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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 255
CHAMBER THREE
AWARD NO. 176-255-3

DIC OF DELAWARE, INC.,
UNDERHILL OF DELAWARE, INC.,

Claimants,

-and-

TEHRAN REDEVELOPMENT CORPORATION,
THE GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN,

Respondents.

AWARD

Appearances:

For the Claimants:

Mr. Frank Phelan,
Vice-President,
DIC of Delaware, Inc.
Mr. Hamid Sabi,
Mr. Kendall Meyer,
Ms. F. Sabi,
Mr. D. Roberts,
Mr. L. Hopmans,
Attorneys
Ms. J. Harvey,
Assistant.

For the Respondents:

Mr. Mohammad K. Eshragh,
Agent of the Government of
the Islamic Republic of Iran
Mr. Nematolah Mokhtari,
Legal Adviser to the Agent
Mr. Yusef Moulaie,
Mr. Mansour Moazami,
Mr. Mohammad Hossein Safarzadeh,
Representatives of Tehran
Redevelopment Corporation.

Also present:

Mr. John Crook,
Agent of the Government of the
United States of America
Mr. John Reynolds,
Legal Adviser to the Agent

I. The Procedural History

The Claimants, DIC OF DELAWARE, INC. ("DIC") and UNDERHILL OF DELAWARE, INC. ("Underhill") (or collectively "the Claimants"), filed a Statement of Claim on 14 January 1982, against TEHRAN REDEVELOPMENT CORPORATION ("TRC") and the GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("the Government"). (TRC and the Government are sometimes referred to interchangeably and collectively or individually referred to as "Respondents"). The claim against TRC is for payments allegedly owing under four contracts entered into between 2 July 1975 and 9 September 1977 relating to the construction of a large development of prefabricated concrete apartment buildings in western Tehran known as the Ekbatan Housing Project or the Ekbatan Urban Development Project ("the Ekbatan project"). The Statement of Claim noted in the list of Respondents that the Government included the Poor People's Foundation, Bank Markazi and the Ministry of Housing. The said Statement, however, did not specify any particular claim against the Government, nor against any subdivision or alleged agency thereof apart from the claim against TRC.

The Statement of Claim included a request for interim partial relief, and on 15 April 1982, the Claimants submitted a Memorandum in support of this request. The Tribunal denied the request in its Decision of 14 May 1982 on the ground that there had not been a sufficient showing that such interim relief was "necessary within the meaning of Article 26 of the Tribunal Rules".

On 7 June 1982, Statements of Defence were filed by the Ministry of Housing and Urban Development, Bonyad Mostazafan ("Foundation for the Oppressed" or "Poor Peoples' Foundation"), Bank Markazi, the Government and TRC. TRC on the same date also filed a Statement of Counterclaim seeking reimbursement of payments made to the Claimants; damages for the allegedly defective performance by the Claimants; an amount allegedly due under a security bond for liquidated

damages and interest and costs. On 1 December 1982, the Government filed another Statement of Defence. On 28 December 1982, TRC filed a Supplementary Statement of Defence and Counterclaim. On 8 April 1983 DIC and Underhill filed their Reply to the TRC Counterclaim.

On 4 April 1983, the Claimants filed a Pre-Hearing Memorial, and on 22 April 1983 a Pre-Hearing Conference was held.

In its Order of 6 May 1983, the Tribunal ordered the parties to file by 15 July 1983 all evidence and memorials on which they wished to rely, and all rebuttal evidence and memorials by 1 October 1983. The Hearing was scheduled for 2 November 1983. By its Order of 25 July 1983, the Tribunal extended the initial filing date for evidence and memorials to 4 August 1983.

On 1 August 1983, the Claimants submitted their Hearing Memorial. On 4 August 1983, the Poor People's Foundation filed a Rejoinder, and the Government filed a Memorial. Also on 4 August 1983, TRC submitted the Farsi version of its Hearing Memorial. The English version of the Hearing Memorial was filed, together with the exhibits, on 2 September 1983. TRC, in this document added counterclaims for liquidated damages, for the return of documents and for reimbursement of other payments. In addition, on 5 September 1983, the Claimants filed a Memorial in response to the Memorial of the Government.

On 6 October 1983, TRC submitted its rebuttal evidence and Memorial. The Claimants filed a Supplementary Hearing Memorial on 7 October.

The Hearing was held on 2 November 1983, with the Claimants, the Government and TRC appearing and presenting oral and written evidence and argument. Pursuant to Article 13, paragraph 5, of the Tribunal Rules, a member who resigned after the hearing on the merits participated in this Award.

II. The Factual Background

Some time prior to 1975 TRC was formed in order to construct a large volume of reasonably priced housing in a short period of time. Ultimately in excess of 14,000 apartment units in 33 buildings were to be completed within several years, creating a modern urban development for 75,000 people, called the Ekbatan project.

On 2 July 1975, DIC, Underhill and Starrett and Eken S.A. ("Starrett") (the Claimants and Starrett are sometimes collectively referred to as "Contractors") entered into a contract ("Phase I Agreement" or "Phase I Contract") with TRC in connection with the development and construction of the concrete superstructures for approximately 4,000 apartments in eight buildings comprising Phase I of the housing project. DIC, Underhill and Starrett are each treated separately throughout the contract and are each assigned separate obligations and a specific percentage renumeration.

This Phase I Contract required DIC to provide "technical assistance, advice and know-how" in relation the concrete foundations and superstructure portion of the work, exclusive of pre-cast concrete facades, and Underhill to render "technical assistance, advice, and know-how" with respect to the pre-cast concrete portion of the work. Both were to operate under the "overall construction management supervision" of Starrett, whose role was, inter alia, one of co-ordination, supervision and mobilization of the construction, review of technical data and drawings and assistance and advice with respect to the management and coordination of the work. TRC was to supply architectural and structural drawings and specifications (or "Plans and Specifications"). TRC was to be responsible for the purchase of materials and equipment and the provision of a labour force. In short, TRC acted as its own architect and general contractor. The

contract called for completion of the work within a specific period. TRC warranted that it had and would have the required funds to finance the projects and make the payments under the agreement; that it had and would have at the site required Iranian labour and materials; and that it had obtained the necessary governmental permits. Also, it was TRC's responsibility to make the buildings ready for occupancy.

The contract specified the respective percentage fees payable to the Contractors. DIC was to receive 3.525% of the "Cost of the Work"; Underhill, 2.525%; and Starrett 4.95%. The term "Cost of the Work" is defined in the General Conditions of the contract as including "all items of cost and expense incurred directly in the performance of the Work." Specific items comprising the "Cost of the Work" were enumerated. Certain items of the "Cost of the Work" were not to be included in the calculation of the Contractors' fees. TRC was required to make available to Contractors all records necessary to determine the amount of the Cost of the Work incurred each month. The parties provided for interest of 8% per annum on monies not paid when due. Payment was to be made on a monthly basis, subject to subsequent adjustments in the event it was determined that any such adjustment was necessary. In 1976, the Contractors' requisitions reflected another method for calculating monthly fees, called the "Trade Payment Breakdown." Under this method, the total construction cost was estimated and used to derive a payment measurement - $80 for every square meter completed.

The Contractors and TRC jointly determined the percentage of work completed each month, and this percentage was the basis of the Contractors' monthly requisitions for payment. On certification by the Contractors of completion of the work (or 97% thereof), an audit of TRC's books was to

be carried out so that the actual cost of the work could be calculated and any necessary adjustment made in a final payment.

Pursuant to the contract, Starrett was to provide TRC with a U.S. $2,000,000[1] bank guarantee with respect to a mobilization fund deposited by TRC and a $10,000,000 bond to secure possible liquidated damages up to that amount. TRC was supposed to provide the Contractors with $2,500,000 to secure the payment of fees. In November of 1975 the parties released the guarantee and the bond pursuant to an agreement.

DIC, Underhill and Starrett were also engaged by TRC to perform similar work on the successive phases of the Ekbatan project. A contract for Phase II involving 6000 units in nineteen buildings of a somewhat different design, was signed on 1 October 1976 ("Phase II Agreement" or "Phase II Contract"). Its provisions were substantially the same as the contract for Phase I, although the fees were reduced so as to allocate 2.484% of the Cost of the Work to DIC, 1.778% to Underhill, and 3.488 % to Starrett. A further discount of 10% was provided for if TRC made timely payment of the fees, which fees were to be paid within 10 days of the end of each Iranian month. These on-account payments were to be determined by the percentage of costs in place, in accordance with the so-called "Trade Payment Breakdown" method. The $80 per square meter completed figure was utilized. The rate of interest on any invoices not paid when due was to be agreed upon by the parties at the time any dispute might arise. Completion was to take place within a specified period.

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[1] Reference to dollars ($) is to United States Dollars.

A further agreement for Phase IA ("Phase IA Agreement" or "Phase IA Contract") was signed on 1 October 1976. It provided for new buildings related to Phase I of the project. The fee percentages were the same as for Phase II. The interest rate on unpaid amounts was left to be determined by the parties.

A Credit Agreement was also signed on 1 October 1976 whereby the Contractors agreed to reduce the fees earned up to a total of $2,000,000 for work completed under the Phase I and Phase II Agreements after 1 October 1976. This was to be implemented by eight quarterly deductions of $222,000 and a final deduction of $224,000 against the fees earned at the completion of Phases I and II. This credit agreement superseded an earlier agreement for a $2,000,000 reduction of the fees.

With regard to the scope of work and the duties and obligations of the Contractors and TRC, the terms of all three contracts are basically identical. Only the financial aspects noted above differ.

There is an issue as to whether or not the parties also entered into a fourth agreement, relating to Phase III of the Ekbatan project (see Part IV B 1 below).

Work proceeded on all phases, and until late in 1977, payments were made by TRC on the basis of the monthly requisitions submitted by the Contractors. However, no fees were paid with respect to Phase III of the project. Work continued even after that time.

On 20 February 1978, TRC ordered the entire expatriate workforce on Phase III to be removed from the project, and on 10 April 1978 the Contractors were ordered to remove from the project 50% of the entire remaining workforce. The entire workforce was withdrawn shortly after an agreement with TRC was signed on 10 June 1978 providing in part for such withdrawal.

On 18 May 1978 Starrett executed an assignment in favour of DIC and Underhill which provided for the assignment of

> "[a]ll of its respective right, title and interest in and to any proceeds of any nature whatsoever, received or to be received by you [DIC and Underhill] or the undersigned in connection with any claim arising under or in connection with or relating to that certain agreement dated July 2, 1975 . . . This assignment shall include the proceeds of any claim which may be filed by you and/or the undersigned with the Ministry of Justice in Iran, and any other claim which may be filed or made, in connection with the Ekbatan project."

The 10 June 1978 written agreement provided that the contracts between the Contractors and TRC would be terminated on the condition that TRC and the Contractors settle their accounts within 18 days. When no such settlement of accounts took place, the 10 June 1978 agreement was rendered null and void by its own terms, and the notices of default provided by the various contracts were served on TRC by the Contractors on 28 June 1978. Those notices provided for termination of the contracts if no payments were made. Thus, the contract for Phase I was to be terminated as of 13 July 1978, and the contracts for Phases IA and II were to be terminated as of 8 July 1978. Notice of other alleged breaches by TRC were sent out by the Contractors. Notices were also sent out with respect to Phase III. On 28 June 1978, the Contractors certified to TRC that the work on Phases I and IA had been completed and demanded an audit of the records of TRC so that a final adjustment could be made in accordance with the respective contracts. No such audit was performed, however, and no further payments were made to the Contractors.

III. Contentions of the Parties

The Claimants assert that the Contractors or their principals and affiliated companies had completed foundation

and superstructure work on projects of similar magnitude to the Ekbatan project. The specific entities which were the Contractors were apparently formed for the project in question.

The Claimants allege that they are United States nationals within the meaning of the Claims Settlement Declaration. They also claim that pursuant to the Claims Settlement Declaration, TRC is subject to the jurisdiction of the Tribunal as an entity controlled by the Government of Iran. The Claimants assert that TRC came under government control, inter alia, when the Ministry of Housing and Urban Development appointed Mr. M. Moazami as temporary managing director on 13 November 1979, and has remained under such control ever since. TRC denies that the Tribunal has jurisdiction over it because, it asserts, it is not an instrumentality or agency of, or an entity controlled by, the Government of Iran, but rather an independent corporate entity.

TRC also disputes the validity and effect of the assignment by Starrett dated 18 May 1978. The Claimants contend that it operated to vest the entire claim in them from the date it arose, which was between 28 June and 18 July 1978, i.e., subsequent to the assignment. TRC contends that the portion of the claim attributable to Starrett is not properly before the Tribunal because the alleged assignment was not effective and that even if it were, the claim was not owned continuously by United States nationals as required by the Claims Settlement Declaration, inasmuch as Starrett is a Swiss corporation.

As to the merits of the case the Claimants make the following contentions. Although the work by the Contractors continued, by late 1977 TRC began to default in payments on submitted requisitions; and the progress of the work was impeded by the repeated failure of TRC to make timely

payments and provide the necessary and contractually required equipment, materials and labour, licences and permits. Despite the notices of default served on TRC on 28 June 1978, no payments were made. The various contracts were terminated by virtue of these notices. Even if the Trade Payment Breakdown method appears as a contract clause for the first time in the Phase II Contract of 1 October 1976, that method for calculation of fees had previously been adopted by the parties with respect to Phase I work, since by March 1976 TRC did not or could not any longer provide the Contractors with the information necessary to determine the "Cost of the Work" in accordance with the provisions of the Phase I Agreement. This Trade Payment Breakdown method was reflected in Requisition No. 11 relating to Phase I.

According to the Claimants, a fourth agreement was entered into on or before 9 September 1977 relating to Phase III of the project for four additional buildings. The Claimants contend that negotiations resulted in an oral agreement for them to undertake work on terms identical to the Phase I and IA projects, and that a written form of agreement, dated 9 September 1977, and comprising the terms of the oral agreement was drawn up, but was never signed. The Claimants rely on that agreement, which, they contend, was terminated in February, 1978.

According to the Claimants the amount due to the Contractors had been presented to TRC in the form of various requisitions and finally in four requisitions, which, in the absence of the audits or completion of the contracts, set forth the total fees earned on the alleged Phase III Agreement up to 20 February 1978 and on each of the other

contracts up to 17 June 1978. The amounts shown as due on the requisitions are as follows:

		total net fees	amount unpaid
Phase I	Requisition No. 32	$ 5,001,420	$ 656,688
Phase IA	Requisition No. 20	$ 566,525	$ 239,156
Phase II	Requisition No. 20	$ 2,475,082	$ 1,280,402
Phase III	Requisition No. 5	$ 596,424	$ 596,424
	Total	$ 8,639,451	$ 2,772,670

Thus the amount claimed as still outstanding on the basis of the requisitions is $ 2,772,670. To this the Claimants have added $337,956, which allegedly was allowed as a credit for prompt payment, yielding an overall figure of $3,110,626.

DIC and Underhill, in addition to the amounts stated in the requisitions, also claim a further sum of $3,321,653. This amount allegedly represents the additional fees earned that would have been computed as owing to the Contractors by 17 June 1978 if TRC had carried out its obligations properly and proceeded with the work on the agreed-upon schedule. In the absence of access to TRC's records, the Claimants arrive at this amount by utilizing the agreed-upon Trade Payment Breakdown method. DIC and Underhill do not seek amounts that would have been earned if the contracts had been fully performed through completion of the projects. They utilize the date of 17 June 1978 because they claim they had actually performed all services they could perform as of that date in view of the delays caused by TRC, and assert that they are not seeking lost profits arising out of performance which could not be rendered by virtue of the premature termination of the contracts.

The Claimants also seek payment of $300,000 for extra work performed and of $169,117 for "Improper deductions by TRC", but allow a further deduction of $52,000 under the Credit Agreement, above deductions already made in the four final requisitions. The Claimants seek an amount attributable to the increase in costs due to inflation which would have increased the amount due them. The Claimants also seek interest on unpaid amounts from 28 June 1978 and their costs of this proceeding.

TRC alleges that work done by the Contractors throughout the project did not meet the required standards and was defective. In its original Statement of Counterclaim, as corrected in its submission of 28 December 1982, TRC claims it is entitled to a refund of all sums paid, which it alleges to be U.S. $6,000,000 plus damages for "delayed payment loss" from the date the loss was incurred until the execution of the Tribunal's Award, then estimated at $1,080,000, plus $10,000,000 guaranteed by the security bond. TRC maintains that the requisitions submitted were incorrect and overstated the percentage of completion. TRC argues that by June 1978 Phase I was only approximately 65% complete, that Phase IA was 83% complete, and that an overall figure for the percentage of work completed would be not more than 65%. Furthermore, TRC argues that the basis of calculations of fees was unsound in that the figure of $80 per square meter was too high. TRC alleges that the credits given to it and the reduction of fees in the Phase IA and Phase II Agreements constituted an acknowledgement that fees were excessive. TRC contends that the Contractors, even if they were entitled to any fees, only would earn $4.5 million and that the Claimants have been overpaid by an amount of $8,492,285.

In its "Response to Claimant's Reply to Respondents' Statement of Counterclaim", which forms part of TRC's Memorial (filed in Farsi on 4 August 1983 and in English on

2 September 1983), TRC asserts it is entitled to collect equitable indemnity from the Claimants in the following amounts: $10,376,375 for defects in the Claimants' work and for expenses of TRC incurred in remedying the defects; $15,900,000 for delay in completion and delivery of work; $8,492,285 for overpayments; and $17,384,990 for "unjustified enrichment," plus costs of arbitration. TRC finally requests the return of all architectural services and site drawings under Article 1(k) of the General Conditions of contract[2].

As to claims relating to the alleged Phase III contract, it is TRC's position that no such contract existed, that no work was performed pursuant to any such alleged contract, and that no payments were or are due in connection therewith.

The Claimants make the following explanations concerning the credit arrangement and the contractual reduction of fees. The reduction of fees accorded in the Credit Agreement was due to increases in the Cost of the Work as a result of the addition of Phases IA and II. The Contractors made provisions for such quarterly deductions and for the 10% prompt payment discount in their requisitions. The reduction in the fee percentages in the Phase IA and Phase II Agreements was attributable to lower costs and expenses because there were no start-up costs which were necessary for Phase I.

The Claimants point out that counterclaims are based on the same allegations of fact as the Statement of Defence. Furthermore, they deny any alleged defects in workmanship. The Claimants allege that if such defects existed at all,

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[2] The Respondents did not seek to amend their counterclaim to allege damage claims not included in the earlier filed counterclaim. In view of the Tribunal's decision with respect to the counterclaims, it is unnecessary to determine whether such changes and additional claims are proper.

they are not attributable to the Contractors. The Claimants contend that none of the complaints of defective work was made while the Contractors were on the site, other than those of which they received notice and remedied in the normal course of their performance under the contracts. They further argue that project apartments have been advertised extensively for sale; that they are now mostly occupied; and that such a situation is inconsistent with allegations of major structural or other defects in the buildings.

The Government, the Ministry of Housing and Urban Development, the Poor People's Foundation and Bank Markazi deny that the claim in this case is attributable to any of them. The Ministry and the Foundation seek their costs of arbitration.

IV. Reasons for Award

A. Jurisdiction

The evidence establishes that DIC was incorporated in Delaware in 1975 and has remained thereafter a United States Corporation and that its shares are held entirely by United States citizens. Evidence also establishes that Underhill was incorporated in Delaware in 1975 and has remained thereafter a United States corporation. Its shares were owned for a portion of the relevant period by Underhill Construction Corp., which was a New York corporation, a majority of shares of which were, at all relevant times, owned by United States citizens. The shares were transferred to individuals, a majority of whom were United States citizens, who, during the remaining relevant period, owned such shares. DIC and Underhill are thus proper Claimants within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration.

Under Article VII, paragraph 3, of the Claims Settlement Declaration, the Tribunal has jurisdiction over an

Iranian entity only if it is an "agency, instrumentality or entity controlled by the Government of Iran." Even if TRC is still presently a joint stock company, the issue is not whether TRC exists in the form of a private entity, but rather whether it is "controlled by the Government of Iran," and the issue of control is one of fact. See Economy Forms Corporation and Iran, Award No. 55-165-1 (14 June 1983).

The Claimants have submitted sufficient evidence to establish that TRC is in fact an entity controlled by the Government of Iran. On 13 November 1979, the Government of Iran appointed a Managing Director of TRC. Other officers of TRC were also appointed by the Government of Iran. That the Government of Iran controlled TRC is confirmed by later events. For example, in a letter dated 5 July 1981, government-appointed managers of TRC wrote that TRC is "managed by a Government-appointed director and is under the supervision of the Ministry of Housing & City Planning. . . ." Moreover, in a letter dated 15 August 1981, the Ministry of Housing wrote to TRC that the government-appointed directors shall "in all respects be considered as the legal substitute for the directors of [TRC and do not require] any special authorization from the directors or otherwise from the owners. . . ." This Tribunal has previously found that the appointment of a manager by the Government is a prima facie indication of control. See, e.g., Rexnord, Inc. and Iran, Award No. 21-132-3 (10 January 1983). The Claimants' evidence of control in this case is more extensive than in previous cases in which the Tribunal held it had jurisdiction by virtue of governmental control and gives rise to a clear presumption of established and continuing government control, which presumption has not been rebutted by the Respondents. Thus, the Tribunal has jurisdiction over TRC. As a result of this holding there is no need to consider the status or involvement of the Poor Peoples' Foundation or Bank Markazi.

A further jurisdictional issue concerns the ownership of that portion of the claim which is based on Starrett's alleged assignment of its rights to DIC and Underhill. The Respondents contend that the Claimants cannot properly assert the claims of Starrett because Starrett's rights to payment under the contracts were not and could not be assigned, that therefore the Starrett claims are not "owned" by the Claimants and that such assignment, even if validly made, would not be adequate to provide Tribunal jurisdiction over the Starrett portion of the claim.

The evidence shows that at the relevant times Starrett was a Swiss company, 90% of the authorized stock of which has been owned by Starrett Housing International Inc., a United States corporation,[3] which has been wholly-owned by Starrett Systems, Inc., also a United States corporation, which, in turn, has been wholly-owned by Starrett Housing Corporation. The Tribunal has already found Starrett Housing Corporation to be a United States national as that term is defined by the Claims Settlement Declaration. See Starrett Housing Corporation and Iran, Interlocutory Award No. ITL 32-24-1 (19 December 1983).

It appears that 55% of the contract proceeds claimed are attributable to DIC and Underhill and 45% to Starrett. DIC and Underhill claim to be entitled to recover Starrett's share pursuant to the assignment dated 18 May 1978. This document takes the form of a letter in which, apparently as part of a general settlement arranged among the various Contractors, Starrett and Starrett Housing Corporation expressly assigned to DIC and Underhill all of their rights to their entitlement from claims under or related to the Phase I Contract and "any other claims which may be filed or made, in connection with the Ekbatan Project." Although all

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[3] It is not clear if the remaining 10% of the shares are outstanding. The Claimants have referred to Starrett as a wholly-owned corporation of Starrett Housing International, Inc.

of the issues concerning the assignment may not be technically jurisdictional, all of such issues shall be discussed together.

A question was raised concerning the validity of the assignment. Henry Benach signed the assignment on behalf of both companies. His signature has been accepted on behalf of Starrett in the past--particularly in connection with the contracts, and there is no showing that he was not authorized to sign the documents on behalf of the corporate entities. Indeed, minutes of meetings show him to be the representative of Starrett[4] as do the contracts themselves. For example, Paragraph 21 of the Phase I Contract provides that "for the purpose of making decisions" Starrett appoints Henry Benach as one of its "representatives".

The language of the assignment is clearly that of an assignment of rights to recoveries and claims as between the Contractors, and not merely a power of attorney or agency agreement.

The Respondents argue that both under Iranian law and the contracts, the consent of TRC was necessary for a valid assignment. The contracts contain an Iranian choice of law clause. The assignment presumably was made in the United States. Thus, the interpretation and effect of the assignment as between the assignor and the assignees is governed by United States law. Issues concerning assignability may be governed by the law of the debt or contract, which could be considered Iranian law. See, e.g., 2 Dicey and Morris on The Conflict of Laws 569-72 (10th ed. 1980). There is no showing that the laws of Iran and the United States are significantly different with respect to the legal principles applicable to this case.

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[4] At the time of the assignment, the claim was owned by the Swiss company and thus it was the proper assignor, unless it could be said that the ultimate parent company, Starrett Housing Corporation was the beneficial owner; it also executed the assignment.

Article 292 of the Civil Code of Iran in paragraph (2) prohibits the delegation of the duty to pay a debt without the consent of the creditor, but paragraph (3) allows the assignment of rights without such consent. Thus Starrett's assignment of its rights in the instant case was not prohibited under Iranian law.

Article 10(b) of the General Conditions of the various contracts states that Starrett "shall not assign the contract documents . . . except as provided in the Agreement." Paragraph 15 of the Phase I Contract and Paragraph 14 of the Phase II and Phase IA Contracts provide that the Contractors shall have the right to assign the Agreement to subsidiaries, affiliated or related companies with the consent of TRC, which consent would not be withheld unreasonably. The Respondents contend that inasmuch as Starrett had no right to make the assignment, the assignment is not valid. The Tribunal disagrees.

The rights assigned in the instant case are assignable. Prohibitions on the assignment of rights are strictly construed. For example, a contractual prohibition against assignment is generally interpreted as applying only to a delegation of obligations and not to the assignment of rights - particularly the simple right to receive monies. Even express prohibitions against assignments of rights are generally interpreted not to apply to an assignment of a claim or of the proceeds of a claim.

Moreover, it is arguable that a contract term prohibiting assignment of rights under the contract gives the obligor a right to damages for breach of the terms forbidding assignment, but does not necessarily render the assignment ineffective. Thus, even if the assignment constituted a technical breach of the contract clause in this case, TRC has shown no damage from any such breach. If no assignment had been made, Starrett would have been entitled to assert its own claim for its percentage of the

fees due or Starrett's parent could have brought such a claim before this Tribunal.

Even if the assignment of the rights was covered by the contracts, TRC could not withhold its consent to such an assignment unreasonably. There is no indication of any legitimate reason for withholding consent of the assignment of the right to receive payments. This is especially the case inasmuch as the Claimants are subject to whatever defenses, including offsets, TRC might have against Starrett, and the Claimants have agreed to be subject to any counterclaims, even if they exceed the amount of the claims. See footnote 5 infra. Thus, if the prohibition on assignments were applicable, the Tribunal could, and would on the record before it, consider any withholding of consent unreasonable and therefore not enforceable.

The Respondents also argue that the conduct of Starrett after 18 May 1978 was inconsistent with the alleged assignment. Such conduct, however, evidences only that Starrett continued to perform its contractual obligations - duties which were not affected by the assignment. The Respondents point to a Ministry of Justice "Judicial Notice Form" filed jointly by the Contractors. This form was a general demand for the payments of the amounts due, official notice of the termination of the contracts and a notice that if payment is not made the contractors "will refer the case to arbitration. . . ." The 18 May 1978 assignment states, however, that "this assignment shall include the proceeds of any claim which may be filed by you [the Claimants] and/or the undersigned [Starrett] with the Ministry of Justice. . ." In addition no action was filed jointly by the Contractors, and neither the form nor the claim contains any specific demand by Starrett for monies owing specifically to Starrett.

Whatever Starrett did would not affect the rights of DIC and Underhill vis-a-vis Starrett. Had Starrett collected monies from TRC and if TRC had no notice of the

assignment, TRC would not have to make the same payment to DIC and Underhill. But as Starrett did not collect any of the monies in dispute from TRC, DIC and Underhill are entitled to pursue the claim. It should be noted that during these proceedings Starrett affirmed the validity of the assignment. Thus, for the foregoing reasons, the Tribunal considers the assignment as valid and applicable.

The date of the assignment was shortly before the submission of the four final invoices of 17 June 1978, and before the formal termination of the contracts on or about 18 July 1978. Although portions of monies had been due prior to the assignment, the Claimants assert that the claims sued upon arose as of 17 June 1978--after the assignment.

The amounts in the Contractors' requisitions, which were allegedly not paid, were merely estimates of portions of the ultimate amount to be due. The final amount due was to be determined after completion of the work and an audit. Then any necessary adjustments could be made. The Claimants sought audits with regard to the completed work and a settlement of all outstanding accounts. Apparently they were unable to obtain them. The actual amount owing would arise at the time of the completion or termination of the contracts--not on the basis of the estimates of such amounts contained in the requisitions. As TRC would not permit audits on the allegedly completed contracts and the other contract was terminated prior to completion, the Claimants rely on the amounts set forth in the requisitions as being the most accurate reflection of what should be owing for the work covered by them. Although alleged breaches of the contracts may have taken place over a period of time, the breach upon which the claim is based is the alleged failure of TRC to pay amounts owing by virtue of the completion or termination of the contracts. As to Phase III, if the relationship ended earlier, the Claimants did not acknowledge they did not have contractual rights and did not make a formal demand for payment until 28 June 1978. Accordingly, the claims are not based on the failure to pay the earlier

requisitions, which were estimates, but rather on the failure to pay the amount finally found to be owing. Indeed, the Claimants in their claim only seek interest from 28 June 1978. Accordingly, all of the claims arose after the assignment.

It should also be noted that the assigned claims were owned at all times, albeit indirectly up to the assignment, by a United States national and thus are within the jurisdiction of the Tribunal on this basis. Article VII, paragraph 2 of the Claims Settlement Declaration.

The Respondents argue that the assignment of 18 May 1978 assigned only the claims under the Phase I Contract. Although the assignment refers to the Phase I claims, it is not limited to them. The assignment expressly provides that it includes "any other claims which may be filed or made, in connection with the Ekbatan Project." Starrett's conduct subsequent to the assignment is consistent with this interpretation in light of the fact that neither Starrett nor its parent company has pursued any claims regarding the Ekbatan Project in any forum, and Starrett has taken the position that it assigned its claim to the Claimants.

Thus, the Tribunal has jurisdiction over Starrett's portion of the Contractors' claims covered by the assignment and such portion is assertable against TRC. The Claimants are also subject to all defenses, including offsets, that could have been made against Starrett with respect to that portion of the claims.[5]

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[5] The Claimants have stated that they would submit to properly filed counterclaims of TRC that arise out of work performed by Starrett under the contracts upon which the claims are based. In view of the Tribunal's findings, infra, the Tribunal need not decide whether it has jurisdiction over such counterclaims to the extent they exceed the amount of the claims.

B. The Merits

1. The Validity and Enforceability of the Contracts

There is no dispute as to the existence, validity or enforceability of the Phase I, IA and II Contracts. Work was performed under them, and payments were made. Indeed, TRC counterclaims on the basis of breaches of those contracts.

The only issue of the existence and enforceability of a contract relates to the alleged Phase III Contract. TRC contends that it did not enter into a contract for Phase III with the Contractors; that the unsigned, draft Phase III contract submitted by the Claimants was of no effect; that the matter never progressed beyond the stage of oral negotiations; and that no work was performed or payments made under any such alleged contract.

The Claimants submitted evidence of oral agreements to proceed with Phase III and writings which appeared to confirm the existence of an agreement related to Phase III. Routine minutes of a meeting on 27 January 1977 confirm that TRC desired the Contractors to do Phase III work. The minutes show that a copy was sent to TRC. The Claimants also note that its correspondence and the work done on Phase III demonstrate the existence of such an agreement. According to the Claimants, a form of agreement allegedly reflecting an oral agreement was drawn up and dated 9 September 1977, but was never signed.

The Claimants have submitted extensive evidence establishing that services were in fact rendered on the Phase III portion of the project with the full knowledge of TRC. The deposition of Mr. J. Morog, the TRC chief on-site architect, and the affidavit of Mr. Madhu Mehta, the TRC chief on-site engineer, who also gave evidence at the Hearing, confirm

that the Contractors performed services in connection with Phase III. In addition, by February of 1978, the Contractors had submitted five invoices to TRC with respect to Phase III detailing that over 31% of the work had been completed.

If there were an oral agreement, it would be enforceable under Iranian law, which would seem to be the law of the contract because of the connection between the project and Iran and because of the fact that Iranian law was chosen to be the applicable law in the contracts for the other phases. See Economy Forms Corporation and Iran, Award No. 55-165-1 (14 June 1983).

Under Iranian law, a contract not in writing and involving an amount exceeding over 500 rials in value cannot be proved by oral or written testimony alone. See The Civil Code of Iran, Arts. 1306 and 1310. In the present case the Claimants rely on contemporaneous documents recording the understandings reached with TRC, and demonstrating part performance of the contract. It appears that acceptance of part performance can be proof of a binding contract under Iranian law. See, e.g., The Civil Code of Iran, Art. 193. Moreover, although the governing law of the contract itself must be taken to be that of Iran, each forum applies its own procedural and evidentiary rules to the disputes before it, and it is arguable that the type of evidence admissible to establish a contract is a procedural or evidentiary matter. Under Article V of the Claims Settlement Declaration the Tribunal must look to "principles of commercial and international law" for guidance. It is widely accepted by municipal systems of law that one can prove the existence of an enforceable oral contract through evidence demonstrating part performance. See, e.g., II K. Zweigert & H. Kötz, An Introduction to Comparative Law: The Institutions of Private Law 40-41, 48-50 (1977). Such a principle must be taken to constitute a general principle of law. Moreover, it could be argued that, by its conduct, TRC is estopped to assert the nonexistence of the contract.

Yet, Requisition No. 1, submitted 29 October 1977, for Phase III has a notation that the head of finance for TRC refused to accept the invoice because "we do not have an understanding regarding the agreement as of today." The expatriate work force for Phase III was ordered off the site on 20 February 1978. A letter by the Contractors of the same day refers to recent "discussions about our contractual relationship with respect to Phase III." Thus, there are suggestions that there was no contract that was sufficiently definite to be enforceable with respect to Phase III.

Accordingly, if there were an agreement, there is not sufficient evidence of its definiteness of terms to be enforceable. Nevertheless, the Contractors performed work at the request of and with the knowledge of TRC and should be compensated therefor. It is well established under Iranian law and general principles of law that under the doctrine of quantum meruit there may be a recovery for work performed. See The Civil Code of Iran, Arts. 301-06, 336; 3 M. Whiteman, Damages in International Law 1732-61 (1943); 12 Williston on Contracts §§ 1452-1459A at 68-108 (3d ed. 1970); Benjamin R. Isaiah and Bank Mellat, Award No. 35-219-2 (30 March 1983).

Evidence of the value of the Contractors' work - - whether measured by the going value of the services or the actual value to TRC - is the formula used by the parties to determine compensation under contracts for the other phases. That formula constitutes the method agreed to by the parties to determine the value of the work and is reflected in the Phase III requisitions. Those requisitions and the formula used by the parties in the Phase IA and Phase II Contracts constitute the only substantial evidence of the value of that work. Accordingly, the Tribunal finds that there is insufficient evidence to establish an enforceable contract covering Phase III, but that the Claimants are entitled to compensation for the value of the work they performed under a theory of quantum meruit and that the value of such work is reflected in the requisitions. Of course, as there is no

contract for Phase III, the Claimants cannot recover for work not actually performed for Phase III.

2. The Claims For Invoiced Amounts

The Contractors submitted monthly requisitions for each contract certifying the percentage of the work completed, invoicing TRC for payments due and setting forth the amount of cumulative fees and past payments. These requisitions were supported by schedules of completed jobs, daily "Field Reports", daily "Work Programs", weekly "Concrete Reports" and other documentation submitted to TRC. Each requisition set forth in detail the work covered. In order to prepare the requisitions, representatives of TRC and the Contractors physically examined and recorded the actual progress of the work on the site of the project. The estimates of the work done by categories were agreed to by representatives of TRC and the Contractors. The requisitions were based on the estimates and apparently hand-delivered to TRC. The last requisitions delivered to TRC showed that the following fees were owed to the Contractors, but remained unpaid as of 17 June 1978:

Phase I:	Requisition No. 32	$ 656,688
Phase IA:	Requisition No. 20	$ 239,156
Phase II:	Requisition No. 20	$1,280,402
Phase III:	Requisition No. 5	$ 596,424

Paragraph 5 of the contract for Phase I provides that fees shall be paid within twenty days after the end of each month. Paragraph 5 of the contracts for Phases II and IA provides that payments are to be paid within 10 days after the end of the month. Each of the contracts provides that any disputed matters shall be resolved within the next month. The effect of these provisions is that any objections must be raised within one month. By virtue of the usages between the parties and applicable to this situation, the same provision should apply to the Phase III work.

It appears from the record before the Tribunal that TRC did not at the time of the submission of the final requisitions object to the specific figures in these requisitions. In addition it does not appear that TRC raised significant objections to the figures in previous requisitions. There is one reference to a disagreement over requisition No. 12 in Phase I, thus showing that if TRC did object, it transmitted those objections. Until October 1977, TRC actually made payments, although none within the specified period for payment. The Respondents submitted to this Tribunal certain requisitions showing handwritten modifications and a direction by someone who appears to work for TRC that payment of modified amounts be made to the Contractors. These modifications were not major. It appears that the modified sums were paid, but it can be inferred that the Contractors did not accept the modifications because such modifications were not incorporated into subsequent requisitions.

TRC submitted to the Tribunal copies of Requisitions 19 for Phases IA and II and Requisition 31 for Phase I with handwritten notes making substantial changes. Unlike other annotated requisitions, these particular requisitions contain no direction that the modified amounts be paid. There is no indication that these annotated requisitions were submitted to the Contractors. There is no evidence of who did the annotations or how they were done. Moreover, the purported notations in these requisitions took place after May of 1978, i.e., after serious conflicts between the parties were manifested in writings. Most significantly these annotations reduce percentage completions even below those contained in previously TRC approved requisitions. Thus, the Tribunal cannot accord any weight to these unauthenticated notations.

It should be noted that even if the percentages of completion for Phases I and IA were less than as set forth

in the requisitions, the work would have been completed by the time of the termination of the contracts so that, as discussed infra, the Claimants would be entitled to the full amount payable for those contracts as damages.

TRC asserts that it paid more than reflected on the requisitions. Yet, it never objected to the amounts shown as paid upon receiving the requisitions. The requisitions show that $5,866,781 was received. TRC, in its counterclaim, as clarified, demanded $6,000,000 for repayment of fees. Thus TRC seemed, at least at that time, basically to agree with the Claimants' figures as to what was paid. TRC offered no documentary proof of a greater payment of fees than reflected on the requisitions. Indeed, on the copies of the requisitions it supplied, with handwritten notations, there are no purported changes of the amounts paid. TRC submitted copies of what seem to be some of their payment vouchers requesting certain payments on certain requisitions. There is no indication that the requests were approved. The spaces for approval and receipt of checks paid are blank. Moreover, the vouchers only refer to a portion of the requisitions and do not in fact indicate more fee payments than alleged by the Claimants.

Even if there were defects in the work of the Contractors as alleged by the Respondents, those defects do not negate the obligation to make timely payment. Such alleged defects, if not waived, might provide a right to offset or counterclaim. See Part 5 infra.

The failure to dispute an account for a lengthly period of time at least places a burden on TRC to demonstrate that the account was not accurate. See R. J. Reynolds Tobacco Company and Iran, Award No. 145-35-3 (6 August 1984). As discussed supra, TRC has not provided sufficient evidence justifying its failure to object to the requisitions. In the absence of an audit to be done at the completion of the

work and in view of the circumstances set forth above, the amount contained in the requisitions shall be deemed to be an accurate reflection of what is owed to the Claimants for the percentage of work completed. This amount, along with the amounts discussed in Part 3, infra, constitute damages for breach of the contracts. It should be noted that although the laws of various countries are not in full accord, the better view and the view adopted by this Chamber is that termination of the contract does not preclude a damage remedy. Morrison-Knudsen Pacific Limited and Ministry of Roads and Transportation, Award No. 143-127-3 (13 July 1984); see The French Civil Code, Art. 1184 para. 2; Treitel, "Remedies for Breach of Contract" in VII International Encylopedia of Comparative Law 145-47 (1976).

The amounts owing are properly stated in dollars. Where there are references to Rials, the approximate exchange rate in effect at the time the monies were due was used. Although the contracts do not provide for payment of fees in dollars, the contracts provided in essence for the free convertability of Rial payments into dollars[6]. Most of the requisitions and all of the later requisitions were stated in dollars without any evidence of objection from TRC. Moreover, there is no showing that the monies were to be retained in Iran rather than repatriated to the United States. As done in other cases, the Tribunal uses the exchange rate in effect at the time the monies were due. See, e.g., Pereira Associates and Iran, Award No. 116-1-3 at 23 (19 March 1984); Blount Brothers Corporation and Ministry of Housing and Urban Development, Award No. 74-62-3 at 16-17 (2 September 1983).

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[6] Iranian exchange restrictions were not promulgated until after the fees were due.

The Claimants also argue that the final requisitions incorporated a 10% discount on certain fees amounting to a credit to TRC of $337,956. The 10% discount was required under the contracts if TRC made its payments in a timely manner -- that is, within 10 days after the end of the applicable Iranian month. The Claimants included the discount on the assumption that certain fees due would be paid in a timely fashion. That TRC did not make many of such payments at all is not in dispute. Nevertheless, these amounts were included in the requisitions to which, according to the Tribunal, TRC, at least impliedly acquiesced and were repeatedly included in requisitions despite the fact that payments were not made in the required periods. Thus the discount should not now be reversed. Accordingly, the Tribunal rejects the Claimants' claim for $337,956.

The Claimants have not provided sufficient evidence with respect to other claimed improper discounts; thus the claim for them is also not granted.

As defences to the amounts sought by the requisitions, TRC asserts that the work was defective, the payment formula was too high, and the percentage of work completed upon which the amounts were computed were inaccurate. Even though, in light of the evidence of TRC's lack of objection to the requisitions, such defenses, even if proven, might not prevail, the Tribunal shall discuss the merits of the later two defences. The defence as to defective work is discussed infra along with the counterclaims raising the same contentions. See Part 5 infra.

TRC claims that the actual overall percentage of completion of the work was at most 65%. This was reiterated at the Hearing by TRC's representative (who was appointed director after the work was done by the Contractors). He stated that the Claimants had left the project unfinished. The evidence in the record, however, demonstrates that the

percentage completion figures listed in each monthly requisition were prepared by TRC's project manager on information obtained from the Contractors and were carefully assembled. The estimates in the requisitions of the work completed were specifically approved by TRC's on-site Architect, Mr. Morog or other TRC officials. TRC occasionally raised minor objections, but never seriously challenged or made major changes in the estimates of the percentage of completion. Indeed, Mr. Morog testified that he verified the percentage of completion figures and did not recall ever changing them. Although he may have been involved in making some changes, they were not significant.

The Respondents claim that the overall estimated costs of the work for the various Phases were reduced without explanation in later requisitions, thereby artificially inflating the percentage of work completed. As to Phase I, Requisition No. 32 provides the explanation, and there is no evidence of any objection to that requisition or other requisitions reflecting the same information. The Respondents refer to the estimated cost of work figure in Annex 1 to the Phase IA Contract. As reflected in Requisition No. 1 for Phase IA, this figure was reduced in return for certain credits given to TRC. It was apparently further reduced in May of 1977 in Requisition No. 7. In some of the Phase IA requisitions, the estimated cost of work appears to vary ($9,024,937 and $9,540,425), but the correct figure is used in the supporting data attached to the last requisition. The lower figure appears to be the correct one based on some requisitions indicating that the partition work was to be performed by TRC and thus was not to be included. If the items omitted from the overall estimated cost of work should have been included, the Contractors would have been able to receive monies on them when they were to be completed or on the theory that they would have been completed but for the actions of TRC. See infra. In addition, the Claimants have

submitted all of the monthly requisitions for the various phases of the project. The percentages of completion included in these requisitions show overall, a relatively orderly and regular progression of the work.

The requisitions for Phase II indicate a progression of work at the work sites as late as May and June of 1978. One half of the Contractors' work force was still at the work-site during portions of this period, and the requisitions indicate that almost all work done at that time was exclusively performed on the Phase II buildings. Also, the requisitions contain supporting materials.

With respect to the final requisition for Phase III, as the Tribunal has found there was no enforceable contract, the figures must be based on the actual value of the work. The date of the final requisition for Phase III was 23 February 1978. That requisition and its supporting material reflect that it covers the completion and value of work "up to 2.20"--i.e., the date the work force was ordered to leave. There was no specific objection to the amount in this requisition. Thus, there is no reason not to assume that the requisition reflects a fair amount for the work performed.

TRC also claims that the payment scale of $80 per square meter completed was unjustifiably high. But the figure of $80 per square meter was arrived at as the result of discussions between equally sophisticated, commercial parties, and TRC never objected to the requisitions for payment on the basis of their being derived from this figure. The Respondents allege that the credits given TRC and the reduction of fees constituted an acknowledgment that the fees were excessive. The fees were arrived at through mutual agreement of the parties. There is no showing that the contracts were adhesive. Reductions and credits resulted from the expansion of the project.

The Respondents assert the relevance of a TRC employee having an investment of less than $500 in a publicly-held parent of one of the Contractors. The Tribunal accords this allegation, even if true, no weight.

Significantly, TRC did not avail itself of the opportunity to have a final audit as requested by the Contractors to rectify any alleged overpayment or overbilling. And TRC never gave notices of default or other significant notice of these complaints. Thus, these defences are not supported by sufficient evidence.

The Tribunal therefore rejects TRC's defences relating to the payment of the amounts reflected in the requisitions and finds the Claimants to be entitled to the $2,772,670 set forth in the final requisitions for payment as part of the amounts owing under the contracts and for the work in Phase III. The Claimants claim interest only from 28 June 1978. Thus Claimants are entitled to interest on such amount from 28 June 1978 at the prescribed rate of 8% per annum with respect to the amount owing on the Phase I requisitions and at the reasonable rate of 10% per annum on the unpaid amounts of the other requisitions. The requisitions make clear that $666,000 was credited to TRC in accordance with the 1 October 1976 Credit Agreement. Whether any further amounts should be credited under this Agreement is dealt with in Part 3, infra.

The Claimants assert that the amount owing should be increased because the cost factor would have increased by virtue of inflation in the construction industry in Iran. The Tribunal, based on what was provided it, cannot ascertain any amounts that would be attributable to such inflation. Accordingly, the Claimants are not entitled to any increase in damages on this basis.

As there is no indication of the direct liability of the Government, apart from the liability of TRC, and no

showing of a need that liability be imposed upon the Government, the claims against the Government are dismissed.

3. The Claims For Non-Invoiced Amounts

DIC and Underhill contend that the work on the Ekbatan Project ceased and the contracts were terminated because of defaults and failures of TRC under the contracts, including delayed payment of fees, refusal to pay fees, wrongfully ordering the removal of expatriate personnel, failure to provide adequate local labour, failing to pay workers properly, other failures to supply personnel and equipment and repudiation of its obligations under the contracts. The Claimants argue that as payment was based on percentage completion of the project, but for the defaults of TRC, the Contractors would have earned an additional $3,321,653 by the date that the parties agreed to settle their accounts, 17 June 1978 and that this amount, when added to the requisition amounts, constitutes the total damages for the breaches of contracts.

The evidence submitted by the Claimants establishes that from the latter part of 1977, TRC repeatedly failed to make contractually required payments to the Contractors, to order recommended equipment, or to provide necessary materials or personnel; that on 20 February 1978, TRC ordered the Contractors to remove the entire expatriate workforce on Phase III; and that on 10 April 1978, TRC ordered the Contractors to remove 50% of the entire remaining workforce, all of which combined to bring the work on the Ekbatan project almost to a halt in May of 1978. These actions constituted violations of TRC's obligations under the contracts--except as to Phase III, for which, the Tribunal has held, there was no contract.

Accordingly, the Claimants are entitled to use as part of their damages, monies they would have earned but for

TRC's actions. The Claimants do not seek to recover as lost profit any amounts which would have been earned if all of the contracts had proceeded to completion and been fully performed. Instead they seek only damages for the contractual defaults of TRC as of 17 June 1978, the date they ceased work. The Claimants contend that if TRC had not, in breach of its contractual obligations, caused the work to slow and eventually come to a standstill, the Ekbatan project on 17 June 1978 would have been significantly closer to completion. By that date, the Claimants contend, the percentage completion of each of the phases should, based on the contractual completion dates, have been as follows:

Phase I	-	100%
Phase IA	-	100%
Phase II	-	77.7%
Phase III	-	61.225%

Instead, according to the Claimants, the following levels of completion had in fact been achieved, as reflected in the final requisitions submitted:

Phase I	-	98.2%
Phase IA	-	97.8%[7]
Phase II	-	35.9%
Phase III	-	31%

In determining the damages allocable to such breaches of contracts, the Tribunal must consider a number of factors.

Based on past progress, it seems that but for the actions of TRC, the small amount of work remaining on Phases I and IA would have been completed by 17 June 1978.

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[7] With respect to the Phase IA Requisitions there is evidence that certain work (the partitions) was not to be included. Even if it were, the percentage of completion would be 91.05%. The superstructure and precast work were virtually completed in Phase IA.

With respect to Phase III, the Contractors terminated "any and all contractual agreements written or verbal . . . with respect to work at the Phase III site," on February 1978, and the Tribunal has found that the Claimants are only entitled to the value of the work performed.

With respect to Phase II, it is difficult to state with any certainty that Phase II would have been 77.7% completed on 18 June 1978 but for the actions of TRC, as contended by the Claimants.

The Claimants' computations as to what the Contractors would have earned by 17 June 1978 varied and do not appear perfectly accurate. At one point they appear to acknowledge the uncertainty in their figures by saying the amount is at least what they are owed. It is very difficult to estimate with any accuracy a time when any particular stage or percentage of completion will be reached. In any contract of the magnitude of those involved in the instant case, delays are not unexpected. Indeed, the contracts themselves contemplated extensions of periods in case of certain events, even if such events were the fault of TRC. There is evidence that from time to time corrective work was necessary. This too would affect the rate of completion. Thus in attempting to determine what the percentage of completion should have been at a particular time, but for breaches of TRC, only major causes of delay by TRC in violation of its contractual duties should be considered.

Moreover, in any calculation of fees which should be earned, the $2,000,000 credit due TRC for monies earned on Phases I and II after October 1976 should be allocated to TRC by the approximate percentage of work which the Tribunal determines should have been attained, which allocation seems to conform to the intent of the parties to the Credit Agreement. If such percentage completion is reduced, then the credit should also be reduced.

The Claimants treat the entire amount sought in this aspect of their claim as though there would have been no

additional costs incurred in further performance up to the June 1978 date. The Claimants probably would have had few additional costs because their duties were supervisory and their personnel were present at the job site for the majority of the time that TRC was in default.

TRC was not making payments to the Contractors in late 1977 or 1978. Thus, it would appear that TRC was having some financial difficulties. This would support the Claimants' assertions that TRC was not fulfilling its responsibilities in connection with personnel and equipment. Indeed, ordering portions of the workforce off the project in 1978 constitutes a clear violation of TRC's contractual duties. Thus it is clear that Phase II of the project would have achieved a greater degree of completion by June of 1978 than was completed. Considering all of the factors, the Tribunal cannot with any certainty, at least for purposes of damages, assume that the percentage of completion on Phase II as of June 1978 would be significantly more than fifty percent (50%). This is not to say it would not have been. The Tribunal approximates as of 17 June 1978 a somewhat in excess of fifty percent (50%) completion for Phase II and one hundred percent (100%) completions for Phases I and IA. The Tribunal also takes into account an approximate percentage of the credit that would have been subtracted for payments up to 17 June 1978 and for taxes that would have been withheld. Taking all of these and other circumstances into consideration, the Tribunal awards the Claimants $795,000 as a net amount estimated to be equivalent to that which would have been earned by the Contractors as of 17 June 1978 (not reflected in the requisitions discussed supra) but for TRC's breaches of contract; this amount constitutes an additional amount of damages for such breaches. The Claimants are entitled to interest on an approximate Phase I portion of such amount of $140,000 at 8 percent (8%) per annum from 28 June 1978 and on the remaining portion at the reasonable rate of ten percent (10%) per annum from 28 June 1978.

4. The Claim for Extra Work Performed

The Claimants allege that, in addition to the work performed under the four contracts, the Contractors performed extra work at the request of TRC consisting of exterior fire stairs, primary and satellite mechanical equipment rooms and water tanks. The Claimants allege that the books and records of TRC would disclose the actual costs of the extra work performed by them. However, such records have not been made available. The Claimants have thus had to estimate the cost of the percentage of extra work completed and the resulting level of the Contractors' fees as at the date of cessation of work.

The Claimants estimate that the total cost of the Extra Work, if fully performed, would have been $8,798,057, of which some $4,000,000 worth was completed. From this they derive a figure of $300,000, representing the Contractors' fees. This figure was apparently read to TRC's representative at a meeting held on 28 June 1978. But the Claimants have been unable to cite specific meetings with TRC concerning such Extra Work, nor can they offer any contemporaneous memoranda addressing the agreement for such work or evidencing its performance. The Tribunal concludes that the evidence is insufficient to support an award of damages with respect to this claim for extra work performed.

5. The Counterclaims of TRC

TRC presents counterclaims for reimbursement of fees paid and other payments, damages resulting from defective performance, payment of a good performance bond, liquidated damages for delay in completion of Phase I and for return of certain TRC documents.

i. The Counterclaim for Reimbursement of Fees

TRC's counterclaim is based upon the same allegations of excess fee payments that supported TRC's defence. These

have been discussed in relation to the question of performance of the contracts. The findings of fact that led this Tribunal to reject TRC's defence likewise result in this Tribunal dismissing TRC's counterclaim seeking reimbursement of payments of fees made to the Contractors.

ii. The Counterclaim for Reimbursement of Other Payments

Respondents assert that there have been various payments made to the Contractors which have not been accounted for. They list a number of alleged amounts paid for expenses of the Contractors or their personnel. TRC's accountants do not offer sufficient support for the proposition that TRC is entitled to reimbursement of payments to the Contractors for matters other than fees. The documents submitted by TRC's accountants lack sufficient back-up data and is incomplete. Under Paragraph 6 of the Phase I Contract, mobilization costs were to be paid by TRC, although TRC gave certain monies to the Contractors for such payments. In the definition of the "Cost of Work" there is a reference to "the following items [which] shall be part of Cost of Work to be paid for by TRC," and these include, inter alia, family relocation expenses and living expenses for expatriate workmen and employees and costs and expenses of the Contractors' executive officers who periodically supervise and inspect the work. In addition the Contractors were entitled to enter into contracts on behalf of TRC for, inter alia, personnel for the Contractors in connection with the work. From the documents submitted by TRC's accountants, it cannot be ascertained whether the claimed payments were for costs to be borne by TRC or by someone else. There is not sufficient evidence that these amounts were reimbursable costs. There is no evidence that TRC ever claimed these amounts in the past, some of which went back to 1975.

TRC argues that it never received an accounting of the amount it gave to the Contractors for the mobilization expenses. An audit was supposed to be made "after a period of three months". Presumably this would have been done in

1975 or 1976. It cannot be ascertained from the record whether such an audit was ever carried out. Indeed, there does not appear to be any TRC demands for an accounting or audit with regard to mobilization expenses. There is no evidence of whether or how much of the mobilization fees are owing to TRC. Accordingly, there is not sufficient evidence to support TRC's counterclaim in connection with any mobilization expenses that might be owing to it. Thus this counterclaim cannot be sustained.

iii. The Counterclaim Alleging Defective Performance

In its pleadings, both written and oral, before the Tribunal, TRC has asserted that the services rendered by the Claimants were defective. There is substantial evidence that the parties frequently met at the job site. Although there is correspondence relating to "remedial measures" that were supposed to be taken by the Contractors, there is no indication that such measures were not taken. As noted above, TRC has been unable to submit any contemporaneous evidence of its objections to any alleged defective performance until the Contractors discussed the termination of the agreements in April of 1978.

It should be noted that the Contractors' task was to render supervisory and consultative services and to supply technical advice and know-how. The scope of this work dealt with foundations, superstructures, concrete facades, partitions and electrical and mechanical openings. TRC was responsible for workers, equipment, subcontractors and all other work.

TRC has submitted what purports to be photographs of the Ekbatan project. But they are not authenticated in any manner. There is no evidence before the Tribunal as to who took the photographs; who is, and what are the qualifications of, the person(s) who provided the commentary to each picture; when the work photographed was performed and by

whom; the date and place that the pictures were taken; or who was responsible for the alleged defects shown. Indeed, there is evidence that the Contractors specifically notified TRC that they could not be responsible for the work of some subcontractors hired by TRC (e.g., core concrete work). A representative of TRC stated at the Hearing that the photographs had been taken "recently." This casts serious doubt on their value as evidence of conditions at the time the Claimants' activities ceased in 1978. There is no indication that the pictures portray defects attributable to the work of any of the Contractors. Thus the photographs can be accorded little evidentiary weight. This is particularly the case in view of the Claimants' evidence that the alleged defects were either attributable to other contractors employed on finishing work, or in fact were monitored and found not to be such defects that would be considered abnormal or beyond specifications.

In addition, neither of the two reports submitted by TRC (the S.G.S. Iran Report and the Report of Mr. Atarchian) can be considered by the Tribunal as overcoming evidence that the Contractors substantially did what was required of them under the contracts, and the fact that the quality of the work was never seriously disputed by TRC at the time of the work on the project. Neither report is dated, although a subsequently submitted SGS letter suggests that the SGS report was prepared sometime between August and November of 1978. Both reports contain statements of opinion concerning the state of the buildings based on inspections which were carried out under circumstances unknown to the Tribunal. The qualifications of those preparing the reports are not disclosed. The Atarchian Report was prepared at the request of the Ministry of Justice under a procedure called collection of evidence. Article 322 of the Iranian Code of Civil Procedure states with respect to that procedure, the "[c]ollection of evidence is for the purpose of protection

thereof and in no case shall it establish that the evidence so secured is valid and admissible. . . ." The stated mandate of the SGS report was, inter alia, to "[p]repare Counterclaim against Starrett" documenting "lack of performance . . . overpayment of fees . . . [or] bad supervision."

The Claimants requested in its Reply to Counterclaims that Mr. Atarchian and the author of the S.G.S. report be present at the hearing for cross-examination. Neither report, however, was supported by the availability of its author at the Hearing to supply further clarification. The S.G.S. report consists basically of conclusions. Its author even suggests that TRC lacks sufficient documents to establish the fault of the Contractors in a proceeding. Similarly the 1976 proposal by TRC's ultimate precast contractor does not provide sufficient evidence of defective work by the Contractors. That document was, for the most part, a proposal with respect to services to be performed by the contractor. Again reference to defects, even if authentic, does not disclose who was responsible. That contractor submitted a statement indicating he corrected some alleged defects. Most of his comments are conclusionary statements about the alleged expertise of various contractors and thus provided little evidence on the subject.

The material submitted by Respondents does not establish that any defects that do exist are attributable to the negligence of the Contractors in carrying out their specific supervisory and consultative activities.

The Claimants submitted to the Tribunal detailed and extensive contemporaneous evidence of the work done under the contracts and on the project, which suggests that their performance was not defective. The statements of former key

TRC employees (independent of the Claimants) endorse the performance of the Claimants. Mr. Madhu Mehta, the TRC Chief on-site Structural Engineer, stated in his affidavit:

> I began working directly for TRC, as an On-Site Engineer and head of the TRC Inspection Department in July, 1977 . . . under my supervision, the TRC Inspection Department was responsible for inspection and testing of the entire Ekbatan project. Accordingly, I hired a staff of 23 engineers and technicians. . . . As a result of the above tests and inspections and my other duties at the Ekbatan site, I closely monitored the speed, quality and rate of completion of the work supervised and assisted by the Contractors. There could not have been any significant defects in the work which would not have been detected by my department. During my tenure as On-Site Structural Engineer there were never any serious problems with the quality or speed of the work performed under the supervision of the Contractors. As is usual in any major construction project, there were slight variations and occasional defects which were routinely corrected . . . but there were never any significant complaints by T.R.C. about the quality of the work.

Mr. Mehta, whose primary duty was to inspect and correct the foundation work in progress, confirmed in his statement at the Hearing that any necessary corrective work was done promptly, and that, despite close liaison between TRC and the Contractors, he was never notified by TRC of any serious defects in workmanship.

Likewise, Mr. Joseph V. Morog, the TRC Chief on-site Architect, who was subpoenaed to an oral deposition, stated as follows in a sworn deposition:

> Question: During this period of time, were you ever informed by anyone that Dic-Underhill was failing to properly perform their duties and responsibilities?
>
> Answer: No. I would say that as a general statement, no. There were small things, you know, that happened on any job this size. But they were general contracting things -- you know,

> whether a slab was out of line or a column was out of line -- and we became aware of these as the work progressed and we made adjustments, either by replacing a member or chopping it back or whatever. This takes place in various degrees on any kind of construction.
>
> Question: Based on your personal knowledge gained as the chief architect for TRC . . . do you have an opinion as to whether Dic-Underhill properly fulfilled their contractual obligations?
>
> Answer: I think they did . . . .

As noted above, with respect to alleged defects in the work, it was not until April of 1978, when the Contractors alleged that TRC was in default and suggested the termination of the contracts, that TRC mentioned any alleged defects. This is long after the work was being done and completed. For years TRC and Contractors' representatives met at the job site. Buildings were being completed. Yet there was no evidence of any reference to the alleged defects during that period.

The failure to object to alleged defects in the work by the Contractors in a timely fashion raises serious doubts as to the existence of such defects. Moreover TRC never gave the Contractors the contractually-required notice of defaults to terminate the contracts, which would have given the Contractors a period to cure any such defaults.

There are other surrounding circumstances which confirm the evidence submitted by the Claimants. Without any contractual obligation to do so, TRC entered into successive contracts with Claimants for Phases IA and II, 15 months after commencement of work on Phase I, long after any major defects, if they existed, must have become apparent. This suggests that, at least until September of 1977, TRC was not dissatisfied with the Contractors' performance. This is

reinforced by the fact that, before payments ceased in 1977, TRC had paid Claimants 80% of their potential fees for Phase I.[8]

Whatever further corrective work that may have been the responsibility of the Contractors has already been included in the Tribunal's calculation of damages in Part 3 supra. The Tribunal in weighing all of the evidence concludes that the Contractors' work was not defective so as to constitute a breach of contract entitling TRC to damages. This counterclaim is therefore dismissed.

iv. The Counterclaims for Payment of Bond

TRC's claim under the $10,000,000 good performance bond appears entirely inconsistent with the evidence that TRC cancelled it by its letter of 16 November 1975 as part of an agreement making certain modifications to the Phase I contract, with the aim of improving the flow of labour and materials to the contract site. This counterclaim is therefore dismissed.

v. The Counterclaim for Liquidated Damages

There is a $10,000,000 liquidated damage clause in the Phase I Agreement providing for a percentage of that amount to be paid TRC based on delays in completing the work. TRC claims Phase I was not completed on time. The evidence

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[8] An advertisement placed by TRC in Time Magazine on 10 February 1978 extolled the success of the project and refers to the "fruitful marriage of an Iranian urban concept with basic American construction know-how." In that advertisement TRC stated that the "Ekbatan Housing Development project has broken records and is unique in Iran" by providing, inter alia, "one housing unit completion per hour every hour of the day over the past year" and the "lowest cost per square meter of quality housing to consume in the country."

demonstrates that all required work for Phase I was completed on time except for the pre-cast portion of the work. There is evidence that this delay was attributable to TRC's own contractor, thereby, under the contract, excusing timely performance by the Contractors. There is not sufficient evidence supporting this counterclaim. Thus this counterclaim must be dismissed.

vi. The Counterclaim for Return of Documents

There is no evidence concerning the possession of any TRC documents by any of the Contractors. Thus the Tribunal cannot give any relief with respect to this counterclaim.

6. Costs

Claimants shall be awarded their costs of arbitration, including reasonable attorneys' fees in the amount of U.S. $25,000.

Based on the foregoing,

THE TRIBUNAL MAKES THE FOLLOWING AWARD:

The claims against the Government of the Islamic Republic of Iran are dismissed.

The counterclaims are dismissed.

Respondent TEHRAN REDEVELOPMENT CORPORATION is obligated to pay and shall pay to the Claimants DIC OF DELAWARE, INC. and UNDERHILL OF DELAWARE, INC., jointly the total sum of U.S. $3,567,670, plus simple interest on U.S. $796,688 at the rate of eight percent (8%) per annum (365 day year) and simple interest on U.S. $2,770,982 at the rate of ten percent (10%) per annum (365 day year), from and including

28 June 1978 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; plus costs of arbitration in the amount of U.S. $25,000.

Such payment 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 Algeria dated 19 January 1981.

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

Dated, The Hague
26 April 1985

Nils Mangård
Chairman
Chamber Three

In the name of God

Richard M. Mosk

Parviz Ansari Moin
Dissenting Opinion