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ORIGINAL DOCUMENTS IN SAFE

Case No. 354

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\*\* DECISION - Date of Decision \_\_\_\_\_  
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\*\* CONCURRING OPINION of \_\_\_\_\_  
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DUPLICATE  
ORIGINAL

CASE NO. 354

CHAMBER ONE

AWARD NO. 535 - 354 -1

PLICOFLEX, INC.,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,  
NATIONAL IRANIAN GAS COMPANY,  
Respondents.

نسخه برابر اصل

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داوری دعوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	16 OCT 1992
	تاریخ ۱۳۷۱ / ۷ / ۲۴

AWARDAppearances:

For the Respondents:

Mr. Ali H. Nobari,  
Agent of the Government of the  
Islamic Republic of Iran,  
Dr. A.A. Riyazi,  
Legal Adviser to the Agent of the  
Islamic Republic of Iran,  
Mr. Seyed Ghasem Nekounazarzad,  
Representative of National  
Iranian Gas Company,  
Mr. Iraj Goudarzi,  
Representative of National  
Iranian Gas Company,  
Mr. Armen Khanian,  
Representative of National  
Iranian Gas Company,  
Mr. Majid Hafizi,  
Representative of National  
Iranian Gas Company.

Also Present:

Mr. D. Stephen Mathias,  
Deputy Agent of the Government of  
the United States of America.

I. PROCEDURAL HISTORY

1. On 18 January 1982, PLICOFLEX, INC. ("Plicoflex" or "the Claimant"), filed a Statement of Claim against THE ISLAMIC REPUBLIC OF IRAN, NATIONAL IRANIAN GAS COMPANY ("NIGC"), WILMEG, BANK MARKAZI IRAN and GUIDE COMPANY LTD. In its Statement of Claim, the Claimant sought compensation for breach and repudiation of a contract between it and NIGC, and for expropriation of its rights thereunder in the amount of U.S.\$869,428<sup>1</sup>. In addition, the Claimant sought \$194,140 as compensation for nonpayment of monies which it asserts were due for goods sold to and received by NIGC, and for the alleged expropriation of the Claimant's property rights in goods consigned to Guide Company Ltd. As set forth in more detail below, see infra, paras. 4-6 and 23, the Claimant later withdrew all of these Claims.

2. On 5 July 1983, the Government of the Islamic Republic of Iran filed a Statement of Defense. On the same date, NIGC filed a Statement of Defense and a Statement of Counterclaim. In its Statement of Counterclaim, NIGC sought compensation for breach of contract in the amount of \$6,478,326 plus interest and legal costs. Later, during the course of the proceedings, NIGC amended the relief sought as follows: First, it claimed compensation in the amount of \$5,830,493, representing the sum it allegedly paid Plicoflex for goods allegedly delivered under contract. Second, it requested the sum of \$143,083, which it allegedly paid Plicoflex as an advance payment for goods under contract. Third, it claimed compensation in the amount of \$87,156,000 for the losses that it would eventually incur in replacing allegedly defective goods supplied by Plicoflex. Thus, the total amount of the Counterclaim, as amended is \$93,129,576.

3. On 9 April 1984, the Claimant filed its "Response to Statement of Defense and Counterclaim". Thereafter, the Government of the Islamic Republic of Iran filed a Rejoinder on 1 May 1985. NIGC filed its Rejoinder on 17 June 1985. In its

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<sup>1</sup>All references to dollars in this Award are to United States dollars.

Order of 14 February 1986, the Tribunal ordered each Party to file by 8 May 1986 all evidence on which it sought to rely in the Case. Likewise, the Tribunal requested each party to file by 12 August 1986 any evidence on which it sought to rely in rebuttal. After having been granted two extensions, NIGC filed, on 6 March 1987, its "Hearing Memorial and Written Evidence". The Claimant was granted three more extensions until 8 December 1987. However, the Claimant neither filed a submission nor requested an extension. On 8 March 1988, NIGC filed a "Request to Dismiss the Claim and Award the Counterclaim or to Allow a Reasonable Deadline for Respondent's Rebuttal Submissions Subsequent to Claimant's Filing of Written Evidence". On the same date, the Agent of the Government of the Islamic Republic of Iran filed a letter requesting the Tribunal to grant NIGC's request. In its Order of 22 April 1988, the Tribunal informed the Parties that it intended to decide the Case on the basis of the documents submitted, unless by 23 May 1988 the Claimant filed a request for a Hearing.

4. By a submission received on 11 July 1988, the Claimant sought to withdraw its Claim. In its Order of 10 August 1988, the Tribunal informed the Parties that it intended "to terminate the proceedings in this Case, unless the Respondents by 11 October 1988 raise justifiable grounds for objection in accordance with Article 34 of the Tribunal Rules." In a submission filed on 6 January 1989, NIGC consented to the withdrawal of the Claimant's Claim but objected to the termination of the proceedings with respect to its Counterclaim. As part of the same submission, the Agent of the Government of the Islamic Republic of Iran stated that the remaining Respondents had "no objection to being stricken from the list of Respondents without any possible prejudice to the National Iranian Gas Company's Counterclaim."

5. By its Order of 7 February 1989, the Tribunal invited the Claimant to comment by 20 March 1989 on NIGC's objection to the termination of the proceedings. The Claimant did not file any comments within that period. However, by a submission received on 30 October 1990, the Claimant renewed its request for withdrawal of the Claim.

6. By an Order of 28 January 1991 the Tribunal noted that under Article 34(2) of the Tribunal Rules it may, in appropriate circumstances, terminate proceedings in a case "unless a party raises justifiable grounds for objection". Finding the existence of the Counterclaim to be "justifiable grounds" for the objection of NIGC, the Tribunal did not terminate NIGC's Counterclaim. However, the Tribunal granted the Claimant's request to withdraw its Claim, and consequently terminated the proceedings in the Case as to the Respondents Wilmeg, Bank Markazi Iran and the Guide Company Ltd.

7. In a request filed on 3 March 1989, the Counterclaimant NIGC sought permission to file further evidence in support of the Counterclaim. In view of the request, the Tribunal invited NIGC to file its evidence, together with a memorial, by 1 April 1991. The Tribunal also invited the Counterrespondent Plicoflex to file by 1 June 1991 any evidence it wished to submit. After having been granted three extensions, NIGC filed on 10 December 1991 "Memorial and Evidence of the Counterclaimant". Plicoflex did not file any evidence or any extension requests.

8. By its Order of 19 February 1992, the Tribunal requested the Parties to appear before the Tribunal for a Hearing on 15 June 1992 to address the Counterclaim asserted by NIGC.

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9. On 23 March 1992, the Agent of the United States submitted a photocopy of the letter by Mr. Carl H. Schulse, dated 18 March 1992. Mr. Schulse emphasized in that letter that he was not an agent or a representative of Plicoflex, and accordingly, the Tribunal notes that this does not constitute a submission by or on behalf of Plicoflex. By the letter, Mr. Schulse informed the Agent that Plicoflex had gone through bankruptcy proceedings in which all of its assets had been used to partially satisfy the registered corporate liabilities, and that Plicoflex was no longer in existence, having been formally and finally dissolved on 1 August 1989. In addition, Mr. Schulse attached to his letter a photocopy of the corporate minutes, of the articles of dissolution, and of a post-confirmation order and notice of the United States Bankruptcy Court.

10. The Hearing concerning NIGC's Counterclaim was held on 15 June 1992. At the Hearing, representatives of the Respondents and the Deputy Agent of the United States were present. No representatives for Plicoflex appeared. Nor did the Tribunal receive any communication by Plicoflex explaining its failure to appear at the Hearing. During the initial stage of the Hearing, Mr. D. Stephen Mathias, Deputy Agent of the United States, referred to the above-mentioned letter from Mr. Schulse. See supra, para. 9. Mr. Mathias stated that the United States does not represent Plicoflex in this Case, and that Mr. Schulse's letter was submitted merely for the Tribunal's information, but not as evidence in the Case. Having regard to its Order of 19 February 1992 by which the Parties were notified of the Hearing, see supra, para. 8, and to the fact that Plicoflex itself did not show sufficient cause for its failure to appear at the Hearing, the Tribunal decided pursuant to Article 28, paragraph 2, of the Tribunal's Rules to proceed with the arbitration in the absence of Plicoflex.

## II. FACTS AND CONTENTIONS

11. In early 1977, NIGC issued tender documents inviting suppliers to submit bids on various subcontracts for parts and supplies in connection with construction of a gas pipeline from Southern Iran to the [former] Soviet Union ("Second Iranian Gas Trunkline Project"). As a response to one such set of tender documents, dated 10 August 1977, Plicoflex sent NIGC a tender letter on 14 October 1977 offering to supply certain coating materials for the pipeline.

12. On 22 January 1978, NIGC accepted Plicoflex's offer by issuing a letter of intent, which Plicoflex also countersigned. The letter of intent stated that until a formal agreement was executed, the offer of Plicoflex, together with that letter of intent, would constitute a binding contract between the two parties. In view of the fact that no such formal agreement was ever concluded, Plicoflex's offer and the letter of intent constitute the only contract between NIGC and Plicoflex.

13. Between May 1978 and 5 March 1979, Plicoflex delivered and invoiced 14 shipments. NIGC contends that it refused to accept delivery of the remainder of the materials because the delivered materials did not correspond with the agreed technical specifications.

14. As to the Counterclaim, NIGC seeks reimbursement of the sum it paid to Plicoflex, asserting that Plicoflex breached the contract by delivering the defective materials. In the Statement of Counterclaim, NIGC stated that the shipped materials were left unused due to their inferior quality. Later, in its Rejoinder of 17 June 1985, Hearing Memorial of 6 March 1987 and Memorial of 10 December 1991, NIGC stated that it had used the Plicoflex coating material in some sections of the pipeline and amended the relief sought by seeking compensation for the costs that it will incur in replacing the Plicoflex material. The representatives of NIGC specified in the Hearing that about fifteen percent of the delivered materials had been used for insulation of about forty-five kilometers of pipelines, and that the rest of the materials were left unused. Plicoflex contends that the shipped materials did fulfill the technical conditions of the contract, and claims that NIGC objected to the material solely because construction of the pipeline had been halted after the 1979 Islamic Revolution and the materials were thus no longer needed.

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15. In its Statement of Defense, NIGC pointed out that Plicoflex had not submitted any evidence concerning its alleged United States nationality. In its "Response to Statement of Defense and Counterclaim" Plicoflex stated that:

Plicoflex, Inc. is a corporation incorporated in the State of Delaware, in the United States, and as such is a U.S. Claimant. One hundred percent (100%) of the shareholders of Plicoflex, Inc. are of American nationality and are citizens and residents of the United States which we will prove during the proceedings.

Plicoflex, however, did not submit any evidence to support these contentions. With respect to NIGC's Counterclaim, Plicoflex argued that the Tribunal does not have jurisdiction over that

Counterclaim. Plicoflex did not advance any specific reason for the Tribunal's alleged lack of jurisdiction.

16. In its Rejoinder, NIGC renewed its previous statement to the effect that the Claimant had failed to demonstrate United States nationality. Referring to the lack of evidence on this issue, NIGC stated in that submission that it continues to take exception to the Claimant's capacity to bring a claim within the framework of the Claims Settlement Declaration.

17. At the Hearing, Dr. A.A. Riyazi, Legal Adviser to the Agent of the Government of the Islamic Republic of Iran, stated that the Respondents no longer objected to any insufficiencies in Plicoflex's proof of its United States nationality.

18. In view of the determinations discussed, infra, it is unnecessary for the Tribunal to describe the other facts and contentions in this Case.

### III. REASONS FOR THE AWARD

#### Jurisdiction

19. The Tribunal will first examine the positions taken up by the Parties concerning its jurisdiction over NIGC's Counterclaim. ~~To begin with, the Tribunal notes that Plicoflex failed to appear~~ at the Hearing of this Case, but that in its written submission it argued in general terms that the Tribunal does not have jurisdiction over NIGC's Counterclaim. See supra, paras. 10 and 15. In these circumstances, although NIGC withdrew at the Hearing its earlier objection to Plicoflex's failure to establish United States nationality, the Tribunal cannot justifiably conclude that Plicoflex has consented to the Tribunal's jurisdiction.<sup>2</sup>

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<sup>2</sup>Moreover, the Tribunal notes that it has examined on its own initiative the question of its jurisdiction even in the absence of any dispute between parties. For example, the Tribunal stated in Burton Marks, et al. and Islamic Republic of Iran, Interlocutory Award No. ITL 53-458-3, p. 11 (26 Jun. 1985), reprinted in 8 Iran-U.S. C.T.R. 290, 297: "[J]urisdictional boundaries, established by the Governments of the United States



20. The Tribunal's practice has consistently affirmed that the Tribunal's jurisdiction over a counterclaim is dependent upon its jurisdiction over the main claim.<sup>3</sup> Put differently, the Tribunal must first establish its jurisdiction over the main claim before it may exercise jurisdiction over a counterclaim arising out of the same contract, transaction or occurrence that constitutes the subject matter of the original claim. Thus, even though the Tribunal has granted the request by Plicoflex to withdraw its Claim, the Tribunal has to examine, for the purpose of determining its jurisdiction over NIGC's Counterclaim, whether the Claim filed by Plicoflex falls within the Tribunal's jurisdiction.

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of America and the Islamic Republic of Iran in adhering to the Claims Settlement Declaration, are absolute and cannot be waived or modified unilaterally by an arbitrating party or parties." See also Behring International, Inc. and Islamic Republic of Iran Air Force, et al., Award No. 523-382-3, para. 49 (29 Oct. 1990), reprinted in 27 Iran-U.S. C.T.R. 218, 235; Orton/McCullough Crane Company and Iranian State Railways, et al., Award No. 484-440-3, para. 7 (25 Jun. 1990), reprinted in 25 Iran-U.S. C.T.R. 15, 17; Itel International Corporation and Social Security Organization of Iran, et al., Award No. 479-476-2, para. 31 (23 May 1990), reprinted in 24 Iran-U.S. C.T.R. 272, 281; American Farm Products International, Inc. and Curys Consulting Engineers, et al., Award No. 356-190-2, para. 4 (5 Apr. 1988), reprinted in 18 Iran-U.S. C.T.R. 175, 177; Parquin Private Joint Stock Company and United States of America, Award No. 275-12783-3, para. 10 (15 Dec. 1986), reprinted in 13 Iran-U.S. C.T.R. 261, 263; Housing and Urban Services International, Inc. and Government of the Islamic Republic of Iran, et al., Award No. 201-174-1, p. 28 (22 Nov. 1985), reprinted in 9 Iran-U.S. C.T.R. 313, 333; Component Builders, Inc., et al. and Islamic Republic of Iran, Interim and Interlocutory Award ITM/ITL 51-395-3, p. 11 note 5 (27 May 1985), reprinted in 8 Iran-U.S. C.T.R. 216, 224 note 9; United States of America and Islamic Republic of Iran, Award No. 106-B-24-1, p. 4 (24 Jan. 1984), reprinted in 5 Iran-U.S. C.T.R. 97, 99.

<sup>3</sup>For example in Reliance Group, Inc. and National Iranian Oil Co., et al., Award No. 15-90-2, p. 3 (8 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 384-385, the Tribunal in dismissing the claim for lack of jurisdiction also dismissed the counterclaim because it arose out of the same contract as the claim. See also, International Technical Products Corporation, et al. and Government of the Islamic Republic of Iran, et al., Partial Award No. 186-302-3, pp. 42-43 (19 August 1985), reprinted in 9 Iran-U.S. C.T.R. 10, 38-39. Behring International, Inc. and Islamic Republic Iranian Air Force, et al., Interim and Interlocutory Award No. ITM/ITL 52-382-3, p. 38 (21 June 1985), reprinted in 8 Iran-U.S. C.T.R. 238, 265.

21. Turning, therefore, to determine whether the Tribunal has jurisdiction over Plicoflex's Claim, the Tribunal first explores the issue concerning Plicoflex's alleged United States nationality. Article VII, paragraph 1, of the Claims Settlement Declaration reads:

A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

22. The Tribunal must evaluate the evidence in the record concerning the nationality of Plicoflex, to determine whether it satisfies the standard set forth above. The Tribunal notes that while Plicoflex has asserted that it is a United States national, assertions alone do not suffice to establish jurisdiction.<sup>4</sup> Neither Plicoflex nor NIGC have submitted any evidence to support Plicoflex's assertion of its United States nationality. Indeed, upon examination of the record, the Tribunal does not see any evidence relating to Plicoflex's nationality. Lacking any proof that Plicoflex is a United States national within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration, the Tribunal finds that Plicoflex's Claim falls outside the Tribunal's jurisdiction. Without jurisdiction over Plicoflex's Claim, the Tribunal does not have any basis for exercising jurisdiction over NIGC's Counterclaim. Accordingly, the Counterclaim must be dismissed. In view of this holding, the Tribunal need not address any other issues concerning NIGC's Counterclaim.

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<sup>4</sup>See Reza and Shahnaz Mohajer-Shojaee and Government of the Islamic Republic of Iran, Award No. 490-273-1, para. 8 (5 Oct. 1990), reprinted in 25 Iran-U.S. C.T.R. 196, 199.

23. Having thus concluded its examination of NIGC'S Counterclaim, there still remains one issue to be decided. In its Order of 28 January 1991, when the Tribunal granted the Claimant's request to withdraw its Claim, the Tribunal did not expressly terminate the proceedings in this Case as to the Respondents the Islamic Republic of Iran and National Iranian Gas Company. See supra, para. 6. The Tribunal notes, however, that in its submission of 6 January 1989, NIGC objected to the termination of the proceedings with respect to its Counterclaim, but did not object to the Claimant's withdrawal of its Claim. Further, the Tribunal observes that the Agent of the Government of Iran stated, as part of the same submission, that the Islamic Republic of Iran has no objection "to being stricken from the list of Respondents without any possible prejudice to the National Iranian Gas Company's counterclaim." See supra, para. 4. Consequently, the Tribunal terminates the proceedings with respect to the Claim asserted by Plicoflex against the Respondents the Islamic Republic of Iran and NIGC pursuant to Article 34, paragraph 2 of the Tribunal Rules.

#### IV. AWARD

24. For the foregoing reasons,


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#### THE TRIBUNAL AWARDS AS FOLLOWS:

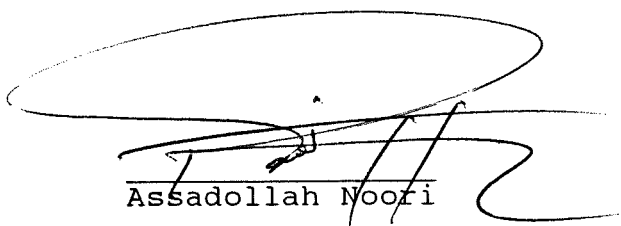
- a) The Counterclaim asserted by NATIONAL IRANIAN GAS COMPANY is dismissed for lack of jurisdiction.
- b) The Tribunal declares the proceedings by PLICOFLEX, INC. against THE ISLAMIC REPUBLIC OF IRAN and NATIONAL IRANIAN GAS COMPANY terminated pursuant to Article 34, paragraph 2 of the Tribunal Rules.


c) Each Party shall bear its own costs of arbitration.

Dated, The Hague  
16 October 1992

  
Bengt Broms  
Chairman  
Chamber One

In the Name of God

  
Assadollah Noofi

  
Howard M. Holtzmann

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