IRAN-UNITED STATES CLAIMS TRIBUNAL

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Case No. 443 Date of filing: 31 May 89

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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____
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** DISSENTING OPINION of _____
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** OTHER; Nature of document: Concurring & Dissenting opinion of Judge Brower
- Date 31 May 89
27 pages in English _____ pages in Farsi

R/12

CASE NO. 443
CHAMBER THREE
AWARD NO. 420-443-3

SEISMOGRAPH SERVICE CORPORATION,
COMPAGNIE FRANCAISE DE PROSPECTION SISMIQUE,

Claimants,

and

NATIONAL IRANIAN OIL COMPANY,
THE ISLAMIC REPUBLIC OF IRAN,

Respondents.

CONCURRING AND DISSENTING OPINION OF JUDGE BROWER

1. My concurrence in this Award is necessary under our Rules (Article 31(1)) if even that which it grants is to be received by the Claimant. For this reason, and to that extent, it receives my concurrence, notwithstanding its manifest insufficiency.*

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* In light of the recent death of our Chamber Chairman in this matter, Professor Virally, I have hesitated to express these views, which strongly dissent from the Award in this Case. In the end, however, I consider it appropriate to publish this Opinion given that these views were made known to Professor Virally prior to his signing this Award and subsequent death. Following circulation of the draft Award in this Case to the Members of Chamber Three, this Concurring and Dissenting Opinion was submitted by me personally for comment to Professor Virally at his residence in Paris on 29 October 1988, three months prior to his death on 28 January 1989. By letter of 16 December 1988, hand-delivered to his residence in Paris that same date, this Opinion was recalled to his attention and some of the views expressed herein reiterated. Thereafter, in the latter part of December 1988, Professor Virally signed this Award as drafted (excepting only corrected calculations and minor editorial changes). On this basis, I am satified that, while continuing to reject the dissenting views stated herein, Professor Virally did not take issue with my statement of them contained in this Opinion.

I. General Areas of Contention

A. Allocation of Unspecified Payments

2. The Award correctly acknowledges (para. 32) that a creditor is free to allocate to outstanding debts in any order it wishes the advances or payments received from a debtor which that debtor has not directed be applied to a specified obligation. The Award errs, however, in finding (para. 33) that in this Case such advances and payments were directed in fact by the National Iranian Oil Company ("NIOC") to specific invoices which the Claimant now asserts as part of its claim, rather than honoring their allocation by Claimant first to the oldest outstanding invoices (which consequently were not made part of the claims in this Case).

3. As proof that the payments in question were directed to specific invoices, the Award relies upon printed forms of internal "Payment Authorization (Contract)" which were submitted in evidence by NIOC in regard to some of the invoices at issue and included the following:

Distribution:	White original	---	Document control group/Disbursement control
	Yellow copy	---	Accounts Payable
	Green copy	---	Contract services/ commercial services
	Pink copy	---	Contractor

The payment authorization forms submitted list specific invoice numbers, and based solely on this internal form language the Award "finds no reasons to doubt that these copies actually were sent to CFPS and that this was the regular practice of NIOC." (Para. 33.) Moreover, the Award, seeming to sense its own inadequacy in this respect, concludes that even if the Claimant did not receive this

form for any one of the payments, it "should have taken action by requesting further specifications." Id. The net effect of the Award's conclusion is that claims for unpaid invoices have been rejected based only on the Respondents' assertion that such invoices were paid, supported only by an incomplete set of internal payment authorizations.[1]

4. The form notation indicating that a copy should have been sent to the Claimant in no way establishes that any such documents were sent to the Claimant. Indeed, the Claimant has expressly denied ever receiving any documents specifying the outstanding invoices for which the payments in question were being made. NIOC has submitted no evidence to suggest that these forms actually were sent to the Claimant in respect of those particular payments and no evidence to suggest that it ever notified the Claimant in any other way of the invoices to be credited on such payments. Given this record, I cannot accept the Award's conclusion that the particular payment authorizations were received by the Claimant. Understandably, I have even greater difficulty with the Award's conclusion that Claimant, being deemed to have received at least some of the forms during the course of its dealings with NIOC, was somehow under a duty to inquire whenever one was not forthcoming, thus relieving NIOC completely of its burden of proof.

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[1]It should be emphasized that the Award not only accepts an invoice as paid when an internal payment authorization for the invoice has been submitted, but also accepts an invoice as paid where no such document has been submitted. The Award's rationale is simply that payment authorizations, since presented for some invoices, must have been delivered for all invoices. The Claimant therefore apparently is thought to have been under an obligation to request such documents, a proposition for which I find no support in any relevant body of law.

5. The Award's disposition in this regard is particularly unjustified in that it represents a clear and unexplained departure from rigorous evidentiary standards heretofore imposed by the Tribunal requiring more than the submission by a party of a "form" document to prove that which such form purports to establish. In Minnesota Mining and Manufacturing Company and Islamic Republic of Iran, et al., Award No. 343-423-3, para. 100 (18 Dec. 1987), this Chamber rejected a claim for concededly unpaid invoices, even though such invoices were produced as evidence, on the grounds that the claimant there did not establish "that the goods covered by these invoices actually were delivered to the freight forwarders." The Tribunal required individual bills of lading or other actual proof of delivery. More recently, in AVCO Corporation and Iran Aircraft Industries, et al., Award No. 377-261-3, paras. 31-33 (18 July 1988), this Chamber rejected a plethora of claims for admittedly unpaid invoices, even though the existence and details of such invoices were proven, because the claimant had not established that the invoices were payable, i.e., that the work had been performed. Finally, in Houston Contracting Company and National Iranian Oil Company, et al., Award No. 378-17-3, paras. 92-97 (22 July 1988), this Chamber found merit in a counterclaim for defects in the construction of a cathodic protection system even though the claimant there had submitted a form completion certificate, acknowledged to have been signed by the respondents, stating that the system had passed the necessary tests and was completed in accordance with the contract.

6. The net result of the Award's finding in this regard is to dismiss a substantial number of invoice claims that I believe to have merit.[2]

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[2]The claims negatively affected by this ruling are the
(Footnote Continued)

B. Credit Owed to the Respondents

7. The Award compounds the vice just cited by reducing Claimant's recovery by the full amount of the "credit" to NIOC -- U.S.$1,007,095.21 against invoices included in the claims here presented -- which the Claimant calculated on the basis the Award rejects, i.e., allocating NIOC's advances and payments to the oldest invoices first. The result is to give the Respondents double credits.

8. A simple example serves to illustrate this defect in the Award. Assuming U.S.$500,000 in "older" unpaid invoices, U.S.$1,000,000 in "newer" unpaid invoices, and receipts from NIOC of U.S.$1,000,000, the Claimant, in effect, applied U.S.$500,000 to pay off the older invoices and claimed here for the U.S.$1,000,000 of newer invoices, against which it acknowledged a credit of U.S.$500,000. If, however, U.S.$250,000 of the U.S.$500,000 Claimant applied to older invoices must be credited instead against newer invoices included in the present claims, as the Award prescribes, then the U.S.$500,000 credit previously calculated by Claimant in respect of the newer invoices must be reduced accordingly, i.e., by the U.S.$250,000 which now goes to pay off the amount of older invoices from which the credits previously applied by Claimant have been redirected by the Tribunal. To do as the Tribunal has done leaves the Claimant U.S.$250,000 short: It has received in respect of its total of U.S.$1,500,000 in unpaid invoices only

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(Footnote Continued)
claim for rial escalation charges under Contracts 215 and 064 (para. 45), the claim for services rendered under Contract 340 (para. 107), the claim for Debit Notes under Contract 340 (para. 117), the claim for services rendered under Contract 338 (para. 161), the claim for services rendered under Contract 334 (para. 212) and the claim for Debit Notes under Contract 334 (para. 221). As made clear in this section of my Opinion, I disagree with the Award's reductions in all of these sections based on allegations of payment.

U.S.$1,250,000, i.e., U.S.$1,000,000 from NIOC and U.S.$250,000 by way of award (U.S.$750,000 for newer invoices, after crediting U.S.$250,000 from NIOC's payments, minus the U.S.$500,000 "credit").

9. The Award implies that any inequity it causes is in fact the fault of Claimant. (Para. 35.) It suggests first, that the Tribunal cannot do justice in the absence of knowing "the global status of accounts" between the Parties and, second, that the Claimant, by explaining the basis of the U.S.$1,007,095.21 "credit" only six days before the Hearing, has deprived the Respondents of a proper opportunity to deal with such explanation, so that Claimant must remain saddled with it as a flat credit in the full stated amount.[3]

10. The second objection implies, of course, as the analysis just above demonstrates, that the first objection is without substance. Knowledge of "the global status of accounts" between the Parties, whatever that may mean, certainly is not necessary to either an understanding of or the correct treatment of the "credit" that the Claimant calculated.

11. Furthermore, the second objection is wholly unfounded given the procedural history of this Case. The Claimant, having in good faith credited various unallocated receipts to older invoices, based its Statement of Claim on the newer unpaid invoices and, on such basis, acknowledged a credit of U.S.$964,246.62. NIOC then responded in its Statement of

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[3]Here, too, the Award is inconsistent, for although it declines to accept Claimant's explanation of the credit as "too late" it nevertheless applies as such credit the larger figure Claimant first submitted and "explained" on 8 November 1985, i.e., U.S.$1,007,095.21, rather than the lower "unexplained" figure advanced in the Statement of Claim, i.e., U.S.$964,246.62.

Defense with a general allegation of payment. Quite properly, the Claimant in its Memorial adhered to its position and put NIOC to its proof,[4] which then was presented as foreseen under our Rules, as part of its Countermemorial. Under the then existing Orders of the Tribunal neither Party would have had any further opportunity to address the matter except in Rebuttals ordered to be filed simultaneously and then at the Hearing itself.

12. As the Award's recitation of this Case's procedural history shows (paras. 3-4), Respondents repeatedly secured extensions of the time for filing their Countermemorial, until 23 September 1985, with simultaneous Rebuttals to be submitted 1 November 1985 and the Hearing to be held 14 and 15 November 1985. Confronted in NIOC's Countermemorial of 23 September 1985 for the first time with specific allegations of payment of particular invoices and evidence in support thereof, the Claimant requested (and was granted) a single extension of one week, from 1 November to 8 November 1985, of the time for submission of its Rebuttal, which was the first opportunity foreseen by our Rules and our Orders in this Case for the Claimant to respond to NIOC's evidence of specific payments. It thus cannot be faulted for not

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[4] In its Memorial Claimant noted (footnote 2, pp. 28-29):

> It it [sic] is possible that certain of these invoice [sic] have been paid. CFPS did, at times, receive Rial payments that did not specify what they were in payment of. CFPS credited OSCO's account with the amounts of such payments and has deducted the total of these payments from its overall claim. See Statement of Claim, paragraphs 67 and 68. Therefore, CFPS had no way of knowing if OSCO or NIOC intended that one of its payments cover a specific invoice. Since these amounts have been deducted from CFPS's claim, the net amount of that claim remains unchanged.

having done so earlier, and, of course, the Respondents were not deprived of any opportunity otherwise available to them to comment on the Claimant's evidence.

13. Thus the Award adds procedural insult to substantive injury, resulting in an unjustly diminished recovery by the Claimant.[5]

II. Completed Contracts (Contracts 215 and 064)

A. Escalation Charges

14. The Award finds the Claimant entitled to U.S.$125,217.49 and U.S.$174,432.36 in dollar and franc escalation costs under Contracts 215 and 064, respectively. In reaching this figure the Award reduces substantially the amounts requested by the Claimant on the basis of certain "inconsistencies" in its calculations under a contractually agreed formula. The Award further rejects as evidence of

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[5]Even on its own terms the Award reaches an incorrect result. The Claimant had computed an unallocated balance, or credit, of U.S.$904,246.30 from the allegedly unspecified payments and of U.S.$102,848.91 from the advances, totaling the U.S.$1,007,095.21 credit. Since ninety percent of this credit constituted the balance remaining after allocating the allegedly unspecified payments (U.S.$904,246.30), the portion of the credit derived from the unallocated amount of the advances (U.S.$102,848.91) cannot be viewed as a credit as the Claimant clearly had the right to allocate this money to those past debts to which they previously had applied the allegedly unspecified payments.

There is no dispute as to the ability of the Claimant to allocate the advance payments. No evidence exists, in the form of payment authorizations or otherwise, to suggest that these were directed to a given debt and, indeed, the nature of an advance payment on a contract would suggest otherwise. The Award itself finds that a party has the right to allocate in such circumstances. (Para. 32.)

the debt certain telexes from IROS to the Claimant since the amounts now claimed "are lower than the amounts OSCO quotes in the telexes." (Para. 50.)

15. In my view the telexes from OSCO, which expressly concede certain amounts due the Claimant for escalation charges, are clear proof that the amounts due the Claimant far exceed those which it has been awarded. The fact that amounts quoted in those telexes exceed those which the Claimant now claims in no way constitutes a basis for discarding the telexes as not probative of the amounts due. On Contract 215 the amounts reflected in the telexes exceed those amounts claimed by approximately one thousand dollars (converting the franc amount to dollars at the rate of 4.17). On Contract 064 the amounts exceed the claimed amounts by approximately U.S.$14,000. These differences, though greater under Contract 064, are insignificant given the size of the claims and may just as well be explained by minor calculation errors on the part of OSCO. At any rate, these minor differences should not reduce the effect of such a concession and presumptively should lead the Tribunal to credit those amounts claimed, which are extremely close to those reflected in the telexes.

16. Rather than doing so, the Award recalculates the amounts due by "correcting" certain inconsistencies in the Claimant's calculations. Specifically, it uses the same figures for F_t (consumer prices in France) and I_t (consumer prices in Iran) for each contract (the Claimant applied different figures to each contract) and applies the same adjustment coefficient to each of the twelve invoices submitted on 22 August 1978 and 31 August 1978 (the Claimant applied different ones for each). For each of these changes the Award chooses to apply the lowest F_t, I_t and adjustment coefficient given.

17. These changes to the Claimant's calculations, without further input on the part of the Claimant, are completely arbitrary. Initially, if the Tribunal had questions regarding the figures used by the Claimant, figures that have not been contested, it should have addressed those concerns to the Claimant at the Hearing or at some other opportune time. Now to reduce the amount demanded merely because the Tribunal does not understand the basis for the Claimant's use of these figures seems to me unjust. Moreover, the Award's simple adoption of the lowest figures given as those that should be applied is equally unjust.

18. None of the problems raised by the Award with regard to the calculation of the amounts claimed is adequate to defeat the presumption, brought about by the Respondents' telexes conceding amounts for escalation substantially similar to those now claimed as due, that the sums asserted by the Claimant are indeed due and owing. The Award's arbitrary reduction of these amounts on the basis of its questions, never before presented to the Claimant, in my view, are simply insupportable. I would have awarded the Claimant the amounts requested.[6]

III. Prematurely Terminated Contracts

A. Contract 340

1. Standby Fees

19. The Award grants the Claimant U.S.$1,204,000 in fees for the period of time that it was put on standby. In arriving at this figure, the Award finds that OSCO agreed to

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[6]My differences with the Award's handling of the rial escalation charges are dealt with in Section I(A) of this Opinion.

compensate the Claimant during the standby period "on the stated condition that CFPS take such 'action necessary to mitigate the costs' it would incur." (Para. 103.) The Award then rejects the Claimant's evidence of costs as "incomplete and internally inconsistent" and arrives at its own monthly figure (U.S.$328,082.32) by taking the projected monthly sales under the Contract (U.S.$520,765.58) and subtracting the profit percentage for the first three months of the Contract (37%).[7] The Award then reduces its figure by U.S.$30,000 per month because of the Claimant's alleged concession that it mitigated its costs by this amount, and then again reduces its monthly cost figure because it is "based on costs incurred during full operation," to arrive at a monthly standby fee of U.S.$280,000.

20. In my view this analysis does not consider properly the evidence in the record establishing that the Respondents agreed to pay the Claimant the monthly standby fee it requested, i.e., U.S.$406,000. In its letter to OSCO of 30 December 1978, the Claimant set forth in detail that its monthly standby fee would be U.S.$406,000. The Claimant alleges that this term was orally agreed upon between the Parties. Such agreement is inferentially confirmed by the letter from OSCO dated 20 January 1979 to CFPS, which, after citing Contract 340 and referring "to your letter of December 30th 1978," does not deny acceptance of standby charges but simply "request[s] that action necessary to mitigate the costs which your Company will incur [sic] during the suspension period be taken by you." The Claimant in fact proceeded to take such measures, resulting in a U.S.$120,000 savings of costs it otherwise would have incurred. Based on this evidence, I believe that an

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[7] It is interesting that the Award accepts the 37% profit margin proposed by the Claimant to reduce this part of the Claim but later rejects the percentage as unreasonable in granting the claim for lost profits.

agreement had been reached on the amount of the standby fee and thus feel that the Claimant should be awarded its fees pursuant to that agreement.

21. Even if the Award is to follow its analysis, however, no basis exists for reducing its monthly costs figure (U.S.$328,082.32) to an artificial level of U.S.$280,000. Initially, while the Claimant concedes that it was able to mitigate costs to the extent of U.S.$30,000 per month, this figure was based on a figure of U.S.$406,000 in monthly costs, a figure rejected by the Award. Since the Award rejects the Claimant's figure for monthly costs, it cannot at the same time accept the Claimant's figure for mitigated costs, which has been based on a higher total cost figure, and apply it to its own analysis, which is based on a much lower figure for total monthly costs. Such a procedure clearly takes out of context the figures submitted by the Claimant, resulting in an unjust reduction in the amount that should be awarded.

22. Moreover, the Award's second reduction, due to its figures being based on costs incurred during full operation, is completely arbitrary. The Award already has reduced the Award for the Claimant's efforts in mitigating its costs, thus it should not "doubly mitigate" the damages due the Claimant.

2. Services Rendered

23. The Award rejects the Claimant's claim for invoiced rent charges for its Ahwaz office incurred subsequent to the termination of the Contract on the ground that the Claimant did not substantiate "that it sought to mitigate the expenses it incurred." (Para. 115.) While conceding that the obligation to mitigate is not one of results, the Award finds that in this case it required the Claimant "to

evidence that [it was] . . . bound to incur the expenses so claimed." Id.

24. I believe that this conclusion is at odds with the express language of the Contract and the actions of the Respondents themselves. Articles 31(1) and 33 provide that upon the contractor terminating the contract for cause, the Respondents "shall assume and become liable for all obligations, commitments and claims that the Contractor may have heretofore in good faith undertaken or incurred in connection with the Contract . . . ." There is no doubt that rental charges for the Claimant's Ahwaz base were obligations incurred in connection with the Contract and indeed were routinely invoiced to NIOC, such invoices having been submitted by the Claimant as evidence of the debt. Indeed the Award finds that three of these post-termination invoices for rental charges were paid by the Respondents. Such payments confirm that the Respondents at the time agreed that they were liable for post-termination charges of this sort.

25. The Award's requirement for the Claimant to mitigate its expenses is not found in the Contract. Even if it were, however, it is probable that Ahwaz office expenses continued to be incurred during the period following termination, as in the case of various guarding costs, at the request of NIOC, given the Parties' hopes of concluding a new Contract No. 376. It is probable, too, that the Claimant to some extent had incurred a contractual commitment to third parties for such expenses. The fact that these charges were invoiced contemporaneously to NIOC and that several were paid already suggest that this is the case.

26. I therefore believe that the amounts requested for such post-termination expenses should have been awarded.[8]

3. Debit Notes

27. The Award rejects the Claimant's claim for costs it incurred in guarding its equipment between 16 January and 24 May 1979, the time when the Claimant was on standby. The Award bases its conclusion on the fact that it already has awarded the Claimant its costs for this period and thus "the Claimant is not entitled to any further compensation for costs incurred during this period." (Para. 122.) Since the Award also finds that the Respondents had paid Debit Note 252, it calculates a net credit due the Respondents of U.S.$39,781.72.

28. Simply, this analysis completely distorts the manner in which the Award arrived at its standby costs figure and the factors that went into its calculations. That calculation, as clearly set forth in the Award (para. 105), subtracted an average monthly profit figure from an average monthly sales figure and then reduced the difference by mitigated costs and an amount to offset the fact that such costs assumed full operation. The calculation, by its terms, only incorporates those costs that the Claimant would have ordinarily incurred on a monthly basis under the Contract and would continue to have while on standby. It does not, however, include additional costs unique to a standby situation. Extra expense for guarding equipment that is not being used because the whole operation was put on standby is such a unique additional expense and thus necessarily was not factored into the Award's compensation for the standby

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[8] Other difficulties with the Award's conclusion that a number of these invoices in fact were paid by NIOC are discussed in Section I(A) of this Opinion.

period. It therefore is unjust for the Award to hold that the Claimant is not entitled to such funds. Indeed, the Award's finding that NIOC actually paid Debit Note 252 seems to contradict this finding.

29. This would not be the situation, however, if the Claimant's request for standby fees had been awarded. That request, which is much higher than that which has been awarded, included such additional costs that were unique to the standby period. Since the Award does not follow these calculations, however, it must at some point take account of these additional costs that were incurred. It is simply inequitable to do otherwise.

4. Lost Profit

30. The Award grants the Claimant U.S.$223,929.21 in lost profits up to the date of termination of the Contract. In doing so, it rejects the Claimant's request to be awarded actual profits lost and its contention that Article 31 provides for lost profits for the full term of the Contract. The Award finds that under the provisions of the Contract it must determine a reasonable level of profits to be awarded. Relying on Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1984), reprinted in 8 Iran-U.S. C.T.R. 298, the Award further finds that awarding the Claimant profits for the full term of the Contract would render the Respondents' contractual right to terminate the Contract at any time for convenience "devoid of most of its meaning," (para. 135), and concludes that the Claimant's reasoning to the contrary is "obviously circular." (Para. 136.)

31. While I agree that the Claimant should be awarded a reasonable profit under Article 31(3) and that such a standard does not necessarily equate with actual profits lost, I respectfully disagree with the Award's limitation of

recoverable reasonable profits to the date of termination of the Contract. Article 31(3) expressly provides that the Claimant, upon such a termination, was to be compensated "for so much of the Services chargeable to the Company incurred up to the date of such termination plus an amount . . . representing the Contractor's reasonable profit." (Emphasis added.) No limitation is placed on the recovery of profits other than that they be set at a reasonable level. Indeed, they are made distinct from the other item to be recovered, charges for services performed up to the date of termination. Such charges, by the terms of the Contract, necessarily would include the Claimant's profit margin for such services. Therefore, the first clause of Article 31(3) compensates the Claimant fully for services charged to the date when services ceased. This suggests that the second clause, which provides for a reasonable profit to be awarded to the Contractor, is not meant to be limited to those profits earned up to the point of termination, but rather was meant to compensate the Contractor for those profits which it reasonably could have expected to achieve if the other party to the Contract had not breached. Any other reading of the clause would make it redundant to the clear language of the first clause.

32. Such language clearly distinguishes this Case from the facts in Sylvania. There the clause at issue specified that "the Employer shall pay the contractor for all direct costs including G and A, overhead and fair profits incurred by the . . . time of . . . termination." Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 at p. 22, reprinted in 8 Iran-U.S. C.T.R. at 313 (Emphasis added). This language makes clear that profits incurred only up to the date of termination were recoverable. Moreover, the terms costs and overhead were used as the other two variables to be considered. This necessarily implied that the term profits was to be a third variable to give the contractor a complete recovery for the

work performed as of that date. Here, however, the terms costs and overhead are not used, but rather the phrase "reimburse the Contractor for so much of the Services chargeable to the Company incurred up to the date of such termination" is applied. The Claimant's charges for services, as previously mentioned, necessarily encompass all three of the variables mentioned in the Sylvania contract, i.e., costs, overhead and profit, and thus are dealt with distinctly from a reasonable profit.

33. This view of Clause 31(3) in no way renders the Respondents' right to terminate for convenience at any time devoid of its meaning. Initially, if NIOC had so chosen to end its relationship with the Claimant, it would have limited dramatically its further monetary responsibilities under the Contract, i.e., future costs and overhead would no longer need be paid. More important, however, by the terms of the Contract, if NIOC had pursued this avenue, it still would have been liable to compensate the Claimant under Article 31(3) for the same items for which it is now being held liable, including reasonable profit.[9] Given that these are the clear and unambiguous terms of the Contract, I fail to see anything "obviously circular" about this fact.

34. I therefore believe that the Claimant should be awarded a reasonable profit assessed over the duration of the Contract. Not to do so is to render the Claimant's rights under Article 31(3) devoid of half of their meaning.

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[9]Article 29 of the General Conditions gave NIOC "absolute discretion" to terminate the Contract "with" or "without cause" at any time upon giving sixty days written notice. If the termination was without cause, Article 31, entitled "Termination By The Company Without Cause," applied. Article 31(3), granting the Contractor reasonable profits, therefore applied in such a situation.

B. Contract 338

1. Reduction in Scope of the Contract

35. The Award finds that OSCO in a 20 January 1978 letter to the Claimant conveyed to it a decision to reduce the scope of the Contract from two crews to one. With all due respect this conclusion has utterly no basis in the record. The 20 January letter requested the Claimant to "indicate [its] standby fee for one team only." It is clear from the subsequent actions and inactions of the Parties that this letter was simply an inquiry and did not constitute a decision by NIOC to reduce the scope of the Contract. The Claimant's perception of the letter as such is established by the fact that, up until the date of termination of the Contract (22 May 1979), it was invoicing NIOC for standby fees for two crews. NIOC's perception of such is established by the fact that it never raised any contemporaneous objection to these invoices on the basis that the Contract had been reduced.

36. Given the ambiguous nature of the 20 January letter and the conduct of the Parties thereafter, I think that it is a factual error to suggest that the scope of the Contract had been reduced.

2. Standby Fees

37. For the same reasons set forth in my comments regarding standby fees for Contract 340, see Section III(A)(1), I believe that the Award has erred in not finding that NIOC agreed to a monthly standby fee of U.S.$15,000 and thus that the Claimant should be dealt with accordingly.

38. Even if no such agreement was reached, however, the Award's dismissal of the Claimant's proposed figures for lack of evidence and its acceptance of NIOC's offer of

U.S.$5,930 per crew as sufficient is somewhat bewildering. NIOC has presented no evidence to suggest that this figure corresponds to the Claimant's actual costs. Thus, NIOC's figure falls prey to the same insufficiency as the Award sees in the Claimant's calculations. It seems to me that if the Claimant's figure is suspect as being too high, then certainly NIOC's figures, offered in the context of a settlement negotiation, must be suspect as being too low. It therefore is left for the Tribunal to arrive at a reasonable figure. Failing to do so, the Award, in my view, errs.[10]

3. Services Rendered

39. The Award rejects the Claimant's claim for payment of Invoice No. 2652 on the ground that it represents a charge for work performed on a contract not at issue in this Case. As explained thoroughly by the Claimant, this invoice was for a final billing for a calibration unit under Contract 739, the predecessor to Contract 338. While Contract 739 had terminated, the final billing was not made until December of 1978.

40. In my view, it is irrelevant whether the unpaid invoice is for work performed under Contract 338 or Contract 739. The fact is that it represents work performed for NIOC by the Claimant. NIOC does not contest that the work was performed or that it received the invoice. Consequently, I see no basis for denying the Claimant money which it clearly has earned.[11]

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[10] I obviously also disagree with the reduction of standby fees due to the alleged reduction in the scope of the Contract. My difficulties with this aspect of the Award have been dealt with previously. See Section III(B)(1).

[11] I obviously further disagree with the Award's (Footnote Continued)

4. Lost Profits

41. For the same reasons set forth in my comments regarding the Award's handling of the claim for lost profits under Contract 340, see Section III(A)(4), I disagree with the Award's resolution of this Claim.

C. Contract 334

1. Termination

42. The Award finds that NIOC terminated the Contract for cause on 2 January 1980 due to the Claimant's improper cessation of performance at that time. Initially, the Award finds the Parties to be in agreement that the Contract terminated on 2 January 1980. It then dismisses the Claimant's rationale for ceasing performance, NIOC's alleged failure to pay invoices within thirty days pursuant to Articles 23 and 33(1) of the Contract, as unfounded. The Award points out that over the course of the Contract NIOC did not comply strictly with this requirement and yet the Claimant did not voice an objection to its payment practices. It therefore concludes that "CFPS . . . is estopped to invoke NIOC's non-compliance with the requirement of payment of invoices within 30 days as a ground for terminating the Contract." (Para. 193.) While conceding that this finding does not mean that the Claimant necessarily could not terminate the Contract due to a payment default by NIOC, the Award posits that it "place[s] on the Claimant the burden of proving that NIOC's remittances to CFPS in the form of advances and payments on account of Contract 334 were

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(Footnote Continued)
findings concerning the payment by NIOC of some of these invoices. My differences on this point are set forth in Section (I)(A) of this Opinion.

insufficient to cover all outstanding invoices as of 20 December 1979." (Para. 194.)

43. The Award then proceeds to dismiss NIOC's failure to pay specific invoices as a basis for an allegation of default on the Contract. As to Invoice 2690, the Award states that the amount of time between the date of the invoice and the 20 December letter (68 days) was not adequate to constitute a default and further finds the invoice itself not to be payable. As to Invoices 245, 2665, 2679, 2681, 2684 and 2687 it concludes that the late payment of approximately one third of the amount due (U.S.$42,042.37) was not a basis for default since the credit due the Respondents on all of the Contracts is greater than the amount due and such amount was insignificant. As to the withholding of U.S.$83,712.80 on the invoices for "SSO clearance," the Award finds that the Claimant was aware of the basis for this withholding and yet did not object to it and thus such withholdings could not be considered evidence of a default.

44. There are numerous aspects of this determination to which I disagree. Initially, contrary to the Award's finding, there is not an agreement in the record as to the date on which the Contract was terminated. The Claimant in its Memorial alleged that "[o]n December 20, 1979 CFPS formally notified NIOC by letter and telex that it was exercising its right to terminate Contract 334 for cause." Indeed, the letter of 20 December to NIOC says just that, that CFPS was giving notice under Clause 33 "for the non-observance by NIOC of Clause 23" and that "clause 31 of the contract will now become effective . . . ." There is no basis therefore to suggest that the Parties are in agreement that 2 January 1980 was the date of termination.

45. In my view, the true date of termination was 20 December 1979, the date of the letter, and such termination was by the Claimant for cause due to NIOC's failure to abide by

the contractual provisions governing payment. Clause 23(1) expressly provides that NIOC was to pay an invoice "within 30 days of receipt of the invoice." Clause 33(1) further provides that in the event NIOC failed "to pay to the [Claimant] any approved amount due within the time specified" the Claimant had a right to terminate the Contract "by giving 60 days' notice in writing to [NIOC]." Such a right is not qualified in the contractual language and thus the Claimant clearly could terminate the contract if NIOC did not comply with the payment provisions.

46. Evidence of NIOC's failure to comply with these provisions is abundant. At least five invoices, rendered at dates from April to September 1979 for computer center services (Invoice Nos. 2665, 2679, 2681, 2684 and 2687), totaling U.S.$167,350, remained wholly unpaid as of 20 December 1979. In addition, Invoice 2690, for the transfer of seismic data from a twenty-one track tape to a nine-track tape, also remained unpaid. Failure to pay these invoices within the contractually allocated time in my view clearly gave the Claimant the right to notify NIOC that it was invoking Clause 33(1) and terminating the Contract. While a payment on the five service invoices was in fact made on 28 December 1979, such late payment does not negate the fact that the Claimant had the right to terminate the Contract on 20 December for NIOC's failure to make such payment. At any rate, NIOC's payment was only for U.S.$42,042.37 and improperly withheld U.S.$83,712.80 against "SSO clearance" for Contract 064. Even with this payment, therefore, NIOC was still in default of its contractual obligations.

47. The Award's findings to the contrary are flawed on a number of grounds. First, the record shows that the late payments on this Contract commenced in or about April of 1979, at which time the Claimant became concerned but did not invoke Clause 33(1) because of its long-standing relationship with NIOC. In effect, the Claimant did not

wish to risk the goodwill that existed between the Parties over a few late payments. When such late payments continued, however, the Claimant entered into negotiations with NIOC to remedy the problem. It was in these negotiations that NIOC insisted that the Claimant obtain a guarantee of performance, which it subsequently did on 27 September 1979. When this act did not remedy the situation and NIOC continued its habit of not paying invoices, the Claimant finally acted and invoked Clause 33(1). For the Award therefore to suggest that the Claimant is estopped to raise the thirty-day payment requirement because it permitted NIOC to ignore it seems somewhat disingenuous considering the pains through which the Claimant went to salvage a working relationship.

48. Second, the idea that the Claimant, to invoke this provision, must show that these invoices were a true debt, i.e., that they exceed any outstanding credit due the Respondents, misses the point. This Award, by its findings on the issue of allocation, necessarily has eliminated any credit that the Claimant had deemed due the Respondents. Under the Award's analysis of specified payments, therefore, no credit existed and such invoice debts exceeded the amounts due them. Even if such a credit did exist, however, application of it to offset the payment of a specific invoice would be to allocate such a credit twice, once against the total amount awarded and a second time against specific debts to find the Respondents not in default. Such a procedure indeed would be unjust.

49. As to the Award's findings on the specific invoices, in my view they are inconsistent with the evidence in the record. No basis exists for the Award to find that NIOC had a legitimate dispute on the payability of Invoice No. 2690. NIOC submits no evidence showing that it ever raised an objection to the invoice with the Claimant. Its assertion that it merely wished to have an estimate given for the

work, rather than to have the work performed, when it gave the tape to the Claimant, seems to me, without any supporting evidence, to be far fetched. Even if such were the case, however, the fact that work was performed by the Claimant and accepted by NIOC, without NIOC mentioning any difficulty, establishes that monies are due the Claimant for services performed.

50. The further idea that NIOC's failure to pay the five invoices does not constitute a default because of the existence of a larger credit and the amount of the debt being insignificant also misses the point. As the Award implicitly must find pursuant to its allocation analysis, no credit exists. Moreover, no base sum is given in the Contract below which Clause 33(1) could not be invoked. As to this Contract, a debt of over U.S.$100,000 must be deemed significant and a proper basis for the finding of a default.

51. Finally, the suggestion that the Claimant was aware of the SSO withholding in the 28 December payment seems to me irrelevant. The fact is that NIOC improperly withheld such monies and thus was in breach of its contractual obligations. Under any standard the Claimant could not be said to be under an additional obligation to object to such withholding, even assuming knowledge of its rationale, since prior to the payment it had given notice of termination. All the Claimant had to know at that time was that the payment made did not cover outstanding debts. This being the case, its prior invocation of Clause 33(1) should be seen as notice of the inadequacy of such payment.

52. On balance, I thus would have found that the Claimant properly invoked Clause 33(1) in its letter of 20 December 1979. It is true, however, as the Award points out, that this Clause required the Claimant to give sixty days notice prior to stopping work. It is further correct, as the Award points out, that the Claimant did not abide by this

provision, abandoning its work on 2 January 1980. I thus concur that the Claimant was not justified by NIOC's previous non-payment in abandoning work on that date. The effect of this early abandonment, however, in my view, is not that NIOC could then terminate the Contract for cause since the Claimant had already properly given notice of termination due to NIOC's payment default. Rather, the effect should be to limit the amount of lost profits the Claimant could recover under Clause 33(3). Such profits should start to run sixty days after the 20 December date to allow for this period of time.

2. Lost Profits

53. The Award dismisses the claim for post-contractual profits on the ground that Clause 32, governing terminations by NIOC for cause, does not grant the Claimant such a recovery. Since I believe that the Claimant properly terminated the Contract for cause on 20 December 1979, I believe that Clauses 31 and 33, governing termination by the Contractor for cause, should govern the rights of the Parties. Clause 31(3) entitles the Claimant to a recovery of such profits. I therefore believe that the Claimant should have been awarded such monies from 18 February 1980, sixty days after giving notice, through the duration of the Contract had it not been interrupted prematurely.[12]

IV. Expropriation

54. The Award finds that Iran did not expropriate the Claimant's equipment, but grants the Claimant U.S.$416,612.40 for interference with the Claimant's ability

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[12] I further disagree with the Award's findings that NIOC had paid various invoices and debit notes under the Claimant's claims for services rendered and debit notes. My (Footnote Continued)

to export a portion of the Crew Three equipment under Contract 340. In my view, however, the letter of 15 June 1980 from NIOC to CFPS constituted a clear and definitive bar to either export or sale in Iran by CFPS of all of its equipment.

55. The Award itself concludes that no equipment could have been exported after that date because (para. 300) of the "unwarranted and unreasonable obstacles" it presented. As of that date it thus became irrelevant whether or not CFPS had actually attempted exportation at an earlier date (except insofar as it might be claimed that deprivation occurred earlier). The door to exportation was firmly shut as of 15 June 1980 and no more was needed to establish the claimed delict.

56. It borders on the facetious to suggest that following the letter of 15 June 1980 the Claimant nonetheless could have sold its property within Iran and therefore suffered no expropriation. There is no basis whatsoever, for example, to conclude that the labor proceeding (involving an attachment), which the Award particularly cites (para. 299) as one of the "unwarranted and unreasonable obstacles," would not have barred a sale equally as it prevented export. In any event, Clause 16 of the General Conditions of Claimant's contracts entitled it to choose between export and sale of the equipment. (Para. 233.)

57. Finally, the Award does not even carry its own flawed reasoning to its natural conclusion. If, as the Award concludes, exportation of certain limited equipment was precluded by the 15 June 1980 letter, it would seem it was precluded forever. Certainly the Award does not suggest

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(Footnote Continued)
differences with these aspects of the Award are set forth in Section I(A) of this Opinion.

that this interference was temporary. That being so, and given the Award's finding that this equipment could have been sold in Iran, is not the proper measure of damages the difference, if any, between the amount for which the equipment could have been sold in Iran and the value it would have had in CFPS' hands outside Iran? The simple grant of two years lost profits on use of the equipment outside Iran is wholly arbitrary and does not logically result from the Award's own analysis of events.[13]

Dated, The Hague
31 March 1989

Charles N. Brower

Charles N. Brower

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[13] The Claimant requested two years lost profits in addition to the value of its equipment on the ground that under the market conditions prevailing at the time of the taking two years lead time was required to acquire such equipment. In a comparable situation the Tribunal has awarded such loss of profit in addition to the value of the compensated equipment. See Sedco, Inc. and National Iranian Oil Company, et al., Award No. 309-129-3, paras. 77-86 (7 July 1987), reprinted in 15 Iran-U.S. C.T.R. 23, 50-53. For the Award here to grant damages only for temporary loss of use of property it concludes has been taken permanently is, to say the least, anomalous.