IRAN-UNITED STATES CLAIMS TRIBUNAL

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CASE NO. 7
CHAMBER TWO
AWARD NO. 141-7-2

TIPPETTS, ABBETT, McCARTHY, STRATTON,

Claimant,

and

TAMS-AFFA CONSULTING ENGINEERS OF IRAN, THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, CIVIL AVIATION ORGANIZATION, PLAN AND BUDGET ORGANIZATION, IRANIAN AIR FORCE, MINISTRY OF DEFENCE, BANK MELLI, BANK SAKHTEMAN, MERCANTILE BANK OF IRAN & HOLLAND,

Respondents.

SUPPLEMENTARY COMMENTS BY DR. SHAFIE SHAFEIEI ON HIS NON-SIGNATURE OF THE AWARD IN CASE NO. 7

An Award was recently issued in Case No. 7 by the majority in Chamber Two, in favor of the United States Claimant. I refused to sign the Award, having become totally convinced that it constituted a flagrant injustice and ultra vires on the part of the majority arbitrators. In the extremely limited four-day period at my disposal, I attempted to set forth my contentions in this regard. The Award was filed with the Tribunal Registry on 29 June 1984 under AWARD NO. 141-7-2. Because the majority had no answer for the highly complex legal, technical and financial issues raised in the Case, they refrained from addressing those issues and took a vague or

mute position in drawing up the Award. This Award does not elucidate the legal and technical facts and issues in the Case, nor does it reveal the reasons upon which the Decision is based, and I therefore believe that further comments are necessary in order to clarify the facts at issue.

In this single Case, the Claimant brought a number of claims against the Government of the Islamic Republic of Iran and several Iranian State banks and governmental organizations. From among these claims, two are important and deserve discussion. The first of the two is the contractual claim. The majority declared that it lacked jurisdiction over both this claim and the counterclaim brought by the Respondent against the Claimant on the basis of the same Contract. The second claim asserts that an Iranian company in which the Claimant held a 50% interest had been expropriated. The majority has entertained this claim without adequately taking into account the facts or the Respondents' defences, and without itself advancing adequate argumentation, and it has then consciously committed a major and highly regrettable error in the appraisal of the said Iranian company's assets. If "X" dies or Company "X" is expropriated or dissolved, then only "X"'s property must later be taken into account when an appraisal is carried out. However, the majority has appraised and computed the property of "Z", which did not belong to "X", together with "X"'s own property. Furthermore, this appraisal was carried out in a manner which took no notice of the Respondents' defences or the technical and financial factors in the Case. In my earlier statement, I examined the Case in three parts: (I) the contractual claim, (II) the claim of expropriation, and (III) the method of appraisal. I shall supplement my earlier comments according to the same format.

I. The Contractual Claim

The Claimant's first claim arises out of the consulting services contract (referred to in the Award as the TIA

Contract) executed on 19 March 1975. The first party to this Contract (the "Client") was the Civil Aviation Organization, referred to in the Award by the abbreviation "CAO". The second party to the Contract (the "consulting engineer") consisted of two firms; one was an Iranian firm named Farmanfarmaian and Associates, abbreviated as "AFFA", and the other was a United States firm named Tippetts, Abbett, McCarthy & Stratton, referred to as "TAMS". This latter entity is the Claimant in the present Case.

The subject of the Contract was the performance of technical and consulting services by the second party, the Consulting Engineer, for building the new Tehran International Airport. Pursuant to Articles XIX and XXV of the Contract, the said Contract and all of the Parties' contractual relations were subject to Iranian law; moreover, all claims arising therefrom fell under the sole jurisdiction of the Iranian courts, and even the language of the Contract, in its legal and non-technical parts, was Farsi.

After the Contract was signed, performance on it was begun and continued. However, coincident with the events associated with the Revolution in Iran and the departure of the Consulting Engineers, all performance on the Contract ceased as of late 1978. This Contract is the source of one principal claim and one counterclaim.

The Claimant's (TAMS') claim is against CAO. The Claimant alleges that some of its invoices for services performed on the basis of the Contract have not been paid, and also that it had performed certain services for which it had not yet sent invoices. It therefore demanded payment of the as-yet unpaid invoices and payment of its fees for the services which it had performed and had not yet sent invoices. The total amount demanded by the Claimant on these grounds was US$ 8,885,589. It should, of course, be noted that the fee was payable in Iranian rials. The Claimant has calculated and

converted its accounts payable at a rate of 70.6 rials to the dollar, but if we were to use as the basis for conversion the rate existing at the time the Award was issued, i.e., at least 86.32 rials to the dollar, then the Claimant's demands on the basis of the Contract would amount to US$ 7,267,507.

The relief sought in the Counterclaim by the Civil Aviation Organization is for compensation for losses allegedly incurred as a result of the Claimant's faulty performance of works done and its delay in performance of the Contract. With regard to defects in work, CAO has stated that the Consulting Engineer failed to carry out its contractual obligations correctly and carefully and has in various instances been guilty of default. The Consulting Engineer failed to make adequate studies as necessary with respect to the underground water channels existing within the airport grounds, or to carry out their demolition and filling in. The soil investigations by the Consulting Engineer were totally inadequate and defective. Sufficient care and study were not given to the selection of the subcontractor and his technical qualifications and abilities. On the basis of the foregoing, CAO suffered damages amounting to 910,060,830 rials. The other part of the CAO Counterclaim concerns delay in performance of the Contract. In this connection, CAO has stated that according to the Contract, the Airport project should have been completed and ready for service in 1981. However, the state of progress of the work reveals that the actual services rendered in performing the work lagged far behind the performance schedule provided for in the Contract. As a result, the project remained incomplete, and CAO lost its entire capital investment and was deprived of the income which it had rightfully expected to receive. CAO also asked that these losses be assessed and awarded as damages.

In light of the provisions of Articles XIX and XXV of the Contract, which designate the competent courts and specify applicable law, and in light of the exclusion clause embodied

in Article II, paragraph 1, in fine, of the Claims Settlement Declaration, the majority conceded that the Tribunal lacked jurisdiction over the claims arising out of this Contract (i.e., the principal claim and the Counterclaim) (cf. pages 4 and 5 of the Award). Nevertheless, the majority subsequently adjudicated and awarded payment on the Claimant's principal claim under the guise of another claim, and so in actuality "honored" its declared lack of jurisdiction only with respect to Iran's Counterclaim.

II. The Claim of Expropriation

As stated hereinabove, the Second Party to the said Contract for consulting services consisted of an Iranian firm named Farmanfarmaian and Associates (AFFA) and an American firm ("TAMS", the Claimant in the present Case). Part of the consulting services provided for in the Contract were to be performed in Iran, and part in the United States. Several months after the Contract was signed, these two firms established a non-profit company called TAMS-AFFA in accordance with Iranian law, in order to provide for coordination of the work and for performing the services in question for the Client. The Claimant has alleged that this company was expropriated by the Government of the Islamic Republic of Iran and has brought claim against the Government of Iran in demand of US$ 514,536 on this ground, for its share in the said company. This claim poses numerous substantive and legal issues, some of which relate to the basic issue of expropriation (Point 1), and others of which concern the appraisal of TAMS-AFFA's assets (Point 2).

1. (a) With respect to expropriation, the majority prefers to employ the term "taking" or "deprivation." I myself prefer the term "expropriation," and "any measures affecting property rights", which have been advanced by the Claimant and are employed by the Algiers Declarations. Of course, these terms must be defined within the special context

of the Algiers Declarations. On another, more appropriate occasion, I shall address myself to this task, but for now I will confine myself to discussing the Tribunal's practice in this regard. In AWARD NO. 135-33-1 (Sea-Land Service, Inc. and Islamic Republic of Iran), Chamber One of this Tribunal stated in connection with expropriation that:

> "A finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment. Nothing has been demonstrated here which might have amounted to an intentional course of conduct directed against Sea-Land. A claim founded substantially on omissions and inaction in a situation where the evidence suggests a wide-spread and indiscriminate deterioration in management, disrupting the functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation. Thus the claim against the Government of Iran based on expropriation must be dismissed."

In that Award, Chamber One has striven at least to determine some of the constituent elements of expropriation. Naturally, of course, it is necessary to establish that a property right exists, and to determine its nature. The Government must have interfered intentionally with such property rights, and their owner must as a result have been deprived of his property and rights. It is particularly important that the existence of such a causal relationship be established. The deprivation of the owner's proprietary rights must have occurred as a result of actions by the Government. Therefore, if an owner personally renounces his right to his property and does not attempt to obtain consideration for it; or if the deprivation of the owner's property rights results from other factors, the Government obviously will not incur responsibility. Moreover, it has been accepted in international law that extraordinary measures taken by a Government in extraordinary situations or in times of crisis in order to safeguard its own national interests, will not entail international responsibility.

Chamber One has accepted this fact as well in its said Award and has furthermore referred in this respect to the Decision by the Mexican-United States General Claims Commission:

> "...It is well recognised that in comparable situations of crisis governmental authorities are entitled to have recourse to very broad powers without incurring international responsibility. As the Mexican U.S. General Claims Commission said in the case of Dickson Car Wheel Co. v. United Mexican States:
>
> > 'States have always resorted to extraordinary measures to save themselves from imminent dangers and the injuries to foreigners resulting from these measures do not generally afford a basis for claims. The foreigner, residing in a country which, by reasons of natural, social or international calamities is obliged to adopt these measures, must suffer the natural detriment to his affairs without any remedy.' (U.N.R.I.A.A. Vol. 4, p. 669 at p. 681-2)."

1. (b) The claim that TAMS-AFFA was expropriated must now be examined and evaluated in light of the approach adopted by this Arbitral Tribunal.

Any examination of the claim of TAMS-AFFA's expropriation and any taking of a decision in this connection, requires that a full account be given of this company and its birth, life and demise. Nonetheless, as was stated in my earlier comments, the majority merely contented itself with a brief and cursory description of the company, and even this description fails to conform to the truth. An important part of the facts and of the Respondents' defences in this respect have been totally concealed. Therefore, I must before all else emphasize that TAMS-AFFA was not a commercial trading company; it was a professional organization established several months after the consulting services contract in question was executed. Its object was to carry out and perform the professional services envisaged in the Contract. TAMS-AFFA was to submit

the said services -- which were to be carried out by Farmanfarmaian & Associates and TAMS in Iran and the United States -- to CAO and receive the fees from CAO, on behalf of and for the account of, these two companies. The company was jointly managed by two representatives, one of whom was appointed by AFFA and the other by TAMS. Simultaneous with the events attending the Iranian Revolution, performance upon the Contract slowed and finally came to a complete halt toward the end of 1978. At the same time, the Farmanfarmaian family also fled Iran. Because the representative appointed by AFFA abandoned TAMS-AFFA, a representative was appointed by the Government in July 1979 for the purpose of managing the company's routine affairs and to prevent it from shutting down. On this basis, the Letter of Appointment of Mr. Zarrin Nejad (the Government-appointed manager) issued on 24 July 1979, which was submitted to the Tribunal by the Claimant itself, states that:

> "Since the principal directors of Abdol Aziz Farmanfarmaian and Associates have abandoned their firm ... you are hereby appointed as provisional manager ... in order to prevent closure of the firm..."

Of course, TAMS-AFFA did not engage in any commercial activities, and appointing a manager was necessary only to ensure that the routine affairs of the company, such as watching the office, paying the water and electric bills, and particularly paying and settling the accounts of the company's employees, were taken care of. In August 1979, Mr. Scarin came from the United States to Tehran on TAMS' behalf. At this time, the sum of 34,071,978 Iranian rials, which had been paid by CAO into TAMS-AFFA's account as fees to TAMS, was paid to Mr. Scarin, and through the extremely considerate assistance of the Government-appointed manager and CAO, Mr. Scarin was able to convert this money into foreign currency and expatriate it from Iran. Moreover, all of the many documents and pieces of correspondence submitted to the Tribunal by the Iranian Respondents demonstrate the good understanding and

full cooperation between the Government's representative and TAMS, and the joint management of TAMS- AFFA.

TAMS also introduced Mr. Hoshang Danesh as its representative for the management of TAMS-AFFA's routine affairs, and the company was thereby managed as usual, through the cooperation of two individuals -- one the representative appointed by TAMS, and the other the Government-appointed representative serving as locum tenens for AFFA's representative -- and all of the company's correspondence bears two signatures. Subsequently, around January 1980, Mr. Danesh, the TAMS representative, left TAMS-AFFA and Iran without giving prior notice.

It should also be noted that TAMS-AFFA came into existence in order to carry out the consulting services contract. By 1978 the said Contract had fallen into total abeyance, and as a result TAMS-AFFA lost its raison d'être; in January 1980, simultaneous with the departure of TAMS' representative, TAMS-AFFA necessarily ceased to exist. In such circumstances, how can it be supposed that the said company was expropriated? And how can TAMS allege that TAMS-AFFA was expropriated by the Government on 24 July 1979, especially in light of the fact that TAMS' representative was present in Iran in August 1979 and received the monies owed him and converted it into foreign currency, as well as in view of the cooperation extended to TAMS in appointing a representative to manage the company? Of course it cannot. Or at least this kind of allegation could only be presented before a Tribunal presided over by Mr. Riphagen. In any event, the sum total of the majority's contentions with regard to expropriation of TAMS-AFFA is as follows:

> "After December 1979, TAMS-AFFA ceased all communication with TAMS, neither reporting to it on the status of the TIA project and TAMS-AFFA's finances nor responding to its letters or telexes. It seems evident from the pleading filed by TAMS-AFFA in the present case that TAMS-AFFA continues to function, although doubtless at a reduced level of employees

> and expenditures, and that it is being managed by the Government-appointed successors to the original Government-appointed manager."

This statement raises two points, one concerning the status of the consulting services contract, and the other the financial status of the company. As for the Contract, at the time of the occurrence of the revolutionary events in Iran, the two firms comprising the Second Party to the Contract left Iran (the Farmanfarmaian family having fled Iran permanently). Therefore, even according to the majority's own statement on page 8 of the Award, by December 1978 or January 1979, the Contract had fallen into virtual abeyance; therefore, its status was, and is, perfectly clear. Indeed, rather, one of the CAO's objections to TAMS is that TAMS' representative suddenly left Iran without notice towards the end of 1979, and that in this way all direct relations and contract between CAO and TAMS ceased. Therefore, the cessation of performance on the Contract may be more attributable to the acts and conduct of the Consulting Engineers themselves; and in any case, TAMS-AFFA had, and has, no conceivable role or duty or actions to take in this respect. As for TAMS-AFFA's financial status, we should keep in mind that this company had no commercial or investment activities. As the Claimant has alleged, its assets consisted mainly of a rial deposit account, amounting to approximately one million U.S. dollars; however, as stated by the Respondents in their defence, the company has a net negative worth in light of its obligations, recurrent expenses, settlement of its employees' salary accounts. In these circumstances, there was no need to draw up the company's balance sheet and report it to TAMS; in any event the failure to do so cannot possibly be construed as constituting expropriation. The majority also refers to certain telexes and letters: what letters and telexes these were, and on what subjects, is not at all clear.

Then, following up its above-cited contention, the majority comes to the conclusion that:

> "In light of these facts, the Tribunal concludes that the Claimant has been subjected to 'measures affecting property rights' by being deprived of its property interests in TAMS-AFFA since at least 1 March 1980 and that the Government of Iran is responsible, by virtue of its acts and omissions, for that deprivation."

In this connection, the following queries might be raised: specifically what measures were taken by the Government? What were the Claimant's property rights? Just how did this measure by the Government affect these rights? Exactly what measures, and particularly, what rights? Just what right was the Claimant attempting to exercise? Just how was it prevented from exercising these rights as a result of the Government's intervention? What has it lost? Upon what facts does the presumption rest that the company was expropriated on March 1, 1980? The Award by the majority gives no answers and mades no contentions with respect to these questions. Naturally, then, it is difficult for me to argue the issue in a void. Still more questions arise: Does this "expropriation", which the majority presumes to have taken place, correspond to the Algiers Declaration's definition of "expropriation"? Isn't the American arbitrator -- and more so, Mr. Riphagen -- abusing the authority unfortunately vested in this Tribunal on 19 January 1981? The answer to this last question, I believe, is in the affirmative, and I therefore refused to sign the Award.

2. Of course, one might suppose with the majority, however, that TAMS-AFFA was expropriated by the Government of the Islamic Republic of Iran, and in that event the issue of appraising TAMS-AFFA's property would arise. Were we to do so, only the property of TAMS-AFFA must be appraised; the assets of Mr. "Z" should not also be calculated along with TAMS-AFFA's property. In Exhibit 10 to its Statement of Claim, the Claimant itself appraised TAMS-AFFA's assets and set its own share thereof at $514,536. On the grounds, however, that the alleged accounts due were receivable by

TAMS-AFFA, the majority has held that TAMS' demands for accounts receivable under the consulting services contract constituted a part of TAMS-AFFA's assets, and has included them in its calculation of the company's balance sheet. The following issues are to be raised in this connection:

(a) Was the Contract transferred to TAMS-AFFA, and did this company therefore own the invoices and contractual claims which the Claimant has sought on the basis of the Contract? Just what was the role and capacity of this company in receiving payment on these invoices?

(b) We should bear in mind that these alleged accounts receivable are the very contractual claims which CAO has disallowed and which form the subject of the Claimant's principal claim, and that the majority has stated that the Tribunal lacks jurisdiction over this claim and the Counterclaim. That being the case, on what grounds is the majority now authorized to adjudicate the said claim? Moreover, these amounts allegedly due constitute at most hypothetical and contingent assets, so how can they be entered into and calculated on the company's balance sheet as confirmed assets?

(c) On principle, what responsibility does the Government bear towards these claims?

2. (a) Pursuant to Article I, paragraphs 1 and 2 of the Contract, the immediate Parties and signatories to the consulting services contract consisted of CAO on the one part, and Abdol Aziz Farmanfarmaian & Associates (AFFA) and TAMS on the other part. In accordance with Article XX, paragraph 1 of the Contract, AFFA and TAMS -- that is, the second party to the Contract -- were not entitled to assign or transfer all or any part of the services relating to the Contract to any other person(s) or legal entity(s), or even to their own employees. However, because the second party to the Contract consisted of

two firms, one of them Iranian and the other American, and because a part of the work was being carried out in Iran and another part in the United States, it was provided in Article XX, paragraph 3 of the Contract, in order to coordinate and facilitate the works, that:

> "In order to carry out its obligations, the Consulting Engineer may establish and register an independent company in conformity to Iranian law. Performance by such company of the services which are the object of the present Contract must not be taken as constituting a transfer of the Contract, and the Consultant's obligations shall continue to conform to that which has been set forth in this Contract and its Annexes. The Consultant may request the Client in writing to pay the cost of its services to the said new company."

In light of the foregoing, it is certain that the rights arising out of the said Contract belonged exclusively to AFFA and TAMS, and that these two entities were jointly responsible for the obligations arising out of the Contract. These rights and obligations were incapable of transfer, and they were never transferred to TAMS-AFFA. TAMS-AFFA has never become the successor to the immediate Parties to the Contract in their contractual rights and obligations. What has been particularly provided for in Article XX, paragraph 3, in fine, of the Contract, is that the Consulting Engineer may in writing request the Client -- that is, CAO -- to pay the fees for its services to TAMS-AFFA. Therefore, if the invoices were submitted to CAO by TAMS-AFFA, the role of the latter in this respect was merely that of an intermediary and agent. In actuality, AFFA and TAMS, which were carrying out the operations embodied in the Contract, partly in Iran and partly in the United States, submitted their documents and invoices to CAO through TAMS-AFFA, having requested that the amounts of those invoices be deposited into TAMS-AFFA's account. This request could certainly have been withdrawn as well; in still more explicit terms, these invoices and accounts receivable did not belong to TAMS-AFFA and the latter merely received

them temporarily on behalf of, and for the account of, AFFA and TAMS, and under no circumstances could they be regarded as constituting a part of TAMS-AFFA's confirmed assets and entered into its balance sheet.

It is also important to state that in order to determine TAMS-AFFA's legal status and the ownership of the invoices, the majority referred to the Parties' practice rather than analyzing the Contract's articles. While it is in any case improper to rely on practice in the face of the explicit terms of these articles and contractual relations, it is also necessary to note that in its 29 June 1982 Memorial, even the Claimant described TAMS-AFFA as merely an intermediary company and stated that TAMS and AFFA had sent the invoices for their services to CAO through TAMS-AFFA; pursuant to the terms of the Contract, the Parties' reciprocal obligations were fixed, despite TAMS-AFFA's formation. However, even if we were to suppose, arguendo, that the Contract was transferred to TAMS-AFFA, with the latter being an independent company, then in that event TAMS-AFFA was an Iranian company, and the Claimant did not have the right to control it. Pursuant to Article VII, paragraph 2 of the Claims Settlement Declaration, the Claimant cannot bring its contractual claim before this Tribunal, and the Respondents particularly emphasized this last issue in their defences.

2. (b) It might be possible to suppose that the consulting services contract was transferred to TAMS-AFFA along with the rights and obligations arising therefrom, or to hold that because the latter company took receipt of these invoices, the contractual invoices ought therefore to be treated as a part of TAMS-AFFA's assets, regardless of the capacity in which TAMS-AFFA received them, or on what grounds. But even with this presumption, still more difficulties emerge. The Claimant's invoices and contractually-based claims have been disallowed and disputed. There is merely one claim; in accordance with Articles XIX and XXV of the

consulting services contract, and by virtue of the exclusion clause embodied in Article II, paragraph 1, in fine, of the Claims Settlement Declaration, interpretation of the provisions of the said Contract and adjudication of disputes arising out of the Contract, lie within the sole jurisdiction of the Iranian courts and must be settled in accordance with the laws of Iran. In light of these provisions, the majority was compelled to declare as well that this Tribunal lacks jurisdiction over this claim. Either it has jurisdiction, or it does not. It categorically does not, and there is no third solution or compromise. Therefore, the present claim must be settled exclusively by the Iranian courts and in accordance with Iranian law. Nonetheless, on the pretext of "evaluation", the majority arbitrarily adjudicated this claim, acting in a manner which cannot be justified and has no legal or logical basis.

As against the Claimant's claims, there also exists a Counterclaim, which it is neither logical nor just to separate from the former. In view of all these factors, the Claimant's alleged accounts receivable constitute at best a hypothetical and contingent asset, and this kind of asset cannot be regarded as being a part of TAMS-AFFA's confirmed assets. Moreover, a part of the Claimant's alleged accounts receivable relate to fees for services which, the Claimant asserts, it performed, but for which it has not yet sent an invoice to CAO. The last-mentioned fees had not been demanded as of 19 January 1981 -- that is, the date on which the Algiers Declarations were signed; furthermore, they were first brought before this Tribunal and asserted on 20 October 1981, in the Claimant's Statement of Claim. For this reason, because on 19 January 1981 there existed no claim or outstanding claim, as intended in Article II, paragraph 1 of the Claims Settlement Declaration, in this part of the Claimant's action, the demands and claim embodied in the said section are not, on principle, capable of being adjudicated before this Tribunal. In these circumstances, how could these accounts receivable possibly be

conceived as constituting a part of TAMS-AFFA's confirmed assets?

Another interesting point remains, which I would like to mention. The assets of TAMS-AFFA, as shown by its balance sheet dated March 20, 1979 (Claimant's rebuttal filed 14 November 1983, Annex I, Attachment 3), which balance sheet has been prepared and approved by TAMS and AFFA, the company directors and owner, excluded the accounts receivable under the Contract. It is clearly evident that TAMS as a director and owner of the company has admitted that the accounts receivable under the Contract were not to be regarded as an asset of TAMS-AFFA. Therefore, how could Judge Riphaghen regard it as such? The above-mentioned balance sheet also indicates that as of March 20, 1979, TAMS-AFFA's liabilities exceeded its assets by the amount of 36,118,855 rials. This indicates that the Claimant has a negative interest as of that date.

2. (c) Let us set aside all the preceding matters; let us forget that the Farmanfarmaian family quit Iran and left TAMS-AFFA without a responsible officer or supervisor, so that the Government was compelled, in order for TAMS-AFFA's routine affairs to be managed and particularly for its employees' situation to be decided, to appoint a representative to TAMS-AFFA on 24 July 1979 to replace the representative appointed by AFFA. Let us forget that after this appointment was made, Mr. Scarin came to Iran on behalf of TAMS from the United States and obtained the monies owing from TAMS-AFFA, and that he was able, because of the considerate help of the Government-appointed manager, to convert these monies into U.S. dollars and expatriate them from Iran at a time when the export of foreign currency was subject to extremely severe restrictions. Let us forget as well that at this time Mr. Scarin designated Mr. Danesh as TAMS' representative for TAMS-AFFA, and that shortly thereafter the latter representative also left Iran without notice. Let us suppose, despite

all the facts at hand, that TAMS is able today to allege before this Tribunal that TAMS-AFFA was expropriated by the Government of Iran on 24 July 1979. Let us close our eyes to the object and purpose behind TAMS-AFFA's formation as well, and suppose that, in arguendo, TAMS-AFFA was a highly-important, foreign-owned manufacturing company, which the Government expropriated discriminately. Even then, the act of expropriation would not give rise to an unlimited degree of responsibility. The Government's responsibility is at most confined to those rights and that property which it has expropriated. The property and rights of TAMS-AFFA should be determined as of March 1, 1980, the date on which, according to the unsupported contention of the majority, the supposed expropriation took place. What property did TAMS lose; of what rights was it deprived? At any event, the Government of Iran bears no responsibility with respect to the Claimant's contractually-based claims. As of March 1, 1980, these accounts receivable had not been paid, and for this reason TAMS had itself sent a number of telexes from the United States to CAO requesting that the account be settled and fees be paid for the services allegedly rendered by it. CAO, however, believed that the fees had been paid in proportion to the amount of work performed and that it had no further obligation; in addition, CAO has a Counterclaim of its own. For these reasons, the alleged accounts receivable on the basis of the consulting services contract were disallowed, and in this regard, on March 1, 1980, there existed only one dispute and one claim. It ought particularly to be noted that TAMS-AFFA does not have the right to bring a claim; it is only TAMS (that is, the Claimant), which is a direct Party to and signatory of, the Contract, possesses the right to bring suit. Therefore, the supposed and imaginary expropriation of TAMS-AFFA by the Government of Iran constituted, and constitutes, no bar to the Claimant's exercise of its rights. The Claimant could and can bring this claim before the competent courts. The Government of Iran has not divested TAMS of this right; it has not encroached on the Claimant's rights in this

regard, and the Government of Iran cannot conceivably be held responsible on this account. Instead of undertaking this kind of legal analysis, however, the majority unfortunately cited a number of definitions of international law and employed the term, "full value." This latter term, however, is peculiar to the United States Department of State and is not a term used in international jurisprudence.

It should be noted that "full" compensation, invented by U.S. Secretary of State Hull in his letter to the Mexican Government in 1938, is a myth and does not reflect the reality of international law. It goes without saying that the United States Department of State, as a matter of course, is in no position to represent its views as constituting international consensus. In this respect, even the editors of the Restatement of the Foreign Relations Law of the United States (Revised) have rightly rejected the Hull formula and "full" compensation as reflecting the state of international law. See the Editorial Comment by Oscar Schachter in The American Journal of International Law, entitled "Compensation for Expropriation," 78 AJIL 122-125 (1984). Yet Mr. Riphagen, unfortunately but not surprisingly, followed the position taken by the United States Department of State, in particular the one detailed by that Department in a letter to the American Law Institute on 14 April 1983 (U.S. Department of State Bulletin of June 1983, Vol. 83/No. 2075 at 52 and 53; 78 AJIL 176 (1984).

Mr. Riphagen's reference to the archaic cases of Chorzów Factory and Norwegian Shipowners Claims is out of context and totally irrelevant to the case presently under consideration. These two age-old cases should be confined to their special facts; moreover, they never refer to the myth of "full" compensation. The former refers only to a duty to payment of "fair" compensation, while the latter speaks of "just" compensation determined by fair actual value at the time and place in view of all surrounding circumstances. See Schachter,

supra, at 123. Mr. Riphagen's decision prompts even more regret, considering the sobering reality that none of the Parties ever argued any of these questions, and the shallowness of his decision becomes even more obvious in light of the following well-known facts, also reiterated by Professor Schachter:

> "It was clear that European state practice showed substantial deviation from what one would ordinarily understand as "full" compensation or as prompt and effective payment. American scholars, by and large, came to share the views of their European counterparts and in the postwar period they increasingly challenged the official U.S. view on the Hull standard. In particular, their examination of state practice in cases of postwar nationalization showed that compensation was less than full value (or fair market value), and that payments were deferred and often made in nonconvertible local currency. To maintain that the Hull formula was law seemed far removed from reality." (Id., at 124)

III. Method of Appraisal

The Contract is accompanied by two Annexes (A and B). Annex A, in eight parts, specifies the technical services which were the object of the Contract.

Annex B to the Contract discusses the mechanism relating to the Consulting Engineer's fee, down payments, monthly instalments and, finally, final reconciliation of the account. For the first part -- i.e., the Master Plan -- a fixed amount of money was envisaged, but the Consulting Engineer's fees under Parts Two, Three, Four and Five of the Contract were to be paid as a specific percentage of the construction costs; said construction costs, and their component elements, are described therein as well. It is impossible, of course, to determine the construction costs because the works were not completed. However, the over-all project budget, and the detailed budget for the various parts of the project, had been

determined, so that it is entirely certain that the construction costs could not and must not exceed this approved budget. In order to determine the Consulting Engineer's fees under existing conditions, it is necessary to determine what percentage of the work in each part the Consulting Engineer performed, and in this respect the claim and the defence are in essential disagreement. The Claimant's assertions in connection with certain of these parts appear particularly unreasonable. The photographs relating to the Airport project which were submitted to the Chamber by the Iranian Respondents, demonstrated that the Airport is only in the initial stages of the topographical survey. Construction work, and the subcontractors' works, have not been completed. The project grounds are merely open lands, and have not even been graded. Yet, in such circumstances, the Claimant asserts that it has completed 40% of the management of the project, which seems difficult indeed to accept. Moreover, the Iranian Respondents have objected to the quality of the work actually performed. Determination of the proportion of work performed under each part, and investigation of the quality of the work, represents a complex and totally technical matter outside the competence of this Tribunal, and it requires an expert opinion. In this regard, throughout the Hearing, CAO profferred detailed reasons explaining why technical expert opinions were necessary for evaluating the works performed by the Claimant and all the other technical and financial aspects of the case, and thus requested that the Tribunal refer the matter to an expert opinion. Nonetheless, despite this request and in particular despite all the technical and financial issues involved, the majority refused to appoint an expert and instead arbitrarily evaluated the Claimant's demands.

Conclusion

A. Pursuant to Article V of the Claims Settlement Declaration, the Tribunal "shall decide all cases on the basis

of respect for law." Furthermore, pursuant to Article 32, paragraph 3 of the Tribunal Rules:

> "The arbitral tribunal shall state the reason upon which the award is based..."

With this aim in mind, an award by the Tribunal should contain a fully clear description of the facts and contentions of the parties. The objections and contentions advanced by the parties to the case should all be set forth in detail in the award, and the Tribunal should explain in detail its grounds and reasons for its award. The Tribunal award should also be responsive to the grounds and contentions of the parties to the case. Unfortunately, however, the present Award by the majority fails to set forth the facts in the case. It is not clear which claims are attributed to which Iranian organizations, and the majority does not even state what relief was sought in the various claims, or on what grounds. As for CAO's Counterclaim, it is merely referred to vaguely and tersely in a line or so. The Award fails to pose the substantive and legal issues attending expropriation, especially with respect to appraisal of TAMS-AFFA's assets.

Pursuant to the relevant terms and conditions of the consulting services contract, the said Contract was subject to the laws of Iran, and the interpretation of the said Contract and the adjudication of all disputes arising therefrom lay within the exclusive jurisdiction of the Iranian courts. In light of these provisions, and in particular in view of the exclusion clause contained in Article II, paragraph 1, in fine, of the Claims Settlement Declaration, the majority acknowledged that the Tribunal lacks jurisdiction over the claim and the counterclaim arising out of the said Contract. Subsequently, however, it adjudicated the Claimant's claim separately from the counterclaim on the pretext of the imaginary expropriation of TAMS-AFFA, and awarded payment thereon. What is the source of the majority's newfound competence to

adjudicate this claim? And how can the claim be disassociated from the counterclaim?

The accounts receivable allegedly due the Claimant under the Contract have been repudiated and are the subject of dispute, and so constitute at best a merely contingent asset. As against this contingent asset, there exists the counterclaim -- that is, a contingent debt -- as well, and these contingent assets and debts cannot be taken in isolation from one another. Nonetheless, in violation of all relevant legal and accounting principles, the majority took note of the former as constituting confirmed assets of TAMS-AFFA and yet ignored the second, namely, CAO's counterclaim. Such an adjudication lacks all rational basis and appears to be a flagrant example of discrimination.

The Contract at issue was a technical contract. Determining the Consulting Engineer's fee presents complex technical and financial issues and absolutely requires recourse to an expert opinion; and yet the majority has arbitrarily assigned a figure of US$ 5,594,405, equivalent to 400,000,000 Iranian rials. The majority fails to utter a single word in answer or explanation of just how it arrived at this figure, what were the bases for its calculations, how it has managed to solve the technical and accounting problems involved, and what response it has to Iran's defences. The Award by the Chamber involves a judgement in excess of eight million dollars (the judgement amount plus interest) and yet it fails to contain a single word justifying and arguing in support of this computation. Such being the case, even a simple law student will discern that this arbitral proceeding does not constitute an honorable judicial and arbitral process. I earlier avowed that Mr. Riphagen had failed to study Iran's Defence or the technical and accounting aspects of the case. Three figures "A", "B", and "C" were proposed to him and he selected one of these, in ignorance of what it comprised and represented. This being the case, if the person who submitted

the figures to him had proposed instead figures "D", "E", and "F", Mr. Riphagen would have selected one of the latter group.

Moreover, it is possible for the Tribunal to err in making its appraisal and calculations, and so naturally either of the Parties to the claim will be entitled to bring the details to the attention of the Tribunal within a specified period of time and request that the Award be amended. In this regard, Article 36 of the Tribunal Rules states:

> "1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative."

The Chamber has not provided any explanation of its method of appraisal or calculation in this case. Therefore, the Parties to the case are completely unable to check its calculations, and so if the Chamber has committed an error, it will be utterly impossible to correct it.

In accordance with the principles of good faith and effectiveness, which are well-established and well-known principles of international law, international treaties must be interpreted and carried out in good faith. Interpretation in particular must be made in such a way so as to ensure that the provisions of a clause are fully implemented, in the manner intended by the governments which have signed that agreement. In the present case, Mr. Riphagen has acted in direct violation of both of these principles. By virtue of the exclusion clause embodied in Article II, paragraph 1, in fine, of the Claims Settlement Declaration, the claim arising out of the consulting services contract lay outside the jurisdiction of the Tribunal. Initially, Mr. Riphagen admitted the Tribunal's lack of jurisdiction, and yet he

subsequently submitted the Claimant's contractual claim to adjudication by resorting to a different tactic. In this way, he has to all effect violated the exclusion provisions of Article II, paragraph 1, and prevented their implementation.

The Tribunal should take its decisions only after entirely free and democratic deliberations and discussions, and its Decisions should reflect a completely impartial legal opinion. Deliberations require study, thought and reflection; and all of the substantive and legal issues in a case ought, together with all the contentions advanced by the parties, to be analyzed and examined impartially and in good faith. Without question, if after such a free and legal analysis and examination the Tribunal arrives unanimously, or by a majority, at a legal conclusion and that conclusion forms the basis of the Tribunal's Decision, then of course such a legal decision or ruling must be respected. Unfortunately, however, this is not the case in the present instance. This Decision by the Chamber is not the result of a legal analysis and examination, and it demonstrates the majority's intention to transfer millions of dollars of Iran's assets to the United States. I am totally convinced of this fact and for this reason refused to sign the Award. It is unfortunately now impossible to conduct an impartial and proper arbitration in Chamber Two; and the arbitrator appointed by the United States is consciously deriving benefit from and exploiting the unfavorable conditions prevailing within this Chamber.

B. The issue of nullifying and setting aside an arbitral award has been a topic of discussion for many years. The issue having been raised in 1873 in the Institute of International Law, the Institute adopted the position that under certain circumstances an arbitral award can be nullified ab initio. According to Article 27 of the Draft Regulations for International Arbitral Procedure:

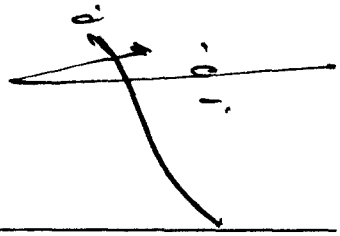
> "The arbitral decision is null in the event of a null compromis, excess of power, the proven corruption of one of the arbitrators, or an essential error."[1]

This doctrine also regards as null and void, awards in which arbitrators have exceeded their powers or failed to observe and respect fundamental rules of arbitration. In the opinion of the French jurist, Dr. Albert Acremant:

> "To exceed their powers, the arbitrators have only to accord to one party satisfaction greater than that allowable to them by the compromis, or, they have only to neglect the provisions of that compromis relating to procedural matters."[2]

In light of all the foregoing, the majority has acted ultra vires in this case; the Award is contrary to the principles of law and therefore null, void, and unenforceable.

Dated, The Hague
27 July 1984



Dr. Shafie Shafeiei

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(1) Annuaire de l'Institut de Droit International, 1st year, 1877, p. 133. Emphasis added. Translated from the original French: "La sentence arbitral est nulle en cas de compromis nul ou d'excès de pouvoir ou de corruption prouvée d'un des arbitres ou d'erreur essentielle."

(2) La procédure dans les arbitrages internationaux, Paris, 1905, p. 163. Translated from the original French: "Pour excéder leurs pouvoirs, les arbitres n'auront qu'à accorder à une partie des satisfactions plus grandes que celles que leur permittait le compromis, ou bien ils n'auront qu'à négliger les règles de ce même compromis quant à la procédure à suivre."

See also: Paul Reuter, Droit international public, Paris, 1968, p. 284; Pierantoni, "La procédure dans les arbitrages internationaux," R.C.I.L.C., 1898, pp. 456-7; Guermanoff, L'excès de pouvoir de l'arbitre, Paris, 1929, p. 60.