

ایالات متحده

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ORIGINAL DOCUMENTS IN SAFE

Case No. 160

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** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of _____
- Date _____
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** DISSENTING OPINION of MR MAHMOUD KASHANI
- Date _____
14 pages in English X pages in Farsi

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CASE NO. 160

CHAMBER ONE

AWARD NO. ITM 29-160-1

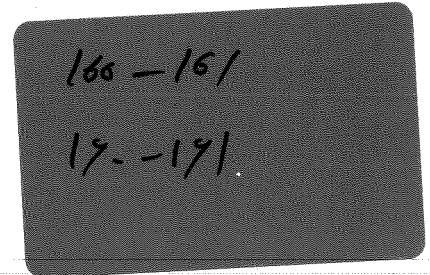
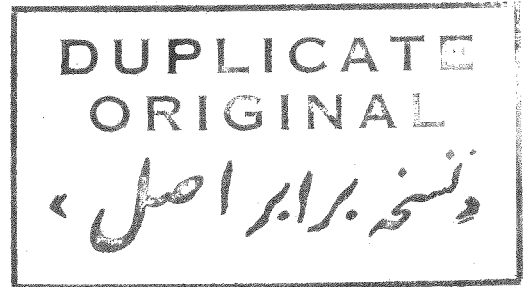
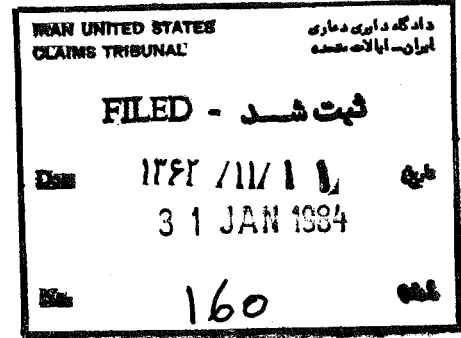
RCA GLOBCOM COMMUNICATIONS
INC. (RCA GLOBCOM INC.),
RCA GLOBAL COMMUNICATIONS
DISC, INC. (RCA GLOBCOM DISK),
RCA GLOBCOM SYSTEMS, INC.

Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN,
TELECOMMUNICATION COMPANY OF IRAN,
IMPERIAL IRANIAN SUPREME COMMAN-
DER'S STAFF, MILITARY SWITCHING
PROJECT OFFICE, BANK MELLI IRAN,
BANK MARKAZI, FOREIGN TRADE BANK
OF IRAN,

Respondents.



DISSENTING OPINION

OF MAHMOUD KASHANI
MEMBER OF CHAMBER ONE

I

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By a Motion dated 12 September 1983 (21 Shahrivar 1362), the Claimants have requested that the Tribunal direct the Respondents, the Government of the Islamic Republic of Iran and the Army Joint Staff of the Islamic Republic of Iran, to stay further proceedings in the action commenced by these latter before branch 2 of the Tehran Public Court, pending a decision by the Tribunal in this case.

The Army Joint Staff of the Islamic Republic of Iran has commenced an action against RCA Global Communications Disk, Inc., before Chamber 2 of the Tehran Public Court. Because the relief sought in this action (an English version of which has been attached to Claimants' Motion dated 12 September before this Tribunal) ⁽¹⁾ has not been reflected in the majority Decision, and because it is important that attention be paid to the contents of that Statement of Claim in order to render a decision in the present case, I here first quote portions of it as follows:

"A contract was signed between the Iranian Supreme Commander's Staff, formerly (presently named as Joint Army Staff of the Islamic Republic of Iran), and the defendant company on Farvardin 27, 1353, (April 16, 1974).

Under Articles 3 and 5 of this contract, the defendant company agreed to provide and install 10 computer teletype centers, warehouse and central workshop, a training facility for the training of technical personnel, and supervision and maintenance of the teletype system.

The defendant agreed to provide the following services and complete the following assignments against the payment of U.S.\$13,060,000.00 and Rials. 93,825,000.00:

(1) Translation by Lawyers' & Merchants' Translation Bureau, New York.

1. Manufacture and supply the equipment required for all the plans of telegraphic switching center and other required equipment including assemblers and compilers without any limitation so that the work is performed satisfactorily, the project is maintained and the Army Switching Project is available for use, and the whole network is set in working order. (INTS system and connecting lines are available and can be used).
2. Provide the spare parts, spare machinery and tools and implements for tests and estimates.
3. Provide the power generators (motors) including batteries required in emergency.
4. Test the equipment in the factory, packing, insurance and transportation of the goods from the factory to the site of installation and storage of goods.
5. Installation of all the equipment and available material according to the technical specifications.
6. Supply and install cables (to join all the trunks and the connecting lines to the telegraphic equipment).
(Connection between CTF and KDF - Telegraphic Switching Project),
These will be provided and installed by the seller.
Join the cables with terminals of both the dividing components.
7. Successful testing of the equipment, programs at the installation sites, works related to the installation and make the whole system available for use.
8. Provide the equipment for the Telegraphic Switching Project according to Annex 8 and technical specifications and amend the programs if necessary.
9. Supervise and maintain the work performance for 420 weeks and all the equipment provided under the program.
10. Guarantee satisfactory performance of the system, equipment and planned programs.
The completion of the works will be confirmed by the main office of the Switching Project by issuing a certificate stating that the performances are fully accepted.
11. Prepare and submit plans, regulations, documents and monthly reports and reports regarding production progress and all other reports which are necessary for completion of this contract.
12. Training of the army personnel regarding equipment, programs and plans provided by the seller.
13. To appoint a representative for the customs clearance and

an authorized representative of the factory in Iran so that the buyer may be able to contact him regarding matters related to the contract. (The Officer named as: Director of the Local Project.)

14. Prepare and submit the timetables (period-wise) for completion of the project and detailed plans for each site.

Under Article 7 of the contract, the seller (defendant), keeping the terms and conditions of the contract and following the timetables mutually agreed by the parties, will proceed with the execution of the contract and complete all the assignments. According to the timetables (period-wise) shown in Annex 8 of the contract, the defendant agreed to manufacture the parts in the factory and, thereafter, begin installation at the sites and make those available for use.

* * *

According to Annex 4 of the contract, the project will be based on the TURNKEY System.

It means that both the supply of the parts and performance of the works/services, installations at the centers, training, construction and maintenance of all the centers should have proper similarity and coordination with each other from the technical point of view, in such a way that all the terms of the contract are executed and the contract is completed as desired and mutually agreed by the parties. According to Article 13 of the contract, in case of delay in completion of the contract, making centers available for use, completion of the training programs and supervision of the work due to fault of the seller, the buyer will have the right to deduct the amount, detailed below, from the total cost/amount of the equipment and services rendered at each center at its own discretion:

First Time: 30 days delay:	.8 percent daily.
Second time: 30 days delay:	.16 percent daily.
Delay Thereafter: 20 days:	.24 percent daily
Delay Thereafter: Last 20 days:	.4 percent daily.

According to Article 10 - Part 2 (Section B) of the contract, if the work is delayed for more than 100 days, the buyer has the right to cancel the contract and determine the loss caused due to delay or negligence of the seller and at its own discretion, claim and recover the amount.

According to Article 9 of the contract, if the material provided, equipment installed, programs or services rendered are not in accordance with the contract, the buyer can refuse to buy or pay for such items. The buyer will give one month's notice to the seller in order for it to comply. If the seller fails to

~~fulfill the obligations according to the terms and conditions~~ of the contract within a month, the buyer can refuse to accept such items and in that case the buyer can take action according to Article 10 - Part I of the contract to give a longer period of time to the seller in that regard. In each case, one month or longer period of time given to the seller, as mentioned above, will be considered as delay and the buyer can claim loss according to Article 13 of the contract. Furthermore, according to Article 6 of the contract, the defendant is obliged to pay all the taxes, government dues, charges of the Social Security Organization and similarly, all the taxes and dues, charges of the Social Security Organization regarding employees of the defendant, both Iranians and foreigners. According to Article 4 - Part 3 of the contract, if differences occur regarding the contract and contract related documents, (except differences regarding technical works), the buyer has the right to choose the most suitable terms and conditions of the contract and contract related documents at its own discretion.

According to Articles 14 and 18 of the contract, all the differences regarding the contract between the parties involved will be resolved according to the laws of Iran through competent Iranian courts. The law applicable in regard to the contract will be the Iranian Law. As the available record shows, my client has had to bear the following expenses so far in regard to work, performance or execution of the project mentioned in the contract:

1. U.S. \$11,390,592.23 paid to the defendant company and Rials. 67,931,500.00.
2. Regarding cost of 1781 teletype apparatus for the use of the system mentioned in the contract.
West German Marks: 33,800,000.00 and Rials. 122,500,000.00
3. Salary paid to 99 employees working for the System, as mentioned in the contract, Rials. 221,740,200.00.
4. Expenses for constructing the buildings at the sites for installation of the apparatus, Rials. 78,085,500.00.
5. Amounts paid to the consulting engineers regarding execution of the project of the contract, Rials. 39,515,650.00 and U.S. \$519,800.00.
6. Amount paid by the Telecommunication Company of Iran for providing channels needed for the project, Rials.122,950,000.00.

The timetables were attached to the contract. All the centers mentioned in the contract should have been completed and made available for use by the middle of Shahrivar 1355 H.S. (September 6, 1976) and handed over to the client.

Nevertheless, the defendant company violated the terms of the contract many times and caused numerous delays due to maladministration, deficiency of the technical personnel and lack of supply of necessary equipment for installation at the proper time since the beginning of the work and during the entire period of work performance. The client had to send reminders and memorandums to the defendant in that regard...."

II

By its order dated 21 September 1983, the Tribunal has requested that the Respondents in Case No. 160 file a Reply to the Claimants' Motion for a stay of proceedings in the Tehran Public Court with the Tribunal by 17 October 1983.

The Respondents have sent a Reply by their Memorial dated 18 October 1983, wherein they object to the Motion. By virtue of Article II, paragraph 1 of the Claims Settlement Declaration, the Respondents have objected to this Tribunal's jurisdiction over the Claimants' claims and have relied upon certain articles of the relevant contract as follows:

"(a) Article 18 of the Contract provides that

'The laws applicable to this Contract are those of Iran, and this Contract is in all respects subject to the laws of the Imperial Iranian Government.'

"(b) Article 14 of the Contract provides that

'Any and all disputes arising between the parties in respect to interpretation of the articles of this Contract or to its execution, which cannot be amicably settled, shall be resolved through recourse to the competent Iranian courts in accordance with Iranian law.'

"(c) Article 20 of the Contract provides that

'This Contract has been prepared in Farsi and English in six identical copies, one of which has been submitted to the Seller. All of the copies of this Contract are of equal value and validity. In the event of any discrepancy between the two versions, the Farsi shall be controlling. All correspondence between Buyer and Seller shall be in Farsi, apart from those technical specifications and commercial documents which are in English.'

"(d) Article II, paragraph 1 of the Algiers Declaration has excluded the following instances from the jurisdiction of the Tribunal:

'.... and, 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, in response to the Majlis position.'

"(e) Article 26 of the UNCITRAL Rules does not give the Tribunal authority to request the Government of the Islamic Republic of Iran or its governmental organizations to stay and suspend actions which they have commenced in the Iranian courts, because Article 26 deals with the conservation of goods and property that are in danger of perishing or destruction.

"(f) Pursuant to the Iranian Civil Procedure Code, a request for stay of proceedings cannot come from one party to a dispute only. Therefore, if the Tribunal makes such a request of the Government of Iran, it cannot be carried out within the framework of the internal laws of Iran (Articles 290 through 298 of the Iranian Civil Procedure Code)."

III

I dissent from the Decision taken in this case by the majority in Chamber One. The Claimants comprise three separate companies, which allege that they have been organized and registered in the United States and that their shares are owned by nationals of that country. A determination as to the American nationality of the Claimants, which pursuant to Article VII, paragraph 1 of the Claims Settlement Declaration is one of the most important conditions of this Tribunal's jurisdiction, has not yet been made. Therefore, it is not possible for this Tribunal to take any decision, even of an interim nature. Although the Tribunal has merely made a request of the Respondents

in its final Decision, and so it might be possible on this basis to overlook the invalid premises employed in the taking of that Decision, nonetheless the arguments adduced in the Decision are so invalid and unjustified that I am obliged to state my views.

The contract out of which the present claim arises -- and both parties to the dispute admit its validity and rely upon its provisions-- embodies an express condition giving the Iranian courts jurisdiction over examination of any interpretation of the contract and over adjudication of disputes arising out of it. In these circumstances -- in the face of such an explicit stipulation -- the Tribunal must divest itself of jurisdiction, in compliance with the Act ratified by the Islamic Consultative Assembly on 14 January 1981 and in conformity to Article II, paragraph 1 of the Claims Settlement Declaration. Moreover, by virtue of the exceptional nature of the Tribunal's jurisdiction and its obligation to take a restrictive interpretation of its jurisdiction, as it has itself admitted in numerous cases, the Tribunal must act on a prima facie basis in the face of the provisions of contracts concluded by the Government of Iran or its agencies with foreign nationals; and it must, by virtue of the mere existence of conditions which in any manner whatever confer jurisdiction upon the Iranian judicial fora, divest itself of jurisdiction in favour of those fora, which possess an inherent and general competence. Indeed, a tribunal endowed with an exceptional and restricted jurisdiction is never authorized to broaden its own jurisdiction over such matters by resorting to various pretexts or by cavilling and hair-splitting over the provisions of contracts conferring jurisdiction upon the Iranian courts. For, among those rights conferred upon the Iranian courts, is the right, if the need arises, to interpret the various

articles of this contract, including the condition pertaining to jurisdiction. And, because of the existence of the explicit condition and not susceptible to any other interpretation which has been incorporated in this contract, on principle there no longer exists any scope for the Tribunal to consider itself competent to hear disputes arising out of this contract. The Army Joint Staff of the Islamic Republic of Iran has brought its claims before the public courts of Iran in reliance upon Article 14 of the above-mentioned contract. Inasmuch as this action falls within the terms of the contract, it is in conformity with the contract relied upon by the Parties. Furthermore, the action taken by the Government of Iran is in conformity with the Act ratified by the Islamic Consultative Assembly and with the Claims Settlement Declaration, because in such instances the Tribunal has been deprived of jurisdiction; whereas the Claimants, RCA Global et al., which have disregarded the express provisions of the contract in filing their claim with this Tribunal, are acting in violation of the very contract upon which they rely. Moreover, they are acting in violation of the Algiers Declaration, to which the Government of the United States has formally adhered.

An important point here is that, in its Decision regarding Case No. A-2 rendered in December 1982, the Full Tribunal took the position that claims by the Government of the Islamic Republic of Iran against nationals of the United States cannot be brought before this Tribunal. Thus, if the Government of the Islamic Republic of Iran and its dependent agencies have been prevented from lodging claims against nationals of the United States with this Tribunal, and are also unable to file their claims with the competent forum -- which is, by virtue of the contract concerned, the Iranian courts -- then this situation flies in the face of all logic. In addition,

then, in this case the Decision by Chamber One of the Tribunal is actually inconsistent with the Full Tribunal's decision in Case No. A-2; the effect of this inconsistency is nothing less than to deprive the Government of the Islamic Republic of Iran of its rights. In addition, it is illogical to request a sovereign Government to withdraw or stay an action which has been brought before a competent forum as an original claim, and to bring that same claim before an incompetent forum in the form of a counterclaim. The Government of the Islamic Republic of Iran and its State agencies have both the right and the duty to resort to the competent Iranian courts in order to vindicate their rights under the terms of contracts which they have concluded with foreign companies and enterprises. For, failure to resort to those courts would result, not only in deprivation of their contractual rights, but also in the application of the statute of limitations to their lawful rights and claims. Under these circumstances, the request that the Government or its dependent agencies stay proceedings is blatantly inconsistent with the lawful rights and interests of that Government and its agencies.

The Decision by the majority in Chamber One requesting the Government of Iran to stay proceedings despite the fact that the pertinent contract confers jurisdiction upon the Iranian courts, constitutes a blatant excess of this Tribunal's jurisdiction. As such, it is incompatible with observance of the ordinary and natural reading of contractual terms and with any interpretation founded upon good will — if, indeed, such an explicit condition can on principle bear different interpretations. This Decision constitutes a manifest instance of abuse of judicial authority, which has always been recognized as being among the grounds for setting aside an arbitral decision (see, inter alia, Article 665 of the Iranian Civil Procedure Code

and Article 649 of the Netherlands Civil Procedure Code on Arbitration).

In addition, there exist no particular legal texts among these documents and materials with which the Tribunal is dealing and from which it derives its jurisdictional competence, such as would justify the taking of such a decision.

Article 26 of the UNCITRAL Arbitration Rules authorizes the taking of interim measures at the request of an arbitrating party in cases where urgent proceedings are necessary for the sake of conserving the goods in dispute; that is, where the disputed good is in danger of spoilage and destruction or of passing beyond reach of its owner by reason of the lapse of time before adjudication. A sovereign government can never be directed to stay an action which is being heard by a competent judicial forum, until such time as another forum supposing itself to have jurisdiction shall have completed its own proceedings. This Tribunal possesses an exceptional jurisdiction, and it is never authorized to interfere with proceedings in an action before a domestic Iranian court possessing an inherent and general jurisdiction -- a court which has been recognized as competent by the terms of the relevant contract.

This is particularly underscored by the fact that Article VII, paragraph 2 of the Claims Settlement Declaration, which provides that "Claims referred to the arbitration 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," and this is with regard to the which one party brings before this Tribunal on its own volition and initiative as an original claim. In addition, in its Decision in Case No. 388 the Full Tribunal has accepted the fact that this

Tribunal does not have sole jurisdiction over counterclaims of the Government of the Islamic Republic of Iran. Therefore, it can be conclusively stated that the fact that the American Claimants have brought a claim before this Tribunal has no effect whatever upon the following up of the claims of the Government of Iran against the aforementioned companies in other competent fora; and in this way, the Tribunal shall have no authority to issue an order or even a request for stay of proceedings in the actions brought before the Iranian courts.

In the absence of any explicit text whatsoever, and instead of pursuing the natural course of adjudication — namely, dismissing the Claimants' motion — the majority in Chamber One has had recourse to a non-legalistic argument, adducing something by the name of the "inherent power" of the Tribunal to preserve its jurisdiction. The "inherent power" of a tribunal, if not supported by any confirmed and recognized legal text or rule of jurisprudence, is nothing other than the exercise of despotism and dictatorship; and this is something which has been prohibited by the laws of numerous nations, including Article 166 of the Constitution of the Islamic Republic of Iran.

The said Article provides that

Court decisions must be reasoned and supported by articles of the law and by the principles on which basis they are rendered.

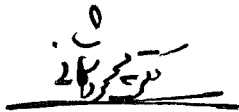
This principle is, without a doubt, of such great importance that, as a fundamental duty of judges, it has been elevated to the status of a constitutional requirement. Nor can this Tribunal, which deems itself an international forum, disregard this internationally accepted and recognized principle or the current practice of international judicial fora, which accompany their decisions by

reason and issue them on the basis of the relevant terms of the law.

In its Decision, the majority bases its request to the Government of the Islamic Republic of Iran upon the need to avoid issuance of contradictory decisions. However, it is obvious that it is, first and foremost, this very Tribunal which must divest itself of jurisdiction in deference to the Claims Settlement Declaration and to the explicit language of Article 14 of the contract, in order to avoid issuing contradictory decisions. Moreover, even if this Tribunal should assert that it has jurisdiction over adjudication of the Claimants' claims, and even if the Iranian courts take up the claims by the Government of the Islamic Republic of Iran by virtue of the competence which they possess, and therefore, different or even contradictory decisions are ultimately issued, such a situation is hardly an uncommon or exceptional event in international legal dealings. And in this event, it is at the enforcement stage of these decisions that such conflicting decisions as shall have resulted must be resolved — and that, before other fora, which are concerned with enforcing such decisions. Furthermore, this Tribunal cannot invalidly continue its proceedings in anticipation of such eventualities and request the Government of Iran and the Ministry of Defence to stay their claims or withdraw them from the competent forum.

In order to vindicate its rights, the Ministry of Defence should prosecute its submitted claim before the Tehran Public Courts which, by the terms of Article 14 of the contract, have been expressly recognized as competent to hear disputes between the Parties. Under circumstances in which the request of the Government of the Islamic Republic of Iran in Case No. A-15 (Parts 2-A and 2-B) that an interim order be issued requiring the Government of the United States to recognize the Government of the Islamic Republic of Iran's ownership

of its properties within the jurisdiction of the Government of the United States, and prohibiting the issuance of sale permits for those properties, which are worth billions of dollars, has been disregarded by this Tribunal and in effect set aside since October 1982 despite its importance and merits -- even though by virtue of Principle A and the terms of the Algiers Declaration the Government of the United States has undertaken to make means available for transfer of those properties to Iran -- it is a matter of the utmost regret that this Tribunal has acted so swiftly⁽²⁾ against the Government of the Islamic Republic of Iran in taking and issuing a decision on the baseless requests filed in Case No. 160.



Dr. Sayyid Mahmoud Kashani

(2) This request was filed with the Tribunal Registry on 12 September 1983; and it was announced that the time set for a Reply by the Respondents, which was the extremely brief period of one month despite the Respondents' preoccupation with numerous other cases, could not be extended.