

THE ISLAMIC REPUBLIC OF IRAN, Respondent.

CASE NO. 135

CHAMBER TWO

AWARD NO. 218-135-2

Iran - United States Claims Tribunal

Filed March 19, 1986

Signed March 19, 1986

AWARD

Appearances

For Claimant: Mr. Joseph P. Griffin Mr. Mark R. Joelson Representatives Mr. Brian Harvey Counsel Mr. Julio Bague Vice-President Mr. Kenneth W. McGraw Expert Witness Standard Research Consultants

For Respondents: Mr. Mohammed K. Eshragh Agent of the Islamic Republic of Iran Mr. Abolhasan Mohammadi Mr. Ahmad Ghatineh Mr. Mohammad Ali Hedayati Legal Advisers to Agent Mr. Abolfazl Kousheshi Assistant to Agent Mr. Seyed Jalal Seyyedi Mr. Mahmoud Abdoli Mr. Bahram Fakhri Representatives of Bank of Industry and Mining

Also present: Mr. Daniel M. Price Deputy Agent of the United States Ms. Lucy Reed Adviser to Agent Ms. Jane H. Chalmers Overseas Private Investment Corporation

I. THE PROCEEDINGS

1. Claimant PHELPS DODGE INTERNATIONAL CORPORATION ("PDIC"), a Delaware, U.S.A. corporation, filed a Statement of Claim on 19 November 1981 naming as Respondent "IRAN" as defined in Article VII(3) of the Claims Settlement Declaration. The Statement of Claim alleged that Iran, acting through the Government of Iran, Industrial and Mining Development Bank of Iran, Iranians' Bank, Foundation for the Oppressed, SICAB Public Joint Stock Company ("SICAB"), SICAB Factory Committee for the Protection of Industries and SICAB Workers' Committee, breached and expropriated certain contract rights owned by Claimant. The claim sought damages aggregating \$2,284,190.80, plus interest and costs.

2. Pleadings in defense were filed by Bank Tejarat, successor to Iranians' Bank, the Foundation for the Oppressed, the Bank of Industry and Mine, successor to the Industrial and Mining Development Bank of Iran, the Organization for the National Industries of Iran, SICAB, and the Committee for the Protection of Industries of SICAB Factory (referred to collectively as "Respondents"). The Committee for the Protection of Industries of SICAB Factory also interposed a counterclaim against PDIC for breach of contract, seeking damages in the amount of not less than \$10 million.

3. The case was consolidated for hearing purposes with Case No. 99, involving

related parties and facts. A Hearing was held on 25-26 November 1985.

II. FACTS AND CONTENTIONS

A. The Agreements

4. On 5 June 1974, PDIC and SICAB entered into two contracts relating to the construction and operation of a wire and cable manufacturing plant at Ghazvin, Iran. One contract, entitled "Technical Assistance and Training Agreement," provided that PDIC would advise SICAB and make available its know-how on the processes of producing and marketing copper and aluminium wire and cable. The second agreement, denominated "Technical Management Agreement," provided that PDIC would manage the technical and administrative aspects of the SICAB plant during construction and after commencement of operations.

5. These two agreements were part of a comprehensive package of agreements through which PDIC's parent corporation, Phelps Dodge Corporation ("PDC"), and several co-venturers founded SICAB. PDC has filed a separate claim against Iran in Case No. 99 for the alleged expropriation of its 19.36 percent equity interest in SICAB.

6. Under the Technical Assistance and Training Agreement, PDIC was obligated to provide a wide range of technical services to SICAB on an upon request basis. These services included the training of SICAB employees at PDIC offices and plants in the United States or elsewhere, furnishing PDIC employees and employees of related companies for employment in Iran to advise on factory operations and to train supervisory personnel, providing technical knowledge relating to new products and to engineering procedures in the wire and cable industry, furnishing engineering and other data relating to wire and cable production, and planning and advising on plant expansion. The Agreement was to continue for a period of 15 years commencing from the date of SICAB's first "commercial production," defined as the date officially fixed as such by Iran's Ministry of Economy.

7. SICAB was to pay compensation to PDIC in two forms. First, SICAB agreed to pay the salaries and related costs of PDIC personnel sent to Iran to perform the functions specified in the Agreement and to reimburse PDIC for the expenses of SICAB personnel sent to various PDIC facilities for training. Second, SICAB was obligated to pay PDIC a technical assistance fee, on a semi-annual basis, for a period of 15 years after the commencement of commercial production. For the first three years of commercial production, SICAB was obligated to pay PDIC a fee computed on the basis of 1 1/2 percent of its total net sales, exclusive of taxes. The fee was reduced to one percent of net sales for the 4th through 15th years of commercial production. The maximum annual fee payable was \$400,000.

8. Under the Technical Management Agreement, PDIC agreed to serve as technical manager of the factory, to designate an experienced PDIC technical manager as Technical Director of SICAB, and to assign certain other of its employees to work for SICAB. For its part, SICAB was obligated to pay the salaries and expenses of PDIC personnel assigned to SICAB. Section 6 of the Technical Management Agreement provided as follows:

The salaries, or other compensation, including the cost of all fringe benefits thereto, and other expenses including travelling expenses, relocation, housing, overseas and other allowances for all personnel assigned to [SICAB] in Iran either on a temporary or permanent basis under this Agreement shall be paid by [SICAB]

9. SICAB also was obligated to render assistance in repatriating PDIC personnel and their belongings upon termination of the Agreement. Section 11 of the Agreement provided that:

Upon termination of this Agreement at its scheduled termination as stated in Section 12 hereof or earlier termination for whatsoever reason as stated in

Sections 10 and 13 hereof, [SICAB] will render all possible assistance to enable PDIC to repatriate the Technical Director and all other personnel assigned to [SICAB] in Iran by PDIC, their families and personal belongings, and [SICAB] shall pay the cost of repatriation of such aforementioned personnel and their families, including their personal belongings, to their country of origin.

10. Section 10 provided that "[i]f [SICAB's] business is nationalized or there occurs some force majeure which would make continued management of the manufacturing operations of [SICAB] unduly onerous to PDIC, PDIC will be entitled to terminate this Agreement by three (3) months' written notice given to [SICAB] at any time." Section 13 provided that the Agreement would be terminated automatically if the Technical Assistance and Training Agreement were terminated, and provided further that, upon termination of the Agreement under Sections 10, 12 or 13, SICAB would remain liable for payments owing to PDIC under Section 6. The Technical Assistance and Training Agreement contained no corresponding cross-termination clause. The only termination clause in that Agreement provided that "in the event that, subsequent to its construction and operation, the [SICAB] Factory is later discontinued and ceases altogether the business of the manufacture of the Copper and Aluminum Products, then the Agreement shall be terminated without liability"

B. Suspension and Termination of the Agreements

11. Performance under the two agreements continued without substantial dispute until the end of 1978, when the Iranian Revolution began gathering momentum. The evidence indicates that construction and operation of the SICAB plant were hampered by strikes and that a few PDIC employees were subject to harassment. In response to what it considered to be dangerous conditions existing in Iran at the time, Claimant, in December 1978, evacuated its personnel from Iran temporarily to Bombay, India. In a letter dated 15 December 1978 to Mr. Bagher Baradar, Chairman of SICAB (and also Senior Assistant Managing Director of the then Industrial and Mining Development Bank of Iran), PDIC explained that concern for the safety of its employees had caused it to remove its employees, and noted that

while we are not terminating the Technical Management Agreement at this time, we want you to know that under conditions such as exist today we are unable to perform under that agreement or to carry on in Iran the Technical Assistance Agreement.

12. On 5 January 1979, PDIC formally terminated the Technical Management Agreement and suspended the Technical Assistance and Training Agreement, effective immediately. The letter, sent by air pouch, reads in pertinent part as follows:

This letter will serve as formal notice of the termination of the Technical Management Agreement dated June 5, 1974 between Phelps Dodge International Corporation (PDIC) and SICAB Joint Stock Company. Such termination is effective immediately upon your receipt of this letter and as provided by Section 10 of such Agreement.

This letter will also serve as formal notice of the suspension of the Technical Assistance and Training Agreement dated June 5, 1974 between PDIC and SICAB.

These actions were reconfirmed in a letter dated 23 January 1979 to Mr. Baradar.. PDIC ordered its personnel repatriated effective 22 January 1979.

13. In reply to PDIC's 5 January 1979 letter, Mr. Baradar, in a letter dated 24 January 1979, expressed regret to "learn of your decision to terminate both the Technical Management and Technical Assistance and Training Agreements." The letter also stated that "[w]e believe that the present course of events should not merit unilateral action and would therefore like to ask you to reconsider the course of action taken."

14. PDIC contends that after its departure from Iran, it has continued to provide

occasional technical advice and assistance by telephone or telex in response to sporadic requests from SICAB. The parties disagree as to the status of SICAB's operations at the time of Claimant's departure from Iran, but the precise operational status of the plant is not relevant to any issue before the Tribunal in this case.

C. Nationalizations and Operation of the Law for the Protection of Industries

15. At the time of Claimant's departure from Iran, a majority of the shares of SICAB were owned by private companies and individuals and managed by managers and a board of directors approved by such private investors. These investors included, among others, PDC, A/S Nordiske Kable-og Traad fabriker ("NKT"), a Danish wire and cable firm, Industrial and Mining Development Bank, Iranians' Bank, and several Iranian individuals, including members of the Sabet family. This situation changed soon thereafter. With respect to ownership, it appears that, pursuant to the 7 June 1979 Law for the Nationalization of Banks and the 7 July 1979 Law for the Protection and Development of Industries in Iran, the Government of Iran nationalized the assets of the Industrial and Mining Development Bank, Iranians' Bank and the major Iranian private shareholders of SICAB, including the Sabets'. Iran transferred the latter's shares to the Foundation for the Oppressed.

16. With respect to management authority, it appears that Iran's Council for the Protection of Industries took over management of SICAB as of November 1980 or thereabouts. The Council is composed of representatives of five different agencies of the Government of Iran. The Council acted on 27 October 1979 to appoint the Industry and Mine Bank and the Organization for National Industries to manage the SICAB factory. This order, apparently, was not announced until 15 November 1980.

D. The Claim

17. The claim at issue in this case comprises two sub-claims. First, Claimant seeks \$219,466.30 for unpaid invoices billed to SICAB under the Technical Management Agreement or the Technical Assistance and Training Agreement. Claimant has filed copies of 84 invoices, dating from mid-1978 to early 1981, covering four general categories of expense: (1) salaries, allowances and related expenses, (2) goods sold and delivered to, and expenses incurred on behalf of, SICAB, (3) training expenses, and (4) repatriation expenses. This claim is directed against SICAB, which failed to pay the alleged debts, and Iran, agencies and instrumentalities of which purportedly interfered with and refused to permit payment of the debts.

18. Second, Claimant seeks \$2,064,724.50 as the alleged present discounted value of the technical assistance fees it purportedly would have received over the 15 year life of the Technical Assistance and Training Agreement. Claimant first alleges that "SICAB's consistent refusal to acknowledge the parties continued rights and obligations under the Technical Assistance Agreement constitute both a termination of that Agreement by SICAB, and an anticipatory repudiation of PDIC's rights under the Agreement."

19. Claimant alternatively claims against the Government of Iran on an expropriation theory. Initially, Claimant contended that the unsafe conditions prevailing in Iran at the time of its departure resulted from "acts instigated, encouraged, permitted, condoned, exploited and ratified by Iran" and thus are attributable to, and the responsibility of, the Government of Iran. In this connection, Claimant alleged that it was and continues to be prevented by these continuing unsafe conditions from sending or maintaining personnel in Iran to perform under the Technical Assistance and Training Agreement and that its right to provide services and to obtain technical assistance fees were therefore "effectively nullified by the actions of Iran perpetuating and encouraging these unsafe conditions." In addition, Claimant's Statement of Claim alleged that Iran had imposed restrictions and measures that prevented payment to PDIC of technical assistance fees, including, but not limited to certain currency restrictions and

debt registration decrees which actions independently nullified and impaired PDIC's rights to technical assistance fees. These actions, according to Claimant, resulted in the expropriation without compensation of the valuable property rights secured to PDIC in fees anticipated under the Technical Assistance Agreement.

20. In its Memorial, Claimant refined its expropriation argument somewhat, contending that "[t]he expropriation of PDC's investment in SICAB necessarily implies the simultaneous expropriation of PDIC's right to receive payments under the Technical Assistance [and Training] Agreement" Claimant equates the amount claimed with the full value of its expropriated property rights, which, according to Claimant, is the standard of compensation provided by the Treaty of Amity[FN1] governing American investment in Iran and customary international law. Claimant values its property as of November 1980, the alleged date of expropriation.

FN1 Treaty of Amity, Economic Relations, and Consular Rights, 15 Aug. 1955, United States-Iran, 8 U.S.T. 900, T.I.A.S. No. 3853, entered into force 16 June 1957.

21. Respondents raise various jurisdictional objections and defenses on the merits. Respondents first contest the Tribunal's jurisdiction over the claim. With respect to the invoice claim, Respondents contend that SICAB is a private company not controlled by Iran. With respect to the claim for technical assistance fees, Respondents also claim that the acts complained of consist primarily of the creation of unsafe conditions for PDIC personnel in the later part of 1978 which acts it contends are excluded from the Tribunal's jurisdiction pursuant to Paragraph 11(D) of the General Declaration.[FN2]

FN2 Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981. Paragraph 11, in pertinent part, requires the United States to bar and preclude claims by the United States or a United States national "arising out of events occurring before the date of this Declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to the United States property or property of the United States Nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran." Article II(1) of the Claims Settlement Declaration excludes from the Tribunal's jurisdiction "claims described in Paragraph 11 of the General Declaration."

22. On the merits, Bank Tejarat, the Foundation for the Oppressed, and the Bank of Industry and Mine, all of which became shareholders in SICAB due to the above-mentioned nationalization laws, contend that, as shareholders, they are not responsible for debts of the corporation.

23. With respect to the claim for invoices, Respondents further contend that only \$180,970.95 worth of invoices are outstanding, of which it accepts only \$40,732.08. Respondents do not, however, provide details concerning which invoices it accepts or rejects, nor do they provide reasons for rejecting invoices, except those for repatriation expenses. Respondents contest Claimant's right to payment on such invoices given that the Technical Management Agreement stipulated that such expenses were payable only upon termination of the agreement, which, in turn, required three months' prior written notice. Respondents observe that no prior written notice was given and that the claimed expenses were incurred prior to the 5 January 1979 termination date. Second, Respondents contend that the payment by SICAB of outstanding debts is prohibited under the Law for the Protection of Industries and Prevention of Stoppage of Factories during the period in which the Council for Protection is in control of the factory. Third, Respondents argue that payment is prohibited by Iran's exchange controls.

24. With respect to the claim for technical assistance fees, Respondents advance

two main defenses. First, Respondents argue that the Technical Management Agreement and the Technical Assistance and Training Agreement are so integrated that Claimant's termination of the former constituted an implicit termination of the latter. Second, Respondents contend that the SICAB plant never commenced commercial production as defined in the Technical Assistance and Training Agreement and therefore its obligation to pay technical assistance fees has yet to commence.

E. The Counterclaim

25. The counterclaim filed by the "Committee for Protection of Industries of SICAB Factory" alleges that PDIC breached the Technical Assistance Agreement by withdrawing its personnel from Iran and wrongfully "suspending" the agreement. The Committee contends that such suspension was not permitted by the Agreement, and that, in practical terms, PDIC's actions amounted to a willful termination of the contract. As a result, the Committee contends that installation of machinery at the SICAB plant was delayed and certain production technologies were not transferred, resulting in losses in excess of \$10 million. The Committee, apparently, is an arm of the Council for the Protection of Industries.

26. Claimant contests the standing of the Committee, which is not a named Respondent, to file a counterclaim, and defends against the merits of the counterclaim by contending, inter alia, that (1) PDIC performed all services called for by the Technical Assistance and Training Agreement, except insofar as its performance was prevented and excused by non-payment by SICAB, by Iran's unlawful acts, or by force majeure; (2) PDIC did not terminate the Agreement; (3) SICAB Factory Committee suffered no damages for which PDIC is legally responsible; and (4) Section 15 of the Agreement bars and precludes the Counterclaim. [FN3]

FN3 Section 15 limits PDIC's liability under the Agreement to "loss or damage willfully caused by PDIC or any of its Associated Companies or their respective employees."

III. REASONS FOR AWARD

A. Jurisdiction

(1) Claimant's Nationality

27. PDIC has presented evidence sufficient to satisfy the Tribunal that it was, at all relevant times, a national of the United States as defined in Article VII(1) of the Claims Settlement Declaration in that it has been incorporated under the laws of the State of Delaware since 1966, that it has always been a wholly-owned subsidiary of PDC, a corporation incorporated under the laws of the State of New York in 1885 and remaining so incorporated from the time the claim arose until 19 January 1981 and that, during such period, natural persons who were citizens of the United States held interests in PDC equivalent to fifty percent or more of its capital stock.

(2) Jurisdiction with Respect to Respondents

28. There is no dispute that all entities named as Respondents in the Statement of Claim, as well as those additional entities filing pleadings in defense, are entities controlled by the Government of Iran within the meaning of Article VII(3) of the Claims Settlement Declaration, with the exception of SICAB. Respondents deny that SICAB is so controlled. The Tribunal, however, finds to the contrary.

29. The evidence indicates that, as of the nationalization decrees of June and July 1979, agencies and instrumentalities of the Government of Iran, including the Bank of Industry and Mine, the National Industries Organization, and the Foundation for the Oppressed[FN4] cumulatively owned over 60 percent of SICAB's shares. The Tribunal has held previously that control by the Government of one of the States Parties can be established through the ownership of shares indirectly through other government controlled instrumentalities and that the government need not own the shares directly. Economy Forms Corp. and Government of the Islamic Republic of Iran et al., Award No. 55-165-1, pp. 10-11 (14 June 1983). See also Ultrasystems Inc. and Islamic Republic of Iran et al., Award No. 27-84-3, pp. 8-9 (4 Mar. 1983). Where such ownership extends to a majority of the corporation's voting stock, the government, as a general matter, controls such corporation.

FN4 In Hyatt Int'l Corp. et al. and Government of Islamic Republic of Iran et al., Interlocutory Award No. ITL 54-134-1, p. 31 (17 Sept. 1985), the Tribunal held that the Foundation for the Oppressed "has been and continues to be an instrumentality controlled by the Government of the Islamic Republic of Iran."

30. Moreover, the November 1980 transfer of management authority from a board of directors selected by SICAB's shareholders to the Bank of Industry and Mine and the National Industries Organization, which are both government instrumentalities, made clear that Iran controlled SICAB. In this connection, the Tribunal notes that Respondents, in their Statement of Defense, admit that SICAB "has fallen under the control of the Government for a limited period," and that the Bank of Industry and Mine has appointed SICAB's present directorate "by virtue of a delegation from the Council for Protection of Industries." Irrespective of whether this delegation of management authority by the Government of Iran and appointment of directors (and thus managers) constitutes an expropriation, such actions clearly evidence control. See, e.g., RayGo Wagner Equipment Co. and Star Line Iran Co., Award No. 20-17-3, pp. 5-6 (15 Dec. 1982) (a showing that Respondent has been administered by persons appointed by some public authority and not its requested Manager and Board of Directors "establishes prima facie evidence that the Respondent is controlled by the Government of Iran"); Rexnord Inc. and Islamic Republic of Iran, Award No. 21-132-3, p. 8 (10 Jan. 1983) ("The evidence . . . clearly shows that the power to appoint and dismiss managers and directors . . . has been with the Government of Iran In view of this, and regardless of whether the two companies were in effect nationalized or expropriated by Iran, the Tribunal holds that both [Respondents] are entities controlled by Iran"). In view of the foregoing, the Tribunal rules that SICAB is an entity controlled by the Government of Iran within the meaning of Article VII(3) of the Claims Settlement Declaration.

(3) Subject Matter Jurisdiction

31. Claimant's invoice claim can be characterized either as a debt claim or breach of contract claim. Similarly, its claim for technical assistance fees can be viewed alternatively as a breach of contract or expropriation claim. All of the above types of claims "arise out of debts, contracts . . . , expropriations or other measures affecting property rights" and are thus within the Tribunal's competence. Article II(1), Claims Settlement Declaration.

32. While the Statement of Claim seeks to attribute fault to the Government of Iran, in part, for creating and maintaining unsafe conditions, neither claim is dependent upon proof of such. Therefore, the Tribunal need not address Respondents' contention that the claims are excluded from the Tribunal's jurisdiction by virtue of Paragraph 11(d) of the General Declaration.

(4) The Counterclaim

33. The counterclaim of the Committee for Protection of Industries of SICAB Factory relates to the Technical Assistance and Training Agreement, and thus arises out of the "same contract, transaction, or occurrence that constitutes the subject matter" of the claim. Accordingly, it is within the Tribunal's

jurisdiction. Article II(1), Claims Settlement Declaration. With respect to Claimant's argument that the Committee lacks standing to file a claim because it is not itself a named Respondent, the Tribunal observes that the Committee currently controls SICAB; accordingly, it is entitled to file a defense and counterclaim on behalf of or as SICAB.

B. Merits

(1) Technical Assistance Fees

34. As noted above, Claimant advances two legal theories in support of its claim for technical assistance fees. First, Claimant contends that SICAB wrongfully terminated and anticipatorily repudiated the Technical Assistance and Training Agreement. Second, Claimant argues that the Government of Iran expropriated PDIC's rights to technical assistance fees by preventing it from continuing to perform under the Agreement and by expropriating PDIC's equity interest in SICAB. For the reasons set forth below, the Tribunal finds neither of these theories convincing.

35. Claimant's first theory of liability presupposes that SICAB expressly or constructively terminated the Technical Assistance and Training Agreement. The evidence in the record, however, does not support this assumption. To the contrary, the evidence indicates that PDIC suspended the Agreement on 5 January 1979 and that neither party took definitive steps either expressly or impliedly to lift that suspension or to terminate the Agreement.

36. In support of its position, Claimant relies heavily upon the 24 January 1979 letter of Mr. Baradar expressing regret at PDIC's decision to "terminate both the Technical Management and Technical Assistance and Training Agreements." However, it is difficult to regard Mr. Baradar's characterization of PDIC's actions as constituting termination by SICAB, in view of Mr. Baradar's accompanying request that PDIC reconsider its decision.

37. Moreover, Claimant contradicts its contention that this January 1979 letter evidences SICAB's termination of the Agreement with its assertion that the suspension was lifted in the spring of 1979 by the conduct of the parties. If the Agreement was operative in the spring of 1979, it could not have been terminated earlier in the year.

38. This alternative attempt on Claimant's part to demonstrate a breach or termination by SICAB after the spring of 1979 also lacks support in the record. The only evidence adduced of conduct arguably suggesting that the suspension was lifted is the testimony of Mr. Julio Bague, a vice-president of PDIC, that, at some point after March 1979, PDIC assisted SICAB in selling SICAB-owned machinery stored in France. This lone incident, however, is inconclusive and can hardly evidence a course of conduct; the nature of the assistance provided can just as easily be characterized as assistance of a type normally provided by a large shareholder and is not clearly technical assistance of a type contemplated by the Agreement. In this connection, the Tribunal notes that the minutes of SICAB's Board of Directors' meeting of 26 June 1978 refer to efforts to dispose of equipment located in Europe and to requests made both to "Phelps Dodge" and NKT to assist in such disposal. NKT's participation is inconsistent with Claimant's contention that PDIC's efforts were undertaken under the Technical Assistance and Training Agreement, as NKT had no corresponding obligations.

39. Having suspended the Agreement in writing, moreover, PDIC has not adequately explained why it did not lift the suspension in writing. As an additional matter, Claimant's contention that the Agreement resumed presupposes that Claimant was, at the time, capable of fully performing its obligations under the Technical Assistance Agreement. In this connection, the Tribunal doubts PDIC's explanation that it could have adequately satisfied its obligations under the Agreement by providing assistance through telex and telephone communication. If this assertion is correct, there would have been no reason for PDIC to suspend the

Agreement in the first place. Having initiated the suspension of the Agreement, Claimant cannot claim for SICAB's breach without proving, at a minimum, that it later regarded the suspension as lifted and communicated such to SICAB. The record lacks such proof.

40. Claimant's concomitant assertion of anticipatory breach is similarly unavailing. The only breach that can be alleged is SICAB's failure to pay technical assistance fees. However, this alleged breach occurred when the Agreement was suspended. Moreover, Claimant's own conduct deviates from its position that the suspension was lifted and fees were owing. If Claimant believed fees were owing, it could reasonably have been expected to have invoiced SICAB for such fees or at least to have demanded an accounting prior to filing its claim here. There is no evidence that it did so.

41. Claimant's arguments predicated upon theories of expropriation and interference with contract rights fail for analogous reasons. PDIC's suspension of the Agreement constituted a suspension of both its obligations and rights thereunder. Any contract rights it possessed were contingent upon the lifting of the suspension, which has not occurred. While Claimant's argument that expropriation of PDC's interest in SICAB necessarily implied an expropriation of PDIC's rights under the Technical Assistance and Training Agreement can be read as a contention that PDIC's right to lift the suspension and begin collecting technical assistance fees was expropriated, the Tribunal does not so find. PDIC's contract rights were not dependent upon PDC's shareholder rights; thus, any nationalization or expropriation of PDC's shareholder interest would not in and of itself deny PDIC of its right to technical assistance fees.

(2) Invoice Claim

42. As noted earlier, Claimant's invoice claim comprises four general categories of expense. The invoices consist of debit invoices totalling \$342,307.52 and credit invoices amounting to \$122,841.22, leaving a net debit balance of \$219,466.30. Respondents' defense consists of a general denial of all but an unidentified \$40,732.08 worth of invoices and reasoned objections to amounts claimed as repatriation expenses. With respect to those invoices to which Respondents have not raised reasoned objections, liability must be found if it appears, prima facie, that the invoice is valid and payable. Each category of invoices is analyzed, in turn, below.

(a) Salaries, Allowances and Related Expenses

43. The invoices within this category cover the salaries and fringe benefits of PDIC employees seconded to SICAB, their moving expenses to Iran, and storage charges for personal belongings not taken to Iran. As a general matter, these expenses are covered by Section 6 of the Technical Management Agreement, [FN5] and SICAB is thus liable for their payment. However, certain of the invoices clearly fall outside the scope of Section 6, either because they relate to expenses not covered or to expenses incurred subsequent to the termination of the Agreements.

FN5 See supra p. 5.

44. In this connection, the Tribunal notes that PDIC continued to invoice SICAB for the salaries of certain PDIC personnel seconded to SICAB for periods after 5 January 1979, even though PDIC terminated the Agreement on that date. While PDIC stopped invoicing SICAB for the salaries and expenses of most of its personnel as of 5 January 1979, it continued to invoice for such expenses in respect of certain personnel who, although withdrawn from Iran in December 1978, did not formally resign from SICAB until later. These personnel included Mr. Baur, SICAB's Managing Director, and Mr. Wickramasuriya, SICAB's Finance Manager. Mr. Baur and Mr. Wickramasuriya resigned from SICAB on 9 April and 12 February 1979, respectively, and PDIC invoiced SICAB for their salaries through such dates.

45. The Tribunal finds no basis for allowing such claims beyond the termination date of the Agreement and therefore disallows such invoices. Upon termination of the Agreement, SICAB was released from its obligation under Section 6 to reimburse PDIC for expenses incurred on SICAB's behalf. Thus, no claim for salaries and related expenses can be maintained on the Contract after the date of its termination. While a claim for unjust enrichment may lie if PDIC could demonstrate that the relevant individuals performed services for SICAB after the termination of the Agreement from which SICAB benefited, no such showing has been made. Therefore, all invoices relating to salaries, allowances, and related expenses accruing after 5 January 1979, which total \$36,744, are disallowed. [FN6]

FN6 The invoices partially or fully involved consist of the following: 85-6371 (as adjusted by credit invoice 85-6549), 85-6403, 85-6472, 85-6515, 85-6548, 85-6607, 85-6938, 85-6939.

46. The Tribunal also observes that the invoices at issue include two invoices for personal losses sustained by PDIC employees in Iran, totalling \$1,469.62. The sole basis relied upon for seeking these amounts is the Agreements. The Tribunal finds the invoice for amounts reimbursed to Mr. F. Pasqualoni for items left in Iran (No. 85-6981) and the invoice for amounts reimbursed to Mr. R. Purtee for damage to his personal effects stored in the United States (No. 85-7515) to be outside SICAB's responsibility under the Agreements. Accordingly, the claim based on them is disallowed.

(b) Goods Sold and Delivered

47. This class of invoices mainly covers supplies and services procured in the United States by PDIC for SICAB and certain travel expenses incurred by PDIC personnel seconded to SICAB. Invoices within the former category all related to expenses incurred in 1978; there is no evidence that SICAB ever objected to such invoices and the Tribunal determines that SICAB is liable under them. Certain of the invoices in the latter category pose the same problem as those discussed under (a) above, as they include travel undertaken after 5 January 1979, purportedly on SICAB's behalf. Two invoices fall within this group, involving travel expenses incurred by Mr. W. Baur in March and April of 1979. These invoices (Nos. 85-6495 and 85-6546), totalling \$4,100, must be disallowed for the reasons set forth above.

(c) Training Expenses

48. These invoices, covering expenses incurred by PDIC over the period August 1978 through December 1978 in training certain Iranian employees of SICAB are clearly within the scope of Section 6 of the Technical Assistance and Training Agreement. The Tribunal therefore holds that SICAB is responsible for them.

(d) Repatriation Expenses

49. The claim for repatriation expenses consists primarily of invoices for the relocation expenses incurred by SICAB's PDIC-seconded personnel and their families (consisting of air tickets, transportation of personal effects, and insurance) and invoices for "exchange losses" suffered by such individuals when they converted their Iranian rials into U.S. dollars in the United States at a rate purportedly less favorable than that prevailing in Iran. The travel expenses generally relate to travel undertaken in December 1978, when PDIC personnel left Tehran for Bombay ultimately destined to their homes in the United States and elsewhere. It is not clear from the record precisely which portions of such travels were billed to SICAB. It is, however, evident that the invoices include at least one two-week hotel bill in Bombay incurred by Mr. M. Feldstein totalling \$1,172.50 (No. 85-6487).

50. As noted, Respondents contest Claimant's right to any repatriation expenses under the Technical Management Agreement because such expenses were incurred, in part, prior to PDIC's termination of the Agreement, and because such termination

occurred without the required three months written notice.

51. The Tribunal determines that PDIC is entitled to be reimbursed in full for the claimed air fare and transportation expenses, but is not entitled to reimbursement for "exchange losses" and costs associated with the two week stay in Bombay. The Tribunal rules that, under Section 11 of the Technical Management Agreement, three months written notice was not a condition precedent to SICAB's obligation to reimburse repatriation costs. In any case, the Tribunal finds that Claimant's departure and concomitant failure to give three months notice of termination were excused by the force majeure conditions then prevailing in Iran, which demonstrably affected both Claimant's personnel and SICAB's operations. Cf. Gould Marketing, Inc. and Ministry of National Defense of Iran, Interlocutory Award No. ITL 24-49-2, p. 11 (27 July 1983).

52. Absent a contractual provision to the contrary, costs incurred as a result of force majeure normally are the responsibility of the party on whom they fall, subject generally to the Tribunal's equitable discretion, using the contract as a framework and reference point. Queens Office Tower Associates and Iran National Airlines Corp., p. 14, Award No. 37-172-1 (15 Apr. 1983); Gould Marketing, Inc. and Ministry of Defence of Islamic Republic of Iran, pp. 4-5, Award No. 136-49/50-2 (29 June 1984). Applying this rule, the Tribunal holds that any expenses incurred by Claimant in Bombay, for which the only relevant invoice appears to be that of the hotel bill, while awaiting the termination of force majeure, must be borne by Claimant. However, once such force majeure conditions ripened into the actual termination of the Technical Management Agreement, SICAB became obligated under Section 11 of that Agreement to pay repatriation costs, which necessarily include travel and transportation costs, irrespective of when they were incurred.

53. This case differs in material respects from International Schools Services, Inc. and National Iranian Copper Industries Co., Award No. 194-111-1 (10 Oct. 1985) in which the Tribunal rejected a claim for certain repatriation expenses incurred after force majeure conditions led to a contract's termination. The contract at issue here expressly provides that the Iranian party was to pay repatriation expenses; in Schools, the contract contained no express provision apportioning responsibility for such costs. Moreover, the Tribunal notes that the bulk of PDIC's repatriation expenses were, unlike Schools, incurred prior to the contract's termination.

54. The Tribunal, however, disallows as unnecessary for repatriation two invoices (Nos. 85-6408 and 85-65-88) covering warehousing expenses for the goods of two employees for periods after 5 January 1979. These invoices total \$536.28.

55. With respect to the claim for exchange losses, the Tribunal finds that such losses are too remotely connected to repatriation to constitute repatriation expenses. The invoices for such expenses, totalling \$6,573.11, [FN7] are therefore disallowed. [FN8]

FN7 Includes amounts invoiced per invoices no. 85-6487 and 85-6831, less amounts credited per invoice no. 85-6718.

FN8 While Mr. Baur, then SICAB's Managing Director, but also a PDIC employee, purported to authorize payment of these "losses," by letter dated 27 January 1979 and a Memorandum dated 25 January 1979, the Tribunal finds that, at that point in time, Mr. Baur had a clear conflict of interest. Any such authorization for payments beyond the scope of the existing agreements, therefore, should have been approved by SICAB's Board of Directors.

(e) Conclusion

In view of the foregoing, Claimant's invoice claim totalling \$219,466.30 must be reduced by the amounts of invoices disallowed, or \$50,595.51. Respondent SICAB remains liable for the balance of \$168,870.79.

C. The Counterclaim

56. The counterclaim of the Committee for Protection of Industries of SICAB Factory for breach of the Technical Assistance and Training Agreement is dependent upon a finding that Claimant PDIC terminated that Agreement. The Tribunal has determined in Part III(B)(1) above that such Agreement was never terminated but remains suspended. Moreover, the Tribunal has ruled that Claimant's departure from Iran and thus its suspension of the Agreement were justified by the force majeure conditions then prevailing in Iran. As to Respondent's argument that termination of the Technical Management Agreement necessarily implied termination of the Technical Assistance and Training Agreement, the Tribunal simply notes that while the Technical Management Agreement contained a cross-termination clause, the Technical Assistance and Training Agreement did not. Thus, by implication, the Parties contemplated that a termination of the Technical Management Agreement would not per se result in a termination of the Technical Assistance and Training Agreement. In any case, Respondent has failed to adduce any evidence in support of its damage claim. Accordingly, the Tribunal rules that the counterclaim is dismissed on the merits.

IV. INTEREST

57. In view of the large number of invoices at issue in this case, Claimant, to simplify matters, claims interest on all amounts only as of November 1980. While several of its invoices are dated after that date, the vast majority were issued well before and the Tribunal accepts the claim for interest as of 1 November 1980. The Tribunal further determines that an annual rate of 11.25 percent simple interest is appropriate.

V. COSTS

58. Each party shall bear its own costs of arbitration.

VI. AWARD

59. For the foregoing reasons, THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

a) THE ISLAMIC REPUBLIC OF IRAN, by virtue of its control of SICAB Public Joint Stock Company, is obligated to pay to Claimant PHELPS DODGE INTERNATIONAL CORPORATION the sum of One Hundred Sixty-Eight Thousand, Eight Hundred Seventy Dollars and Seventy-Nine Cents (U.S. \$168,870.79), plus simple interest at the rate of 11.25 percent per annum (365 day year), from 1 November 1980 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account, on the claim for invoices.

b) The claim for technical assistance fees and the counterclaim for breach of the Technical Assistance and Training Agreement are dismissed on the merits.

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

d) The above obligations shall be satisfied out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria, dated 19 January 1981.

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

Dated, The Hague 19 March 1986

Robert Briner

Chairman

George H. Aldrich

Hamid Bahrami-Ahmadi

Concurring in part, Dissenting in part

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