



IRAN-US CLAIMS TRIBUNAL

IUSCT Case No. 7

TIPPETTS, ABBETT, MCCARTHY, STRATTON V. TAMS-AFFA CONSULTING ENGINEERS OF
IRAN

AWARD (AWARD NO. 141-7-2)

29 June 1984

Tribunal:

[Shafie Shafeiei](#) (Appointed by the respondent)

[George H. Aldrich](#) (Appointed by the claimant)

[Willem Riphagen](#) (President)

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Award (Award No. 141-7-2)

I. The Claims

- [1]. The Claimant, TIPPETS, ABBOT, McCARTHY, STRATTON ("TAMS") is a United States engineering and architectural consulting partnership. TAMS and Aziz Farmanfarman 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.
- [2]. 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.
- [3]. 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 expropriated and 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

- [4]. 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.

- [5]. 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

- [6]. 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...."
- [7]. 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].
- [8]. 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.¹ 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.

3. Jurisdiction over the Bank Guarantees and the Related Undertakings

- [9]. 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.

¹ 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.

- [10]. 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.
- [11]. 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

- [12]. 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.
- [13]. The Tribunal therefore has jurisdiction over TAMS' claim for its property interest in TAMS-AFFA.

5. Jurisdiction over the Claim for Bank Deposit

- [14]. 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).
- [15]. The Tribunal therefore dismisses for lack of jurisdiction the claim of TAMS for its bank deposit.

6. Jurisdiction over TAMS-AFFA's Counterclaims

- [16]. 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

- [17]. 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.
- [18]. 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.
- [19]. 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.

- [20]. 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.² 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.
- [21]. 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.³
- [22]. 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.
- [23]. 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

- [24]. 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.⁴

² 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.

³ 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).

⁴ While tax and social security premium liabilities of TAMS-AFFA must be estimated for purposes of valuing TAMS-AFFA, the alleged separate

- [25]. 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.⁵ 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.
- [26]. 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.⁶
- [27]. 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.
- [28]. 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*.⁷
- [29]. On the other hand, it would be equally unjust and logically indefensible for the Tribunal to assume

tax and social security liability of TAMS, are, of course, irrelevant to the value of TAMS-AFFA.

⁵ 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.

⁶ 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).

⁷ See generally, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 149 (1953).

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.

- [30]. 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.
- [31]. 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.
- [32]. 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

- [33]. 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

- [34]. Each of the parties shall be left to bear its own costs of arbitration.

AWARD

- [35]. THE TRIBUNAL AWARDS AS FOLLOWS:

The Respondent, Government of the Islamic 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 allegedly 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.