

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاری ایران - ایالات متحدہ
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CASE NO. 165
CHAMBER ONE
AWARD NO. 55-165-1

ECONOMY FORMS CORPORATION,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN;
THE MINISTRY OF ENERGY;
DAM & WATER WORKS CONSTRUCTION CO. ("SABIR");
SHERKAT SAKHTEMANI MANA SAHAMI KHAASS ("MANA"); and
BANK MELLAT (formerly BANK OF TEHRAN),

Respondents.

DISSENTING OPINION OF MAHMOUD M. KASHANI

I

The Claimant has filed numerous claims against two joint-stock companies registered in Iran, namely the Mana Construction Company (private joint-stock) and the Dam Construction and Irrigation Facilities Company (Sabir, private joint-stock). In its Statement of Claim, the Claimant states that these two companies are divisions of the Ministry of Energy, and in another part (Paragraph C) of the same Statement of Claim, it states that its claim is "against Iranian nationals and the Islamic Republic of Iran."

Inasmuch as the Claimant's claim is directed against two commercial companies organized and registered in Iran and considered to be nationals of Iran as set forth in Article VII, paragraph 1 of the Claims Settlement Declaration, as the Claimant itself has stated, the claim is among those claims filed by a national of one country against a national of another and is therefore outside the scope of the Tribunal's jurisdiction. Nonetheless, by ignoring this explicit admission and resorting to casuistic arguments, the majority has held that Mana and Sabir are a part of the Government of the Islamic Republic of Iran, as set forth in Article VII, paragraph 3 of the Claims Settlement Declaration, and it has thereby held that the Tribunal has jurisdiction over the claim. Aside from the fact that by disregarding the Claimant's own admission the majority has violated established principles of judicial procedure, even its reasoning on the applicability of the definition of the "Government of Iran," as given in Article VII, paragraph 3 of the Claims Settlement Declaration, to Mana and Sabir runs counter to fact and warrants criticism. The aforementioned companies, which have been incorporated and registered in accordance with the provisions of the Law on Joint-Stock Companies, are basically private companies which were formed to carry out private commercial objectives, and which are nationals of Iran by virtue of Articles 590 and 591

of the Iranian Commercial Code. Moreover, although with certain conditions, Article VII, paragraph 1 of the Claims Settlement Declaration has, in confirming this fact, regarded companies registered within the jurisdiction of either of the two governments as nationals of that country. There exists no provision in Article VII, paragraph 3 of the Claims Settlements Declaration or in Iranian law to define the Government of the Islamic Republic of Iran as covering the joint-stock companies organized and registered in Iran and considering them as being the Government of Iran itself. Particularly because the Claims Settlement Declaration provides in Article II, paragraph 1, that claims by nationals of one government against the other government may only be heard by the Tribunal under that paragraph. This yet more explicitly precludes any inference that nationals of one State are a part of the government of that State.

Notwithstanding this fact, by incorrectly interpreting Article VII, paragraph 3, the majority has disregarded the provisions of the Claims Settlement Declaration in holding that Mana and Sabir are a part of the Government of Iran. In order to demonstrate the invalidity of this interpretation it is necessary to examine this Article in light of both the ordinary meaning of its terms and the object and purpose which occasioned its inclusion in the Declaration. As Article VII, paragraph 3 states:

"'Iran' means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof."

A corresponding definition of the "United States" has been provided as well, in Article VII, paragraph 4. What is certain and indisputable is that the purpose in providing for this Article was neither so broad to construe the sense and scope of "the Government of the Islamic Republic of Iran" as embracing the nationals of Iran as well, nor so broad to

include those commercial companies organized and registered under the provisions of the Iranian Commercial Code whose shares are wholly or in part owned, directly or indirectly, by the government under the rubric of "Government of Iran." The definition of "government" as set forth in Article VII, paragraph 3 of the Claims Settlement Declaration is neither an exceptional definition of the Governments of the Islamic Republic of Iran and of the United States of America, nor a new definition of "government" under international law. The Government of Iran has a specific signification in accordance with its municipal law and with universal rules of international law, and Article VII, paragraph 3 has set out to confirm this reality of municipal and international law. Thus it is first necessary to refer to the municipal law of the Islamic Republic of Iran in order to gain a proper understanding of what the "Government of the Islamic Republic of Iran" signifies, and of the rights and liabilities of that government before this Tribunal.

The constituent elements of the Government of Iran also recognized by Article VII, paragraph 3 are as follows:

1. "The Government of Iran": a collectivity of organs of the central government whose representative role for the political system of the Iranian nation is beyond doubt;

2. "Political subdivisions of the Government of Iran": any local political subdivision which is subject to the central government, such as governorships-general, governorships, etc. Such political subdivisions have been determined by the Law on National Divisions and the Duties of Province Governors and District Governors, of 16 Aban 1316 (7 November 1937) as amended.⁽¹⁾

3. "Any agency, instrumentality or entity controlled by the Government of Iran or any political subdivision thereof": With respect to administrative law, aside from the government

and its political subdivisions, another category of juridical persons exists under public law which has been termed "government agencies" pursuant to Iranian law. A government agency carries out a public service either throughout the country or within a particular region, and for this reason government agencies are dependent agencies of either the central government or of any local or regional political subdivisions of the government. One example is the Ports and Shipping Organization, which possesses juridical personality, is dependent to the Ministry of Roads and Transportation, is established pursuant to the Act on Permission to Establish the Ports and Shipping Organization of 1960, as amended, and pursuant to that Act and further implementing regulations, has undertaken to carry out the country's ports and shipping commercial affairs referred to in said laws.

Other examples are the Civil Aviation Organization dependent to the Ministry of Roads and Transportation, the Deeds and Properties Registration Bureau dependent to the Ministry of Justice and the Vital Registration Bureau dependent to the Ministry of Interior.

It is worth noting that the various terms used in the Farsi text of Article VII, paragraph 3 of the Claims Settlement Declaration all have one intent, being in effect synonymous. By the same token, the terms "agency" and "instrumentality" in the English text of Article VII, paragraph 3 embody a single meaning and are synonymous; furthermore, the term "entity" must also be regarded as falling within the same category--that is, as being of the same sort as the first two terms, in keeping with the ejusdem generis rule. What is intended by all these terms is that category of government

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- (1) The clear case of "political subdivision" is the independent states constituting a federal government that in the case of the United States of America even possess state government with three legislative, executive and judicial powers separate from the federal government.

agencies which are part of the government by virtue of the nature of their assigned activities and functions. The laws of Iran also define the term "government agency" in this manner. For instance, Article 1 of the State Employment Law, ratified on 31 Khordad 1346 (21 June 1967), defines "government agency" as follows:

"A 'Government agency' is an organization established by the Government pursuant to law."

Despite the diversity of their activities, government agencies share common characteristics. For instance, these agencies possess juridical personality and therefore possess a measure of autonomy with respect to the central authority or the political subdivision with which these agencies are affiliated. On this basis, Article 587 of the Commercial Code of Iran provides that "Governmental and municipal agencies and establishments shall possess juridical personality upon their formation, without need of registration." As a whole, government agencies possess the following characteristics:

a) Government agencies are juridical persons as a matter of public law. As such, a government agency has official standing and enjoys the privileges of an administrative authority. The property of government agencies falls under the category of government properties and cannot be attached. Thus, in the final analysis, government agencies are a part of the government, despite their independent personality.

b) Government agencies are established pursuant to law and are charged to carry out specific public services for the account, and on behalf, of the government.

These characteristics are set forth below in the definition one commentator has given for this sort of government agencies:

"State agencies

By general definition, a State acts through its organs or agencies, which normally include the persons, representatives, subordinate organs, instrumentalities, corporations and government departments, which constitutionally form organic parts of the machinery of the central government of a sovereign State. Such agencies being part and parcel of the State are generally accorded the same immunity as the State they represent..."⁽¹⁾ (Emphasis added)

This introduction disposed of, the basic issue is: under what conditions a governmental agency, whether possessing juridical personality by virtue of being a company or by some other means, is affiliated with, or separated from, the government on the international plane. Even though government agencies are established by the government and the latter supervises their activities, these factors are in themselves insufficient to make the status of such agencies part of the government on the international plane. On the international plane, the relationship of a government agency with the government, and unity of the two, is based upon another fact. That fact being whether said agency is related to the government by virtue of being one of its organs or of carrying out a governmental service; for on the international plane a government presents itself as a single entity embracing all its organs.⁽²⁾

(1) S. Sucharitkul, Immunities of Foreign States before National Authorities, R.C.A.D.I., t.149, pp.100-101.

(2) For an elaboration and characterization of this theory, refer, inter alia, to an article by Fu'ad Riyaz, Academy of International Law, 580 (1963-1), where he states in part:

"L'identification d'une entité juridique avec l'Etat sur le plan international semble être commandée par une donnée différente: celle de savoir si cette entité se rattache à l'Etat en tant qu'organe ou service de ce dernier. Sur le plan international, l'Etat apparaît comme une seule

(cont.)

The Claims Settlement Declaration Article VII, paragraph 3 comprises "Iran" of the Government of Iran and any agency, instrumentality, or entity controlled by the Government of Iran. An entity is controlled only where it is a part of the government, for paragraph 3 concerns the definition of the Government of Iran and thus the control test must be construed on the basis of public law and public international law. Article VII, paragraph 2 concerning the definition of "national" requires the application of ownership interest for determination of control of one corporation over the other, since a corporation, as a national, is the subject of private law. But paragraphs 3 and 4 of Article VII concerning the definition of government do not use the ownership interest test. This is the basic distinction between the control referred to under paragraph 2 and the control referred to under paragraphs 3 and 4 of Article VII. Thus an entity is under the control of the government where it is a part of the body of the government. When determining the definition and

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entité englobant tous les organes et tous les services qui dépendent de lui.

L'étude comparative du rôle que jouent les entreprises publiques dans les divers systèmes nationaux indique clairement que certaines d'entre elles sont élevées par l'Etat au rang de services, vu l'importance de leur activité. La pratique nous offre d'ailleurs, comme nous le verrons, nombre d'exemples où un Etat soutient qu'une entreprise donnée constitue un de ses services et réclame pour elle le traitement que cette qualité requiert.

Ainsi, dès qu'une entreprise est constituée en tant que service de l'Etat et fait partie du rouage étatique, elle se présente comme ne faisant qu'un avec l'Etat sur le plan international. Le fait qu'elle possède une personnalité distincte en droit interne ne s'oppose pas à ce qu'elle s'identifie à l'Etat dont elle constitue un service.

Par contre, si l'entreprise publique ne constitue pas un rouage, un service de cet Etat, elle ne saurait être identifiée avec lui. Le fait que l'existence de l'entreprise ainsi que son fonctionnement dépendent de la volonté étatique ne saurait à lui seul mettre obstacle à la projection de la personnalité juridique propre à l'entreprise sur le plan international."

scope of government, international jurisprudence has applied criteria similar to the control referred to in paragraphs 3 and 4 of Article VII. In cases where sovereign immunity of a government and its scope is an issue, courts of many nations have resorted to the "control" test. Thus, sovereign immunity of a State from jurisdiction is quite similar to jurisdiction under the Claims Settlement Declaration, for in both situations jurisdiction of a forum is at issue, although in the former it concerns the jurisdiction of a municipal forum and in the latter the jurisdiction of an international forum subject to restrictive interpretation.

The immunity afforded by State sovereignty bears a marked similarity to jurisdiction under the Claims Settlement Declaration. In both instances, the jurisdiction of an authority is at issue: in the Claims Settlement Declaration, the jurisdiction of a foreign forum; and in issues related to sovereign immunity, the jurisdiction of a municipal forum.

In terms of the recognition of the sovereign immunity of foreign States, the civil procedure of various nations can be of considerable help for understanding the meaning of "government" in international law.

In instances where a foreign State agency has asserted that it falls under the sovereignty of the foreign government, English courts have applied "control" in a sense very close and analogous to that of Article VII, paragraph 3 of the Claims Settlement Declaration. The general test in these instances is primarily whether the control is effective and actual (see Brownlie, Principles of Public International Law 342 (3rd. ed. 1979)). From the corpus of decisions rendered by the English courts, the conclusion is clearly reached that the mere existence of a certain control relationship between a State and an agency is insufficient; on the contrary, in these

decisions it has been held that a very strong and intense degree of control must be demonstrated in order for that agency to be considered a part of the State. Furthermore, in every instance where the test of State control is applied, such is done in order to establish whether the agency or entity is, or is not, basically to be regarded as a part of the foreign State. In light of the fact that this is also the object and purpose of the test of control in Article VII, paragraph 3, it is possible to draw the conclusion that in every case an agency or entity must be considered a part of the State apparatus before it can fall under the sovereign immunity of that State, or before it shall become subject to the jurisdiction of this Tribunal.

Two major decisions rendered by the English Courts on this issue are as follows:

a) In Trendtex Trading Corporation v. Central Bank of Nigeria, [1977] 1 Q.B. 529, the English Court of Appeal found that the Central Bank of Nigeria was a central bank modelled on the Bank of England and that it had governmental functions in issuing legal tender, safeguarding the international value of currency and acting as banker and financial adviser to the government. It found that its affairs "are under a great deal of government control in that the Federal Executive Council may overrule the board on monetary and banking policy and on internal administrative policy" (per Lord Denning M.R., page 560 F-G). It also found that it acted as banker for the states of the federation and had few, if any, private customers.

In spite of its conclusion that Nigeria exercised a great deal of control over the Bank (Stephenson L.J. stating at page 564B that the Government of Nigeria controlled the Bank), the Court of Appeal held that such control was insufficient to render the Bank a part of the Government of Nigeria:

"It is clear enough that the bank was the subserving agent of the government in a variety of activities but this is not in my judgment adequate to constitute it as an organ or department of government." (per Shaw L. J., page 575F.)

b) In another recent case, the House of Lords applied the test of control in a context and for a purpose closely analogous to those of Article VII (3) in such a way as to demonstrate that a very high degree of control must be proved before it can be established that an entity is essentially part of a government. In C. Czarnikow Ltd. v Centrala Handlu Zagranicznego Rolimpex [1979] A.C. 351, the House of Lords had to consider an argument that the sellers were an organ or department of the Polish Government and therefore were not entitled to rely on a provision of the contract which excused "government intervention...beyond the seller's control." In reviewing the arbitral award in the case, the House of Lords held that on the findings of the arbitrators the sellers were not an organ or department of the Polish Government but an independent state enterprise. Their Lordships considered that although the arbitrators had found that Rolimpex was controlled by the Polish State, they had also found that the degree of control was insufficient to render it a part of the government:

The appellants do not say that the respondents are to be identified with the Polish Government. The respondents are an organization of the State. Under Polish law they have a legal personality. Though subject to directions by the appropriate Minister who can tell them 'what to do and how to do it', as a State enterprise they make their own decisions about their commercial activities. They decide with whom they will do business and on what terms and they have considerable freedom in their day to day activities. They are managed on the basis of economic accountability and are expected to make a profit. The arbitrators in my opinion rightly found as a fact that the respondents were not so closely connected with the Government of Poland as to be precluded from relying on the ban imposed by the Decree as government intervention.

The appellants also asserted that the respondents bought and sold for the State. This while no doubt true, does not in my view help the appellants. The facts found by the arbitrators stated above show that they were not a department of the government but have a separate identity. They were, it was found as a fact, employed as 'a commission merchant' to sell sugar intended for export on behalf of Sugar Industry Enterprises which were also State enterprises.

The fact that they did so cannot in my opinion invalidate the Decree made on the 5th November.

The decision provides another clear demonstration that the existence of even a very substantial measure of control will not suffice to establish that the entity controlled is essentially a part of the entity exercising control.

American law and practice also follow the same course. The Restatement of the Law, Second, on Foreign Relations Law of the United States provides:

§66. Applicability of Immunity of Foreign State

The immunity of a foreign state under the rule stated in § 65 extends to:

- (a) the state itself;
- (b) its head of state and any person designated by him as a member of his official party;
- (c) its government or any governmental agency;
- (d) its head of government and any person designated by him as a member of his official party;
- (e) its foreign minister and any person designated by him as a member of his official party;
- (f) any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state;

- (g) a corporation created under its laws and exercising functions comparable to those of an agency of the state. (Emphasis added)

The Restatement Second, Section 66 Comment (a) adds that, "the term 'agency' as used in this Section means a body having the nature of a government department or ministry. It does not include every person or entity acting as an agent for a state. The question in each case is whether the relationship between the state and the agency, established by the law of the state creating the agency, in fact makes it a part of the government of the state. In determining whether the agency is in fact a part of the government, the views of the government creating the agency are given great weight, but are not necessarily conclusive."

The Restatement's Reporters' Note No. 2 adds the following as the relevant criteria on whether a governmental corporation is a part of the government:

(a) Law under which incorporated. The fact that a corporation was created under the laws of the state whose government owns its stock does not automatically entitle it to immunity although it is essential to a claim of immunity that the corporation be incorporated under the laws of that state.

(b) Proportion of stock owned by foreign state. A corporation performing a governmental function is possibly entitled to immunity even though the government owns only a portion of its stock. *Dunlap v. Banco Central del Ecuador*, 41 N.Y.S.2d 650 (Sup. Ct. 1943) [immunity granted corporation, five elevenths of stock of which was owned by Equadorean government, because suit arose out of corporation's public function in procuring coins for Ecuador's currency]. The fact that the foreign government does not own all of the stock must, however, be given great weight, in determining whether the corporation is an agency of the foreign government.

(c) Manner in which corporation is treated for purpose of suit in its own state. That the corporation is permitted to be sued in the state of its creation in the same manner as a private corporation, is a factor which points toward the

corporation's not being entitled to immunity. That the state creating the corporation has surrounded the corporation's liability to suit in its own state with the same safeguards surrounding suits against itself or its agencies, is a factor which points toward treating the corporation as entitled to the state's immunity.

Comment (c) to Section 66 on foreign governmental corporations states: "A governmental corporation of a foreign State may be entitled to immunity on the same basis as an agency of the government if it acts in behalf of the government of the foreign state in the same manner as an agency of the foreign state. As to criteria used in deciding whether a corporation is entitled to the immunity of a state under the rule stated in Clause (g) ... Reporters' Note 2 to this Section" citing Baccus S.R.L. v. Servicio Nacional del Trigo, [1957] 1 Q.B. 438 (C.A. 1956) and its holding that although the status of the defendant was that of a corporation, its functions were wholly those of a department of the government. It also provides "that the test is of necessity a general one, in which great weight must be given to the fact that the foreign state considers the corporation to be performing the functions of a governmental agency".

This proposition is also demonstrated by United States Courts decisions on State immunity. As in the English cases, immunity is extended only to entities which are essentially a part of a foreign government. There is abundant authority in the United States courts that a suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government and is used as a governmental agent and its stock is owned solely by government. (See, for example, United States v. Deutsches Kali-syndikat Gesellschaft (1929) 31F 2d 199; Ulen & Co. v. Bank Gospodarstwa Krajowego (1940) 24 NYS 2d 201, anticipating the statement of Lord Denning in Rahimtoola v. Nizam of Hyderabad [1958] A.C. 379,417 that "...a separate legal entity which carried on commercial transactions for a state was an agent,

and not an organ, of the government..."). The extent of control is, once again, the governing test; immunity will be accorded only if there is established a sufficient degree of control to render the entity a part of the government. (See for example, Hannes v. Kingdom of Roumania Monopolies Institute (1940) 20 NYS 2d, 825.)

In this way, according to American law and practice, only those government corporations created under the law and exercising a function comparable to that of an agency of the State are part of the government, and a governmental agency is a body having the nature of a government department or ministry. It does not include any person or entity acting as an agent for the State. Moreover, ownership of shares of a corporation by the government does not render the corporation part of the government.⁽¹⁾

(1) See also: the Draft Articles on Sovereign Immunity of States and State Properties, drawn up by the Commission on International Law of the General Assembly of the United Nations. The fourth report, issued by the participants at the 34th session of the Commission held from 3 May to 23 July 1982, held that the term "foreign government" included only those governmental organizations and instrumentalities which are responsible for performing Acts of State as government organs. The text of the (relevant) Article is as follows:

- "a) L'expression "Etat étranger", telle qu'elle est définie à l'article 2, paragraphe 1 d) ci-dessus, comprend:
- i) Le souverain ou le chef d'Etat
 - ii) Le gouvernement central et ses divers organes ou départements;
 - iii) Les subdivisions politiques d'un Etat étranger dans l'exercice de l'autorité souveraine de ce dernier;
 - iv) Les organismes ou mécanismes agissant en tant qu'organes d'un Etat étranger dans l'exercice de l'autorité

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Limiting the scope of State, and as a consequence its rights and liabilities on the international plane, to agencies which are part of the government structure is a fact in international law and jurisprudence. Moreover, it is definitely within the purview of the law, and within the scope of authority of the government itself, to set forth the criterion for determining whether a public agency is a constituent part and organ of the State and carries out one of the sovereign functions of the State.⁽¹⁾ For it is a natural and officially acknowledged right of governments to determine their own economic and social system. Article 1 of the Charter of Economic Rights and Duties of States, ratified by the United Nations General Assembly on 12 December 1974, provides in relevant part:

"Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever."

If States possess this axiomatic and established right to select the form of their economic system within their jurisdictional domain, then such a choice must be respected on the international plane as well. On this basis, Article 5 of the Draft Articles on State Responsibility adopted by the United

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souveraine de ce dernier, que ces organismes ou mécanismes soient dotés ou non d'une personnalité morale distincte et qu'ils fassent partie ou non de l'appareil opérationnel du gouvernement central..."

- (1) See Fu'ad Riyaz, loc. cit., p. 581, who states in this regard:

"Comme il s'agit en l'occurrence de la détermination du cadre même des services de l'Etat étranger, cadre que seul l'Etat étranger a qualité pour délimiter--car il y va de sa compétence étatique--l'on devrait se référer au système de l'Etat étranger pour savoir si l'entreprise publique étrangère constitue un service de cet Etat. Le respect de la compétence étatique implique que chaque Etat reconnaît le droit des autres Etats à déterminer ce qui fait partie du cadre de leurs services."

Nations International Law Commission in July 1980 confirms both of the above-mentioned criteria for defining Acts of State to the effect that by the term "State" is intended to refer to only those State organs having that status under the internal law of that State. In relevant part the Draft provides:

"The 'Act of the State' Under International Law

Article 5. Attribution to the State of the conduct of its organs

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question."

The conclusion to be drawn from the preceding discussion is that this Tribunal cannot, and must not, deny and trample underfoot Iranian law and international jurisprudence relating to the definition and understanding of what the "State" and its constituent organs denote. On the contrary, this Tribunal has the duty to respect legal facts exactly as they are officially recognized within the realm of the laws and regulations and legal system of the Islamic Republic of Iran. In other words, there is a whole series of stock companies which have come into existence pursuant to the Law on Joint-Stock Companies and which, like all other "persons" under private law, are engaged exclusively in commercial activities and can in no sense whatsoever be considered part of the Government of the Islamic Republic of Iran. Nor do Iranian courts treat such companies as part of the government: first, such companies do not enjoy immunity, and their properties can be attached by creditors within the territory of Iran; second, upon resorting to the courts they are not exempt from payment of court costs, as are the State and its agencies; third, and most important of all, dissolution of such companies and liquidation of their assets are in all respects subject to the provisions set forth

in the Law on Joint-Stock Companies, which amended part of the Commercial Code on 24 Esfand 1347 (16 March 1969).

II

With the understanding arrived at of the definition of the "Government of Iran" pursuant to Article VII, paragraph 3 of the Claims Settlement Declaration, it must now be kept in mind that it is an established rule of international jurisprudence that every text and passage conferring jurisdiction upon an international forum must be interpreted in a narrow and restrictive sense. It is never permissible for the Tribunal's jurisdiction to be extended, on various pretexts, beyond what the two Parties have intended and explicitly declared.

Like hundreds of other Iranian companies, both Mana and Sabir are companies registered in Iran and engaged in construction work. These two companies have no duties relating to public services, such as are carried out for society by the State's administrative apparatus on a continual basis. They are engaged in their commercial activities neither in the name, nor on behalf, of the State. These companies are charged only with the duty to engage in private commercial activities, similar to those carried out by the private sector. Not only are these two companies not divisions of the Government of the Islamic Republic of Iran or of any of its political subdivisions, but no manner of direct control is exercised over them by the State or by any of its political subdivisions. Mana was established through capital investment by a number of other commercial companies. Its shares are owned by those companies and by the Industrial Development and Renovation Organization of Iran (Official Gazette, dated 30 Azar 1353/21 December 1974). Therefore, aside from the fact that they do not, as we explained above, fall under the definition of "State agency", they are also not subject to the direct control of the Government of Iran or any of its political subdivisions. Even if

the Industrial Development and Renovation Organization of Iran were to be regarded as an agency of the Government of Iran, that in itself would not be sufficient cause to subject Mana to the jurisdiction of this Tribunal on the pretext that it is controlled by the above organization: only direct and unmediated control by the State or by any of its political subdivisions can suffice to entail the jurisdiction of this Tribunal.

Extension of the Tribunal's jurisdiction by including those entities subject to control by the Government of Iran through the intermediacy of an agency will involve this Tribunal in a veritable chain reaction, and it exposes the Government of the Islamic Republic of Iran to the danger of becoming liable for acts by entities over which it exercises only nominal or superficial, rather than actual, control. The governments of economically developing nations, including that of the Islamic Republic of Iran, have no alternative but to supervise the economic enterprises in their countries in order to guide their economies in the interests of society. These governments cannot leave their economic system to itself and as a result to be run at the behest of multinational companies for profiteering the national resources. Therefore, it is entirely unjust, under such circumstances, for the political denotation of a government to be so broadened so as to include independent economic entities which are only indirectly under the influence of an agency of the government. The unambiguous language of Article VII, paragraph 3 of the Claims Settlement Declaration, as well as the ordinary meaning of its terms, has led the Government of Iran to believe, quite logically, that by adhering to the Algiers Declaration it would be answerable only for those entities which are engaged in governmental services, carry out their functions on behalf of the government and are directly under the control of the government or any of its political subdivisions. Had the two governments intended that control by an intermediary should also bring about the Tribunal's jurisdiction, they would have stated so explicitly, just as the United States has clearly set forth

with respect to the blocking of the Iranian Government's assets and properties in the United States. The United States Treasury Regulations on the blocking of the Iranian assets expressly provides for covering the assets of not only entities under the control of the Iranian Government or any of its political subdivisions, but also entities under the control of an agency or instrumentality.⁽¹⁾ In the absence of such explicit language in the Claims Settlement Declaration, how can the Government of the Islamic Republic of Iran possibly be held liable for something beyond the reasonable meaning of the text to which it has adhered and which was written by the United States, as testified to in Case A/15 Claim IVF by Robert B. Owen, then Legal Advisor to the United States Department of State?

The necessity of confining the meaning of the "Government of Iran" in Article VII, paragraph 3 of the Claims Settlement Declaration to its explicit language, and within the parameters of only the central government and its political subdivisions and any entity which is a part of the State apparatus, also finds confirmation from another direction. On principle, the two governments declared their adherence to the Declarations of the Government of Algeria on the basis of equal sovereignty. Such can be understood, not only from Paragraph 1 of the Algiers Declaration, but also from a glance at Article II, paragraphs 1 and 2 of the Claims Settlement Declaration, which specify this Tribunal's jurisdiction and also point to the existence of a parity between the two governments with regard to instances of this Tribunal's jurisdiction. The two governments have accepted the Tribunal's jurisdiction on the basis of equality and parity. The definition of "government" employed in Article VII, paragraphs 3 and 4 is also entirely identical with respect to both governments.

(1) See, for instance, "The Iranian Assets Control Regulations," § 535.301.

Thus, also from the terms of the Declaration, it is deduced that the two governments enjoy equal standing before the Tribunal with regard to the undertakings assumed by each, and that the Tribunal is to exercise an equal-handed jurisdiction with respect to the two governments.

On this basis, the Algiers Declarations must be interpreted with respect to the Tribunal's jurisdiction so as to ensure the two governments' mutual equality and parity. The United States Government, which administers its nation on the basis of "economic liberalism," does not consider itself liable for the large and small companies incorporated within its jurisdiction, even though these companies act in complete harmony with, and subservience to, the national political and economic policy of the government of that State. (As an example, reference may be made to the United States President's executive orders imposing the economic embargo upon the Islamic Republic of Iran, with which American companies complied.)

In the interpretation of the Claims Settlement Declaration it rendered in Case No. A/2, the Tribunal in effect declared that the claims of the Government of the Islamic Republic of Iran against American corporations, which had very involved and multifarious ties with the former Government of Iran, cannot be entertained. This position has brought about an extreme inequality in this Tribunal, for whereas the Government of Iran have been able to file no direct claims against American corporations and nationals, the latter have lodged nearly 4000 major and small claims against the Government of the Islamic Republic of Iran before this Tribunal. In addition, even though they have had no contracts of any kind with the Government of Iran, many large multinational corporations have asserted, by virtue of their alleged control over other companies throughout the world, that the claims of such companies also qualify as claims by nationals of the United States, and have submitted them to the Tribunal. They

improperly interpret the Algiers Declaration as constituting a document entailing worldwide obligations, on whose force the Government of Iran has renounced its sovereign immunity with respect to the nationals of all nations of the world.

This inequity and inequality is exacerbated by the fact that Article VII, paragraph 3 of the Claims Settlement Declaration, which has described only the Government of the Islamic Republic of Iran, has been interpreted and explained so as to subsume a large number of commercial Iranian companies having an independent juridical personality, engaged solely in private commercial activities like other Iranian nationals, under the Government of the Islamic Republic of Iran, with the result that the Tribunal's jurisdiction with respect to one of the two governments has been excessively and illogically broadened.

The United States, in its Memorial in the Case concerning Interpretation of the Algerian Declarations (case No. A/2), stated that according to United States municipal law it was not allowed to refer to the Tribunal the claims against United States nationals and that such action was contrary to the United States Constitution. This must also be considered true for the Islamic Republic of Iran, for the joint-stock companies organized and registered in Iran possess independent juridical personality and make their decisions through their general managers, boards of directors and shareholders' general meetings; the Islamic Republic of Iran was not allowed either to refer the claims of Iranian companies to this Tribunal without going through said procedure and observing other provisions of the Law on Joint-Stock Companies, even if itself be the shareholder.

Yet the fact is, the two governments bestowed jurisdiction upon this Tribunal under equal conditions and with equal obligations, neither of the two governments enjoying privileges greater than those of the other. Now, if we note that approximately 4000 major and small claims have been filed by

nationals of the United States against the Government of Iran, whereas due to lack of commercial and financial relations with the United States Government, no claims can be filed by nationals of Iran against the Government of the United States, this inequitable interpretation of the Declarations becomes all the more manifest. The reciprocity or mutuality of the commitments of the two governments in the Declarations are not merely for the sake of argument; rather, it forms the causal basis for justification of each other's obligations. Article VII, paragraphs 3 and 4 of the Claims Settlement Declaration must not be interpreted in such a manner that one government shall be required to respond to 4000 claims, while the other government shall be declared free and clear of any obligation to respond to claims by the other government even though those paragraphs have provided the same definition for each of the two governments. This situation has created an unjust disparity between the two sovereign governments, one which shall call into doubt all of their reciprocal undertakings.

III

The Government of the Islamic Republic of Iran, which has been named one of the Respondents in the present Claim, objected in its Memorial dated 28 January 1983 that the Claim was non-attributable to it. The Legal Advisor to the Agent of the Government of Iran stated at the Hearing that "both the Mana and Sabir companies possess independent juridical personalities and are not included under the definition of the Government of Iran as set forth in Article VII, paragraph 3 of the Claims Settlement Declaration." He added that the government is not itself the owner of this company's shares; rather, its shares are held by [Government] organizations and possibly by other companies. It is even possible for the government to sell its shares in these companies; in that event, it would not be possible to say that a company is at one time subject to the provisions of the Declarations, and at another time that it has ceased to be covered by the Declaration's

provisions. Moreover, all of Mana's transactions and activities are those of a company whose personality is independent of the government. The same facts were reiterated by counsel for Mana.

It is thereby established before this Tribunal that Mana and Sabir possess independent juridical personalities, and that they have been organized and registered in accordance with the provisions of the Iranian Commercial Code. Although their shares are at the disposal and in the possession of a number of organizations which are agencies of the Government of Iran, the aforementioned companies have a juridical personality separate from and independent of that of their shareholders by virtue of the Iranian Commercial Code, which governs their formation and the fixing of their liability. In accordance with its articles of association, a joint-stock company makes transactions in its own name; the company's obligations are also related solely to its juridical personality and have no relationship to its individual shareholders. This fact has been explained in Article 1 of the Law on Joint-Stock Companies, ratified in 1347 (1968-9), as follows:

"A joint-stock company is a company whose capital is divided into shares, and the liability of whose shareholders is limited to the face value of their respective shares."

This principle, that is, the independent personality of a company and the limited liability of its shareholders, is today an internationally accepted principle enshrined in the legal systems of most nations of the world. In addition, it is necessary to note that the activities of a joint-stock company have an essentially commercial orientation and fall under the purview of private law. In this respect, Article 2 of the Law on Joint-Stock Companies specifically provides that

"Joint-Stock Companies shall be considered to be commercial companies, even if their activities are not commercial in nature."

By virtue of Articles 590 and 591 of the Iranian Commercial Code, and pursuant to their articles of association, Mana and Sabir are Iranian nationals. In confirming the nationality of joint-stock companies, Article 94 of the Commercial Code, as amended, provides that

"No general meeting can change the nationality of a company or, by any majority, increase the obligations of its shareholders."

Article VII, paragraph 1 of the Claims Settlement Declaration has also included commercial companies under the category of nationals. However, paragraphs 3 and 4 of the same Article, which define the two "Governments," make no reference to companies because, as ought to be obvious, a commercial company cannot be characterized and categorized as a national and, at the same time, treated as the government itself.

Notwithstanding the explicit terms of the abovementioned laws, which are controlling in the case of Mana and Sabir, the majority has regarded these companies, which have been established for the purpose of carrying out commercial activities and are subject to the Law on Joint-Stock Companies by virtue of the terms of their articles of incorporation, as being part of the Government of the Islamic Republic of Iran. In its Award, the majority has said that the objection of nonjurisdiction was first made in the Hearing Conference. This statement is contrary to fact, for in the Statement of Defence of the Government of Iran, filed in January 1983, a short time prior to the holding of the Hearing, objection was made that the claim was non-attributable to the Government of Iran. The other contradiction in the majority decision is that on one hand, it has formally recognized the independent personality of Mana and Sabir; yet, on the other hand, it has enforced the unjust decision it issued in their regard against the Government of the Islamic Republic of Iran, which is merely a shareholder. By this decision, the majority has violated the

imperative laws of the Islamic Republic of Iran. Whereas this Tribunal has received its legitimacy and standing from the two sovereign governments, it is under no circumstances permitted to trample the laws and regulations of the Government of the Islamic Republic of Iran. Respect for the sovereignty of the Government of the Islamic Republic of Iran requires that the independence of the legal and commercial companies and establishments existing in Iran be formally recognized by this Tribunal just as they exist in reality and as they are accepted by the courts and judicial and administrative authorities in Iran. It is particularly necessary to respect this point in connection with these companies' liability for their debts and obligations; just as the Law on Joint-Stock Companies provides, a direct claim must never be filed against the shareholder who is, legally speaking, entirely distinct from the company. This position is accepted not only in the municipal law of every nation but in international jurisprudence as well.

In France, public enterprises, including both government agencies and joint-stock companies, have a juridical personality independent of the government. They are treated like all other juridical persons under private law. They possess private capital of their own and only they themselves bear responsibility for their acts, whether contractual or non-contractual.

The same situation holds true in Great Britain. State enterprises, whether joint-stock companies or public corporations, have a separate juridical personality and are financially independent. They are entitled to file claims in municipal fora on both contractual and non-contractual grounds.

In this connection, Soviet jurisprudence provides even more striking examples, for in that nation State enterprises exercise full control over production and transactions;

moreover, the State has a monopoly over foreign trade. Article 19 of the Civil Code of the Russian Federated Soviet Socialist Republic ("R.F.S.S.R.") provides that State agencies, which are administered on the basis of economic objectives and whose budgets are separate from that of the State, shall be regarded as independent juridical persons. These agencies are liable for payment of their own debts within the limits of the monies allocated them. This rule is further confirmed in Article 13 of the principles of Civil Legislation adopted by the Supreme Soviet of the Union of the Soviet Socialist Republic for the R.F.S.S.R. and the other Soviet Republics in December 1961. Paragraph 2 of this Article provides that

"The State is not liable for the obligations of State organizations which have a separate juridical personality, nor are these State organizations liable for the obligations of the State."⁽¹⁾

Aside from the clear provision made in the laws of the above nations, the International Court of Justice has predicated its well-known decision in Barcelona Traction rendered on 5 February 1970 by a nearly unanimous vote of its judges 15 to 1, upon the same basis. On the separation of the juridical personality of a company's shareholders from that of the company itself, the Judgement provides in relevant part that

38. In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to

(1) Concerning the provisions of French, British and Soviet law, see Fu'ad Riyaz, loc. cit., pp. 571-2.

refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.

39. Seen in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals. As such it has become a powerful factor in the economic life of nations. Of this, municipal law has had to take due account, whence the increasing volume of rules governing the creation and operation of corporate entities, endowed with a specific status. These entities have rights and obligations peculiar to themselves.

40. There is, however, no need to investigate the many different forms of legal entity provided for by the municipal laws of States, because the Court is concerned only with that exemplified by the company involved in the present case: Barcelona Traction- a limited liability company whose capital is represented by shares. There are, indeed, other associations, whatever the name attached to them by municipal legal systems, that do not enjoy independent corporate personality. The legal difference between the two kinds of entity is that for the limited liability company it is the overriding tie of legal personality which is determinant; for the other associations, the continuing autonomy of the several members.

41. Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets. (Emphasis added)

Thereby, the International Court of Justice, the highest authority for the formulation of international law, has

explicitly stated that it is necessary to recognize the independent juridical personality of a company under international law.

Indeed, I do not know how the majority in Chamber One of the Tribunal has permitted itself, in clear violation of the explicit language of the Iranian Law on Joint-Stock Companies and of recognized procedures of international jurisprudence founded upon separation of a company's liability from that of its shareholders, to ignore the independent juridical personality of these companies and to render a decision requiring payment of such a sizable sum by the Government of the Islamic Republic of Iran, which is neither a party to the contract with the Claimant nor to which the slightest infraction in terms of breach of rules of international law is attributed. Other than to call into doubt the legality of the majority decision, what can the effect be of such patent violations of principles of municipal and international law, which must be respected by this Tribunal by virtue of Article V of the Claims Settlement Declaration?

IV

By virtue of Article VII, paragraph 1 of the Claims Settlement Declaration, the basic condition for eligibility to file a claim with the Tribunal is that the claimant establish his American nationality on the basis of the requirements set forth in that Article. It is possible to prove nationality in the case of companies possessing a juridical personality only if the claimant has, properly and on the basis of legal evidence, produced evidence of the company's incorporation in the United States, as well as proof that natural persons who are nationals of the United States own more than 50% of the capital stock of said company. By virtue of Article 24 of the Tribunal Rules, the burden of proof is upon the claimant; moreover, the claim is before a foreign forum and the respondent to the claim is a government vested with sovereign

rights. Judicial examination by this Tribunal is adversary in nature, and the fact that the adjudication is a one-stage process requires that the matter of nationality, which is the key to the Tribunal's jurisdiction as well, be meticulously examined. In my Opinion of 22 March 1983, in Case No. 36, I explained in detail the conditions and evidence necessary to establish nationality on the basis of Article VII, paragraph 1 of the Claims Settlement Declaration. For the purposes of the present case, I rely upon that Opinion and do not consider it necessary to restate it here.

The Claimant in the present case has asserted that it is a company incorporated in the State of Iowa, but it has not presented documents sufficient to establish the company's corporate status from the time that the claim arose to the time that the claim was filed, as well as to the time that the award was rendered. In addition, in its Statement of Claim and subsequent Memorial, the Claimant submitted no information on the company's shareholders or the number and kind of their shares. It presented at the Hearing only a list of the names of its alleged shareholders on a piece of paper not issued by any authority. Aside from the fact that the Respondents, who have denied the American nationality of the Claimant in all of their memorials submitted to the Tribunal, have not been granted sufficient opportunity to comment in this respect, the Claimant has essentially provided the Tribunal no document or evidence of any kind demonstrating the American nationality of such persons. Furthermore, the Claimant asserted in the Hearing that the shareholders have been divided into two separate categories, "first trust" and "second trust,"; although it should have, it has never submitted any copies of the trust agreements to the Tribunal. In addition, in order to determine the validity of the Claimant's assertion, the Tribunal is obliged to require the Claimant to submit the Company's share register to reveal the nature of the shares and the identity of the individual shareholders, so that ownership of the shares -- and as a result the nationality of

the Claimant company -- might be determined in accordance with Article VII, paragraph 1 of the Declaration. Nonetheless, no such documents have been submitted to the Tribunal. What is amazing in this connection is that when the majority encountered these obvious defects, instead of carrying out its legal duty pursuant to Article V of the Claims Settlement Declaration which binds the Tribunal to "decide all cases on the basis of respect for law" and rather than requesting the Claimant to produce sufficient evidence to establish its assertion -- or else, in the event of the Claimant's failure to produce evidence, rejecting the claim -- instead, the Tribunal stated that "although no underlying documents to establish the citizenship of the holders of more than 50% of the voting stock in Economy Forms were produced, the statement at the hearing of Ralph Jennings with respect to that citizenship is a sufficient basis for the Tribunal's conclusion." This occurred under circumstances in which the Claimant's request at the Hearing to be permitted to appear as a witness was refused. Due to the sensitivity of the matter, the minutes of this portion of the Hearing are here quoted verbatim :

"It was so decided that Mr. Jennings would not be heard as a witness, because he is the chairman of the board of directors of the Company and is therefore considered to be an interested party."

Although the Tribunal acknowledges that the Claimant has presented no evidence or documentation in order to establish its nationality, the majority has exempted the Claimant from the obligation to do so. Without the slightest legal basis, it has accepted the assertions solely on the basis of the statements of Mr. Jennings himself, who is an interested party in this claim and thus it has made it clear that its Award is invalid. Is it not unfair and oppressive that the unsubstantiated statements by the Claimant in an international forum be accepted as establishing its allegations, and that such a considerable sum be awarded against a sovereign government

merely on the basis of an allegation brought against it? Indubitably, those persons with an interest in the Tribunal's arbitration will not relax their vigilance and will not readily overlook such high-handed decisions, nor will the international legal system, closely following the Tribunal's decisions.

V

As to the merits of the case, the Claimant's claims were principally brought against Mana. A very small part of the claims were raised against Sabir. Bank Mellat was also named as Respondent in a part of the claims. The Government of the Islamic Republic of Iran and the Ministry of Energy were in no way involved in these relationships and yet were named as Respondents in this case for no conceivable reason. Therefore, in a submission dated 28 January 1983, the Government of the Islamic Republic of Iran took exception to the attributability of the claim to itself and to the Tribunal's jurisdiction.

Before dealing with the basic criticisms to which the majority decision concerning Mana is liable, I would note that, while some seven pages of the majority decision are allocated to explaining the Claimant's contentions and allegations and the remaining pages to reiterating these contentions and forming conclusions thereon -- so much so that on some points the decision went so far as to expand upon the Claimant's allegations -- only one paragraph, less than half a page, was devoted to the Respondents' pleadings. The decision makes no mention whatsoever of many of the Respondents' well-founded and valuable defences, which are capable of convincing any impartial person. In other words, there was not even a superficial maintenance of impartiality or respect for the parties' equal rights. Consequently, to explain my Dissenting Opinion, I first have to deal with the Respondents' various arguments ignored by the majority and not reflected in the Award.

In all, on different dates, Economy Forms sent five proforma invoices⁽¹⁾ to Mana, in each of which it gave a list of various parts of metal forms and related accessories used in concrete constructions. In keeping with standard commercial practice, the prices of the individual goods were quoted in the proforma invoices. The proforma invoices are dated, respectively, 29 August 1978, 15 September 1978, 21 October 1978, 10 November 1978 and a second 10 November 1978, with the last two invoices even bearing no signature. In submitting its Statement of Claim to the Tribunal, the Claimant has alleged that these five proforma invoices confirmed sales contracts concluded in Iran (Statement of Claim at 5). Furthermore, although it did not ship any of the parts mentioned in the proforma invoices to Iran, the Claimant alleges that it manufactured those parts but was unable to dispatch them to Mana because of the difficulties then prevailing in Iran, and consequently, the Claimant demands the price of those goods and the storage and handling costs thereof, plus interest.

Claimant submitted no documentary evidence in substantiation of its allegation that a contract was executed by and between Mana and the Claimant in connection with the five alleged "contracts" mentioned above. Its only documentation is those same proforma invoices, two of which even lack a signature. It is, therefore, necessary first to clarify the legal value of a proforma invoice and its role in concluding a contract.

In trading practice, a proforma invoice is basically a kind of proposal or invitation made by a seller (to a

(1) In these five proforma invoices, an itemized list of equipment is given, together with the respective prices and the mode of payment thereof, namely, through the opening of a letter of credit. The "proforma invoice", therefore, is nothing but a price list, sometimes referred to in international trading practice as a "quotation."

potential purchaser), and is in no way binding on either. This is why, in some cases, a person to whom the proposal is made, demands from the seller a bid bond to bind the latter to abide by the terms and conditions contained in the proposal. (1)

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- (1) The Dictionary of Business English - (J. H. Adam, 1982,) defines "proforma invoice" as follows:

"Proforma invoice

- (b) in export trading, a sample invoice to give a possible buyer information about prices, discounts, charges and conditions of sale if he places an order. A way of making a quotation.
- (c) a sample invoice sent by a business to its branches and agents to give them information which they need to fix local selling prices."

The same definition has been given for "proforma invoice" in a number of other commercial dictionaries:

- (a) Elements of Commerce, by Charles O'Conner:

"8. Proforma invoice. The wholesaler would send the retailer a proforma invoice if he wished to give only a quotation, or to disclose the cost price of the goods to a retailer to whom he sent them on approval or to whom he did not desire to give credit. It is similar to an invoice, but bears the words "proforma" (for form's sake), and the wholesaler does not debit the retailer with the price of the goods."

- (b) Business Dictionary, by Collins Gem:

"Proforma For form's sake. A term applied to accounts or invoices which act as a sample of charges that will be made if a transaction does occur. In the case of a proforma invoice the document is often used to obtain payment for goods before delivery."

- (c) Lexicon of American Business Terms, by James H. Filkins and Donald L. Caruth:

"Proforma statement : (1) An accounting, financial or other type of statement containing, at least in part, hypothetical amounts. (2) An accounting, financial or

(cont.)

The bid bond usually constitutes up to 5% of the total value of a proforma invoice, varying of course, from one case to another. Should a seller, for reasons of his own, change his mind and withdraw his proposal, the only guarantee available to the purchaser will be the bid bond. Thus, from the standpoint of civil and commercial law, a proforma invoice carries far less weight than a definite (conclusive) offer forming the basis of a sales contract, nor has it inherently such a binding effect or power, even if accepted by the purchaser.

Thus, so far as trading practice is concerned, there can be no doubt that a proforma invoice is merely a sort of preliminary offer and quotation and cannot have any legal contractual value involving any binding effect on the purchaser unless accepted by him and unless the arrangement for the payment of the price is mutually agreed upon. This is further clarified by the fact that in all these proforma invoices the Claimant included the following to ensure the purchaser's acceptance and to have sufficient guarantee as to the mode of payment in case the purchaser accepted the proforma invoices in question:

"We certify that this equipment will be shipped to the port of Houston from Des Moines within 40 days after receipt of Letter of Credit. Letter of Credit should remain negotiable for 70 days after receipt by Economy Forms Corporation."

In consideration of the foregoing, I shall initially examine the first proforma invoice and then deal with the remaining four proforma invoices, for which no letters of credit have ever been opened and which have never been accepted by Mana, because of the fact that Mana has opened a letter

(cont.)

other type of statement which has been modified to show the effect of proposed transactions which have not yet been consummated."

of credit only for the first proforma invoice, dated 29 August 1978, and because the issues related to the first proforma invoice are more complicated due to the opening of the letter of credit and the involvement of Bank Mellat therein.

VI

Mana deposited with the Bank of Tehran, Maleko Shoara Branch, the rial amounts required to open letter of credit No. TRI/630911, dated 20 September 1978, in the name of the corporation selling the equipment. The letter of credit was in the amount of U.S. \$357,070.15 and was negotiable through 5 January 1979. Mana had the letter of credit made negotiable for 100 days instead of the 70 days requested by the Claimant. This act demonstrates the purchaser's good faith, for ordinarily, purchasers try to limit the period for which a letter of credit is negotiable, in order to minimize bank charges and interest. Moreover, Mana agreed that the equipment could be shipped from any U.S. port, and even authorized gradual shipment of the equipment.

The letter of credit basically provided, inter alia, that Economy Forms manufacture the ordered equipment and deliver it to a shipping company for shipment to Iran prior to 20 December 1978. Under the same letter of credit, the Bank of Tehran authorized Banca Nazionale del Lavoro, New York, to pay the proceeds of the letter of credit upon the presentation of the documents required thereby. In its letter of September 26, 1978, Banca Nazionale del Lavoro, New York, advised Economy Forms of the terms and conditions of the letter of credit and expressly declared that the irrevocable letter of credit was to remain negotiable through 5 January 1979. The Bank of Tehran, as per its telex dated 8 October 1978, once more informed the correspondent bank, Banca Nazionale del Lavoro, New York, that the letter of credit would expire on 5 January 1979, and on 12 October 1978 the latter again advised Economy Forms, pursuant to its previous letter, that the exact date of

expiry of the letter of credit was 5 January 1979. Again, on 5 December 1978, the correspondent bank, Banca Nazionale del Lavoro, New York, reminded Economy Forms of the fact that: "a certificate of origin signed in six copies by the local Chamber of Commerce is required by the Letter of Credit and the ordered equipment can be shipped from any U.S. port."

In light of the fundamental and decisive fact that in the text of the proforma invoice, Economy Forms expressly made shipment of the equipment from Economy Forms' headquarters to Houston subject to the purchaser's opening of a letter of credit, and that Economy Forms provided itself a period of 40 days, obviously in order to manufacture the forms and related accessories and to pack them, it can readily be understood that the equipment was to be manufactured and shipped only if the letter of credit had been opened and notified. Otherwise, Economy Forms would not have deemed itself to be under any obligation; nor, obviously, would it have been entitled to obligate the opposite party. This is the express language of the sentence quoted from the Claimant's proforma invoice, which can bear no contrary interpretation whatever.

Mana declared its acceptance of the proforma invoice dated 29 August 1978, and by effecting the payment to the Bank of Tehran of the rial equivalent of the price of the equipment and shipping costs thereof and by properly opening a letter of credit in favor of the Claimant, it made the necessary arrangements for definite payment. In turn, the Bank of Tehran chose Banca Nazionale del Lavoro, New York, as its correspondent bank in New York and in every respect made it possible for Economy Forms to be paid for the price of the equipment ordered. It goes without saying that receipt by Economy Forms of the proceeds under the letter of credit was made conditional upon its manufacture of the equipment and preparation of the required shipping documents. In other words, merely sending a proforma invoice did not entitle the Claimant to anything; the entitlement was to arise only after the

equipment had been manufactured and delivered to a shipping company in compliance with the provisions of the letter of credit and the required shipping documents had been presented.

To ascertain the probable undertakings of the Parties, the Tribunal was obligated to consider the nature and legal value of a proforma invoice; it was further duty-bound to take into account the mechanism for payment upon letters of credit on the basis of the ICC Rules for Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce and used as a guideline for banking and trading institutions in their dealings with letters of credit. However, despite the fact that it has been explicitly mentioned in the text of the letter of credit opened at the purchaser's request that the letter of credit was subject to the ICC Rules, and that in its Statement of Defence Bank Mellat relied on these Rules, even quoting parts thereof, the Tribunal paid no attention to them.

The letter of credit opened by the Bank of Tehran at the request of Mana is an irrevocable letter of credit. It is also stated in this letter of credit that it is subject to the ICC Rules for Uniform Customs and Practice for Documentary Credits (Statement of Claim, Exhibit C). Article 3 of these Rules provides:

a. An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:

- i. to pay, or that payment will be made, if the credit for payment, whether against a draft or not.

* * *

b. An irrevocable credit may be advised to a beneficiary through another bank (the advising bank) without engagement on the part of that bank, but when an issuing bank authorizes or requests another bank to confirm its irrevocable credit and

the latter does so, such confirmation constitutes a definite undertaking of the confirming bank in addition to the undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:

* * *

c. Such undertakings can neither be amended nor cancelled without the agreement of all parties thereto.

In the light of the foregoing Rules, it should be noted that following the Bank of Tehran's issuance of the irrevocable letter of credit, the correspondent bank, that is, Banca Nazionale del Lavoro, New York, notified this irrevocable letter of credit to the beneficiary, i.e., Economy Forms (See Exhibit No. 1 of Bank Mellat's Statement of Defence).

In an international transaction, when a correspondent bank notifies a supplier of an irrevocable letter of credit, the bank becomes the primary source of collection of the price for the seller. The logic behind the ICC Rules, on whose basis thousands of international commercial transactions are effected daily, is that there should be established some guarantees between a purchaser and a seller living thousands of miles apart, and frequently on two different continents, so that the former can be assured of receiving the commodity against payment of the price and the latter can be reciprocally assured of receiving the price upon delivery of the commodity. To achieve this end, international contracts are served by the world banking system and two different banks accessible to the respective parties function as a reliable vehicle for the exchange of related instruments. Undoubtedly, the utmost confidence in which international financial circles hold the banking system creates a secure atmosphere for buyers and sellers by ensuring the delivery of commodity and payment of price, respectively.

VII

Under such circumstances, Economy Forms was obligated to manufacture the equipment, deliver it to a shipping company in compliance with the terms and conditions of the letter of credit and present the necessary documents, in order to receive the proceeds under the letter of credit. For the letter of credit was properly opened and notified three times, and neither Party has ever denied its existence and validity. Nevertheless, the Claimant's position regarding the reason for its failure to receive the proceeds under the credit is not clear. It repeatedly mentions the internal difficulties in Iran in both its Statement of Claim and its subsequent submission. On page 7 of its Statement of Claim, the Claimant asserts:

"The concrete construction forms and accessories were then ready for shipment and were presented for shipment on December 27, 1978. Economy Forms was unable to ship the concrete construction forms and accessories to Iran due to internal difficulties within Iran." (Emphasis added.)

The same theme is repeated on page 3 of its Reply, filed on September 1, 1982:

"The failure of the Claimant to ship the goods as requested by the various entities within the Government of Iran was due to internal difficulties within Iran and beyond the control of the Claimant...said internal difficulties, beyond the control of the Claimant made it impossible for the claimant to perform." (Emphasis added.)

However, the fact remains that even if the internal difficulties within Iran referred to by the Claimant indeed existed, they could not possibly affect the shipping arrangement and could in no way have presented an obstacle for loading the equipment in the port of Baltimore or any other port in the United States. The Claimant was obligated to comply with the terms and conditions of the letter of credit, namely to deliver the concrete construction forms to a ship-

ping line at a United States port and present the bill of lading and other required documents. Furthermore, in accordance with the terms and conditions of the letter of credit, the Claimant was obligated to deliver the commodity to a shipping company, for shipment to Iran, not later than 20 December 1978. But the Claimant asserts that it delivered the goods to the shipping company on 27 December 1978. Mana objected to the Claimant's failure to make timely delivery of ordered goods as a breach of its obligations (Mana's Statement of Defence at 3). Despite being confronted by this objection, the Claimant did not change its position even in its Reply filed on 1 September, 1982. However, in an unauthorized submission filed on 16 December, 1982, the Claimant suddenly declared that the date "27 December 1978" mentioned in the Statement of Claim was incorrect, the correct date being December 18, 1978, and it requested that the Tribunal accept the amendment of the Statement of Claim accordingly. The Tribunal never agreed to the amendment, and it consequently considered it established that the Claimant had violated the terms and conditions contained in the letter of credit. Obviously, this single violation could have been cause for non-payment, even if all other provisions of the letter of credit had been complied with.

Later, In a Memorial prepared by the Vice-President of Economy Forms and filed on 16 December 1982, the Claimant changed its position, alleging an insufficient balance in (the issuing bank's account with) Banca Nazionale del Lavoro. Apart from being a highly improbable event in banking relations, the idea that against presentation of proper documents the correspondent bank refused to effect the relevant payment even though it notified the letter of credit three times, is a new allegation on the part of the Claimant, put forward neither in the Statement of Claim nor in the Claimant's subsequent Reply, and consequently, the Respondents have had no opportunity to defend against this new allegation.

At any rate, in the Memorial prepared by the Vice-President of Economy Forms, the Claimant has made a futile effort to demonstrate that it had the shipping documents at its disposal and that the correspondent bank had refused to make payment despite the presentation of those documents to the correspondent bank. On principle, by notifying the opened letter of credit to the Claimant and advising it again thereafter, Mana and the Bank of Tehran must be regarded as having taken all necessary steps to abide by any and all undertakings for which they were liable. Undoubtedly, this was not the Claimant's first international transaction on the basis of a letter of credit, and so it cannot allege that it was unfamiliar with the provisions of letters of credit or with the requirements and limitations imposed by them. Rather, one can be certain that the Claimant was well aware of the fact that the correspondent bank was obligated to check and verify shipping documents against the terms and conditions of the letter of credit and that it would make payment only after having ascertained that the documents contained no defects, ambiguities or discrepancies.

Now it remains to examine the terms and conditions of the letter of credit in question and the actions taken by the Claimant to comply with them.

First: The letter of credit was irrevocable; that is, until 5 January, 1979, the purchaser had surrendered all right of revoking it and the seller was entitled to submit the shipping documents to the correspondent bank for receipt of the proceeds of the letter of credit until the final moment of the working hours on that date.

Second: The documents which the seller was obligated to submit to the correspondent bank by 5 January 1979 in order to receive the amount of the letter of credit consist of: (1) All of the original copies, and one duplicate copy, of the clean on-board bill of lading in the name of the Bank of

Tehran or else transferred to the name of the Bank of Tehran, in addition to the agent's receipt from the shipping company attesting to the movement of the consignment towards its destination.

The bill of lading is the most important and valuable document relating to international transactions; from the legal point of view, it is tantamount to the ownership papers for an object of sale issued in the name of the purchaser or his legal representative -- that is, the bank opening the letter of credit. The shipping establishment plays the part of trustee and neutral party between the two parties to the transaction, and because it is subject to international regulations, the documents issued by it -- that is, the bill of lading -- do not normally require confirmation by the Chamber of Commerce or consulate, etc., being automatically regarded as negotiable instruments. The owner of the goods -- that is, the purchaser and his legal representative -- are able to transfer ownership of the goods to another party by endorsing the reverse of the bill of lading. From the legal point of view, issuance of the bill of lading by the shipping establishment, jointly with a certificate by the shipping company's representative to the effect that the goods have proceeded towards their destination, signifies that the seller has surrendered the object of sale into the possession of the purchaser and thereupon may request payment of the amount of the letter of credit by presenting the bill of lading and the other documents to the correspondent bank.

The Claimant has not provided the Tribunal with the bill of lading or a copy thereof. The forwarding agent's receipt stating that "[t]he shipment departed from Baltimore, Maryland via M/V 'Arya Far' Bill of Lading number 70 dated 'ON BOARD' December 18, 1978," was submitted (Claimant's unauthorized submission of 16 December 1982, Exhibit I), but in tampered condition and in two different forms. It is not clear why two different receipts have been issued for a single consignment.

One of them is undated and the other dated 15 December; the amazing point, however, is that it is stated in the text of the latter that the goods concerned had left the port of Baltimore on 18 December. It is not at all clear, logically speaking, how the goods should have left the port by ship and set out for sea on 18 December, although the certificate of its departure had been issued three days earlier. In the text of the certificate, the word "departed" has been used in the past tense, indicating that the event had definitely occurred. This point decisively divests the abovementioned certificate of all standing. Furthermore, if this certificate is valid and the goods did depart the port of Baltimore, then how is it that Mr. Muller, the Company Vice-President, states in his "Affidavit" that he was able to retrieve the goods from the ship and place them in storage at the end of January 1979, approximately 40 days later?

2. Six copies of the invoice, one of which must have been confirmed by the Chamber of Commerce. According to trading practice, related documents must always be confirmed by the local branch of the Chamber of Commerce within whose area of jurisdiction the residence of the seller is located. It may be observed in the present case that the invoice rather than having been confirmed by the Chamber of Commerce of Des Moines, Iowa, Claimant's document No.N. was confirmed in Los Angeles, California, which is more than 1700 miles away from the seller's residence and in the opposite direction from the port of Baltimore. It is not clear what justification exists for this action by the Claimant.

3. A certificate of origin in six copies, which the letter of credit requires to be confirmed by the local Chamber of Commerce. Document Q -- i.e., the certificate of origin -- was also confirmed by the Los Angeles Chamber of Commerce, which absolutely cannot, according to trading practice, be recognized as the "local Chamber of Commerce." The seller resides in the Midwest, in the State of Iowa, and the goods

were loaded on the East Coast, the port of Baltimore, Maryland; yet the certificate of origin was issued 4000 kilometers away, in the Los Angeles, California, and Mr. Michael Loprimo, of Sendrex Cargo, Inc., the forwarding agent located at Los Angeles, certifies that the goods had been loaded on 18 December (apparently from the port of Baltimore, on the other side of America!), and on the same date the Westchester Chamber of Commerce, Los Angeles, California, attested to the American origin of the loaded goods. Even if we take this to be correct and acceptable, despite all the objections to which it is susceptible, it is still unclear how Mr. Muller managed to obtain the goods forty days later from the middle of the ocean and to retrieve them from the captain of the ship.

4. A signed packing list of the goods, in six copies. This list, which must conform completely to the items mentioned in the proforma invoice, does not do so, and is certainly related only to the initial proforma invoice, dated 29 August, 1978.

5. The certificate of the shipping company, to the effect that the ship bearing the goods regularly plies the shipping routes. This document is not among the documentary evidence, and its absence represents one of the deficiencies of the (case) documentation.

6. A certificate to the effect that the manner of packing was appropriate to the kind of goods and the mode of transport. Because this certificate is issued only by the seller, it is not an object of contention here.

Under normal conditions such as existed for the seller, in accordance with the contents of the letter of credit, the seller would have been entitled to demand the amount of the letter of credit if he presented the six documents mentioned above, in proper form, to the correspondent bank before 5

January, 1979. Ordinarily, banks compile a list of this kind of documents when they receive them, and give a dated receipt form to the beneficiary. The Claimant has not submitted any such receipt form from the bank; the seal of the correspondent bank can be found on only Document H, which is an unsigned letter whose original copy has not been submitted. Now, if this paper is to be considered as evidence that all the documents were submitted to the bank, it remains to be seen why the bank failed to pay the amount of the letter of credit.

In the letter of credit, the Bank of Tehran has explicitly ordered the correspondent bank to debit its account with the correspondent bank's central office in Rome in order to make payment on the amount of the letter of credit. This order means that directly upon determining that the documents are genuine, valid and complete, the correspondent bank shall send a telegram informing the bank issuing the letter of credit and shall then proceed to pay its face amount to the beneficiary -- namely, the seller -- and debit the account of the bank issuing the letter of credit by the same amount. In its final order to the correspondent bank, the Bank of Tehran instructed it to pay the beneficiary the amount of the letter of credit only in the event that the documents produced conformed strictly to the terms and conditions of the letter of credit; otherwise it was to refrain from making payment, to send a telegram to the Bank of Tehran informing it of the particulars of the documents' defects and non-conformance, and to obtain confirmation from the Bank of Tehran before making payment, or else to forward the documents so that payment might be made if these were acceptable. Because of the explicitness of this order, it is entirely clear that the correspondent bank would have acted to make payment on the letter of credit only in the event that all the shipping documents and papers had been delivered to it in accordance with the stipulations in the letter of credit.

The Claimant alleges that it has prepared these documents

and papers. Aside from the fact that there is no copy, or even a photocopy, of the bill of lading among the documents submitted to the Tribunal by the Claimant; and aside from the fact that the documents which it has subsequently submitted have been altered, the Claimant has presented no evidence or document whatever demonstrating that the correspondent bank has stated that it is unable to make payment on the letter of credit or that the shipping papers are complete. Yet, as has been explained, the correspondent bank notified the Claimant three times concerning the irrevocable letter of credit, the last of these being 5 December 1978 -- that is, a number of days prior to the deadline by which the Claimant was to have delivered the goods to the shipping establishment. If the shipping documents and papers had in fact been correctly and completely prepared and submitted to the correspondent bank, the correspondent bank could, on the basis of the fact that it had sent notice three times concerning this letter of credit, have contacted the Bank of Tehran by telex in order to make payment on the letter of credit; and yet no document has been presented by the claimant in this regard, either. Moreover, if the Claimant had in fact manufactured the goods and prepared the documents but the correspondent bank had refrained from making payment, then the Claimant could itself have sent a telex reporting the particulars to the Mana Company, which had been in continuous contact with the Claimant, and could thereby have taken measures to obtain payment on the letter of credit. However, up to the time that the Claimant filed its claim with the Tribunal, it had taken no measures and made no effort to send the goods or to receive payment for them. All of the surrounding evidence bears witness, in this way, to the fact that no consignment ever left the Claimant's factory for any American port or for its destination in Iran, and naturally that none was ever delivered to the shipping company.

VIII

Now, as should be seen, given circumstances in which Mana

deposited the necessary funds in rials with the Bank of Tehran as of September 1978 in order to open a letter of credit, and in turn the Bank of Tehran also reserved the dollar equivalent of its own funds deposited with the correspondent bank for the Claimant by opening the letter of credit and sending it via its correspondent bank, what other measures could the Bank of Tehran or Mana conceivably have been expected to take? Once the seller refused to deliver goods, neither Mana nor the Bank of Tehran could, categorically, be expected to reserve and refrain from making use of its own account in the face of such a culpable company, which was not prepared to perform on its own promise; moreover, the letter of credit was valid only until 5 January 1979. When Economy Forms violated the terms and provisions of the letter of credit by not sending the goods, on 28 July 1979 Mana requested by its letter No.10-13797, dated 6-5-1358 (28 July 1979), that the expired letter of credit be cancelled and that the Bank of Tehran return its funds. Owing to the importance of this document, which the Tribunal did not take note of, I here insert it verbatim (Exhibit No.4 to the Statement of Defence by Bank Mellat):

"To: Bank of Tehran,
Maleko Shoara Branch

Re: Cancellation of Letter of Credit No.
630911 for the amount of U.S. \$357,070.15

Due to non-shipment as scheduled of the detached metal accessories purchased from the United States, please cancel Letter of Credit No. 630911 and pass to the credit of our current account No. 404 with you all advance payments deducted by you under the Notifications dated 27/6/57 (18 September 1978) amounting to rials 4,174,073/ and rials 81,540/ for insurance premium, and advise us the result.

Yours faithfully,
(signed)
Mana Construction Co.
(Joint Stock)"

Following Mana's request, the Bank of Tehran telexed its correspondent bank, Banca Nazionale del Lavoro, on 29 July

1979, requesting that it cancel the abovementioned letter of credit and notify it of the result (id., Exhibit No.5). The correspondent bank complied with this request on 31 July 1979, and by its letter dated 3 August 1979 it charged the Bank of Tehran \$10 for the cost of cancelling the letter of credit (id., Exhibit No.6). The Bank of Tehran also debited the bank account of the Mana Company the sum of rials 150 in this same connection (id., Exhibit No.7).

These documents, all of which have been attached to the Respondents' Memorials, clearly demonstrate that Mana and the Bank of Tehran did all in their power to make payment upon the letter of credit. They also demonstrate that the Claimant's assertions that the necessary credit had not been deposited in the correspondent bank are entirely specious and unfounded; however, no documentation has been presented by the Claimant to counter these valid and established documents. What here seems astonishing, and at the same time regrettable, is that this Tribunal, which deems itself to have the standing and status of an international forum, has disregarded all this evidence and these documents of the Respondents and instead imagines that the unsupported statements by the Claimant itself, or its President, who is an interested party in the claim, and upon which the burden of proof lies according to all principles of judicial procedure and under all judicial systems, are true, and accepts them on their face. The majority carries its breach of impartiality, and its bias in favor of the Claimant, to such an extreme that in its Award it openly proceeds to make statements contrary to fact. For example, on page 16 of the English version of the Award it is stated that

"Indeed, Economy Forms received both a Forwarding Agent's Receipt and an on-board Bill of Lading certifying that the goods were en route from the port of Baltimore loaded on board a named vessel."

Yet, the fact is that not the slightest trace of a valid bill of lading can be found in any of the papers submitted by the Claimant, and that this is a mere allegation by the Claimant. In another section, the majority states that

"The sequence of events which then occurred is somewhat unusual. As stated before, when Economy Forms presented the shipping documents to the Bank of Tehran's correspondent bank in New York, it was informed that payment could not be effected under the letter-of-credit due to the unavailability of funds in the Bank of Tehran's account. Subsequently, Economy Forms learned that the goods had never been shipped."

Besides being blatantly inconsistent with the preceding statements, inasmuch as it was stated above that the bill of lading had been issued and the goods were en route to Iran from the port of Baltimore loaded on board a named vessel, these statements by the majority are also contrary to fact. Not only has no document been submitted by the Claimant to the effect that the correspondent bank has stated that funds were unavailable in the Bank of Tehran's account, but it is also demonstrated by the authentic documents available in the case file, as well as by the fact that notice on the letter of credit was sent by the correspondent bank three times and it was finally cancelled in August of the following year owing to its nonuse and at the request of the Bank of Tehran, that the Bank of Tehran and Mana did the utmost in their power to effect payment of the monies to the Claimant if it submitted the necessary documents and papers. Nonetheless, the Chamber majority has disregarded the available documents presented by the Respondents and has blatantly proceeded to make statements which are baseless and contrary to fact. In truth, it is inconceivable that a judicial forum bound even to the slightest degree by the principles of sound jurisprudence should pursue such a policy.

IX

When it became aware of the fact that, contrary to its prior statements, the Claimant did not have adequate and valid shipping documents at its disposal, the majority admitted that the documents submitted by the Claimant did not reveal the state of affairs in the port of Baltimore. Yet, the fact is that everything was in order in the port of Baltimore and a bill of lading would easily have been issued to the Claimant if it had actually delivered the goods properly. Finally, the Tribunal, unable to ignore the fact that no bill of lading had been issued, was obliged to declare the Bank of Tehran nonliable, inasmuch as it had committed no breach of duty. However, the matter deserved deeper reflection on the part of the majority. For what does it mean for the Bank of Tehran to be clear of all liability? Certainly, its clear and express sense is that the Bank of Tehran had placed the necessary monies at the disposal of the correspondent bank and that the Claimant was unable to submit the shipping papers in order to obtain the funds in the letter of credit. Further, if the Bank of Tehran is nonliable, then in what conceivable way can Mana be held liable, which placed the rial equivalent of that sum at the disposal of the Bank of Tehran and left it blocked there for nearly a year; and what breach of contract can be attributed to that Company? On principle, what other steps was Mana expected to carry out? When a commercial company opens a letter of credit in order to obtain goods, and effectively secures means of payment of monies through the international banking system, but then the goods are not sent to it, then is it rational and logical to hold this company to be remiss and liable, and to accuse it of breach of contract? Does the Tribunal expect Mana to have sent cash or a bank cashier's check by mail to the Claimant, thus subjecting its chances of receiving the goods to the vagaries of fate? At the very least, the majority has been unable to comprehend the legal significance of a letter of credit and the related international mechanisms. In international commercial transactions

based on letters of credit, it is solely the conditions prescribed in the letter of credit that decisively and unconditionally govern the relations between the parties and which clarify their rights and obligations. The legal presumption in C & F transactions is that delivery of the goods is an inseparable part of the element of offer in a sales contract, in the sense that initially the seller makes a provisional offer to the buyer by sending him a proforma invoice, then the customer declares his acceptance, which is contingent upon special terms and has a time limit, and then the seller completes the requisite elements of offer by expressly or implicitly accepting the letter of credit and delivering the object of sale to the shipping company. From the moment that the object of sale has been delivered to the shipping company, the liability of the shipping company is that of a trustee.

Articles 382 and 383 of the Iranian Commercial Code and Article 65 of the Maritime Act permit the sender, with certain special conditions, to recover his merchandise while it is in the possession of the shipper, upon payment of costs and expenses. However, in such an event recovery of the merchandise should be considered as constituting cancellation of the sale. Further, if the purchaser consents to the return of the merchandise to the seller, the former has in effect consented to a cancellation of the sales contract. Nonetheless, it is important to note that in an international sale entered into by means of a letter of credit and subject to the provisions of the ICC Rules, pursuant to Article 8(a) of the said Rules:

"In transactions based on letters of credit, all parties shall act on the basis of the documents, not on the basis of the merchandise concerned."

As a result, the seller may obtain the sum constituted by the letter of credit only by delivering the merchandise to the shipping company and by having valid documentation, including

a bill of lading⁽¹⁾, in his possession.

In this regard, to clearly show the mechanism by which international sales are effected by means of a letter of credit, I shall attach a diagram of this mechanism, reprinted from a publication by the ICC (Attachment 1).

Economy Forms did not deliver the merchandise to the shipping establishment and did not obtain a bill of lading. Yet, despite this fact, Economy Forms has alleged that it recovered the goods from the shipping establishment due to the non-availability of funds in the correspondent bank's account. Now, if we consider the Claimant to be telling the truth in these statements as well, then this act constitutes no less than a withdrawal from the transaction on the basis of the seller's own volition. It falls under one of two conditions: either (a) Economy Forms decided to obtain consideration for the goods, in which case it was obligated to refrain from recovering the goods and was only to contact the correspondent bank, the Bank of Tehran or the Mana Company in order to have the monies sent-- and, as has been stated above, this letter of credit was continuously open in the correspondent bank from the date that it was opened, December 1978, until July 1979 when at last, on 5 July 1979, its term expired owing to the Claimant's breach of duty--or else (b) if Economy Forms found it to be in its interest to keep the goods and not to send them, then it certainly could not simultaneously maintain custody over the goods and make demand for payment on them. It is a self-explanatory rule of jurisprudence that price and object of sale stand opposed to one another, and that both the price and object of sale must never be vested in one the two parties. In this same connection, under the laws of most

(1) Iranian Maritime Act Article 52, in defining "bill of lading", states: "A bill of lading is a receipt for goods placed on board or to be placed on board a vessel, signed by the person who contracts to carry them or his agent, and is the written evidence of the terms on which the goods are to be carried for a specified freight."

nations both parties to a sales contract have been endowed with the "right of detainer." For example, Article 377 of the Iranian Civil Code provides that "Either the seller or the buyer is entitled to refuse to surrender the object of sale or its consideration until the other party is prepared to surrender his part..." Therefore, if the Claimant cannot or does not wish to deliver the goods to the customer in a reliable manner, he is not entitled to demand consideration for the goods. Without surrender of goods, demand for consideration violates the principle that both parties to a sales contract are equal. The parties are entitled to enjoy equal guarantees. Whenever the parties open a letter of credit, the bank issuing the letter of credit, or else the correspondent bank, will make payment on the letter of credit only in the event that the seller delivers the goods to the shipping establishment (which is the trustee and deputy of the buyer), receives a valid and correct bill of lading, and submits that, along with the rest of the shipping documents, to the correspondent bank. The fact that payment on the letter of credit will be made to the seller only once the purchaser has gained full assurance that he will have the opportunity to take possession and title over the goods bought, constitutes a guarantee provided in the interest of the purchaser. However, in the present circumstances, Economy Forms did not deliver the goods, did not receive a bill of lading, has the goods entirely at its disposal, and is yet at the same time, by submitting its Statement of Claim, demanding compensation for these goods from the buyer. This demand is illogical and unjust, because if the buyer is obligated to make payment of the sales price without the goods having been delivered to him, he shall have given up the right of detainer and will have no guarantee of receiving the goods; moreover, the buyer can be obligated to make payment on the sales price (only) to the same measure that the seller can be required to deliver the goods. This is an agreement made by both parties upon opening the letter of credit. In particular, it has been explicitly stated in the final paragraph of the letter of credit opened by the Bank of

Tehran at the request of the buyer, that the abovementioned letter of credit was subject to the ICC regulations and, as we have said, the ICC regulations have established effective reciprocal guarantees for the seller and buyer in an international sale.

Now, even if we were to regard the proforma invoice of 29 August 1978 (for the sake of which the letter of credit was opened) as constituting an international contract after the opening of the letter of credit, in this case it would have been the seller's duty to act in accordance with the conditions of the letter of credit. And if the sum of the letter of credit was not, for some reason, paid him, then in that event, if he had not withdrawn from the sales contract and remained desirous of performing on the sales contract, he would have had the right to make demand for consideration only in the event that he had previously taken necessary steps to deliver the goods. Otherwise, the buyer would have no guarantee whatsoever, after having paid the sales price. Furthermore, because of the seller's failure to deliver the goods by the time stipulated in the letter of credit, he has on principle no longer any right, after expiry of the time limit set therein, to require the buyer or the bank which has opened the letter of credit to make payment on the sales price.

In its Award the majority has disregarded all these facts, and whereas it has found the Bank of Tehran to be non-liaible, it has unjustly awarded against Mana for payment of the sales price. This ruling is inequitable and in violation of legal principles and rules.

X

As for the handling and storage costs demanded by Claimant and awarded by the majority, aside from the fact that on principle no decisive evidence of the manufacture and preparation of the metal forms has been presented by Claimant, and

aside from the fact that these construction forms are not something especially prepared for a particular project -- and a great number of them are moreover couplings and nuts and bolts (accessories) of the sort that the Claimant uses for all its orders and were not specially made to specification for any particular contract -- on principle, since the time that Claimant decided not to perform upon the offer of sale and transported the alleged shipment back to its factory, this equipment has belonged to the Claimant itself and has never been decisively placed in the possession of the customer or the shipping establishment in such a way so as to cause the customer to be vested with ownership over it. Under these conditions, Economy Forms cannot make demand for handling and storage costs on equipment which it has kept in its possession and has refrained from delivering. It is an established rule of law that in exchange for the privileges which every owner enjoys by virtue of his ownership of something, he also assumes liability for its maintenance and the related expenses. Thus the majority Award, wherein it has awarded payment of a considerable sum for costs to such a Party, which has retained ownership over the equipment for itself and has refused to deliver the equipment to the shipping company or to carry out its preliminary proposal, is inequitable and in violation of recognized legal principles.

XI

In addition to the first proforma invoice, the Claimant has made demand in its Statement of Claim upon four other proforma invoices, two of which were sent on 15 September and 21 October 1978 and two others, which are unsigned, on 10 November 1978. As previously explained, legally speaking, these proforma invoices constitute no more than proposals conditional upon the customer's acceptance and his opening of a letter of credit. In all of them it has been stipulated that the equipment shall be sent from Economy Forms' factory to the port of Houston within 40 days of receipt of the letter of

credit. The manifest meaning of this stipulation is that the seller has explicitly made his proposal conditional upon the opening of a letter of credit, and so this proposal is, like every sales proposal, nothing more than an option for the party receiving the proposal, who can either reject the proposal or open a letter of credit if he agrees to the language of the proposal and to the stated prices. As was indicated above, two of these proposals even lack signatures. For reasons of its own, Mana did not accept these proposals and naturally refrained from opening a letter of credit. Further, in its Response it has denied the existence of any manner of contractual relationship, adding that the said submitted lists not only failed to establish that a contract had been formed but also lacked the standing of a proposal, as they constituted no more than an invitation to purchase or to present a proposal. Economy Forms has not submitted any evidence in its Statement of Claim that a binding contract was formed between the Parties and has merely annexed these few pages of price lists to its Statement of Claim. Furthermore, although Mana has denied any contractual relationship and requested that the Claimant produce evidence of same, the Claimant did not present any such evidence whatsoever in its subsequent Reply, promising instead that it would present its evidence in the arbitral proceedings (pages 1 and 2 of the Reply). Not only has the Claimant failed to date to produce any evidence in support of its allegation, but the Affidavit by Mr. Muller, the Company Vice-president, filed on 16 December 1982, contains no assertion whatever that the equipment comprising the subject of these four proforma invoices was ever manufactured and prepared for shipping. What this signifies is that Mr. Muller, the Company Vice-president, who was in a position to relate what transpired between the Claimant and Mana, has repudiated the allegations of the Claimant, for if such equipment had been manufactured and shipped to the port, then Mr. Muller would at least have made some reference to same in his Affidavit. In this way, in that portion of its Claim where it has demanded damages of \$1,479,307.80, together

with storage costs and interest, on the basis of the four contracts, the Claimant has presented no evidence or documentation demonstrating that a contract was formed between the Parties. Moreover, in its Statement of Claim the Claimant has alleged that the contracts were concluded in Iran, whereas pursuant to Article 1306 of the Iranian Civil Code, no contract, unilateral obligation or undertaking relating to something having a worth or cost in excess of rials 500 can be proved to exist on the weight of verbal or written testimony alone. (1)

As reflected by its Award, once it perceived that Claimant's assertion that the contracts were concluded in Iran stood in conflict with Article 1306, and that according to Iranian law a written contract must exist in order to prove the existence of contracts entailing such great sums, the majority disregarded all the facts in the case and vainly endeavored to prove, even in a form contrary to that admitted by the Claimant, that these contracts had been concluded, in order to issue an Award in favor of the Claimant by any means possible.

In its Award, the majority states that a series of communications took place between Mana and Economy Forms and that orders were placed by Mana with Economy Forms; finally, it has reached the conclusion that it was Mana which made the offer, that these proforma invoices sent by Economy Forms should be regarded as constituting acceptances, and on this basis that a series of contracts were concluded by the Parties. In order to establish its position, the majority has

(1) "Article 1306. Except in cases where the law has made exception, no contracts, obligations or transactions made for an object worth more than rials 500 in capital or in value, can be proved by verbal or written evidence only; but this rule does not prevent the courts from examining the statements made by witnesses, for further information and discovery of truth."

adduced amazing reasoning. For example, it states that Mana made no objections whatsoever to these proforma invoices (page 14 of the English text), and it adds that Mana did not place orders with any other suppliers for these materials, which were necessary for completion of its ongoing projects, and instead awaited delivery of the materials ordered from Economy Forms (page 15 of the English text). It also adds that "so far as the evidence indicates, Mana did not even solicit alternative bids for the same materials from other suppliers." (Idem.) From the totality of these arguments, the majority draws the conclusion that contracts were thereby concluded between the Claimant and Mana.

XII

These contentions, which more closely resemble sophistry than legal reasoning, are, in the first place, contrary to fact; and in the second place, they constitute denaturation of simple legal matters. They are contrary to fact, because no order by Mana concerning these four proposals (proforma invoices) exists, and because no evidence was submitted by the Claimant to substantiate its allegations in this respect. If such evidence had in fact existed, it would certainly have been attached to the Claimant's Statement of Claim or its subsequent submission (Reply) together with the other documents. Therefore, I must most regretfully say that this statement made by a Tribunal which aspires to arbitrate inter-governmental disputes, is contrary to fact.

In the instant case, there are only four proforma invoices, two of which even lack signatures. As for the point that Mana did not object to them, it must be noted that a commercial enterprise daily receives various proforma invoices and quotations; should its failure to protest them be construed as its acceptance of those proforma invoices?! The majority argues that Mana did not place any orders with other suppliers to meet its needs. First, what evidence does the

majority have in support of this statement? Second, Mana contends in a subsequent memorial that it did not agree to Economy Forms' price list and therefore did not accept the offer. Was Mana, who acted as purchasing agent for several Iranian construction companies, not entitled to dispense with contracting with the Claimant, to contract with others instead, or pursuant to instructions of its principals to give up the transaction completely, and must it justify such a waiver? Third, assuming that Mana did not intend to suspend the project and that it was in need of the equipment in question, is it logical to take the position that the Respondent accepted the Claimant's offer merely because the former did not place any orders with other suppliers?! Is it logical to say that since Mana did not request any bids from other suppliers, it must have accepted the offers made by Economy Forms? A basic question automatically comes to mind: why does the majority deliberately ignore the text of the proforma invoices? Assuming that the proforma invoices should be treated as offers, were they not subject to the opening of the letters of credit? If we recall the fact that Mana did not accept the offer and did not open a letter of credit, how can it be conceived that a mutually agreed upon contract was formed? Basically, is it logical to require Mana to produce evidence substantiating its disagreement with the Claimant's quotations and, at the same time, to relieve Economy Forms, which as the Claimant bears the burden of proof, of the obligation to present evidence establishing the existence of a contract?

On the other hand, the action taken by the majority in this respect constitutes a denaturation of legal matters, for the following reasons:

- (i) The majority decision is in conflict with the Claimant's admissions, namely that the contract was concluded in Iran.

(ii) It reached the extraordinary conclusion that Mana made the offer and the supplier declared its acceptance. This is contrary to the natural course of dealings, for the offer is usually made by the supplier, and in the instant case, Economy Forms has itself admitted making the sales offers.

(iii) The parties to the case are two commercial concerns located within the jurisdiction of two different governments. If Mana had accepted the Claimant's offer, then in accordance with the 1980 United Nations Convention on Contracts for the International Code of Goods, the contract would have been considered an "international sale" and would consequently have been governed by international sales regulations rather than by commercial laws of a State of the United States of America. Meanwhile, the Iowa and Maryland law, assuming to govern these so-called contracts, they are in no way limited to the Uniform Commercial Code of the United States. Moreover, the explicit language of the proforma invoices authorized Mana to open a letter of credit only if it agreed with the proposals made therein.

Mana's receipt of the proforma invoice dated 29 August 1978, and its subsequent opening of a letter of credit, may not constitute a special "course of dealing"⁽¹⁾ capable of comprising a common basis for a mutual understanding and resulting in the conclusion of a contract between the parties. This is especially true of the said proforma invoice for which a letter of credit was opened. The relationships between the

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which fairly is to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

parties are expressly governed by the ICC regulations entitled Uniform Customs and Practice for Documentary Credits. Under such circumstances, the holding by the Tribunal to the effect that these proforma invoices are to be considered as the acceptance of some other offer not only stands contrary to the explicit language of the proforma invoices themselves, but contravenes the standard and mutually agreed upon course of dealing.

Another contradiction readily observable in the majority Award is that while Mana has there been subsumed under "the Government of Iran," the related contract has been considered as governed by the laws of two States of the United States of America. Under international jurisprudence, however, if a contract is entered into by and between a national, whether natural or juridical, and a foreign government, then that relationship is a State contract, upon which said national has subjected himself to that government's legal and judicial jurisdiction.

At any rate, the action taken by the majority constitutes no less than denaturation of legal facts. As such, it is a cause for setting aside an award, pursuant to Article 564 of the Civil Procedure Code of Iran, which reads as follows:

"If a lawsuit ensues from a contract, and a different meaning is given to the express meaning of the said contract or to an applicable law or regulation, the said judgment or writ issued in this connection will be quashed."

The French Civil Procedure Code also contains the same provision. (1)

(1) See : Procedure Civil, Jean Vincent, Serge Guinchard, 20th Ed. Nos. 1036-1043.

XIII

With respect to the manufacture and equipment, the status of these four proforma invoices is not admitted even by the Claimant itself, despite the proforma invoice dated 29 August 1978. In Mr. Muller's affidavit, no measures were taken by Economy Forms to manufacture and ship the equipment covered by the proforma invoices in question. Given the fact that the opening of a letter of credit by Economy Forms was conditional on the opening of a letter of credit, this seems quite natural. Employing the same arguments, however, the majority in its decision placed the burden of proof on the Claimant of the burden of proof and states that it has not alleged that Economy Forms failed to manufacture and ship the equipment, one should assume that it was. (See page 19 of the English version of the decision.)

However, in its Statement of Defence, Economy Forms denied Claimant's contentions with regard to the proforma invoices. If Claimant alleges that Economy Forms manufactured the equipment, it must present evidence to support its allegations. Yet no such evidence can be found in the case, so that for this reason too, the majority's decision is contrary to fact and unfair. Furthermore, Economy Forms had produced the goods, since it was contrary to the ordinary proposal which made the production of the goods thereof conditional upon the opening of a letter of credit. Economy Forms acted to its own detriment.

Mana properly opened a letter of credit for the first proforma invoice, laying idle for a period of approximately one year to receive the equipment and equipment. Given the fact that Mana failed to open the letter of credit, and that Mana failed to provide what guarantee would it have had in return for the opening of credit in relation to the four proforma

it had intended to accept Economy Form's proposals and enter into the transaction?

The Claimant's allegations in the present case are self-contradictory and lacking in legal basis. In addition, however, even if we were to assume, agreeing with Economy Forms' contention in its Statement of Claim, that its failure

to ship the goods listed in the first proforma invoice was caused by internal difficulties within Iran; and even if we were to assume that damages were thereby inflicted on the Claimant for which Claimant was not at fault, such damages could be considered as having arisen out of the Islamic Revolution in Iran, and claims relating to those damages have been excluded from the jurisdiction of this Tribunal by virtue of Paragraph 11(D) of the Declaration of the Government of Algeria.

In conclusion, the Claimant shipped no goods, whatsoever, to Iran in relation to either the first proform invoice, for which a letter of credit was opened, or the subsequent proforma invoices, some of which even lack signatures. Further, Mana did not benefit in the least from the Claimant's alleged services, and so the majority's \$1.5 million Award against Mana and the Government of the Islamic Republic of Iran is unfair and contrary to municipal and international legal principles.

The majority's decision with respect to the payment of interest is a further violation of the Algiers Declarations since, aside from the fact that the Tribunal denied the Government of the Islamic Republic of Iran any opportunity to defend itself in this respect, that government has requested the Full Tribunal to decide on the issue of interest through submission of Case No. A/19 and the process of exchange of pleadings in that case is not completed yet. In light of the fact that Case No. A/19 is still pending before the Full

Tribunal, Chamber One is not authorized to preempt the Full Tribunal and to make a decision in lieu of the Full Tribunal without hearing what the Iranian Government had to say. The majority decision is, therefore, improper and contrary to the Algiers Declarations by virtue of awarding payment of interest as well.

XIV

As discussed above, the majority Award is flawed with respect to the merits. In the conclusion to the Award, on one hand the claims against the Government of the Islamic Republic of Iran have been dismissed, while on the other hand Mana has been ordered to pay \$1.5 million. If the majority formally recognizes Mana's independent personality and considers it to be distinct from the Government of the Islamic Republic of Iran, then why has it stated that this Award shall be paid out of the \$1 billion Security Account belonging to the Government of the Islamic Republic of Iran? If it has held that Mana is under the control of the Government of Iran, then it should not have awarded against said company, as an entity independent of, and distinct from, the government. The conclusion in applying the rule of control is that the controlled entity is an inseparable part of the Government of Iran and altogether loses its independence because otherwise, it will not fall under the definition of "the Government of Iran" as provided by Article VII, paragraph 3 of the Algiers Declarations and the Tribunal will not have jurisdiction over the claim against it.

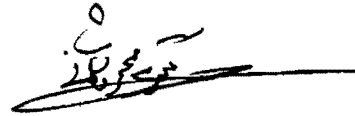
Can the act of awarding against an independent commercial company in this was, and of satisfying the Award by payment out of the Security Account and funds belonging to a separate and independent government, constitute anything other than legal acrobatics? This sort of inequitable behavior by the Tribunal is far removed from what the Government of the Islamic Republic of Iran intended when it referred to

arbitration its legal and financial disputes with the Government of the United States. The Government of the Islamic Republic of Iran justifiably and reasonably expected that this Tribunal would carry out the mandate entrusted to it with complete impartiality and on the basis of respect for the law and in observance of the criteria of equity and justice. The Government of the Islamic Republic of Iran has accepted the principle of a mutually agreeable arbitration and has borne the weight of one-half of its considerable expenses. Moreover, apart from the scale of their relative political and economic strengths, the two governments have come before this Tribunal as two governments enjoying equal sovereignty. If this Tribunal wishes such inequitable and unlawful decisions, an example of which is the present case, to demonstrate such a marked preference for the United States Government and its corporations and nationals; and if it wishes, by resorting to sophistical pretexts, to pour one and a half million dollars belonging to the Government of Iran into the pockets of an American company for no reason whatsoever; then not only will its decisions be devoid of all judicial value, but this arbitral body will most certainly lose its legitimacy and its work will cease.

The bitter fact is that such decisions have also been rendered repeatedly by the other Chambers of the Tribunal. Without a doubt, what has encouraged the rendering of such decisions is the existence of the Security Account opened by the Government of the Islamic Republic of Iran with the Algerian Government, which has unjustly executed these decisions automatically and hastily. If the Algerian Government were diligently carrying out its responsibilities as a trustee for the funds deposited with it and as a trustee for the Government of the Islamic Republic of Iran, and if it were taking due consideration of the Iranian Government's logical notices requesting that it refrain from paying on awards rendered in violation of the principles of international jurisprudence, then this Tribunal would certainly not permit

itself to issue these improper decisions in such a cavalier manner, whereby in practice it even executes its awards prior to serving them to the government awarded against. It is unbelievable that the awards of this Tribunal should be executed by a strange and unusual mechanism, immediately upon issuance and without the Government of the Islamic Republic of Iran having been provided an opportunity to express its opinion. This situation represents yet another infringement upon the recognized rights of a government at the international level, because throughout the history of international arbitration, governments have always been entitled to refrain from carrying out an arbitral award when it has been issued in conjunction with excess of jurisdiction, misuse of authority, or other factors requiring to a setting aside of said award.

Dated, The Hague
1 December, 1983



Dr. Mahmoud Kashani