i) The Claim for Breach of the AEOI Contract

Under Article II, paragraph 1, of the Claims Settlement Declaration, the Tribunal's subject matter jurisdiction extends to claims which "arise of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding ... 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..."

AEOI has objected to the Tribunal's jurisdiction over the claim on the ground that the AEOI Contract included, in Article 10.16, a clause which falls within the provisions of the final exclusion clause of Article II, paragraph 1. This contract clause reads as follows:

> Any dispute or disagreement arising under this Contract shall first be discussed amicably by both parties. Failing agreement, such dispute or disagreement shall be submitted to conciliation. Each party shall have the right to appoint one conciliator and a third conciliator shall be appointed by the Plan and Budget Organization of the Government of Iran. In the event that either party is unwilling to accept the decision of the conciliation board, the matter shall be decided finally by resort to the courts of Iran.

In another case before it, the Tribunal has held that it lacks jurisdiction by virtue of a similar contract clause. See T.C.S.B., Inc. v. Iran, Interlocutory Award No. ITL 5-140-FT. While stating its disagreement with the decision in that case, Claimant has conceded that the forum selection clause at issue therein cannot be distinguished from Article 10.16. The Tribunal concludes that, by virtue of the article, it lacks jurisdiction over the claim for breach of the Contract. That conclusion applies to the claim for US $40,000 "for defending against a warranty claim asserted by AEOI", since it must also be deemed to arise under the Contract.

(ii) The Alternative Claims for Quantum Meruit and Account Stated

Claimant argues that, even if the Tribunal has no jurisdiction over the breach of contract claim, Claimant may nonetheless maintain its claim on the alternative bases of quantum meruit and account stated. AEOI denies that the claim may be so maintained on three grounds: first, that the Tribunal's affirmative jurisdiction does not extend to claims based upon quantum meruit or accounts stated; second, that, under whatever theory it is advanced, the claim arises "under" the Contract and is therefore barred by the final exclusion clause of Article II, paragraph 1; and, third, that remedies for quantum meruit and an account stated are available only when an enforceable contract remedy does not exist.

The Tribunal has found earlier that it does not have jurisdiction over the claim insofar as it is based on the alleged breach by AEOI of the AEOI Contract. The crucial question with regard to the two alternative claims is whether they arise "under" the Contract in accordance with the terms of Article II, paragraph 1, of the Claims Settlement Declaration; if they are deemed to do so, the Tribunal will not have jurisdiction over the alternative claims either.

The claim against AEOI is based primarily on the Contract, without the existence of which no services would presumably have been performed. The validity and enforceability of the Contract has not been contested.

The quantum meruit claim is for the value of services rendered under the Contract. That claim clearly arises under the Contract. Therefore the Tribunal finds that it has no jurisdiction over that claim. To assume jurisdiction over the quantum meruit claim in this case would, in effect, mean circumventing the exclusion provision in Article II, paragraph 1, thereby rendering it ineffective.

With regard to the second alternative claim, for account stated, Claimant's basic argument is that AEOI in fact, by implication, acknowledged its indebtedness to Claimant by not objecting within a reasonable period of time to a number of invoices transmitted to it; with regard to

the claim related to invoice Nos. 1, 2, 4, 5, 6, 8, 10, 12 and 14 the argument appears to be that the amount sought has been assented to through AEOI not disputing that portion of the invoices. According to Claimant such acknowledgement by AEOI of its indebtedness constituted a new separate agreement, distinct from and independent of the underlying AEOI contract. By basing its claim on such new agreement, Claimant argues, it avoids the forum selection clause in the AEOI contract being applicable.

It is a well-established general principle in various legal systems that in commercial relationships one party may be obligated to pay another party, with which it has been doing business, a sum specified in an invoice if it receives the invoice but does not object to it within a certain period of time. The question here is, however, whether AEOI's mere passivity in the present case caused an entirely new agreement to come into existence, independent of and replacing the underlying AEOI Contract. The Tribunal finds that the alleged lack of objections from AEOI to the invoices cannot be implied so as to constitute such a new agreement. Accordingly, the Tribunal holds that also the alternative claim for account stated must be deemed to arise under the AEOI Contract and that it thus has no jurisdiction over this claim.

The Tribunal's conclusion is therefore that it is not vested with jurisdiction over the claim against AEOI on any of the theories presented by the Claimant. Likewise, AEOI's

counterclaim must be deemed to fall outside the Tribunal's jurisdiction.

V. THE CLAIM AGAINST THE ISLAMIC REPUBLIC OF IRAN

Claimant alleges that in the course of its work in Iran, it accumulated substantial movable property which it claims has been expropriated by the Islamic Republic of Iran. The subject matter of this claim falls clearly within the terms of Article II, paragraph 1, of the Claims Settlement Declaration and, thus, the Tribunal has jurisdiction over the claim.

According to Claimant, the property, which included vehicles, office equipment, instruments and other equipment, was kept at a rented privately-owned warehouse near Tehran and at three field laboratories in various other locations.

Claimant submitted sworn statements of one Mr. Yaghoubian and one Mr. Askari, described, respectively, as the Managing Director and General Manager of Claimant's activities in Iran during the relevant period. They both state that, in the autumn of 1980, representatives of the Government of Iran had occupied the warehouse and informed representatives of Claimant that the warehouse was to be used to house refugees of the war and that any useful equipment stored therein would be turned over to the Iranian army. The affidavits further state that representative of Claimant were thereafter denied access to the equipment.

Claimant also submitted a list of equipment it alleges to have stored in the warehouse, as derived from its inventory records, along with the original purchase date and price of each item. The Claimant seeks to recover the total original cost of the equipment of US $354,924.

With regard to the three field laboratories, the Claimant alleges that it has been unable to recover any of the equipment left at the field locations, a fact which it contends demonstrates that the equipment has been confiscated. In the two above mentioned affidavits it is stated that company records indicate that the equipment had an original purchase price of US $80,000, which amount the Claimant seeks as relief in connection with its claim.

The Government of the Islamic Republic of Iran originally asserted a general denial of liability. Subsequently, AEOI submitted on 4 April and 10 May 1983 two statements in defence to the claim. AEOI's statements are deemed to have been presented on behalf of the Government of Iran. Essentially, AEOI alleges that authorized representatives of Claimant had conveyed all of the equipment concerned to various Iranian individuals and companies before the time of the alleged taking.

In support of this allegation, AEOI presented an affidavit of Mr. Felix Sahakian with whom Claimant had previously contracted to serve as a custodian of the warehoused equipment. Mr. Sahakian states that he was given

a power of attorney by Mr. Askari, Claimant's General Manager in Iran, authorizing him to assign ownership of the equipment to anyone, including himself. He further states that, in order to reimburse himself for certain unpaid expenses he incurred on behalf of Claimant, he subsequently conveyed all of the equipment to himself. With regard to the three field laboratories, Mr. Sahakian states that one was sold by Claimant to a firm doing business as Zamiran Company and one has previously been placed in the warehouse and conveyed along with the other equipment, to himself. He also states that the Claimant's records in Iran reveal that the third field laboratory was not at a separate site and suggests that the equipment must have been included with the equipment of the other two sites.

Attached to Mr. Sahakian's affidavit are a power of attorney dated 3 April 1979 purportedly signed by Mr. Askari; two documents indicating debts allegedly owed by the Claimant to Mr. Sahakian arising out of his termination from prior employment and expenses incurred by him on behalf of the Claimant; a statement of ownership interest dated 22 March 1979, again purportedly signed by Mr. Askari, indicating that all of the warehoused equipment belongs to Mr. Sahakian and that the Claimant has no further claim on the equipment; and an undated letter to D & M International from Zamiran Consulting Engineers indicating that the Claimant had sold one of the field laboratories to Zamiran on 18 August 1979, requesting the payment of rent for D & M International's continued use of the equipment through 21

November 1979, and, in a handwritten notation, indicating that the requested payment has been made in full.

Neither the Government of Iran nor AEOI contest Claimant's evidence that the warehouse and its contents have been sequestered by government representatives. The unilateral taking of possession of property and the denial of its use to the rightful owners may amount to an expropriation even without a formal decree regarding title to the property. The interference with the use of the stored equipment in the present case is so complete that it must be deemed unreasonable. The Tribunal concludes that a taking of the property occurred no later than 1 January 1981.

Having reviewed the evidence before it, the Tribunal finds that the allegation that Claimant conveyed its ownership interest in the warehoused equipment is not sufficiently substantiated. Having found that the property has been taken by the Government of Iran, the Tribunal holds that Claimant is entitled to compensation for the value of the equipment as of 1 January 1981.

The evidence of a taking with regard to the field laboratories is less convincing. Claimant has submitted no evidence which would demonstrate that its equipment has been taken and has not rebutted Respondent's evidence that ownership of one of the field laboratories has been conveyed. Respondent's evidence indicates, however, that another of the field laboratories had previously been stored

in the warehouse prior to the government's sequestration. It must be concluded that this equipment was among the property taken and is therefore included in the above award. Claimant's claim with regard to the other two field laboratories must be dismissed for lack of proof.

As evidence of the value of the expropriated equipment, Claimant has submitted materials indicating that the original purchase price of all items stored in the warehouse, including the one field laboratory, was US $354,924. However, there is no evidence regarding the relationship between the price of each item on the date of purchase and the value in the fall of 1980. Because of this gap in the evidence and the difficulties in quantifying the actual amount of damages in this respect with any precision, the Tribunal is justified in estimating such amount. Considering all the circumstances, including the age of the equipment, the Tribunal decides that the approximate value of Claimant's expropriated property is US $100,000, to which amount Claimant is now entitled.

Claimant has also sought interest on this claim at various rates. The Tribunal finds that Claimant is entitled to interest on the principal amount awarded on this claim at 10 per cent per annum from 1 January 1981 to the date on which the Escrow Agent instructs the Depositary Bank to pay the Award.

VI. THE CLAIM AGAINST NISCO

Claimant claims against NISCO for amounts allegedly due for services rendered under a Contract between D & M International and NISCO dated 1 August 1975. Claimant alleges that, pursuant to the Contract, D & M International performed quality control work during the construction of a steel mill at Ahwaz, Iran, from early 1979 until the spring of 1980. The Claimant seeks US $123,523 as the dollar equivalent of the amount due under six invoices issued from 2 June 1979 to 31 December 1979 and totalling 8,689,874 rials.

NISCO contends that the Tribunal lacks jurisdiction over the claim because it arises under a contract which includes a forum selection clause which falls within the terms of the final exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration. On the merits, NISCO defends by alleging that it has satisfied its obligation with regard to these six invoices and to a seventh invoice issued during this period. NISCO alleges that these seven invoices totalled 11,020,031 rials, and that, after making certain deductions required by law and after crediting itself 3,000,000 rials for "payments on account", it paid the net amount due of 7,391,889 rials into D & M International's bank account on 3 February 1980. Moreover, NISCO alleges that, on the same day, this amount was paid over to Mr. Felix Sahakian as a representative of D & M International.

Article 20 of the Contract sets forth the procedures agreed upon by the parties for the settlement of disputes. That article reads, in pertinent part, as follows:

> All disputes arising out of this contract or of interpretation thereof between the parties thereto which are not settled shall be referred to an ad hoc committee consisting of the highest authority in the execution unit (or his assistant) and the Consulting Engineer party to the contract, and in case the committee fails to settle the disputes on the basis of the contract and related regulations, the dispute shall be settled under the laws of Iran by recourse to a competent court of law.

The Tribunal has previously ruled in other cases that claims arising under contracts containing similar provisions did not come within the terms of the final exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration. See for instance Gibbs & Hill, Inc. v. Iran Power Generation and Transmission Company, et. al., Interlocutory Award No. ITL 1-6-FT. For the reasons stated in that award, the Tribunal holds that the claim is not excluded by virtue of Article 20 of the Contract.

In support of its defence on the merits, NISCO submitted bank statements and other financial records which demonstrate that it made a payment of 7,391,889 rials to the bank account of D & M International and that this sum was thereupon paid to Mr. Sahakian. In the face of this evidence, Claimant has conceded the allegation regarding the payment.

Claimant maintains its claim in respect of the 3,000,000 rials deducted by NISCO from its invoice payments. NISCO contends that this amount reflects a "payment made in advance on account". Claimant denies that D & M International ever received this amount as an advance payment and contends that it represents amounts paid to former employees of that company who were re-hired directly by NISCO. In support of its position, Claimant cites NISCO's own assertions concerning such payments and the fact that the Contract makes no provision for advance payments.

However, NISCO has submitted financial records which support its contention and demonstrate that the 3,000,000 rials were paid during 1979, the period for which D & M International submitted invoices. There are no circumstances which would cast doubt upon the authenticity of these records and in view of the fact that there is no indication that D & M International objected at the time to the amount paid on the invoices, as reduced to reflect the 3,000,000 rials deduction, the Tribunal finds that the claim must be dismissed for lack of proof.

VII. THE COUNTERCLAIMS OF NISCO

NISCO presents four separate counterclaims against Claimant relating to alleged liabilities of D & M International. First, NISCO alleges that the expatriate managers of D & M International left Iran in 1978 in breach of the Contract thus requiring NISCO to employ new

professional staff to perform the tasks covered by the Contract. NISCO claims US $42,077.20 paid to these employees.

Second, NISCO alleges that D & M International failed to pay social insurance premiums due for work performed by its employees, an unspecified portion of which NISCO alleges it has paid as required by Article 38 of the Social Security Act of Iran. NISCO now seeks to recover the US dollar equivalent of the 17,464,892 rials it alleges to be due.

Third, NISCO alleges that soil tests performed for the construction of the Ahwaz mill led to major defects in the foundation that was subsequently constructed. NISCO seeks to recover US $1,474,000 in expenses that it allegedly incurred to investigate and repair the foundation defects.

Fourth, NISCO seeks unspecified damages for "false accusation and injury to reputation" allegedly caused by the prosecution of Claimant's case.

a. The Counterclaim for Reimbursement of Employee Payments

NISCO has submitted no evidence to support the allegation that it hired and paid new employees to perform the obligations of D & M International under the Contract. Certain bank records and internal company documents which NISCO submitted indicate only that it paid 856,000 rials to

five employees of D & M International for services performed from 20 March to 20 April 1981. However, these same documents reveal that the D & M invoice for this period had not yet been prepared and would be "turned down" in any event. This payment was for services performed by D & M International personnel for which services NISCO would have been obligated to pay D & M International under the Contract in any case. Thus it does not give rise to liability. In the absence of further evidence the Tribunal must dismiss this counterclaim for lack of proof.

b. The Counterclaim for Social Insurance Premiums

The evidence that D & M International remains liable for unpaid social insurance premiums consists of a letter dated 7 April 1982 from the Social Insurance Organization of Iran to NISCO stating that, on the basis of 77,043,860 rials paid under the Contract, D & M International owes a total of 17,464,892 rials in principal and delayed payment damages. The method used for calculating the amount due is not indicated, nor does the letter suggest that the records of the Social Insurance Organization have been reviewed to determine what, if any, payments have already been made. Finally, the legal basis for the calculation is not set forth.

With regard to the 7 April 1982 letter the Tribunal further notes that NISCO has claimed that it has made some of the payments on behalf of D & M International under Article 38 of the Social Insurance Act. These payments would have been credited against the total liability and should have affected the calculation of outstanding amounts due. However, no such credit appears in the letter, indicating either that the payments were not made or that the calculation is inaccurate. Moreover, Claimant contends that the social insurance premiums are payable only on employee renumeration, which constitutes only about 20 per cent of the total payments made under the Contract. NISCO has not countered this argument.

The Tribunal must conclude that the evidence in support of the counterclaim is insufficient to prove liability. While Claimant has challenged the Tribunal's jurisdiction over the counterclaim on a number of grounds, the Tribunal need not determine this objection in light of this conclusion.

c. The Counterclaim for Defective Performance

On 17 November 1982, the day of the Pre-Hearing Conference, NISCO submitted its third counterclaim seeking compensation for damages allegedly resulting from purportedly defective soil tests performed by D & M International.

The evidence offered consists of an undated internal NISCO memorandum stating simply that a number of foundations had collapsed due to incorrect soil mechanics calculations and a number of photographs purportedly demonstrating defects in the building. NISCO presented no expert opinion on either the validity of the soil tests or on the relation of any testing defects to the foundation problems that later developed. Claimant presented the testimony of one of its officers indicating that the building defects could be attributed to a number of causes unrelated to the tests performed by D & M International. On the basis of the submitted evidence the Tribunal is unable to find that D & M International's performance was in any way defective. The counterclaim is therefore dismissed for lack of sufficient proof. In light of this holding, the Tribunal need not decide on the objections to the Tribunal's jurisdiction over and timeliness of this counterclaim.

d. The Counterclaim for Injury to Reputation

NISCO first presented its counterclaim for alleged injury to its reputation in its Hearing Memorial filed on 9 May 1983, three days before the Hearing. No circumstances have been suggested which would justify this delay in filing the counterclaim. The Tribunal determines that the counterclaim must be dismissed for non-compliance with Article 19, paragraph 3, of the Tribunal Rules.

VIII. THE CLAIM AGAINST NIGC

The claim against NIGC arises out of services performed under an alleged Contract executed by D & M International and NIGC in 1973. The Claimant seeks US $108,435 due under two invoices issued under that contract or, in the alternative, this same amount either in quantum meruit for the services performed or under the invoices as an account stated.

NIGC does not contest that the services were performed or that the invoices are accurate. Instead, NIGC contends that the Claimant has not proven that the parties had entered into a contract and that the Tribunal has no jurisdiction over claims based upon quantum meruit or account stated.

In support of the claim, Claimant has submitted the two invoices referred to and the affidavit of Mr. Yaghoubian, the Managing Director of Claimant's Tehran office during the relevant period.

While Claimant has not presented a copy of the alleged contract, explaining that it has been unable to recover its records from Iran, the two invoices submitted both refer to "contract agreement No. 302/2093". These references, together with the statement of Mr. Yaghoubian and the fact that NIGC does not dispute that the services were performed, are sufficient to indicate that the parties entered into a contract.

There being no dispute regarding the services or that payment has not been made, the Tribunal holds that the Claimant is entitled to the US $108,435 due 30 days after the date of the last invoice, that is 24 November 1978. The Tribunal also finds that the Claimant is entitled to interest at a rate of 10 percent per annum on the principal amount as from that date to the date on which the Escrow Agent instructs the Depositary Bank to pay the Award.

IX. COSTS OF ARBITRATION

The Tribunal determines that each of the parties shall bear its costs of arbitration.

X. AWARD

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

The Claim against, and the Counterclaims of, Respondent IRANIAN MEDICAL CENTER are dismissed.

The Claim against, and the Counterclaims of, Respondent THE ATOMIC ENERGY ORGANIZATION are dismissed.

The Claim against, and the the Counterclaims of, Respondent NATIONAL IRANIAN STEEL COMPANY are dismissed.

Respondent THE ISLAMIC REPUBLIC OF IRAN is obligated to pay and shall pay to Claimant DAMES & MOORE the sum of One Hundred Thousand United States Dollars (US $100,000) plus simple interest at the annual rate of ten (10) per cent calculated as from 1 January 1981 up to and including the date on which the Escrow Agent instructs the Depositary Bank to pay the Award.

Respondent NATIONAL IRANIAN GAS COMPANY is obligated to pay and shall pay to Claimant DAMES & MOORE the sum of One Hundred and Eight Thousand Four Hundred and Thirty Five United States Dollars (US $108,435) plus simple interest at the annual rate of ten (10) per cent calculated as from 24 November 1978 up to and including the date on which the Escrow Agent instructs the Depositary Bank to pay the Award.

Such payments shall be made out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algiers dated 19 January 1981.

Each of the parties shall bear its costs of arbitration in this case.

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

Dated, The Hague
20 December 1983

Nils Mangård
Chairman
Chamber Three

In the Name of God,

Richard M. Mosk
Dissenting Opinion as to Part IV

Parviz Ansari Moin
Dissenting Opinion as to Parts III, V, VII and VIII