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Case No. 140

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IRAN-UNITED STATE

140-246

140-246

دیوان داری دعاوی ایران - ایالات متحدہ

Case No. 140

Chamber Two

Award No. 114-140-2

T.C.S.B., INC.,

Claimant,

and

IRAN,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحدہ	
ثبت شد - FILED		
Date	۱۳۶۲ / ۱۲ / ۲۶	تاریخ
16 MAR 1984		
No.	140	شماره

AWARD

Appearances

For Claimant:

Mr. Stephen M. Truitt
Mr. Mark Bravin
Representatives of TCSB
Mr. Dick Tadjer
President of TCSB
Mr. David Hattis
Vice-President of TCSB

For Respondent:

Mr. M.K. Eshragh
Agent of the Islamic
Republic of Iran
Mr. Abolhasan Mohammadi
Legal Adviser to the Agent
Mr. Sayfollah Mohammadi
Attorney of Housing
Organization
Mr. Davood Hadinejac
Representative of Housing
Organization
Mr. Mohsen Kakavand
Representative of Bank
Tejarat
Mr. Gholamali Zarif Golzar
Assistant to Housing
Organization

Also Present:

Ms. Jamison Selby
Deputy Agent of the
United States of America



I. The Claims

The Claimant, T.C.S.B., Inc. ("TCSB"), a Maryland corporation, has brought four claims against Iran and has specified three particular agencies, instrumentalities or entities, the Ministry of Housing and Urban Development, the Housing Organization and Bank Tejarat (formerly Irano-British Bank).

Claim One

In 1975 the Claimant was retained by the Respondent, the Housing Organization, to act as consulting engineer on a large housing project (Mali Abad) to be built near Shiraz, Iran. The actual construction was to be performed by a joint venture called Bouygues-Tessa. The Claimant began work in May 1975 pursuant to a letter of intent, and a formal contract (the "Project Supervision Contract") was concluded in July 1975 between the Claimant and the Housing Organization. The contract provided, and the Claimant performed its duties for, a 51-month term ending in July 1979, although it should be noted that Bouygues-Tessa suspended its work, primarily for lack of funding, in November of 1978, by which time approximately 57 percent of the project was completed.

The Claimant alleges that the Housing Organization breached its contract with the Claimant by failing to make the required quarterly fee payments during the final year of the contract. The Claimant also seeks refund of the

15 percent withheld from each payment for recovery of an advance payment (which, in fact, was not paid in advance but only in May 1978), and the 10 percent withheld as a performance guarantee. In addition, the Claimant seeks payment of fees for work done after the end of the contract and of a bonus allegedly due under the contract. The Claimant seeks damages in the amount of U.S. \$3,678,493, plus interest. The Claimant also seeks a declaration that neither the Housing Organization nor Bank Tejarat have any right or claim with respect to a bank guarantee and a stand-by letter of credit issued in connection with the advance payment made to the Claimant under the Project Supervision Contract.

The Housing Organization alleges that the dispute regarding the amount owing under the Project Supervision Contract was settled by a 1979 Settlement Agreement entered into by the two parties. The Housing Organization also maintains that TCSB has not applied the proper contract payment provision in calculating the amount to which it claims to be entitled. Finally, alleging that the Claimant did not properly perform its contractual services or pay social security fees and taxes, the Housing Organization counterclaims for approximately 1.8 billion rials.

Bank Tejarat counterclaims for 25.6 million rials, representing the face amount of the letter of credit issued in connection with the advance payment made to the Claimant.

Claim Two

The Claimant alleges that it entered into an oral agreement with the Housing Organization, pursuant to which it was to perform site work supervision. While a draft written contract was prepared, it was not signed. The Claimant alleged that it performed site work supervision services as requested by the Housing Organization during the period August to November 1978 for which no compensation was paid. The Claimant seeks damages of U.S. \$313,598, representing payment for the cost of work performed, plus interest, lost profits and incidental damages.

In response, the Housing Organization denies the existence of a contract with the Claimant.

Claim Three

TCSB, alleging that as a result of Iran's failure to protect its personnel and property, it suffered damages, sought over U.S. \$309,000, representing the value of lost property, the cost of withdrawing its personnel and the extraordinary severance pay it was required to pay to its Iranian employees. The Claimant has, in effect, abandoned this claim, stating that it does not have access to suitable evidence.

Claim Four

TCSB alleges that the Housing Organization breached a consulting engineering services contract (the "BHRC Contract") entered into by the parties in May 1975, by failing to pay fees for work performed. The Claimant seeks damages of U.S. \$131,671, representing the unpaid fees and lost profits, plus interest. The Claimant originally based its claim on breach of contract. Following the Full Tribunal decision on 5 November 1982 that the BHRC Contract contained a forum clause providing for the exclusive jurisdiction of the Iranian courts and that therefore the Tribunal lacked jurisdiction over the contract claim,^{*} the Claimant argued that it was entitled to recovery of U.S. \$105,072 based on the theory of quantum meruit.

The Housing Organization maintains that the Claimant is precluded from recovery based on quantum meruit, both because of its tardiness in raising such a claim and because the Claimant's right to payment arises only from the contract and thus is not within the jurisdiction of this Tribunal. The Housing Organization also alleges that it has paid TCSB in excess of the amount to which it is entitled under the contract and seeks recovery of that excess amount. Finally, maintaining that the Claimant did not perform the services it was required to perform under the BHRC Contract, the Respondent counterclaims for damages of approximately 3.7 million rials.

* Interlocutory Award No. ITL 5-140-FT (T.C.S.B., Inc. and Iran) dated 5 November 1982.

The Claimant, the Housing Organization and Bank Tejarat, in addition to the damages requested, also seek costs.

A hearing was held in this case on 3 and 4 November 1983.

II. Jurisdiction

Apart from the issue of the jurisdiction of the Tribunal to adjudicate the Claimant's quantum meruit claim for services performed pursuant to the BHRC Contract (which is discussed along with the merits of that claim in Section III below) and the issue of jurisdiction over tax and social security counterclaims (which is discussed in Section IV below on counterclaims), no serious jurisdictional issues are presented in this case. Our jurisdiction over claims based on the contract in the first claim was upheld by the Full Tribunal in Interlocutory Award No. ITL 5-140-FT (T.C.S.B., Inc. and Iran) dated 5 November 1982. The Claimant is a Maryland corporation and, during the relevant period, over 50 percent of its stock was held directly or indirectly by four individuals, all of whom are, and at the material times were, United States citizens. The Claimant, therefore, is a national of the United States as defined in Article VII, paragraph 1 of the Claims Settlement Declaration. The Tribunal notes that the documentation provided by the Claimant did not make clear that all four of

these individuals became United States citizens prior to the date the claim arose, but, although it would in such circumstances be helpful if the relevant documents were shown to the Tribunal, this question was settled by competent testimony at the Hearing.

There can be no dispute that the Respondents, the Ministry of Housing and Urban Development, the Housing Organization and Bank Tejarat, are included within the definition of "Iran" in Article VII, paragraph 3 of the Claims Settlement Declaration.

III. The Merits

Claim One

Pursuant to the Project Supervision Contract, the Claimant's remuneration for its services on the Mali Abad Project, as set forth in Annex No. 2 to the contract, was to be based on one of several formulas, depending on the time period of construction and the amount of the Project completed, and was to be paid by means of an advance payment and by 17 quarterly payments beginning 20 July 1975.

Beginning in May 1975, the Claimant performed the services required under its contract, both in the United States and in Iran, reviewing Bouygues-Tessa's design documents, specifications and drawings, monitoring the quality of Bouygues-Tessa's construction work, and developing and implementing a system for verifying and

controlling the cost of construction. The Claimant routinely submitted reports to the Housing Organization as required by Article 4 of the contract and worked closely with representatives of the Housing Organization and of Bouygues-Tessa.

In May 1978, when the Housing Organization was finally able to pay TCSB its advance payment, the Claimant secured a bank guarantee (Reference number 21/717, dated 7 May 1978) from the former Irano-British Bank in favor of the Housing Organization in the amount of 30.4 million rials, which amount was reduced in June 1978 to 25,687,408 rials. This bank guarantee was valid until 22 September 1979, but could be extended at the request of the Housing Organization. To secure this bank guarantee, the Claimant obtained an irrevocable letter of credit from the National Bank of Washington in favor of the Irano-British Bank for the same rial amount. This letter of credit was valid until 20 March 1979 and was secured by monies deposited by the Claimant at the National Bank of Washington. At the request of the Irano-British Bank, and in conjunction with the extension of that bank's guarantee in favor of the Housing Organization, the expiration date of this letter of credit was extended to 10 October 1979.

In September 1979, after the end of the 51-month term of the contract, the Housing Organization requested the Irano-British Bank to extend its bank guarantee for another

year. In conjunction with that request, the Irano-British Bank requested another extension of the letter of credit from the National Bank of Washington. On 5 September 1979, the National Bank of Washington telexed the Irano-British Bank, stating that it had been informed by TCSB that the contract was complete and requesting clarification and confirmation from the Housing Organization. The Irano-British Bank did not respond prior to 10 October 1979, and the Claimant contends that the letter of credit expired by its own terms. Bank Tejarat (the successor to Irano-British Bank) argues that the letter of credit did not expire and counterclaims for its amount. The Claimant requests a declaration by the Tribunal that the Housing Organization and Bank Tejarat have no rights or claims under the guarantee and letter of credit. These matters are dealt with below in Section IV dealing with counterclaims.

The Claimant, alleging that the Housing Organization's failure to pay its fees was a breach of contract, now seeks payment for the services it performed. The evidence establishes that the Housing Organization has paid TCSB 153,223,612 rials with respect to this contract and has withheld taxes in the amount of 9,864,867 rials pursuant to the contract. Two payments to third persons were made by the Housing Organization in 1979 and 1980 in the total amount of 857,167 rials, allegedly to pay obligations of the Claimant, but only one of those payments in the amount of 660,000 rials was authorized by the Claimant.

The Housing Organization alleges that any dispute regarding the amount it owes to the Claimant was resolved by a Settlement Agreement entered into by the parties in late 1979. As a result of settlement negotiations on 24-25 September 1979, the Claimant submitted to the Housing Organization a Settlement Agreement signed by it under cover of a letter dated 26 September 1979 which conditioned its acceptance of the agreement on two actions by the Housing Organization: first, approval by the Organization within thirty days, and second, obtaining agreement of Iran's central bank to payment in U.S. dollars. While the Housing Organization alleges that it eventually accepted the agreement, although the Claimant was not informed of that acceptance, the evidence is clear that it was not accepted within the thirty-day period and thus never came into effect.

The Housing Organization also seeks to avoid liability by alleging that the Claimant failed to perform its supervisory work, thus causing the Respondent damage in excess of 1.7 million rials. The Housing Organization, however, has failed to provide any evidence of the Claimant's neglect of duty. Under the Project Supervision Contract, TCSB was obligated to monitor the work performed by Bouygues-Tessa, verify its compliance with the Project's plans and specifications, and notify the Housing Organization of problems as they arose. While the Housing Organization has alleged a number of defects in the construction of the Project, it has neither provided evidence of those defects

nor established Claimant's responsibility for them. The Claimant, however, has produced evidence that it performed its duties, including inspection of Bouygues-Tessa's work, notification to the Housing Organization of problems and approval of only such work as met the applicable contract specifications.

The Housing Organization's attempt to hold TCSB responsible for defects in the Project is further undermined by the fact that on 15 September 1979 it entered into a Settlement Agreement with Bouygues-Tessa pursuant to which Bouygues-Tessa was released from all warranties and guarantees relating to the work it had performed on the Project. The Housing Organization can not now hold TCSB responsible for defects when it has already released the prime contractor from responsibility.

The Tribunal, therefore, holds that the Respondent, the Housing Organization, is obligated to pay the Claimant for the full 51-month term of the contract.

The payment provisions of the contract are set forth in the following terms of Annex No. 2:

B. Remuneration for services

1. For the scope of work described above TCSB is to receive the fee of 2.43% of the estimated prices plus Contractor's Services Price (including escalation) as those terms are defined and used in the Construction Contract between Housing Organization and Bouygues-Tessa. If the project comes

below the estimated prices (including Contractor's Services Price) TCSB fee is to be as follows:

if A = estimated prices plus

Contractor's Services Price

B = actual cost

A-B= savings below estimated prices

TCSB fee will be $2.43\% A + \frac{1}{3} (A-B) 2.43\%$

2. If the construction time is extended beyond the period indicated in the contract between the Housing Organization and the Contractor, TCSB will be paid 1.65 x (payroll plus expenses) for the additional time, payments are to be paid monthly.
3. If the construction of the project does not commence, TCSB will be paid all (expenses and payroll) x 1.65 incurred until the day of notification that the project will not commence.
4. If only part of the project is constructed TCSB will receive the fee of 2.43% of the contract cost actually executed.

The Claimant contends it is entitled to an additional U.S. \$3,645,493 million for the work it performed during the 51-month contract period. The Claimant arrives at this figure by applying Paragraph B(1) of Annex No. 2, which, in essence, provides for payment calculated on the basis of the initial cost estimate of the Project increased by escalation in prices and change orders. The Housing Organization, on the other hand, maintains that since the Project was never completed, the Claimant should be entitled to no more than 2.43% of the contract cost actually executed, as provided in Paragraph B(4) of Annex No. 2.

The Tribunal finds Paragraph B(4) controlling. The Claimant itself has admitted that at the time Bouygues-Tessa halted construction work on the Project, 11 November 1978,

only 57% was completed. The Claimant argues that Paragraph B(4) was included in the contract solely to provide a basis for calculating its fee in case the overall size of the Project was decreased by more than 20 percent, but the Tribunal is not persuaded. The language is clear on its face, and the Claimant has pointed to no ambiguity in the contract on this point and has provided no evidence of the alleged intention of the parties for which it argues. The Tribunal, therefore, holds that for the work it performed during the 51-month contract period, the Claimant is entitled to 2.43 percent of the contract cost actually executed.

The Claimant has submitted evidence that the final contract cost of that portion of the Project which was completed ranged between 9.615 billion rials and 11.1 billion rials. The lower figure, 9.615 billion rials, was the figure agreed to by the Housing Organization and Bouygues-Tessa in the September 1979 Settlement Agreement between those parties. The Tribunal notes, however, that this figure was arrived at as part of a compromise of Bouygues-Tessa's claim against the Housing Organization in exchange for Bouygues-Tessa's release from all guarantees and warranties, and therefore it may be presumed to understate the actual contract cost. The Claimant argues that the correct figure for total contract cost is 11.1 billion rials, the figure submitted by Bouygues-Tessa in its final accounting in May 1979. The Tribunal notes, however, that in its July 1979 Final Report to the Housing Organization,

the Claimant stated that the 11.1 billion figure contained charges for which no reimbursement should be made, and recommended that the total contract cost should be reduced to slightly more than 10.502 billion rials. The Tribunal concludes that for the purpose of calculating the Claimant's fee, the contract cost is 10,502,273,318 rials, the figure which the Claimant itself recommended to the Housing Organization. The Claimant's total fee for the work it performed during the 51-month contract period is therefore 2.43% of 10,502,273,318 rials or 255,205,242 rials.

TCSB also seeks recovery of U.S. \$33,000, which it claims represents its fee for 3 months additional work it performed on the Project at the request of the Housing Organization following the termination of its contract. The Claimant, however, has produced no evidence that the Housing Organization ever requested it to perform these additional services. The Tribunal, therefore, holds that the claim for the additional three months fees must be dismissed for lack of proof.

The Claimant also seeks U.S. \$10,287 as a bonus payment under the contract. The Tribunal concludes that the Claimant is not entitled to such a bonus. Under Paragraph B(1) of Annex No. 2 of the contract, such a fee was payable only if the entire Project was completed.

As stated above, the Claimant was entitled to receive 255,205,242 rials for its supervisory services under the contract. It has already received 163,748,479 rials, including the 9,864,867 rials withheld for the 5.5 percent contract tax. From the balance of 91,456,763 rials still owing to the Claimant, 5.5 percent of the total amount due under the contract, representing the Iranian contract tax, must be deducted, because the parties agreed that it was to be withheld from all payments made to the Claimant, and it was in fact withheld from all such payments. 5.5 percent of 255,205,242 rials is 14,036,288 rials, of which 9,864,867 rials have already been withheld. Thus, 4,171,421 rials additional should be deducted. The Claimant is thus entitled to receive 87,285,342 rials from the Housing Organization.

Under the contract, the Housing Organization was obligated to make payments to TCSB in rials, not dollars. The Claimant has argued that any rial amount to which it is entitled should be converted into dollars for payment from the Security Account at the rate of exchange prevailing as of 20 July 1979, the date upon which the contract terminated, at which time the rate of exchange was 72.5 rials to 1 U.S. dollar. The Housing Organization maintains that the rate of exchange should be the rate in effect on the date the Award is issued, which is 85.9 to 1. The Tribunal agrees with the Respondent. Normally with a debt of this kind, where there has not been a devaluation and where it is not clear that the claimant would have promptly converted

the rials into dollars if they had been paid when due, the Tribunal believes the better rule is that conversion should be made as of the date of the award. The Claimant assumed under the contract the risk of exchange rate variations. The fact that by virtue of the Algiers Declarations payment of the present award is to be made in U.S. dollars, should not, by itself, relieve him of that risk. This rule was followed by Chamber 3 in its award in the Rexnord Case, Award No. 21-132-3, dated 10 January 1983. In the instant case it is clear that, had TCSB received the rials owing to it in 1979, it would have immediately sought to convert those rials into dollars. However, the Tribunal notes that by July 1979 Iran had imposed exchange controls that gave the Iranian Central Bank considerable discretion to approve or refuse foreign exchange, so it is uncertain whether the Claimant would have been successful in obtaining conversion of rials to dollars. Neither this question nor the validity of the controls was argued by the parties in this case. The Tribunal concludes that, on the record before it, conversion in this case should be made as of the date of the award.

In order to compensate the Claimant for the damages it has suffered due to the delay in payment, the Tribunal considers it fair to award Claimant interest at the rate of 12 percent from 20 July 1979.

The Tribunal, therefore, holds that the Claimant is entitled to U.S. \$1,016,127, plus interest at the rate of 12 percent from 20 July 1979.

Claim Two

The Project Supervision Contract between TCSB and the Housing Organization did not include supervision of the Project site work. The Claimant maintains that it entered into a separate contract with the Housing Organization to provide such supervisory services.

The Claimant's evidence for the existence of a contractual relationship between it and the Housing Organization does not consist of a document signed by both parties, but rather a series of documents, evidencing ongoing negotiations between it and the Housing Organization. The most important of these documents is a letter dated 12 September 1977 from the Housing Organization to TCSB which stated in part as follows:

RE: Control and Supervision of Phase 1, 2 of Site Work

... [S]ince your Supervision and Control Contract is being considered by [Housing Organization] and will soon be ready for signature, in order to avoid further delays in this regard, please take action to control Phase 1 and 2 as soon as possible, and inform us of the result. It is obvious that in case no agreement is reached in signing the Control and Supervision Contract of the said project, the Organization will pay you the fee regarding Phase 1 and 2 review which will be equal to what had been orally agreed by the Executive Unit.

Following other correspondence and meetings with representatives of the Housing Organization, TCSB submitted to that Organization a draft letter of intent dated 16 August 1978 which detailed the scope of services which TCSB was to perform and the remuneration it was to receive. The Housing Organization did not respond to TCSB's draft letter of intent.

From August through November 1978, TCSB performed site work supervisory services for the Housing Organization but received no payment for those services. In late October, representatives of the Housing Organization met with TCSB officials and informed them that because of lack of funds all site work supervision would be suspended as of 20 November 1978. According to TCSB, the parties also discussed the amount to which TCSB was entitled, based on TCSB's August 1978 letter of intent. Following the meeting, TCSB prepared and submitted to the Housing Organization a memorandum of the meeting's discussions, recording the Housing Organization's proposal that TCSB be paid 22.14 million rials for its 3 months of services. At the end of the memorandum, TCSB requested the Housing Organization to notify TCSB within 10 days if the document did not correspond to the agreement reached by the parties at the October meeting. The Housing Organization did not notify TCSB of any problem or disagreement with the memorandum.

It is clear that the Housing Organization requested TCSB to perform the site work supervisory services and that the Claimant performed such services. Whether the two parties entered into an oral contract or not is difficult to determine, but that is not important for purposes of this claim because the Claimant has, in effect, been awarded compensation for site works under Claim One. The recommended total contract cost of 10,502,273,318 rials on which the Tribunal has decided to base the Claimant's fee includes the cost of site works performed by Bouygues-Tessa. Therefore, included in the amount of the award to be made with respect to Claim One is a fee of 2.43 percent of the actual cost of site work. To grant anything further under Claim Two would be to give double recovery. Therefore, this claim is dismissed on the merits.

Claim Three

The Claimant has asserted that as a result of Iran's failure to protect its personnel and property from November 1978 through August 1979, it suffered damages of approximately U.S. \$309,000. The Claimant, however, has essentially abandoned this claim, asserting that the relevant evidence is not available to it. The Tribunal, therefore, holds that TCSB's claim for damages for such failure to protect its personnel and property must be dismissed for lack of proof.

Claim Four

In its original Statement of Claim, TCSB alleged that the Housing Organization had breached the BHRC Contract between the two parties by failing to pay for services rendered by the Claimant pursuant to that contract. On 5 November 1982, the Full Tribunal decided that the forum clause in the BHRC Contract met the requirements of the exception in Article II, paragraph 1 of the Claims Settlement Declaration and therefore excepted from the jurisdiction of the Tribunal any claims based upon that contract. (Interlocutory Award No. ITL 5-140-FT (T.C.S.B., Inc and Iran) dated 5 November 1982). The Full Tribunal expressly left it to this Chamber to decide whether any claim remains related to the BHRC project that is not based on the contract and therefore is within our jurisdiction. The Claimant has alleged that it is entitled to compensation for the value of the work it performed on the project on the basis of the doctrine of unjust enrichment or quantum meruit.

A claim based on unjust enrichment is not a claim based on a contract and therefore is not a claim excluded from the Tribunal's jurisdiction by the forum clause exception in Article II, paragraph 1 of the Declaration. However, the Tribunal does not believe that a legal cause of action based on that theory arises, because the contract remains valid and enforceable. Where a valid contract exists, unjust enrichment is a derivative, or at best a secondary alternative, legal theory to an action on the contract. While

there are some precedents, particularly in the United States, for permitting a claimant, if he so chooses, to sue on the basis of unjust enrichment, rather than on the contract, the preponderance of authority is to the contrary. See 98 Corpus Juris Secundum §§27 and 30; 5 Corbin on Contracts §1110 at 590-91 (1964); 12 Williston on Contracts §1459 at 75-85 (3rd ed. 1970) (both stating that the alternative pleading of unjust enrichment and breach of contract is permissible in certain United States jurisdictions); Répert. Dalloz, Droit Civil, "Enrichissement sans Cause" par François Goré, No. 101 (1972); Drakidis, "La 'Subsidiarité', Caractère Spécifique et International de L'Action D'Enrichissement sans Cause", Revue Trimes trielle de Droit Civil 577 (1951); Gutteridge and David, "The Doctrine of Unjustified Enrichment", V Cambridge Law Journal 204 (1935) (all stating that the general rule is that unjust enrichment may not be pleaded if a valid contract exists). In international cases, a similar result is found in the Ambatielos arbitration, 12 R.I.A.A. 91; See also Shreuer, "Unjustified Enrichment in International Law", 22 American Journal of Comperative Law 28 at 194-297 (1974).

While recognizing that the evidence presented by the parties and the Tribunal's own research have necessarily been limited to a few legal systems, the Tribunal holds that a substitute right of action based on unjust enrichment does not arise in this case. Where a contract binding on both parties exists, the issue of whether a performance of the contract results in any "enrichment" of a party and whether

such enrichment is "unjust" in relation to the other party, cannot be decided without specifically determining the contractual rights and obligations of the parties. This is not to say that the existence of a valid contract necessarily prevents recovery in other contexts. Thus, a claim may arise from performance going beyond the contract, or from a situation in which the parties to a contract have, by agreement between them, liquidated their original contractual relationship. Furthermore, the assets and liabilities of each party in connection with a contract, may be relevant for claims arising from measures affecting property rights. But no such claims have been presented in the present case.*

For the above reasons this claim is dismissed on the merits.

IV. The Counterclaims

A. The Housing Organization

Asserting that the Claimant did not properly perform its work under the Project Supervision Contract, the Housing Organization seeks damages of approximately 1.7 billion rials. As discussed above, the Respondent has provided no

* The Chamber thus reaches a similar result, but one based on different reasoning from that of Chamber 3 in its Award No. 97-54-3 (Dames and Moore and The Islamic Republic of Iran dated 20 December 1983).

evidence that TCSB failed to perform its contractual obligation to supervise and monitor the design and construction work performed by Bouygues-Tessa. The Tribunal also notes that it was only after this claim was filed that the Housing Organization raised the issue of the Claimant's failure to perform its contractual duties. The Claimant, on the other hand, has presented considerable evidence of its performance of its duties, including its identification of defects.

The Tribunal, therefore, holds that this counterclaim must be discussed for lack of proof.

The Housing Organization has also presented a counterclaim alleging, inter alia, that TCSB did not pay social insurance contributions due to the Social Security Organization in respect of TCSB's employees in Iran and owes a sum of money "as his due tax". The former allegation was elaborated upon in a memorial filed 11 November 1983; it appears from a "Supplement" filed on 29 December 1983 that the latter allegation was meant to refer to "taxation in respect of revenues arising out of its (i.e., TCSB's) operations".

Under Article II, paragraph 1, of the Claims Settlement Declaration the Tribunal has jurisdiction to decide "... any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims arise out of debts, contracts expropriations or other measures affecting property rights...."

Accordingly, 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 above 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.

Since the 5.5 percent tax has been taken into account in the present Award, the tax and social security counterclaims must be dismissed for lack of jurisdiction.

The Housing Organization has also counterclaimed for damages arising from TCSB's alleged failure to perform its contractual obligations under the BHRC Contract. Since the Full Tribunal has dismissed the Claimant's claim based on the BHRC Contract for lack of jurisdiction, the counterclaim based upon that same contract must also be dismissed for lack of jurisdiction.

B. Bank Tejarat

Alleging that TCSB has been unjustly enriched by the failure of the National Bank of Washington to extend or pay the amount of the letter of credit, Bank Tejarat has demanded that 25.6 million rials, the amount of the letter of credit, be paid to it by the Claimant.

Since according to the present Award, TCSB is not in default of its obligations towards the Housing Organization under the Project Supervision Contract, it follows that no claim for payment or extension can be made lawfully by the Housing Organization or the Irano-British Bank and its successor, Bank Tejarat, under the bank guarantee [Bank guarantee Reference Number 21/717, dated 17.2.2537 (7 May 1978)] and the irrevocable letter of credit (letter of credit number 2377, dated 20 June 1978 and amended 27 June 1978).

The counterclaim of Bank Tejarat is, therefore, dismissed on the merits.

V. Costs

Each party shall be left to bear its own costs of arbitration.

AWARD

THE TRIBUNAL AWARDS AS FOLLOWS:

With respect to the first claim, the Respondent, Housing Organization, is obligated to pay the Claimant, T.C.S.B., Inc., U.S. \$1,016,127, plus interest at the rate of 12 percent per year, calculated as from 20 July 1979 to the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.

This obligation shall be satisfied by payment out of the Security Account established by paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981.

The bank guarantee of the former Irano-British Bank [Reference no. 21/717, dated 17.2.2537 (7 May 1978)] and the irrevocable letter of credit of the National Bank of Washington [no. 2377, dated 20 June 1978 and amended 27 June 1978] have no further purpose, and the parties shall not make any further effort to call or collect on either of them.

That part of the first claim for work performed after the end of the 51-month contract period, the third claim, and the counterclaim of the Housing Organization with respect to defective performance under the Mali Abad contract are dismissed for lack of proof.

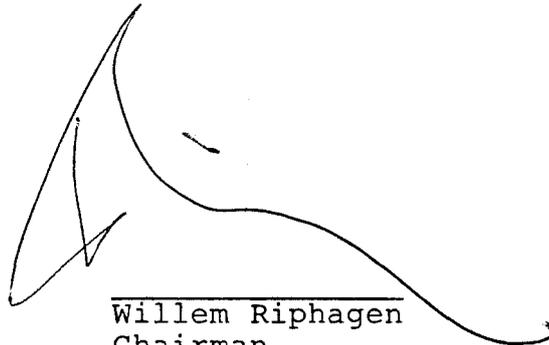
The counterclaims of the Housing Organization relating to taxes and social security contributions (first claim) and to the B.H.R.C. contract (fourth claim) are dismissed for lack of jurisdiction.

All other claims and counterclaims are dismissed on the merits.

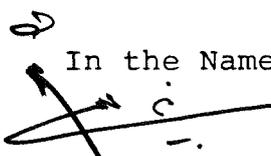
Each of the Parties shall bear its own costs of arbitrating this claim.

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

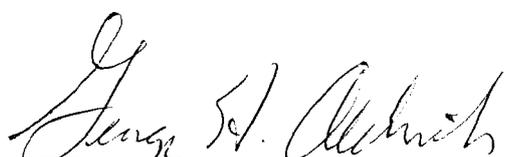
Dated, The Hague
16 March 1984



Willem Riphagen
Chairman
Chamber Two

 In the Name of God

Sharie Shafeiei
Dissenting in part,
Concurring in part


George H. Aldrich