CASE NO. 7

CHAMBER TWO

AWARD NO. 141-7-2

Iran - United States Claims Tribunal

Filed June 29, 1984

Signed June 22, 1984

AWARD

Appearances:

For the Claimants: Mr. John A. Rudy Attorney Mr. Donald R. Peirce Mr. John E. Bandes Mr. Joseph L. Scarin Representatives of Claimant

For the Respondents: Mr. Mohammad K. Eshragh Agent of the Islamic Republic of Iran Mr. Yaha Madani Legal Adviser to the Agent Mr. Esmail Bakhshi Plan & Budget Organization Mr. Emami Ministry of Defence Mr. Mohsen Kakavand Bank Tejerat Mr. Mostafa Kalantari Mr. Zhirir Simonian Mr. Abbas Khoshbin Mr. Mehdi Pour Ashraf Civil Aviation Organization Mr. Serj Enjilian Mr. Ali Akbar Zarsazan Bank Maskan

Also Present: Ms. Jamison M. Selby Deputy Agent of the United States of America

I. The Claims

The Claimant, TIPPETS, ABBOT, McCARTHY, STRATTON ("TAMS") is a United States engineering and architectural consulting partnership. TAMS and Aziz Farmanfarmaian and Associates ("AFFA"), an Iranian engineering firm, created and equally owned TAMS-AFFA, an Iranian entity created for the sole purpose of performing engineering and architectural services on the Tehran International Airport ("TIA") project. This performance was based on a contract entered into on 19 March 1975 by TAMS and AFFA on the one hand and the Civil Aviation Organization ("CAO") on the other.

TAMS presents four claims to the Tribunal. First, TAMS claims against the CAO on the basis of the TIA contract for its share of the billed and unbilled amounts allegedly due TAMS-AFFA under that contract and for amounts retained as good performance guarantees by CAO from invoices that were paid to TAMS-AFFA. Second, TAMS claims against the Government of Iran for the value of its fifty-percent interest in TAMS-AFFA which it alleges was expropriated by the Government of Iran. In the event the Tribunal should hold that its first claim against CAO is excluded from the jurisdiction of the Tribunal by the forum selection clause, then TAMS asserts that the value of TAMS-AFFA would include TAMS-AFFA's accounts receivable from CAO under the TIA contract. Third, TAMS seeks a cash deposit it maintained with Bank Melli and which it alleges was wrongfully retained by Bank Melli. Finally TAMS seeks the cancellation of bank guarantees and undertakings related to the TIA project. TAMS originally presented a fifth claim for personal property allegedly expropriated, but it later withdrew that claim.

The Respondents deny the jurisdiction of the Tribunal on various grounds and deny any liability to the Claimant on the claims. The CAO counterclaims, alleging

inadequate and defective contract performance by TAMS. The Respondents deny that TAMS-AFFA was expropriatedand allege that its value had by 1979 become negative. TAMS-AFFA counterclaims for a share of the debts it allegedly owes to third parties. Bank Sakhteman and the Mercantile Bank of Iran and Holland counterclaim for maintenance charges for bank guarantees issued at the request of TAMS-AFFA.

II. Jurisdiction

1. General

The Claimant has satisfied the Tribunal that it is a national of the United States. During all relevant periods of time it has been a partnership registered in the State of New York, and all the partners have been citizens of the United States. The Tribunal is also satisfied that all named Respondents, except TAMS-AFFA, are included within the definition of "Iran" in Article VII, paragraph 3 of the Claims Settlement Declaration.

In view of the other holdings of the Tribunal on jurisdictional issues, which are set forth below, the Tribunal does not need to decide whether, TAMS AFFA is included within the definition of "Iran" in Article VII, paragraph 3 of the Claims Settlement Declaration or whether the Claimant's ownership interests in TAMS-AFFA were sufficient at the time the claim arose to control TAMS-AFFA.

2. Jurisdiction over the TIA Contract Claim

Under Article II paragraph 1 of the Claims Settlement Declaration the Tribunal has jurisdiction over a claim arising out of a contract unless such claim arises under "a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts...."

Article XIX of the TIA contract provides:

> All the disputes that arise between the parties hereto over this Contract or the interpretation of its contents that cannot be settled through negotiation or correspondence, shall be primarily referred to a committee consisting of the highest authority of the executive agency (or his deputy) and the Consultant for settlement and in case they fail to settle the dispute on the basis of this Contract and the relevant regulations, the dispute shall be settled through competent Iranian courts and in accordance with Iranian Laws.... [emphasis added].

A similar clause in the BHRC contract in T.C.S.B. Inc. - and - Iran Interlocutory Award 5-140-FT (5 Nov. 1982) was found to divest this Tribunal of jurisdiction.[FN1] The Tribunal finds no significant distinctions between the clause in the instant case and the clause in the BHRC contract. While the Claimant argues that disputes "over" the contract are more limited than disputes "arising out of" the contract, the Tribunal is not convinced that there is any significant difference. Therefore the claim and the counterclaims based upon the TIA contract are dismissed for lack of jurisdiction.

FN1 The BHRC forum selection clause provided:

> All disputes arising out of this Subcontract, or the interpretation and understanding of its provisions between the parties, which cannot be settled through amicable negotiations or correspondence, shall first be referred to a committee composed of a representative of each of the Employer, Housing Organization, and Subcontractor. In case no agreement can be reached or if one of the parties does not agree with the judgment of the majority of the committee, the dispute will be settled according to the laws of Iran by reference of it to competent courts of Iran.

3. Jurisdiction over the Bank Guarantees and the Related Undertakings

Article II paragraph 1 of the Claims Settlement Declaration provides that the Tribunal has jurisdiction over claims which "arise out of ... contracts (including transactions which are the subject of letters of credit or bank guarantees)...." The Tribunal therefore as an initial matter has jurisdiction over the subject matter of this claim.

The bank guarantees and related undertakings at issue in the instant case however, were entered into pursuant to obligations created by the TIA Contract, and the claim to have them cancelled is ancillary to the claim on that contract, in that the basis for the relief requested is breach of that contract, not the contracts between TAMS-AFFA and the banks. For the reasons stated in the preceding section, claims based on the TIA contract are excluded from the jurisdiction of this Tribunal. Therefore, TAMS' claim for cancellation of bank guarantees and related undertakings is dismissed for lack of jurisdiction.

Inasmuch as the claim against the banks is excluded from the jurisdiction of the Tribunal as TAMS-AFFA, rather than the Claimant, was the contracting party with the banks with respect to these guarantees, the counterclaims for maintenance charges must also be dismissed for lack of jurisdiction.

4. Jurisdiction over the Claim for Property Interest in TAMS-AFFA

TAMS has also filed a claim based on the alleged taking of its property interest in TAMS-AFFA. The subject matter of such a claim (i.e., "expropriation or other measures affecting property rights...") clearly is within the Tribunal's jurisdiction.

The Tribunal therefore has jurisdiction over TAMS' claim for its property interest in TAMS-AFFA.

5. Jurisdiction over the Claim for Bank Deposit

TAMS lastly claims $24,601, the dollar equivalent of an October 1979 rial deposit with Bank Melli Iran. Bank Melli has stated that TAMS does currently possess such a deposit in the amount of IR 1,736,840. Bank Melli further states, however, and Claimant admits, that TAMS made no demand for such monies prior to 19 January 1981. Inasmuch as no demand was made, there was not, as is jurisdictionally required by Article II, paragraph 1, of the Claims Settlement Declaration, a claim outstanding on 19 January 1981. See Harza Engineering Company -and- The Islamic Republic of Iran Award No. 19-98-2 (30 December 1982).

The Tribunal therefore dismisses for lack of jurisdiction the claim of TAMS for its bank deposit.

6. Jurisdiction over TAMS-AFFA's Counterclaims

Respondent TAMS-AFFA contends that its value is negative and counterclaims for payment by the Claimant of its share of debts allegedly owed by TAMS-AFFA to third parties. In view of its holdings below on the merits, the Tribunal does not need to decide in this case whether it has jurisdiction over such a counterclaim. However, to the extent that TAMS-AFFA purports to present a counterclaim for taxes and social security premiums allegedly owed separately by TAMS to the Iranian authorities, it lacks standing to assert such a counterclaim, so it is unnecessary to decide whether in this case such a claim would be within the jurisdiction of the Tribunal.

III. The Merits

1. The Claim for Deprivation of Property

The TAMS-AFFA partnership was established in August 1975 as a 50/50 partnership. Equal shares of the IR 1,000,000 capital were held by each partner, and TAMS-AFFA was managed by a four-member coordination committee, two members of which were appointed by each partner. Article 6 of the articles of partnership required that any decision by TAMS-AFFA required the consent of at least one member appointed by TAMS and at least one member appointed by AFFA. Authority to sign documents creating obligations for TAMS-AFFA was vested in two persons, one appointed by each partner. The evidence indicates that TAMS-AFFA operated on the prescribed principle of joint control until 1979.

As a consequence of the Iranian revolution, work on the TIA project stopped almost completely in the December 1978-January 1979 period. Prior to further significant discussions between TAMS-AFFA and the CAO concerning the future of the TIA project, the Plan and Budget Organization of the Government of Iran on 24 July 1979 appointed a temporary manager for AFFA. The Farmanfarmaian family was one of the fifty-one individuals or families whose enterprises were placed under Government management pursuant to Paragraph 15 of the Law for the Protection and Development of Iranian Industry. Although the appointment named only AFFA, there seemed to be some confusion as to whether the new manager was manager only of AFFA or also of TAMS-AFFA. The Official Gazette published the appointment on 11 August 1979 as that of the manager of TAMS-AFFA, and the new manager assumed the right to sign checks on TAMS-AFFA's accounts by himself and make personnel and other decisions without consulting TAMS.

During the months of August through November 1979 TAMS representatives in Iran managed to rectify at least partially these violations of the partnership agreement. They restored, for example, the practice of two signatures on checks, and they obtained the cooperation of the Government-appointed manager in their ultimately successful efforts to be paid some 34 million Iranian rials owed to them by TAMS-AFFA and to obtain permission to convert that sum to dollars for export from Iran to the United States. However, the crises in the relations between the United States and Iran that developed in November 1979 reversed this trend. The last remaining TAMS representative with signature authority apparently left the country in December 1979. TAMS wrote and telexed TAMS-AFFA on several occasions in January and February 1980 concerning further work on the TIA project but received no responses. 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 pleadings 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.

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. The Claimant is entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived.[FN2] The Tribunal prefers the term "deprivation" to the term "taking", although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required.

FN2 See Chorzow Factory Case (Merits) (Ger. v. Pol.), 1928 P.C.I.J. Ser. A, No. 17, at 47 (Judgement of 13 September); Norwegian Shipowners' Claims (Nor. v. U.S.), 1 U.N. Rep. Int'l Arb. Awards 307 (1922). The parties in this case have not argued the question of the relevance of the investment protection provisions of Article IV, paragraph 2 of the Treaty of Amity of 15 August 1955 between Iran and the United States.

A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its

benefits, even where legal title to the property is not affected.[FN3]

FN3 See 8 Whiteman, Digest of International Law 1006-20; Christie, What Constitutes a Taking Under International Law? 38 Brit. Y.B. Int'l. Law 307 (1962); and the Lena Gold-field's Case reprinted in Nussbaum, The Arbitration Between the Lena Goldfield's, Ltd. and the Soviet Government, 36 Cornell L.Q. 31 (1950).

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.

In the present case, the Claimant and the Government-appointed manager of TAMS-AFFA managed to cooperate sufficiently well in mid 1979 so that such appointment could not by itself in this case be considered an act depriving the Claimant of its property. However, the developments of late 1979 and early 1980, particularly the complete absence of answers to letters and telexes and of any communication from TAMS-AFFA to the Claimant, effectively ended such cooperation and deprived the Claimant of its property interests in TAMS-AFFA. If any doubt remained about this question in early 1980, it has been removed by the absence of new developments and the passage of time.

2. The Value of TAMS-AFFA

Claimant in the instant case seeks only the dissolution value of its interest in TAMS-AFFA, i.e. the value of TAMS-AFFA after the collection of all assets and the discharge of all obligations. Thus, the task of the Tribunal is to make its best estimate of the assets and liabilities of TAMS-AFFA as of 1 March 1980. This involves not merely the valuation of bank accounts and fixed assets, but also the valuation of TAMS-AFFA's accounts receivable, including those under the TIA contract and TAMS-AFFA's debts, including those to the tax and social security authorities, and potential liabilities such as those represented by the counterclaims under the TIA contract asserted in this case and those that could possibly arise under the bank guarantees.[FN4]

FN4 While tax and social security premium liabilities of TAMS-AFFA must be estimated for purposes of valuing TAMS-AFFA, the alleged separate tax and social security liability of TAMS, are, of course, irrelevant to the value of TAMS-AFFA.

That the accounts receivable are those of TAMS-AFFA, rather than those of the individual partners, seems clear from the conduct of the parties to the contract. The invoices were submitted to the CAO by TAMS-AFFA, and payments were made by the CAO to TAMS-AFFA. Division of revenues between the partners was effected from time to time on the basis of decisions by TAMS-AFFA. The Tribunal notes that, in the pleadings in this case, the Respondents argued that only TAMS-AFFA, not TAMS, could claim under the TIA contract. The establishment of an independent entity and payment of the contract remuneration to that entity were authorized by Article XX (3) of the TIA contract.[FN5] While that Article made clear that TAMS and AFFA could not thereby divest themselves of liability under the contract, it allowed what the subsequent practice confirmed - that the new entity, rather than the two partners, would be the entity entitled to receive payments from CAO under the contract.

FN5 Article XX(3) provided:

> For the purpose of carrying out its obligations, the Consultant may establish an independent entity under the laws of Iran and register the same. Execution of the service of this Contract through such entity shall not be considered as

a transfer of this Contract and the Consultant's obligations shall remain the same as per this Contract and its Appendices thereof. The Consultant may submit a written request to the Client asking for the deposition of the remuneration in the account of such equity.

In determining the value of the accounts receivable under the TIA contract and the related liabilities, the Tribunal recognizes the difficulty of precision in the absence of final and authoritative resolution of the contract disputes between the CAO and TAMS-AFFA, disputes that are outside this Tribunal's jurisdiction. Similar difficulties arise with respect to determination of TAMS-AFFA's debts to third parties. It should clearly be understood that this Award involves no adjudication of the rights and obligations of the parties to the TIA contract or of any obligations owed by TAMS-AFFA to the tax and social security authorities of Iran or other third parties.[FN6]

FN6 Inasmuch as the tax and social security premium counterclaims and the monies owing for work performed on the TIA project could not be presented directly to this Tribunal, the Tribunal's collateral consideration of those items is not res judicata. See K. Carlston, The Process of International Arbitration 88 (1946).

Thus, in making its best estimate of the net value of TAMS-AFFA, the Tribunal is not deciding issues that are excluded from its jurisdiction. It would be unjust and logically indefensible to completely ignore such assets as the accounts receivable under the TIA contract and such debts as the tax and social security liabilities, even though the adjudication of disputes concerning those assets and debts would be outside the Tribunal's jurisdiction.

In this connection, the Tribunal notes that, if the CAO had paid the invoices submitted by TAMS-AFFA and such funds were part of the undistributed accounts of TAMS-AFFA, then obviously they would be part of the dissolution value of TAMS-AFFA. Similarly, if TAMS-AFFA had paid all its tax and social security obligations, those payments would have reduced the dissolution value of TAMS-AFFA. If payments for work on the TIA project have been wrongfully withheld by an Agency of the Government of the Islamic Republic of Iran and if for the lack of such payment the Tribunal did not include such monies in the dissolution value of TAMS-AFFA, then the Respondent Agency would profit by its own wrong. Conversely, if TAMS-AFFA wrongfully failed to pay tax and social security obligations and if the Tribunal did not deduct such obligations, then TAMS-AFFA would profit by its own wrong. It is a well recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their own wrong, Nullus Commodum Capere De Sua Injuria Propria.[FN7]

FN7 See generally, B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 149 (1953).

On the other hand, it would be equally unjust and logically indefensible for the Tribunal to assume that all payments on the TIA project alleged by the claimant to have been wrongfully withheld, were in fact so withheld, or to assume that all tax and social security obligations alleged by the Respondent to be due by TAMS-AFFA are in fact due and were not paid. As stated above, the adjudication of disputes concerning these assets and debts would be outside the Tribunal's jurisdiction. At the time the claimant was deprived of his property interest in TAMS-AFFA, those disputes did not yet exist. From the statements and evidence submitted to the Tribunal by both parties it appears, on the one hand, that a number of factual circumstances are not in dispute even today, and, on the other hand, that such disputes as do exist are supported only partly by evidence and contain elements of divergent legal appreciation of the facts. Under those circumstances, the Tribunal can make only a very rough evaluation of the assets and liabilities involved, which evaluation must take into account the uncertainty of the outcome of any final adjudication of the disputes by a competent court.

Finally, the Tribunal notes that the evidence indicates that TAMS-AFFA owed AFFA approximately IR 47,000,000 more than it owed TAMS for reimbursement of costs,

which amount must be deducted before a dissolution value is determined.

On the basis of the foregoing considerations the Tribunal determines the dissolution value of TAMS-AFFA as of 1 March 1980 to be Rials 800,000,000. Thus, the Claimant is entitled to IR 400,000,000 for its fifty percent interest in TAMS-AFFA.

For the above reasons, the Respondent Government of the Islamic Republic of Iran is obligated to compensate the Claimant in the amount of U.S. $5,594,405, which was the equivalent on 1 March 1980 of IR 400,000,000.

IV. Interest

In order to compensate the Claimant for the damages it has suffered due to the delay in payment, the Tribunal considers it fair to award Claimant interest at the rate of 12 percent per year, calculated from 1 March 1980.

V. Costs

Each of the parties shall be left to bear its own costs of arbitration.

AWARD

THE TRIBUNAL AWARDS AS FOLLOWS:

The Respondent, Government of the Ialamic Republic of Iran, is obligated to pay the Claimant, Tibbets, Abbot, McCarty, Stratton, U.S. $5,594,405, plus interest at the rate of 12 percent per year, calculated as from 1 March 1980 to the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account. This obligation shall be satisfied by payment out of the Security Account established by paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981.

The counterclaims of TAMS-AFFA are dismissed on the merits, except to the extent the counterclaims include a counterclaim for taxes allegely owed by the Claimant to the Iranian tax authorities, which counterclaim is dismissed for lack of standing by TAMS-AFFA to present it. The remainder of the claims and counterclaims are dismissed for lack of jurisdiction.

Each of the parties shall bear its own costs of arbitrating this claim.

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

Dated, The Hague 22 June 1984

Willem Riphagen

Chairman Chamber Two

Shafie Shafeiei

George H. Aldrich

Mr. Shafeiei took part in the hearing and deliberation of this case. Having been

invited to sign the Award, he refused to do so.

Willem Riphagen

Chairman Chamber Two

Geogre H. Aldrich

DR. SHAFEI SHAFEIEI'S REASONS FOR NOT SIGNING THE AWARD

On 19 March 1975, The Civil Aviation Organization of Iran (a Respondent in the present case) on the one part, and TAMS (the American Claimant in the present case) and Abdol Aziz Farmanfarmaian and Associates (an Iranian partnership) on the other part, concluded an engineering and architectural services contract ("the Contract") for building the Tehran International Airport. In conformance to that which consulting engineering contracts impose by their nature, the Contract was non-transferable, and the technical services involved therein were to be rendered directly by TAMS and Farmanfarmaian and Associates, partly in Iran and partly in the United States. Several months after the contract was signed, TAMS and Farmanfarmaian and Associates formed a non-profit, non-commercial partnership, in fact with a joint office in Tehran, under the name TAMS-AFFA. The role played by the TAMS-AFFA partnership was merely that of liaison, or at most, of coordinating and carrying out the joint works.

On 20 October 1981, after the creation of this Tribunal, the Claimant filed a Statement of Claim wherein it lodged a number of claims against the Government of the Islamic Republic of Iran, several banks, and various organizations of the Iranian Government. It is not necessary to enumerate all of the Claimant's claims; the two claims which are relevant and important to discuss here are the following:

(a) The first is the Claimant's contractual claim - that is, the claim arising out of the Contract. In this connection, the Claimant alleges that certain invoices it sent for services rendered were not paid, and also that it rendered certain services for which invoices have not yet been sent. On this basis, the Claimant demands a total of $8,885,589.

(b) TAMS' other claim arises out of the alleged expropriation of TAMS-AFFA. TAMS-AFFA did not engage in commercial activities, but it did necessarily have funds in the banks in order to manage its routine affairs. The Claimant has alleged that this partnership was expropriated by the Islamic Republic of Iran. The Claimant has also carried out its own valuation of TAMS-AFFA's assets and has demanded $514,536.

By virtue of the express provisions of Article XIX of the Contract, the Iranian courts are vested with sole jurisdiction over interpretation of the Contract and over all disputes arising therefrom. The Contract is subject to the laws of Iran, and its controlling language is Farsi (Articles XXIV and XXV of the Contract). In view of the express provisions of the said Articles, and in accordance with Article II, paragraph 1 of the Claims Settlement Declaration setting forth the condition for the jurisdiction of the Iranian courts, the majority has of necessity been compelled to admit that the Tribunal lacks jurisdiction over the Contract and the claims arising therefrom. However, in actuality, it has accepted those provisions on the one hand while setting out to violate them on the other. The majority has made a presumption that TAMS-AFFA was expropriated, and then, taking the Claimant's claim and the sums allegedly due from the Contract in isolation and divorced from the Defence and Counterclaim of CAO, it has regarded the former as constituting a part of TAMS-AFFA's assets. Out of the total of the sums allegedly due the Claimant, namely $8,889,589, the majority has then awarded it the sum of $5,594,405 plus interest and has refused to entertain CAO's Defence and Counterclaim for lack of jurisdiction.

The majority award does not deal with the facts and contentions of the Parties in a manner properly reflecting the realities involved; and it makes no mention of the Respondent's objections to the jurisdiction of the Tribunal, nor to their defenses on the merits to the various claims of the Claimant, nor to their arguments with respect to the counterclaim. The majority's positions and reasoning are entirely mute and ambiguous as well. Overall, the award completely fails to address the numerous legal issues involved in the present claim, and the reader cannot discern the facts at issue or the reasoning underlying the majority's decision. The majority commences in the first paragraph of the award with a discussion of the formation of TAMS-AFFA, whereas this matter is not among the first facts and issues involved in the case. There are other facts preceding the formation of the partnership, which it is necessary to mention and elaborate upon. Moreover, the objective reality of TAMS-AFFA differs entirely from the way in which the majority has depicted it and presumed that the partnership was expropriated. The picture which the majority has drawn of TAMS-AFFA is a hypothetical and entirely imaginary one. Even if we were to accept, in arguendo, that TAMS-AFFA has been expropriated, it must first be determined what elements comprised the partnership's assets. In particular, there arises a question as to whether the monies allegedly due under the Claimant's consulting services contract ought to be regarded as a part of TAMS-AFFA's assets. This point raises numerous legal issues. TAMS-AFFA's legal nature and its role should have been analyzed in the light of the relevant provisions of the Contract. For example, a part of the demands which TAMS asserts, as has been noted above, relate to services which have allegedly been rendered but for which no invoice has to date been presented to CAO for payment. Aside from all other matters, is such a claim, on principle, an outstanding claim as intended by Article II, paragraph 1 of the Claims Settlement Declaration, and is it cognizable before this Tribunal? Yet the majority has avoided all these judicial realities by silence and ambiguity and has even gone far beyond the remedy sought by the Claimant itself. There is another issue which is extremely important to discuss. CAO has denied TAMS' contractual claim and demands, and it has stated that it has paid TAMS' fees in proportion to the percentage of work performed and owes TAMS nothing further. CAO has, moreover, lodged a counterclaim, but because the majority lacks jurisdiction over the Contract, as it itself admits, it acts as if it has not seen these defences and counterclaim, and merely takes into account the Claimant's claim and demands for monies allegedly due in isolation, considering them to constitute a part of TAMS-AFFA's proven assets.

Amidst all these ambiguities and problems, the reader arrives at page 17 of the award, which is, unlike the preceding murky and obscure pages, entirely lucid and specific, and which reveals the majority's definite intent and decision to transfer the sum of $5,594,405, plus interest at 12% as from 1st March 1980, from the Security Account of the Government of the Islamic Republic of Iran to the account of the Federal Reserve, New York, for transfer to the American Claimant. No ambiguity whatsoever remains in this regard. It is also essential to point out that the appraisal of the Claimant's contractual demands was carried out in an entirely arbitrary manner. After dealing with the facts and with the Claimant's contractual claim and its claim of expropriation in greater detail, I shall turn to an analysis of the facts and legal points involved therein. This examination will commence with a brief mention of the consulting services contract, which forms the basis of the Claimant's first claim, and with the Tribunal's lack of jurisdiction over both the Contract at issue and the claims arising therefrom (I). Following that will come an examination of the claim that TAMS-AFFA has been expropriated. In this section, it will be necessary to provide a short description of TAMS-AFFA, its formation and purpose, and its alleged expropriation. The legal status and role of the said partnership must in particular be determined (II). It is also necessary to give a brief account of the mechanism relating to the fees of the consulting engineers, together with CAO's defence in this regard; this issue forms the subject of section III. This study will demonstrate that the withdrawal from the Security Account of the Government of the Islamic Republic of Iran in favor of the American Claimant in the present case, which is being effected by the Chamber majority, constitutes an illegal and illegitimate withdrawal.

I

There is nothing to be gained from enumerating all of TAMS' claims; instead, we

shall discuss two of them which are relevant here.

1. The Claimant's first, and indeed most important, claim is the contractual claim. The object of the Contract was the preparation of the design and architectural plan, provision of consultation services, and execution of the construction of a new airport in Tehran. Pursuant to Article I, paragraph 2 of the Contract, the Consultants consisted of TAMS and Abdol Aziz Farmanfarmaian and Associates, acting with joint and several liability in connection with performance of the obligations undertaken under this Contract.

Furthermore, pursuant to Article XX, paragraph 1 of the Contract:

"ARTICLE XX - RIGHT OF ASSIGNMENT

1. The Consultant shall carry out the object of this Contract via its employees, however, the Consultant shall not assign or transfer, without the Client's approval the services relating to the Contract or any part of those services to other persons be it legal or natural or his employees." [sic]

The above provisions are in actuality nothing more than confirmation of a simple, logical matter. In a contract for consulting services, the identity and scientific capability of the consulting engineers is a matter of the utmost importance and is regarded as being among the fundamental elements of the contract. Therefore, such contracts cannot be assigned.

Article XIX of the Contract provides for the means whereby any eventual disputes arising therefrom are to be settled:

"ARTICLE XIX - SETTLEMENT OF DISPUTES

All the disputes that may arise between the parties hereto over this Contract or the interpretation of its contents that cannot be settled through negotiation or correspondence, shall be primarily referred to a committee consisting of the highest authority of the executive agency (or his deputy) and the Consultant for settlement and in case they fail to settle the dispute on the basis of this Contract and the relevant regulations, the dispute shall be settled through competent Iranian courts and in accordance with Iranian Laws." [sic]

Furthermore, pursuant to Article XXV of the Contract:

"This Contract shall be governed from all aspects by the law of the Imperial government of Iran." [sic]

Provision has also been made in Article XXIV for the official language of the Contract as follows:

"The text of this Contract has been prepared in Farsi and English. In case of discrepancies, except in Appendix A and D, where the English text is valid, the Farsi text shall be valid from the legal and judicial point of view."

Finally, Article IV of the Contract provides for the duration of the different phases of the Contract.

Completion of construction of the airport was scheduled for 1981; Article IV, paragraph 2, provides that:

"It is understood that the construction activities will be ompleted by the end

of 1980 and the final handover of the project shall take place at the end of 1981."

With the consulting engineer's departure from Iran shortly after the victory of the Revolution, all work on the airport project ceased.

2. The suspended Contract is the basis for the principal claim filed by the American party, and for the counterclaim filed by the Iranian party. The first concerns the payment of fees allegedly owed by Iran to the American consulting engineers; the latter concerns reparation for damages allegedly resulting from the poor execution and breach of contract by the American party. Further to this, the Iranian defendants object to the Tribunal's jurisdiction.

The sum total of the Claimant's alleged demands is as follows:

ITEM	AMOUNT
TAMS' services to CAO - billed but unpaid	US$ 7,058,988
TAMS' services to CAO - unbilled	$ 1,826,601[FN1]
TOTAL	$8,885,589

FN(1) Of course, the Claimant's alleged demands were, like TAMS-AFFA's funds, in Iranian rials, which the Claimant has evaluated at the rate of 70.6 rials to the dollar, but if we consider the exchange rate as of the date of issuance of the Award, which was at least 86.32 rials, then the amount of the remedy sought by the Claimant in connection with the contractual claim and the claim of expropriation, will in fact be as follows:

TAMS' services to CAO - billed but unpaid	$5,773,454
TAMS' services to CAO - unbilled	$1,493,953
TOTAL $7,267,407	
TAMS-AFFA undistributed accounts - TAMS' share	$ 420,832

The latter concerns reparations for damages allegedly resulting from the poor execution and breach of contract by the American party. In addition to this, the Iranian Respondents object to the Tribunal's jurisdiction.

3. The jurisdiction of the Tribunal has been defined in Article II, paragraph 1 of the Claims Settlement Declaration as follows:

"1. An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or Bank Guarantees), expropriations or other measures affecting property rights... excluding claims arising under a binding contract between the parties specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis

position."

This Article sets forth the framework of the Tribunal's jurisdiction with respect to claims by United States nationals against the Government of Iran, together with their conditions.

It is not necessary to point out that the exclusive nature of a choice of forum made by parties to a contract does not depend upon the specific term "sole jurisdiction". The simple fact that a forum selection clause was inserted confers an exclusive jurisdiction upon the forum designated by the contracting parties. However, it must be emphasized that any interpretation of Article II, paragraph 1 of the Claims Settlement Declaration must take into consideration the Iranian law authorizing the Iranian Government to conclude the agreement embodied by the Declaration - and indeed, this law was notified to the Government of the United States and is expressly referred to in Article II, paragraph 1.

With respect to the governing law and the competent courts, the provisions of the Contract at issue are entirely clear. The Contract is in all respects subject to the laws of Iran. Interpretation of the Contract, and all disputes arising therefrom, shall be settled by the competent Iranian courts in accordance with Iranian law. In light of the above, the alleged claims of the Claimant, Iran's Defence, and the counter-defence, which is the subject of the Claimant's first claim, all lie outside the scope of the Tribunal's jurisdiction, as has been acknowledged by the majority itself.

II

As has been shown hereinabove, the Claimant's first, and in fact most important, claim is its demand for fees in consideration of services which, it alleges, it rendered in accordance with the consulting services contract. This claim arises directly out of the Contract and has been directed against CAO. However, examination and interpretation of the Contract, and adjudication of all disputes arising therefrom, are outside the scope of this Tribunal's jurisdiction, and the majority has admitted its lack of jurisdiction in this regard. Another claim has been brought by the Claimant against the Government of the Islamic Republic of Iran, arising out of the alleged expropriation of TAMS-AFFA, 50% of the assets of which belonged to the Claimant, by the Government of the Islamic Republic of Iran. The Claimant has appraised the assets of the partnership itself, fixing its own share at US$ 514,536, and it has demanded payment of that amount by the Government of the Islamic Republic of Iran. The majority has accepted the presumption that TAMS-AFFA has been expropriated, and it has also regarded the monies allegedly due the Claimant on the basis of the consulting services contract - examination of which is outside the jurisdiction of the Tribunal - as constituting a part of TAMS-AFFA's assets, without taking into account CAO's Defence and Counterclaim. In this roundabout fashion, the majority has endeavored to honor these allegedly due claims.

Neither would the expropriation of the TAMS-AFFA entity in itself constitute a basis for the jurisdiction of the Tribunal over the first claim concerning payment of fees for services allegedly rendered by the Claimant under the Contract at issue. The TAMS-AFFA entity was in fact defined as an agent interposed between Iran on one side, and TAMS and AFFA on the other, and as such was responsible for transmitting invoices, notices and documents issued by the latter to the former. The rights and contractual obligations of the Parties to the Contract were independent and would not be affected by expropriation or dissolution of TAMS-AFFA. Furthermore, it is clear that the contractual rights and invoices of TAMS do not constitute assets owned by the entity TAMS-AFFA. These points will be examined hereinbelow. However, prior to elucidating all other matters relating to TAMS-AFFA, it is necessary to take up the issue of its alleged expropriation.

1.a After signing the consulting services contract relating to construction of the Tehran International Airport in March 1975, the consulting engineers, namely TAMS and Farmanfarmaian and Associates, commenced carrying out the services in Iran and

the United States. Thereafter, in August 1975, these two parties formed a joint partnership, named TAMS-AFFA, for the purpose of carrying out, coordinating and providing engineering services. In accordance with Article III of its Articles of Association, the partnership was formed with the sole object of providing professional engineering services and construction engineering services relating to the new Tehran International Airport, pursuant to and subject to the provisions of the consulting services contract. The capital funding of the partnership was approximately 1 million Iranian rials (roughly US$ 15,000), of which 50% belonged to TAMS and 50% to Farmanfarmaian and Associates. The management of the partnership, decision-making, signing of all documents and checks, and effecting all payments, were jointly carried out by two representatives: one from TAMS and one from Farmanfarmaian and Associates. In addition, on 16 October 1975, the partnership was registered with the Iranian Registrar of Companies as a non-commercial partnership, under No. 1674. Coinciding with the revolutionary events in Iran, performance on the consulting services contract fell into abeyance, and in this context, the purpose of the partnership was frustrated. The Farmanfarmaian family fled Iran, whereupon the conduct of TAMS-AFFA's ordinary and routine affairs fell into disorder. TAMS-AFFA was not engaged in commercial activities, nevertheless it did have an office with a number of staff and the sudden departure of its directors created problems with respect to paying the salaries and settling the accounts of its employees, and paying the rent, utility bills and other expenses. Thus, on 24 January 1979, the Government designated a manager for the partnership in order to resolve these problems. The majority has regarded the Government's designation of the manager as constituting evidence of expropriation of the partnership, without bothering to consider the facts attending said designation nor taking into account the subsequent events. The facts relating to the said designation and the subsequent events require further elaboration.

1.b In actuality, the collapse of the former regime destroyed a social, political, economic and military order. The establishment of a new order appeared difficult. Moreover, certain directors of enterprises, many of which were heavily indebted to Iranian banking institutions, fled Iran at its moment of crisis. It was the task of the newly-installed government to avoid social disorganization, maintain order, and prevent economic activity from coming to a halt. It was in this context that the Bill of 19 June 1979 was voted into force by the Revolutionary Concil, whereby the Iranian Government was authorized to appoint provisional managers for enterprises abandoned by their directors, whether these latter had ceased to work or had for some reason or another found it impossible to manage the day-to-day affairs of the enterprise. Article 1 of the said Bill is as follows:

> Official Gazette No. 10012 - 17/4/1358 (8/7/1979)
>
> Article 1. With regard to manufacturing, industrial, commercial, agricultural and service units belonging to either the public or private sector including firms and institutes with the following activities: industrial and mining, agricultural, contracting, consultant engineering, building and installations, residential building, transportation and loading and unloading of goods at ports; whose managers or owners have left the said units or worksites, stopped work or cannot be reached for any reason; and at the request of owners or managers of the said units, each of the government ministries, institutes or companies who have entered in some way into dealings with, have some connection with and/or are related to the activities of the said units, are permitted to appoint, with the Ministry of Labour and Social Affairs' knowledge, one or more persons as managers, members of board of directors or observers for management and/or observation over affairs in order to prevent closure of same.

These provisions clearly indicate the reasoning behind the Bill for the Designation of Managers. Once appointed, these managers personally direct the enterprise and do not act in the capacity of agents of the Iranian Government. The Iranian Government is not entitled to exercise the slightest degree of control over the enterprise, nor may it revoke or cancel any decisions taken by the provisional managers. In accordance with the said Bill, the Government of Iran named Mr. Azad Zarrin Nejad as provisional director for AFFA on 24 July 1979. His letter of appointment was as follows:

> "Since the principal directors of Abdol Aziz Farmanfarmaian and Associates have abandoned their firm, by virtue of the Bill Concerning Appointment of

Provisional Director(s) to Supervise Productive, Industrial, Commercial, Agricultural and Services Units both in the public and private sectors approved at the Islamic Revolutionary Council's session of 24.3.1358 (June 14, 1979), and in order to prevent closure of the firm, you are, with the prior approval of the Ministry of Labour and Social Affairs, hereby appointed as the provisional director of the firm to manage it with due and full observance of the abovementioned Bill, a copy of which is enclosed herewith.

Your salary and total fringe benefits will be determined and advised later. Should you encounter any difficulties in practice, please report the matter so that action may be taken thereon.

(Signed by) Ali Akbar Moinfar Minister of State for PBO

cc: Abdol Aziz Farmanfarmaian & Associates"

I believe that this appointment was made in the sole interest of all those involved with AFFA, of which the sudden disappearance of the directors would otherwise have disrupted the company's operations.

Furthermore, it has been thoroughly established that the manager appointed by the Government was only a locum tenes for Farmanfarmaian and Associates' representative in TAMS-AFFA and he did not interfere with with TAMS' rights in the partnership. Moreover, the reasons for his appointment was that Farmanfarmaian and Associates' representative had abandoned TAMS-AFFA. The other events subsequent to this appointment are as follows: On 7 October 1979, TAMS presented Mr. Danesh as its representative, and as a result the routine affairs of TAMS-AFFA have been managed jointly by the Government representative acting as a locum tenes for Farmanfarmaian and Associates' representative, and by TAMS' representative, in accordance with the partnership's Articles of Association. The memorial filed on 15 September 1983 by one of the Iranian Respondents contains abundant correspondence and documentation, all of which speaks for the good understanding and full cooperation between the Government's representative and TAMS, and the joint management of TAMS-AFFA.

In August 1979, the sum of 34,071,978 Iranian rials which had been deposited in TAMS-AFFA's account in payment of TAMS' fees was paid out to TAMS.

Particular note should be taken of the honest endeavor of both the government-appointed Iranian manager of AFFA and that of CAO to intervene in Bank Markazi Iran with regard to TAMS' foreign exchange request in August 1979, the date on which foreign exchange came under strict control. In his letter dated 21 August 1979, addressed to Bank Markazi Iran, the government-appointed manager wrote:

> "...I wish to state that in so far as government regulations may permit, I endorse and support Tippetts-Abbett-McCarthy-Stratton's request for foreign exchange in the amount of Rls. 34,071,878, ..."

CAO, too, as is evident from its letter no. 600-100-11617 dated 3 September 1979 to Bank Markazi, in good faith tried its utmost to assist TAMS to obtain foreign exchange permission.

As stated hereinabove, the partnership's affairs were managed jointly by the Governmental manager and TAMS' representative. The last correspondence addressed by TAMS-AFFA to CAO (14 November 1979) bears two signatures. Subsequently, in January 1980, Mr. Danesh, TAMS' representative, left Iran with no prior notice. Here it must particularly be noted that TAMS-AFFA is a non-profit, non-commercial partnership, and that upon suspension of the consulting services contract coinciding with the occurrence of the revolutionary events in Iran in 1978, the purpose of the TAMS-AFFA partnership was, for all practical purposes, frustrated.

How, then, could the appointment of a director by the Iranian Government be

construed as expropriating or otherwise affecting the property rights of TAMS? Was it not a measure of protection, in the absence of which TAMS could very well have suffered disruption? Is it not contrary to the principles of morality to treat that action as constituting an act of expropriation and holding the Government of Iran liable for it? It is equally important to point out that TAMS-AFFA is a non-profit, non-commercial entity and that a director was required to manage the day-to-day affairs, such as the local payments for water and electricity, and to deal with the personnel abandoned there.

1.c Teh manner in which the majority has portrayed TAMS-AFFA does not, in the least, correspond to the facts. It will suffice to note one or two points in this regard. The majority states:

"[The] Plan and Budget Organization of the Government of Iran on 24 July 1979 appointed a temporary manager for AFFA. The Farmanfarmaian family was one of the fifty-one individuals or families whose enterprises were placed under Government management pursuant to Paragraph 15 of the Law for the Protection and Development of Iranian Industry." (page 8)

This statement gives the reader the impression that the Government's decision to appoint a manager was carried out for the purpose of expropriating the properties of the Farmanfarmaian family et al pursuant to the Law for the Protection and Development of Iranian Industry. Unfortunately, however, the statement by the majority is absolutely baseless. TAMS-AFFA was not an industrial company, and the reason for the government's appointment of a manager was, as is expressly stated in the letter of appointment, due to the fact that the manager appointed by the Farmanfarmaian family had abandoned TAMS-AFFA.

On page 9, the majority also states:

> "It seems evident from the pleadings 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 manager." (emphasis added)

The object of TAMS-AFFA was to provide professional consulting services as intended under the consulting services contract. But as the majority itself admits, that Contract fell into total abeyance in December 1978 or January 1979. In light of this fact, what possible purpose could there be for continuing with TAMS-AFFA's work and activities? Still, even if we were to suppose, in arguendo, along with the majority, that TAMS-AFFA has been expropriated, one fact still remains: namely, that the rights and contractual obligations of the parties to the Contract at issue survive, despite any expropriation or dissolution of the entity, and any amounts owed by CAO to TAMS by no means constitute assets of an entity.

2.a The 19 March 1975 consulting services contract was signed by CAO as the client, on the one hand, and by TAMS and Farmanfarmaian and Associates as the consulting engineer, on the other hand. In accordance with Articles I and XX of the Contract, these entities were the direct and liable parties to the Contract, and the Consulting Engineers did not have the right to transfer the Contract.

The TAMS-AFFA entity has, in fact, been an agent interposed between the contracting parties, responsible for submitting to CAO invoices and documents issued by the consulting engineers, for assuring the communication between the parties, and finally, for receiving the fees and remitting them to the consulting engineers.

The method adopted in practice for carrying out the Contract and the partnership's work, confirmed the preceding characterization. In its Memorial filed on 29 June 1982, the Claimant itself describes and characterizes TAMS-AFFA in the above manner:

> "This was a contract entered into directly between TAMS and AFFA, as Consulting

Engineer, and CAO, under the direction of PBO (and later assigned to IAF), as Client. TAMS and AFFA, as specifically contemplated by the Contract, joined to create the TAMS-AFFA entity, and requested that the Client made payment for invoiced services to that entity. In this regard, the Contract specifically provides that:

> 'For the purpose of carrying out its obligations, the Consultant may establish an independent entity under the laws of Iran and register the same. Execution of the service of this Contract through such entity shall not be considered as a transfer of this Contract and the Consultant's obligation shall remain the same as per this Contract and its Appendices thereof.
>
> The Consultant may submit a written request to the Client asking for the deposition of the remuneration in the account of such entity.'

(TAMS Statement of Claim, Ex. 1, Art. XX[3].) Under the terms of the Contract, the obligations of the parties to each other remain fixed, despite the interpositioning of the TAMS-AFFA entity. In accordance with the last sentence of Article XX[3], TAMS and AFFA invoiced CAO and IAF for their Contract services through the TAMS-AFFA entity." (emphasis added)

These terms employed by the Claimant itself clearly indicate the legal nature of the TAMS-AFFA entity and the responsibility conferred on it in relation to the Contract of 19 May 1979 concerning the Tehran Airport project. It should also be noted that this responsibility was not irrevocable: at any moment TAMS or AFFA equally could terminate the procuration conferred upon the TAMS-AFFA entity; TAMS-AFFA also could renounce its mandate. It is therefore very clear that any expropriation or disappearance of such an agent would not in the slightest degree affect the rights and obligations of the contracting parties.

2.b From the foregoing it is apparent that the Contract, fees, invoices, claims, etc., must directly belong to TAMS, as party to the Contract. They by no means constitute assets of the entity TAMS-AFFA. Nonetheless, the majority refused to analyze TAMS-AFFA's legal nature and rule, or to determine the status and ownership of the invoices and claims for debts, merely contenting itself with commenting as follows:

> "In this connection, the Tribunal notes that, if the CAO had paid the invoices submitted by TAMS-AFFA and such funds were part of the undistributed accounts of TAMS-AFFA, then obviously they would be part of the dissolution value of TAMS-AFFA.... It is a well recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their [sic] own wrong" p. 15).

It must be remarked that if CAO had paid the said invoices, the monies paid therefor would certainly have gone to TAMS, and that there is no way by which they would now comprise a part of TAMS-AFFA's undistributed accounts. For the same reason, the sum of Rls. 34,071,878 which CAO paid into the account of TAMS-AFFA for the last time in payment of TAMS' fees, was paid to TAMS by the Government-appointed manager of TAMS-AFFA in August 1979. But apart from this issue, it is essential to note the following points relating to this statement by the majority. The majority forgets that it is supposed to be appraising the assets and capital of TAMS-AFFA as an independent juridical person, and that it is not supposed to be appraising the assets and capital of TAMS-AFFA's partners. In fact, these invoices are the property of TAMS and Farmanfarmaian and Associates themselves, and not to TAMS-AFFA. Furthermore, CAO has no debts to TAMS-AFFA, nor does it have any contractual relationship with it; if it does have any debts, it owes them to TAMS and Farmanfarmaian and Associates themselves, and these two entities must take action to receive any monies allegedly due them. But worst of all, a part of TAMS' claim concerns fees for services, for which no invoices have yet been sent to CAO - CAO therefore has no knowledge of them and thus no obligation to pay. How can these claims possibly be construed as constituting a part of TAMS' assets? The preparation of a company's balance sheet must be limited solely to that company's own asseets, and the only assets which ought to be taken into account and counted are those which exist and are specified and definite. A balance sheet cannot be prepared on the basis of factors which are uncertain and merely hypothetical, and the property and assets of other entities

must not be included in the balance sheet. This is perhaps among the most elementary, and yet the most fundamental, principles of accounting. Furthermore, CAO has denied these claims for monies due and has stated that the consulting engineers' fees have been paid in proportion to the percentage of work performed, and that it has no further debts; in addition, CAO has brought a Counterclaim. In view of its lack of jurisdiction over this Defence and the Counterclaim, the majority is to be excused, and yet, notwithstanding the above, it has regarded the Claimant's allegedclaims for monies due in connection with the consulting services contract as constituting a part of TAMS-AFFA's assets!

2.c It must also be pointed out that the Claimant itself never considered the Contract, its invoices, its fees and that which was due to it from CAO as being the property of TAMS-AFFA. Claimant has in fact drawn the distinction between its claim for reimbursement of fees for services it rendered by virtue of the Contract and its claim of expropriation of TAMS-AFFA by the Government of Iran. With respect to this latter, Claimant maintains in its own Statement of Claim that "the largest portion of TAM's total claims arise out of the contract with CAO for services on the TIA project. It is appropriate to note those claims include only amounts owed to TAMS for services already rendered." These services have been evaluated at $8,885,589. Concerning its claim based on expropriation of TAMS-AFFA by the Government of Iran, Claimant explains:

> "On July 24, 1979, the date of the expropriation, TAMS had interests in the accounts and other items of property of TAMS-AFFA which had not been distributed to the TAMS-AFFA owners - TAMS and AFFA. Annexed hereto as Exhibit 10, is a schedule of those accounts and items of property and a statement of TAMS's share of them. Exhibit 10 shows that TAMS's interest on July 24, 1979, as adjusted for payments in October 1979, totalled US $ 514,536."

In Exhibit 10 of its Statement of Claim, Claimant has very well evaluated the debits and credits of TAMS-AFFA to determine the balance and the respective portion owing to it, that is $514,536.

It is to be noted that the majority, having ignored all these facts, has totally altered the sense and remedy sought in the Claimant's claim. The majority also employs the term "deprivation of property" even though this expression can be found in neither the Algiers Declarations nor the Claimant's Statement of Claim. In addition to all that, the majority made an entirely arbitrary appraisal of the claims for monies owing.

III

1. The mechanism provided for in the Contract for the Consulting Engineer's Remuneration.

The object of the Contract at issue was the utilization of the Consulting Engineer's services by CAO in connection with Tehran International Airport. Consultants' Services are set forth in Appendix A of the Contract and comprise eight parts:

Parts I	-Master Plan
IA Investigation and	-Site Testing Program
II Design	-Preliminary
III	-Detailed Design
IV	-Construction

Supervision

V
Management -Project

VI
-Supervision of Subconsultants

VII
Plan and -Organization

Training Program

Article VIII of the Contract states that the remuneration of the consultants for services rendered shall be in accordance with Appendix B of the Contract. Article I of that Appendix relates to the Consulting Engineer's remuneration for services rendered on the various parts of the Contract. For the Master Plan, a fixed remuneration of Rls. 180,000,000 was set. However, according to Article I, paragraph 2, the Consulting Engineer's remuneration for Parts II, III, IV and V of the Contract consists of various percentages of The Construction Cost. The Construction Cost and its constituents are in turn determined and specified in Article I, Paragraph B. Appendix B also contains a table of various percentages. Naturally, the higher the Construction Cost, the higher the Consulting Engineer's remuneration. Meanwhile, the percentages relate to the various parts of the Contract so, consequently, the Consulting Engineer's fees vary. This mechanism gives rise to one problem: on the one hand, the estimation of the Construction Cost, and consequently the Consulting Engineer's remuneration, becomes possible only upon completion of the Project; on th other hand, monthly payments had to be made to the Consulting Engineers both at the outset and during the course of the work. What, then, was the basis for the calculation of these payments? In this connection, the Note under Article II of Appendix B provides:

> Note: In order to determine the amounts of monthly payment relating to the second and third parts of the Consultant's services, the Consultant shall in due time, which in any case shall not exceed eight months from initiation of the Project, prepare and submit to the Client a Preliminary estimate. After approval by the Client, this estimate shall be the basis for the payment of each installment. Upon completion of each part of the services, a thorough estimate shall be prepared as per stipulation of Appendix "A", which after approval shall form the basis for determination and payment of the monthly remunerations. In cases where the previous estimates have been up-dated in the course of each part of services and approved by the Client, the up-dated estimate shall be the basis for the payments. Upon completion of the services, the Consultant's remuneration shall be calculated on the basis of the Contractors final statement and Construction Cost which shall form the basis for final payment to the Consultant. (emphasis added)

Based on the above provision, and at the start of the Project, the Consulting Engineer estimated the final Construction Cost to be US$ 787,000,000, and later increased this amount to US$ 1,075,000,000. However, the CAO formally informed the Consulting Engineer in a letter dated 22 October 1975 that a budget of RLS. 60,000,000,000 had been established for the entire TIA Project Cost.

It is therefore evident that the cost of construction of the TIA Project, as referred to in Appendix B, Article I, Section B, was not intended to exceed the approved budget of Rls. 60 billion.

Upon notification of the approved budget, the Consulting Engineers prepared a detailed cost estimate in relation to the various parts of the Project, taking into account the budgetary limits, and proposed the new estimates to the employer, the CAO. According to this arrangement, the monthly payments were meant to be made on a provisional basis with a view to their being taken into account at the final estimation of the Consulting Engineers remuneration.

2. Determining the Consulting Engineer's remuneration under the present conditions.

The Claimant has claimed for account stated and services rendered on the basis of its own cost estimate which is at variance with the Construction Cost mentioned in the approved budget. This error could easily be corrected, but the crucial difficulty lies elsewhere. Determining the Consulting Engineer's remuneration upon completion of the Project need not pose any problems when the Consulting Engineer has fully performed its duties in connection with all parts and when the performance has been approved by the Employer. However, at present, the Project is not completed and the work has been abruptly stopped. Under the circumstances it therefore becomes necessary to: (a) determine the percentage of work performed by the Consulting Engineers in each part of the Contract and then determine its entitlement accordingly; and (b) evaluate the quality of the work performed. Under the present circumstances, these two factors are fundamental to the determination of the Consulting Engineer's remuneration. However, there are radical differences among the parties on this issue. The following list contains the percentages of work performed, as contended respectively by the parties in their Statement of Claim and Statement of Defence:

CONTRACT PART (October 1979)		PERCENTAGE COMPLETE	
		Claimant	Respondent
Part I	-Preparation of the Master Plan	100%	100%
Part I(A) Unknown- (performed) by sub-consultants	-Soil Investigations and Testing Program		
Part II	-Preparation of documents regarding the Preliminary Design	100%	100%
Part III	-Preparation of the Detailed Design and Tender Documents	86%	35%
Part IV	-Construction Supervision	5%	0
Part V	-Project Management	40%	0
Part VI	-Supervision of the sub-consultants	0%	0

Part VII -Preparation of0%-

Organization
Charts

and
implementation

of training
services

for the airport

personnel

Site 100%
mobilization

What the CAO particularly objected to is the quality of the work performed under the Contract. The Consulting Engineer is responsible for the correctness of documents. The Contract specifies in its Article V (B.4) that:

> "The approval of the Client does not release the Consulting Engineer of his responsibility for the correctness and fitness of these documents."

Further, in Article II (B.4 and B.3) of Appendix 2, and particularly under the section specifying the percentages of remuneration for the services rendered in the various parts, it is clearly stated that payment of the last installment of each part shall be subject to the approval of the respective final report.

Article XII of the Contract, which concerns the precision, efforts and professional skill to be employed by the Consultant, states:

ARTICLE XII - CARE AND DILIGENCE

> The Consultant shall fulfill his obligations under this Contract using the best professional methods and in accordance with the best technical Standards acceptable to the Client, and shall exercise all his duties subject to this Contract using his utmost care and diligence.

The CAO has submitted evidence according to which it has regularly informed the Consulting Engineer of the deficiencies and inadequacies of the work performed. Particularly, in connection with the Detailed Design, the CAO expressly declared in its letter No. 36/41 dated October 3, 1975, that the Consulting Engineer could start the Detailed Design, at solely its own responsibility, since the drawings prepared in connection thereto involved certain problems, a part of which had been brought to the attention of the Consulting Engineer in the letter No. 1505-2-10/32 dated 27 December 1980. At any rate, the Conulting Engineer performed only 55% of the work, of which only 35% has been approved by the CAO. Furthermore, the Consulting Engineer was never authorized to proceed with the work related to Project Management pursuant to Paragraph 2, Article III. Furthermore, the Consulting Engineer never sent the separate invoices provided under Article II (B.5) of Appendix 2 to signify any management services rendered.

The CAO also submitted a counterclaim, which the majority has dismissed for lack of jurisdiction. Nevertheless, regardless of the claims and counterclaims presented by Iran, the determination of the Consulting Engineer's remuneration involves various problems of a technical, accounting and legal nature. Confronted with all these difficulties, the majority merely resorts to absolute silence or assumes an ambiguous position. Amidst that silence and ambiguity, it states:

> It should clearly be understood that this Award involves no adjudication of the rights and obligations of the parties to the TIA contract or of any obligations owed by TAMS-AFFA to the tax and social security authorities of Iran or other

third parties."

On the contrary, the majority is far from ambiguous and in fact completely clear when it instructs payment of US$ 5,595,405 from the Security Account to the Claimant.

CONCLUSION

1. The claim brought before this Tribunal arises out of a contract signed in Tehran 19 March 1975 by CAO, on the one hand, and by Farmanfarmaian and Associates and TAMS (the American Claimant) on the other. The rights and obligations arising from the Contract were directly related to the immediate signatories to the Contract, and were not transferable. In accordance with Article XIX and XXV of the Contract, the Contract and all contractual relations between the two parties were subject to the laws of Iran, and all disputes arising therefrom lay within the sole jurisdiction of the Iranian courts; and pursuant to Article XXIV, even the controlling language of the Contract was Farsi. Furthermore, by virtue of the forum exclusion clause embodied in Article II, paragraph 1 of the Claims Settlement Declaration, this claim lies outside the scope of this Tribunal's jurisdiction. In light of the provisions of the Contract, and of Article II of the Claims Settlement Declaration, which specifies and at the same time limits the mandate of this Tribunal, the majority has acknowledged its lack of jurisdiction. But on the other hand, by resorting to another tactic it has contravened all the above provisions.

The Consulting Engineer, the second party to the Contract, formed an entity called TAMS-AFFA in order to provide for liaison and coordination in carrying out the Technical Services which were the subject of the Contract. The majority has wrongly assumed that TAMS-AFFA has been expropriated, and it has then taken note of and counted the sums allegedly due the Claimant under the Contract as if they constituted assets of TAMS-AFFA, in isolation and without any consideration of Iran's Defence and Counterclaim.

2. The picture provided of TAMS-AFFA by the majority is not any unbiased one, for a large part of the facts and the Respondents' defences in this regard have been concealed. TAMS-AFFA was registered solely as a non-profit entity with a capital investment of US$ 15,000, and its role was simply that a liaison office between all of the parties to the technical services contract in question. Naturally, upon cessation of performance of the Contract in 1978, the subject and purpose of said entity was frustrated. This non-profit entity is not capable of expropriation, and in particular, as of March 1980, the date postulated by the Tribunal as that of its expropriation, the entity became defunct.

The Government of Iran has taken no action against TAMS' interests, and at any event, any expropriation or dissolution of TAMS.-AFFA would not be prejudicial to TAMS contractual rights. The Contract, Claimant's hypothetical contractual rights, and the invoices can under no circumstances be regarded as constituting a part of TAMS-AFFA's assets. The fact of the matter is that TAMS comes before the Tribunal suffering another problem - namely, Articles XXV and XIX of the Contract and the forum exclusion clause embodied in Article II, paragraph 1 of the Claims Settlement Declaration - and this Tribunal has simply sought some device whereby to relieve it of its problem; thus the "expropriation" of TAMS-AFFA as depicted and presumed by the majority must be seen in this light.

The majority refers in numerous places to international law, but at the same time it ignores many fundamental rules of international law relating to interpretation and execution of international treaties, such as the principle of "useful effect" ("l'effet utile") and particularly the principle of interpretation in good faith; and contrary to the above rules, in practice the majority has prevented application of the forum exclusion clause. In a void, it invokes a number of definitions and formulae relating to expropriation from the point of view of international law, but it fails to answer just how this supposed expropriation applies to the present concrete situation; nor does it provide any answer to the legal, technical and financial issues in the present case.

The majority takes up examination of the Contract and the contractual claims, but in order to avoid adjudicating CAO's Defence and Counterclaims, it states that:

> "It should clearly be understood that this Award involves no adjudication of the rights and obligations of the parties to the TIA Contract or of any obligations owed by TAMS-AFFA to the tax and social security authorities of Iran or other third parties".

3. At the foot of the Award issued by the majority in Case No. A-18, we Iranian arbitrators have written that this Tribunal, as now constituted, is in no sense impartial and is not competent to adjudicate the disputes of a Trird World country with the United States. I perceived this clear and overt lack of impartiality in the adjudication of the present case. Mr. Riphagen ignored all the rules of law and even the most elementary technical and accounting rules. At a certain stage of our study and deliberations, it became thoroughly clear to me that Mr. Riphagen's aim is to transfer millions of dollars to the United States from Iran's security account. Therefore, all my efforts spent in analyzing the legal, technical, and accounting issues, and even my efforts to arrive at least at a more or less equitable solution, have been to no avail.

I must also note with regret that the appraisal of the Claimant's contractual claims, which was performed separately and in isolation from Iran's Defence and Counterclaim, was completely arbitrary. The Contract concerns a highly technical project, and it is impossible to determine the level of fees without an acquaintance with the contractual mechanism for payment of fees and without a thorough examination of the relevant provisions of the Contract and a technical and accounting-oriented study of the facts. I can honestly testify that Mr. Riphagen studied neither the technical and accounting aspects of the Contract nor Iran's Defence. The three figures A, B and C were proposed to him, and he selected one of them without knowing what they represented or of what they consisted. Why figure "B" and not figure "A" or "C"? He had no clear answer to the legal issues in the present case, and the Award contains no argumentation or justification, or even the least explanation, with respect to the method of appraisal.

Because I am entirely convinced that the deliberations and adjudication in connection with the present case were neither just nor impartial, and that the transfer of these millions of dollars to the United States from the account of the Iranian nation is taking place in an illegal and illegitimate manner, I have refused to sign the present award. Should the "award" be automatically enforced, depriving thereby the Government of the Islamic Republic of Iran of its rights to a meaningful defence and legitimate objections, then what has taken place as "international arbitration" cannot, in my view, be regarded as anything but a clear instance of misappropriation of the national assets of the Islamic Republic of Iran.

Dr. Shafie Shafeiei

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'etre; 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 in 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 mainil 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 ground. 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 moines 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 highlyimportant, 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 Governmenths 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 matte 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 Chorzow 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.[FN1]

FN(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'exces de pouvoir ou de corruption prouvee d'un des arbitres ou d'erreur essentielle."

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."[FN2]

FN(2) La procedure dans les arbitrages internationaux, Paris, 1905, p. 163. Translated from the original French: "Pour exceder leurs pouvoirs, les arbitres n'auront qu'a accorder a une partie des satisfactions plus grandes que celles que leur permittait le compromis, ou bien ils n'auront qu'a negliger les regles de ce meme compromis quant a la procedure a suivre."

FNPaul Reuter, Driot international public, Paris, 1968, p. 284; Pierantoni, "La procedure dans les arbitrages internationaux," R.C.I.L.C., 1898, pp. 456-7; Guermanoff, L'exces de pouvoir de l'arbitre Paris, 1929, p. 60.

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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