IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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- Date 8 Jan 90
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

DUPLICATE ORIGINAL
«نسخه برابر اصل»

CASE NO. 370
CHAMBER ONE
AWARD NO. 429-370-1

WATKINS-JOHNSON COMPANY,
WATKINS-JOHNSON LIMITED,
Claimants,

and

ISLAMIC REPUBLIC OF IRAN
(Ministry of Defense),
BANK SADERAT IRAN,
Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
DATE 8 JAN 1990
تاریخ ۱۸ /۱۰/ ۱۳۶۸

DISSENTING OPINION OF ASSADOLLAH NOORI

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I. INTRODUCTION

1. With the Award in this Case, another page of the book of the injustices relating to the IBEX Project has been turned, for writing which the majority in Chamber One alone shoulders heavy blame. In this Project, in which Iran did not wish to get involved (at least, in the projected magnitude), and in whose interruption Iran actually played no role whatsoever, the Iranian nation has been compelled to pay the American contractors nearly $200 million prior to the cessation of the works, and tens of millions of dollars as a result of Chamber One's unjust and inequitable awards, without the defective works which were allegedly performed having, in the end, yielded the slightest benefit to Iran in achieving the contractual goals.

In this Case too, the Tribunal has, with an amazing indifference, permitted those same contractors who had already received far more than the worth of the properties (built, procured or ordered), to seize and plunder millions of dollars of the Iranian nation's property by resorting to spurious pretexts, including that of mitigation of damages. The Contractor for this segment of the IBEX Project has only been able to allege -- as against his receipt of more than $13 million in cash over the course of the performance on the Contract, and approximately $3.3 million (in principal) pursuant to this Award -- that he could deliver goods worth only approximately $4.6 million to other Project contractors in the United States, and that having seized the rest of Iran's property, worth roughly $8 million, he could credit the Buyer with only some $1.4 million for that property.

2. The majority's findings in this Case -- and in principle in the other cases relating to the IBEX Project as well -- are so unjust and inequitable, and so contrary to the

Contract, the law and principles of logic accepted by all mankind, that I cannot concur in the Award, even where the majority has dismissed certain limited, unfounded and insignificant elements of the Claimants' exorbitant claims. For I believe not only that the Claimants in this Case lack the slightest entitlement to any monies whatsoever, but also that if this arbitral Tribunal had approached the Case equitably, totally without bias and prejudice, it would have had to award against the Claimants for payment of the damages incurred by the Iranian Respondent. For this reason, I deem the title of "Dissenting Opinion" to be the most appropriate heading to the present writing.

3. I feel that it is essential to begin by providing a very abridged and general picture of the IBEX Project here, so that the reader may have a clearer understanding of the Award and this Dissenting Opinion. From the early 1970's, when great progress was being made on intelligence and data-gathering techniques through highly complex electronic methods and systems, and when it was the goal and objective of each superpower to fly aircraft equipped with sensitive espionage equipment and apparatus over the territory, or over the closest frontier zones, of the other, the United States hit upon the idea of creating an airborne and ground-based intelligence data-gathering and analyzing system in Iranian territory. For the United States, Iran lay in a crucial geographical position, because aside from its proximity to the Indian Ocean, and apart from the fact that it extends along the length of the north side of the Persian Gulf, the Straits of Hormuz and the Sea of Oman, Iran also has a common border of about 2000 kilometers with the Soviet Union, the United States' rival as a super-power. Economically, Iran was also the only country that could, besides having the desired geographical location, sustain the onerous expense of such a project (for which the initial budget projections were $650 million) in the interests of the United States, out of the revenues

generated from its oil sales. In view of these considerations, in 1974-75 the United States pondered the means of realizing its long-cherished dream, and finally commenced a project, which was given the code name IBEX ("mountain goat"). The task of carrying out the Project, from the planning stage to that of construction, installation, monitoring and auditing, was assigned to United States contractors, who had been selected under the supervision of the United States and on its advice and approval, in view of that country's own economic and security considerations. The United States exercised total supervision and control, not only through its Military Advisory Group but also, by virtue of the Project's sensitivity, through representatives who directly monitored all of the phases and routine works from inception to completion, even up to the stage of approval and payment of invoices; in the Contract, they are referred to as the Field Support Services Group. For an acquaintance with the role of the United States and of that nation's direct interests, it is sufficient to note -- besides the above-mentioned involvement -- the subject-matter of the Contract (a top-secret, sensitive airborne and ground-based intelligence and data-gathering system) and the provisions thereof, which made commencement and continuation of the Project contingent upon the permission of the United States, and where a refusal on the part of that state to issue permits for the provision of goods and services was deemed to constitute force majeure. It will also suffice to refer to the point that after the victory of the Islamic Revolution of Iran, and after the policy of its high-ranking officials became known and the United States abandoned hope of being able to continue with and benefit from the Project as it had desired, the United States felt compelled, by virtue of the crucial and critical nature of the Project, to provide Saudi Arabia with AWAC airplanes (at the expense of Saudi Arabia), in order to gather the desired data.

As we shall see in the following pages, the United States, which had itself proposed the Project, gave up on its continuation, in light of the ramifications of the Islamic Revolution in Iran and the fundamental changes to which it gave rise, and also in view of the Project's sensitivity.

II. FACTUAL BACKGROUND

4. This writer is aware that the briefer a Dissenting Opinion, the greater is the likelihood that it will actually be read. It is also true, however, that the majority has failed to relate the facts honestly and impartially, and this has an undeniable effect upon its justification of the reasons for, and findings in, the Award. The majority has also abetted the Claimant in its fabrications and distortions, by narrating the Claimant's assertions as set forth in its Rebuttal Memorial filed on 19 December 1986; moreover, it has attempted to set the stage for a justification of its final conclusions, by making disconnected, scattered and fabricated selections from the voluminous history of the IBEX Project, and especially of the facts relating to this Case. Therefore, in my opinion, the majority's incorrect, defective and biased presentation of the facts constitutes the cornerstone of the Award's inequity and incorrectness; and for this same reason, I shall first endeavor to provide an account of the facts on the basis of the available evidence in the Case -- that is, to describe the events as they actually took place, and not as the majority would have liked them to be -- and I shall then set forth my own reasons for dissenting to the Award.

A. The Contract and its provisions

5. The disputes arise out of a contract that was executed on 13 October 1976 between the then Government of Iran (the Buyer) and Watkins-Johnson Services Co. (the Seller).[1] The Contract, pursuant to Article 14 thereof, was to commence from the date of the first down payment, or else from the date when the first letter of credit was opened, this latter step being contingent upon prior approval of the Contract by the U.S. State Department. The Contractor's obligations included acquiring the licenses and approvals necessary for implementing the Contract (Article 2.1.12), and pursuant to Article 5 of Appendix 5 to the Contract, the Contractor was required to obtain such approval by the State Department "within four (4) months after signature of this Contract by the Buyer." If approval was not obtained within four months, either the Buyer or the Seller had the right to terminate the Contract on the grounds of force majeure.

The Contract made no provision for down payments; thus the Claimants and Respondent agree that the Contract commenced on the date that Letter of Credit No. 10/85838 was opened, i.e., 6 or 9 March 1977.[2] This letter of credit was to expire on 10 January 1979, but was extended for six months until 10 July 1979 and, as attested by Bank Markazi, eventually became null and void in January 1980 following a further extension, with an unused balance remaining of $5,907,434.

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[1] The Claimant alleges that in 1977, the name "Watkins-Johnson Service Co." was changed to "Watkins-Johnson, Limited."

[2] The Claimant regards the Contract's date of commencement as being the date on which the letter of credit was approved by the Bank of America (9 March 1977), while the Respondent holds that it commenced on the date on which this instrument was issued by Bank Markazi (6 March 1977). This minor disagreement has no impact on the issue at hand.

6. The contract price was made up of four sums, which consisted of the following: (1) $18,068,566 (increased to $18,193,101 after two amendments) for the procurement, manufacture, shipping and delivery of the equipment and materiel that constituted the subject-matter of the Contract; (2) $560,000 for services to be rendered by the Contractor in Iran; (3) $4,000,000 for repair and return of manufactured equipment that would require repair in the future; and (4) $200,000 for support services. The Contract never reached its stipulated term, and therefore the services covered by the last two amounts never commenced.

7. The unit price of each item of equipment to be manufactured, shipped and delivered was individually specified in Section C-1 of the "Statement of work." The term of the Contract, up to the end of the period of guarantee and of services to be provided following the manufacture of the equipment, was 32 months; and the Statement of work also provided, in relevant part, the dates by which the equipment and materiel were to be delivered. Pursuant to this part of the Contract, all of the materiel and equipment were to be delivered over a period of time (at specified dates), F.O.B. at the destinations designated by the Buyer, and the shipping documents pertaining thereto were to be submitted to the Buyer pursuant to Article 5 of the Contract; and at any rate, the final shipment was to be made within twenty months after the date on which the term of the Contract commenced (i.e., at latest by 9 November 1978). Pursuant to Article 5.5 of the Contract, the risk relating to loss of, or damage to, the equipment was to be borne by the Seller up to the stage of shipment to the destinations specified by the Buyer.

8. The contract price, covering the stages and costs of designing, manufacturing, packing, shipping, transferring and delivering the goods, was to be paid out of the letter of credit, in accordance with invoices which were to be "prepared each month on the basis of progress of works and

... submitted to the Buyer's Audit Agency for certification," following approval by the Buyer (Article 1.3 of Appendix 2 to the Contract).

9. Because the Contract set forth the unit prices of the goods and their dates of delivery separately for each individual item, and also provided that payments were to be made on the basis of the progress of works, Section "C" of the Contract (the Statement of work) required the Seller to prepare a schedule of works with the assistance of the representatives of the Buyer and the Auditor, specifying the work progress milestones and the key events and critical action points in connection with each item of the goods and with the Contract as a whole. Each month, the Seller was to prepare a report reflecting the "status and progress [on manufacturing and procurement of] the equipment." In this report, the Seller was to include a summary of the total milestones achieved in the progress of the works, a description of problems and actions, the status of the Contract, the costs actually incurred versus the planned expenditures, and a great deal of other facts and data. Numerous pages of the Section entitled the "Statement of work" (Section C) were devoted to these duties on the part of the Seller.

10. Two IBEX Project contractors served as evaluator and auditor for the purpose of ascertaining the percentage of works accomplished in connection with manufacturing and delivering the equipment, as well as for carrying out the duty of evaluating the Seller's work on the basis of the deliverable milestones and data. It was the duty of Rockwell (which was later succeeded by Harris, in 1977) to evaluate the progress of works on the basis of the deliverable data and milestones, and on the basis of the deadlines set for carrying out each part of the work or for delivery of each item of the goods, as well as the impact of the foregoing on the other segments of the Project. Touche Ross was to audit and confirm the invoices on the basis of

the Rockwell/Harris evaluation of the progress of the works. (As the Systems Engineering Contractor, Rockwell also exercised over-all supervision of the Project works and the progress thereon, and for this reason, its reports affected the assessment of Watkins-Johnson's progress of works as well.) For the purpose of carrying out these highly complex technical and financial assessments and evaluations (to fulfill which, three or at least two contractors were employed at considerable cost), procedures called the "Invoice Certification and Processing Procedures" were applied from the very commencement of the works by the IBEX Project contractors. With the assistance of the auditors, Harris issued the final procedures relating thereto, developed "for the timely certification of ... invoices and for securing approval of their payment," on 7 November 1977, following lengthy studies, exchanges of views and meetings with the Project contractors. Harris' duties were set forth in paragraph A.1 of the Procedures (paragraph 16 of the majority's Award).

The duties of Touche Ross are defined in paragraph A.5 of the Procedures, as follows:

> Touche Ross will evaluate financial acceptability of each invoice in accordance with their Statement of Work and in consideration of inputs from the Systems Integration, Systems Engineering, Management Consultant, and Training Evaluation Contractors...

11. Once the review described in paragraph 10 above was completed, the Systems Integration Contractor (Harris) delivered the invoice to the Program Director (at that time, an individual named General Asrejadid). The invoice was to be approved (if there was no objection thereto) within four weeks by the representative of the Employer/Buyer (General Tavakkoli, the then Director of the Communication and Electronic Organization). After passing the final stage of approval, the invoice was sent to certain individuals of the United States Advisory Group in Tehran, who were supervising this Project and, in this

connection, also served as the Contractor/Seller's representative as intended in Article 1.3 of Appendix 2 to the Contract, for forwarding to the United States via the Systems Integration Contractor's courier, and collection thereon by the Contractor from the letters of credit.

12. In view of the complexity and scope of the work under the IBEX Project, and in order to coordinate the procedures for evaluating the invoices in keeping with the weight that was to be given to the work progress reports, the items delivered, and the data and milestones accomplished, as well as to facilitate as far as possible the task of evaluating the progress of the works, on 27 May 1978 Harris issued Revision "A" to the Procedures in the light of the experience accumulated by all the parties involved, which was later replaced by Revision "B" on 10 July 1978 (notified to the contractors on 5 September 1978).[3] The Revisions to the Invoice Processing Procedures were more or less the same as the initial Procedures, except for certain minor changes dictated by experience. There was no change in the sequence of stages of certifying invoices, and at any event, the invoices were still to be delivered to the United States representatives (acting on behalf of Watkins-Johnson) for forwarding to the United States, after final approval by General Tavakkoli.[4]

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[3] As we shall see in paras. 18-20 of the present Dissenting Opinion, Touche Ross was objecting well before that time to the manner in which Harris applied the contractual parameters. Therefore, Watkins-Johnson's nonentitlement to receive the contractual consideration (as will be explained below), and the impossibility of sending an invoice for a period in 1978, were not related to either of these Revisions.

[4] Merely in light of what has so far been set forth concerning the relevance of the progress of works ratings to payment on the invoices, and in view of the procedures for settling accounts with the Contractor in the event of termination of contract (even if this occurred by decision of the Buyer or as a result of force majeure), which were

(Footnote continues on following page)

The Invoice Processing Procedures were implemented in an identical manner with respect to all of the Project contractors; and in its Awards, this Tribunal has recognized those Procedures and the two Revisions thereto, including Revision "B", as constituting a standing contractual procedure agreed to by the contracting Parties who were involved in carrying out the IBEX Project.[5]

13. Pursuant to the Contract, the Seller was required to guarantee his good performance of the works entrusted to him, by providing valid, unconditional and irrevocable bank guarantees. These bank guarantees were to be valid for a period of 32 months, i.e., until the end of the 12-month guarantee period for the equipment sold. In fulfillment of these contractual conditions, the Seller submitted to the Buyer two bank guarantees in the total amount of $1,875,310.60 (from Bank Saderat Iran, secured by standby letters of credit issued by Wells Fargo Bank in the United States). Bank Saderat and Wells Fargo Bank undertook, vis-à-vis the Buyer and Bank Saderat, respectively, to pay the Buyer whatever amount it specified under the said guarantees, up to the ceiling amount thereof, immediately upon receipt of his first request and without need of issuing a demand to the Seller or resorting to any legal/judicial measures.

(Footnote continued from preceding page)
to be implemented on the basis of the works performed and the goods delivered and being manufactured, or in accordance with the work progress reports as accepted by the Buyer (Article 7, paras. 4 and 6 of the Contract), as the case may be, one can perceive just how invalid and inaccurate are the points raised in Footnote 5 to the majority's Award. If one took the contents of Footnote 5 as his criterion, it would provide the illogical conclusion that the results of the Seller's work, and his progress thereon, have no effect upon payment of his alleged costs.

[5] See: Sylvania Technical Systems, Inc., Award No. 180-64-1, reprinted in 8 Iran-U.S. C.T.R. 298, 308; also Rockwell International Systems, Inc., Award No. 438-430-1, at para. 21.

B. The Contractor's failure to perform on the Contract properly and in a timely manner

14. The 1250 items of electronic equipment (transmitters and receivers) which Watkins-Johnson was assigned to manufacture and provide were supposed to be delivered, promptly on the scheduled due dates, to the contractors on the airborne and ground systems segments and, in part, to the training segment contractor (Sylvania), so that they could be used in those segments.[6] The Statement of works provided that the Seller "shall perform [on its obligations in such a way as] to meet the requirements of the IIAF," while its performance of those obligations was also to be in conformity to the "Delivery Schedule... specified in Section C." Based on the obligations, work program and time schedule under its Contract with Watkins-Johnson, Iran had assumed certain obligations vis-à-vis the contractors on the airborne, ground and training system segments.

15. The first consignment of goods under the Contract was to be delivered in June 1977. However, from 1978, especially April of that year in accordance with the Schedules annexed to the Contract, the delivery of the goods took on highly significant parameters with regard to determining the progress of works percentage. Moreover, all of the

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[6] The electronic equipment provided by Watkins-Johnson was to be integrated and deployed by the airborne and ground systems contractors together with certain equipment provided by other sellers. This equipment could form a data-gathering system only when combined with the equipment from the other contractors; otherwise, as the Iranian experts stated repeatedly, and as they testified at the Hearing conference, it consisted mainly of ordinary transmitting and receiving models that could be used for numerous purposes, including industrial/commercial uses.

goods were supposed to be delivered by 9 November 1978, [7] on which date the guarantee and support services period was also to begin. The hardware for the airborne system was to be delivered to the relevant contractor (E-Systems) in May 1978, so that the latter could equip the two Boeing 707 airplanes allocated for airborne data-gathering with the data-gathering equipment and deliver them to Iran on 15 October 1978.

16. The Seller's failure to carry out his work manifested itself from December 1977, i.e., from the time that the progress of the works was to begin to become more tangible. In that month, the Seller delayed the delivery of 25 pieces of hardware which were supposed to have been ready for delivery in December 1977, as a lever for forcing the Buyer to accept the particular paint color desired by the former, who had arbitrarily, and in violation of the contractual specifications, painted six panels in that color. As Harris stated in its contemporaneous report:

> However, none of the 25 deliverable hardware items were submitted as a result of the contractor's decision to stop work in certain areas until the paint problem was solved.

In the report which they sent together with the work progress status report, the representatives of the United States and Harris reported that:

> Instead of either (1) requesting a waiver from [the Buyer], or (2) complying with the specification, [the Contractor] chose to negotiate with the SIC and the Program Office and anyone else who would listen to impose new specifications on all other equipment contractors.

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[7] The copy of the Contract provided by the Contractor, and especially the Section on the Statement of works, is incomplete; and for this reason it does not clearly reflect these facts, although these dates can be arrived at through a simple computation. The copies of the Contract and its Annexes and Schedules filed by the Respondent are more legible and complete.

The report goes on to state that:

> This maneuver [by the Contractor] caused continuous delay in the resolution of the problem, since in the end WJ was granted a waiver on [repainting] all panels painted prior to rejection by SIC. This approach on the part of WJ, in our view, does not represent the action of a contractor interested in overall program success.

Despite this problem, Harris approved the progress of work at 99%, and Touche Ross confirmed the relevant invoice for payment.

17. The documents on file clearly show that the Seller continued with its breaches and slow pace of work in January 1978 as well, despite all the Buyer's efforts and cooperation. In that month, it prepared only six of the 25 items in whose delivery it was already behind schedule. And although the delivery of 19 of the items of hardware was two months behind schedule, and that of the other six items one month behind, this time too Harris estimated the progress of work at 98%, without using the correct parameters for calculating and determining the progress of the works, and Touche Ross once again confirmed the invoice for payment, after deducting 2% from the invoiced amount. Aside from that reported breach, Attachment 1 to the report for January 1978 indicates that the Contractor was at least one to several months late in preparing many of the other deliverable items or data, and that in some cases it had postponed their delivery until some future time, even though the anticipated deadlines had already passed. Nonetheless, Harris did not deduct any percentage for these shortcomings and failures.

18. As of February 1978, six of the 25 items that were supposed to have been delivered in December 1977 had still not been delivered. Attachment 1 to Harris' report also reveals that the preparation of certain Category III and IV

items, supposed to have been completed in November and December 1977, had been tentatively postponed until March 1978. Here too, Harris determined the progress of the work to be 99%, without taking the Invoice Certification and Processing Procedures into account.

This time Touche Ross, the Project Auditor, was obliged to point out Harris' erroneous application of the contractual parameters of the Invoice Certification and Processing Procedures to Harris and the Program Director. In its report of 5 April 1978, Touche Ross objected to the rate specified by Harris for the progress of works in connection with Watkins-Johnson's February 1978 invoice, and stated that:

> We have determined that the SIC has evaluated progress of works based upon revised delivery schedule which is different from the contractual delivery schedule... We believe that the evaluation of progress of works should be based upon contractual schedule, or only those revisions thereto that have been approved by the Program Director. Further, we believe that a contractor should not receive an evaluation of 100% when they are delinquent on any deliverables...

Touche Ross then states that:

> We have discussed our position with the SIC and it is our understanding that they now agree... We understand that the SIC will prepare its March 1978 evaluation bases, using the contractual schedule as the baseline.

Touche Ross then approved payment of the invoice for February 1978 solely on the basis of Harris' promise that the assessment for March would conform to the Contract:

> Based upon the SIC's representation to us that the March evaluation will be prepared using contractual schedule... and resolution to your satisfaction of the treatment of delinquent deliverables and milestones, we recommend this invoice be approved for payment.

Despite Touche Ross' final recommendation that "[h]owever, we suggest this invoice be held until the March evaluations are prepared and we communicate the results to you," the Buyer made a timely payment on the February invoice as well, out of good faith and in view of the promise that the March invoice would be revised, using the contractual parameters for determining the progress of works.[8]

19. In its reports for March and April 1978, Harris mentions Watkins-Johnson's efforts to remedy the two- to three-month delay in the overall schedule; and for this reason the invoices relating to those two months were paid on the basis of a 98% and 99% work progress evaluation, respectively, despite the delays in preparing and delivering the Category III equipment.

20. As noted in paragraph 15, supra, the months of April and May 1978 were pivotal points in Watkins-Johnson's delivery schedule for the equipment, because out of the $3,830,868 worth of goods that were to have been delivered through May, $2,750,688 worth of goods were supposed to be delivered in April and May, and in particular the latter month. Moreover, the equipment that was needed for the airborne segment was supposed to be delivered to E-Systems in May as well. Therefore, beginning with these two months, the actual performance on the Contract and the actual delivery of equipment played a crucial role in determining the progress of works percentage, and the Systems Integration Contractor and the Invoice Certification and Processing Contractor could not content themselves

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[8] It is worth observing that Touche Ross' objections, and Harris' concession, that the invoices should be processed and paid on the basis of the progress of works and the contractual schedule, as well as Touche Ross' suggestion not to pay the February invoice, were all made within the framework of the original Invoice Processing Procedures and the contractual provisions, without regard to Revision A, and before the issuance of Revision B thereof.

with simply making the ineffectual promises and statements reflected in their monthly reports. Contrary to all the promises made, and to the hopes and anticipations attached to the reported efforts in the months of March and April, the situation became worse in May, and each month thereafter matters became graver still. By that time, by the Claimant's own admission, Iran had paid at least $12,294,680 on Watkins-Johnson's invoices, whereas (by the Claimant's own, unsubstantiated allegation) Iran had received a mere $798,452 worth of goods (delivered in 1977) in exchange. Due to Watkins-Johnson's failure to deliver the hardware needed for the airborne system to E-Systems in May 1978, this segment of the program was delayed; and since Watkins-Johnson did not ultimately provide the hardware in the following period either (by 15 October 1978), the entire program was aborted, so that the work on the Boeing airplanes was never actually carried out, and Iran incurred losses amounting to millions of dollars.

In view of these shortcomings and failures in Watkins-Johnson's work, and its nondelivery of equipment worth $3,830,868 (of which $2,750,688 worth was to have been delivered in the months of April and May 1978 alone, while the rest was supposed to have been delivered prior to April, in accordance with Section "C" of the Contract), Watkins-Johnson's progress on the works was rated at 93%; but since by that date $12,294,680 had already been paid to the Contractor, Watkins-Johnson did not prepare or send any invoice for the month of May 1978, in effect conceding that it had no entitlement in that connection.

21. The Seller was behind his work schedule in the month of June 1978 as well, being unable to prepare for delivery the $2,371,346 worth of goods which it was supposed, under the Contract, to deliver in that month. Therefore, since Watkins-Johnson had by this stage failed to deliver equipment worth a total of $6,202,214 (with the exception of the

$798,452 worth of goods allegedly delivered in 1977), its progress of works rating was reduced to 89%. [9] For this very reason, the Contractor bowed to reality and refrained from preparing and sending any invoice for the month of June.

22. In July and August 1978, not only was there no breakthrough in the works, but Watkins-Johnson actually fell further behind the contractual schedule. The Seller was supposed to deliver $1,893,808 worth of equipment in July, and $2,197,517 worth in August, so as to bring the total value of the goods delivered up to the level anticipated in the Contract, namely $10,293,539. Owing to the Contractor's failure to perform on these obligations, and also due to the effect of these parameters, the rate of progress of works not only failed to ascend, but necessarily traced a descending arc instead. For this reason, the rate of progress of works was only 85% in July, and 78% in August.[10]

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[9] In one section of the report which Harris prepared for the progress of works in June, it is stated that:

> "Yet one hundred and twenty-two (122) Category V items were not delivered."

Delivery of 56 of those items was also behind the May 1978 schedule.

[10] For the months of July and August, Harris mentions a delay of over 22 weeks in the work on the airborne system, above and beyond the extensions that had been granted up to that time. In its report for August, Harris also states that:

> "Category IV and V hardware 16-18 weeks late...
> Watkins-Johnson group test delays...
> Watkins-Johnson is late in delivering 228 hardware items..."

(Footnote continues on following page)

As it was fully aware of these facts and circumstances, Watkins-Johnson did not prepare or send any invoice for these two months, either.[11]

(Footnote continued)

Watkins-Johnson appended a list to its report for August 1978, which has been filed by the Respondent with the Tribunal. This report demonstrates that of the 841 items of goods that were supposed to have been delivered by that date, only 125 items had actually been delivered, as set forth below:

	Units scheduled (Contract)	Units shipped
Brown Rose	276	72
Green Rose		
Category II	25	0
Category III	147	53
Category IV	102	0
Category V	291	0

[11] In July and August 1978, Watkins-Johnson protested against Revision "A" of the Invoice Certification and Processing Procedures. While the Claimant has attempted throughout these proceedings to blame this Revision for the fact that it was not entitled to receive a higher rating on the progress of works, the evidence in the Case and the remarks set forth above clearly demonstrate that the invoices were not paid for the simple reason that (a) the Contractor's performance failed to conform to the express terms of the Contract and the equipment delivery schedule, and (b) it had received large amounts of money without giving any tangible return. Moreover, just as Touche Ross, the Project Auditor entrusted (pursuant to Article 1.3 of Appendix 2 to the Contract) with the duty of processing and approving the invoices, noted already in 1977 and in early 1978, the Contractor should have been receiving lower work progress ratings for some time; and well before Revision A was prepared, it had been established that Watkins-Johnson was not entitled to receive a higher progress of works rating. Furthermore, Revisions A and B of the Invoice Certification and Processing Procedures, which had been put into effect with respect to all the Project contractors pursuant to their contracts and without any objection whatsoever, had been issued "for the timely certification of all Contractors' invoices and for securing approval of their payment," as well as in order to improve the processing procedures.

23. As attested by Harris, and as emerges from Watkins-Johnson's report for the month of August, as at 31 August 1978, 71 of the 161 items of equipment that were supposed to have been delivered to the Buyer were in Watkins-Johnson's own factories, ready for delivery. [12]

Pursuant to the Contract, Watkins-Johnson was supposed to deliver $1,016,105 worth of equipment in September 1978, thereby increasing the total value of the equipment delivered to the Buyer to $11,309,644. Therefore, even though the percentage rate for the progress of works should in principle have been lower than that for the month of August, Harris rated the progress of works relating to the September invoice at 78%, the same rate as for the month of August, in view of the fact that 71 items of goods were ready for shipment. Watkins-Johnson did not send any invoice for this month, either. In arriving at the 78% rating, Harris writes on page one of its Work Progress Report for the period through September 1978:

-- 2 Data Deliveries behind Contract Schedule.

-- 48 Hardware Deliveries ahead of Contract Schedule.

-- 218 Hardware Deliveries behind Contract Schedule.

-- Lack of internal accomplishments toward group

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[12] According to the terms of the Contract, Watkins-Johnson was required to deliver the equipment "FOB" to the destinations specified by the Buyer or his representatives. As can be seen from this and the following paragraphs, Watkins-Johnson refused, despite repeated requests, to ship and deliver the equipment that it allegedly had ready for delivery as at 31 August, and to which it ascribes a value of $1,937,765. This equipment was apparently delivered (late) to the relevant contractor on 9 October 1978 (page 3 of Harris' "Work Progress Report").

> test have [sic] created late hardware deliveries.13
>
> -- The Contractor continues to be non-responsive to timely delivery of Hardware directed shipped by SIC and available at his factory...

24. Beginning in August and September, Watkins-Johnson followed the same policy that it had earlier pursued in order to impose its position in connection with the color of the six panels. That is to say, this time it refused to deliver the equipment which it had allegedly manufactured and made ready for shipment to the other Project contractors, in order to impose its position and thereby receive monies outside the Invoice Certification and Processing Procedures, and also to prevail in its assertion that it should be paid its alleged costs, without the contractual milestones and parameters being taken into consideration.

25. Watkins-Johnson was supposed to deliver a further $1,012,770 worth of goods to the Buyer in October, in order to bring the total value of the goods delivered to $12,322,414. In the course of the present proceedings, Watkins-Johnson alleged that in October, it delivered, on

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13 Watkins-Johnson's own monthly report for September states, in para. 2.1.1:

> "3) The group Test and shipment of subsequent article Green Rose Category IV and Category V units have been delayed due to continued problems with the WJ-DCU-51."

It was anticipated in the over-all Project report that delivery of the Category IV and V hardware would be delayed 14 to 16 weeks. For this reason, Harris notes in its Work Progress Report that these delays would impact on the schedule of the airborne system contractor, who was supposed to receive the equipment from Watkins-Johnson by 15 October (in light of an extension of the deadline).

Iran's account, over $2.4 million worth of property to certain Project contractors, thereby bringing the total value of the goods delivered to Iran as at 31 October 1978 to $4,653,822.

Regardless of the truth or untruth of this allegation,[14] the schedule appended to Watkins-Johnson's own report for the month of October shows that the Seller had succeeded in shipping only 341 items out of the 1047 items of goods that were supposed to have been shipped and delivered by 31 October 1978.[15] At any rate, as reported

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[14] In the handwritten list which the Claimant prepared in connection with this allegation, it is asserted that the Claimant delivered the goods described in the following schedule, and with the values and on the dates set forth therein, to the IBEX Project contractors:

- June & July 1977: $798,452 (no independent evidence has been produced in support of this allegation)
- August 1978: $1,371,666 (no independent evidence has been produced in support of this allegation)
- 9 October 1978: $1,937,765 (without specifying the amount, Harris agrees that the equipment ready for delivery on 31 August 1978 was delivered to contractor LSC in Medford on 9 October)
- 17 October 1978: $300,316 (no independent evidence has been produced in support of this allegation)
- 30 October 1978: $245,623 (no independent evidence has been produced in support of this allegation)
- 28 December 1978: $16,333 (this is the only item of whose delivery, apparently to the Training Segment Contractor, the Respondent has any knowledge)

[15]

	Units scheduled (Contract)	Units shipped
Brown Rose	279	206
Green Rose		
Category II	25	13
Category III	147	122
Category IV	142	0
Category V	454	0

by Harris, E-Systems, and other Project contractors, the equipment that was supposed to have been shipped and delivered to E-Systems (the airborne system contractor, to which a large quantity of goods was to be delivered) on 15 October 1978 following an extension of time, was not delivered by that date -- nor indeed was it ever delivered, to state the matter more correctly. Moreover, as my colleagues in this Chamber are well aware, owing to their involvement in other IBEX cases, the airborne system program was totally aborted, and the airplanes allocated to this segment of the Project were eventually returned to Iran after the lapse of several years without the necessary work on them having been carried out, and after millions of dollars had been spent on expenses and in payment of enormous amounts of compensation to other contractors and Americans. In view of the delivery of certain equipment, in the month of October the progress of works percentage increased for the first time, instead of decreasing. Harris evaluated the progress of works for this month at 83%, and the Seller could have prepared and sent an invoice for the sum of approximately $895,000 on the basis thereof, but he refused to do so, insisting that he receive $2,400,000.

26. Notwithstanding repeated reminders and requests by Iran and its representatives (including Harris) that Watkins-Johnson deliver the equipment, the latter refused to ship and deliver the units (or even, in my opinion, to manufacture a large number of them), [16] as a means of exerting leverage in order to compel the Buyer to make

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[16] As we shall see in the present Dissenting Opinion, infra, the evidence presented by the Claimant itself (inter alia, its internal correspondence) demonstrates that its allegation that the equipment was ready, and that the Group Testing had been carried out, was totally untrue, even as at a date in November 1978. (See, inter alia, para. 27 of this Opinion).

extra-contractual payments. The schedule annexed to Watkins-Johnson's report for the month of November indicates that out of all the equipment under the Contract that was supposed to have been shipped by November 1978, only 341 units had actually been shipped. And yet, by that time the Seller should actually have delivered all of the goods which were the subject of the Contract, and thereby completed the works, whereby the total value of the goods delivered would have reached $12,960,822, with the inclusion of goods worth $638,408 which were due to be delivered during the month of November.

C. Frustration of Iran's measures intended to save the Contract and receive the goods

27. At this juncture, Iran was making strenuous efforts to avoid, by all possible means, "the program's suffering any serious consequences." For its part, however, the Seller was totally preoccupied with obtaining additional monies on the basis of its alleged costs (supposedly some $16 million, including 15% profit), and not on the basis of the progress of the works; and to this end, it attempted to force the Project Auditors, Assessors and Director to accept its position. Watkins-Johnson even sought, by taking unfair advantage of the situation, to obtain $52,000 in "sales and use taxes" [17] and approximately $116,000 for

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[17] Pursuant to the Contract, Watkins-Johnson was required to bear the burden of any taxes imposed in the United States. Such a claim could only relate to the "Repair and Return" task, work under which never, on principle, commenced. (See paras. 104-107 of the majority's Award.)

alleged change orders,[18] as well as to receive certain monies for yet other claims, as a precondition for fulfilling its contractual obligations.[19] All of the parties involved in the Project, including the Auditors and even the U.S. Government's representatives, pointed out to Watkins-Johnson that the Seller and the Project Director had to remain within the framework of the Contract and the Invoice Certification and Processing Procedures. The only solution, they all proposed, was that Watkins-Johnson ship at least $3.4 million worth of goods, in order to raise the progress of works to a level which would reasonably redress the imbalance between the payments made and the progress of the works. In an internal Memorandum dated 20 November 1978, whose contents were not made known to Iran prior to the filing of the Claimant's Rebuttal Memorial on 19 December 1986, and which is asserted to be a report on negotiations conducted with the representatives of Harris and Touche Ross, as well as the United States advisors and representatives, the participants reminded Watkins-Johnson that:

> the Program Director could not go to General T. and ask for more money for anything without showing that he was receiving tangible value for it.

A further fact was divulged in this internal Memorandum, namely that despite the allegation that certain equipment was ready to ship, which allegation Watkins-Johnson sought to use as leverage for obtaining more money, in reality it was going to be impossible for it to ship and deliver at least $6 million worth of goods not only in November, but

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[18] The Claimant withdrew this claim in the late stages of the proceedings. (See para. 11 of the majority's Award.)

[19] For example, the demand for $200,000 in connection with the issue relating to the change in paint! (See para. 16 of the present Dissenting Opinion).

in December 1978 as well; the delivery thereof would take until July 1979 or even later that year (even if all went as intended, and the Seller was really able to fulfill its promise). [20]

28. Watkins-Johnson itself has admitted the fact that at their meeting of 28 November 1978 with the representatives of Watkins-Johnson, the representatives of the United States, the Systems Integration Contractor and the Program Director maintained the position that the Seller and Buyer must "stay within the system" (i.e., within the framework of the Invoice Certification and Processing Procedures). At this meeting, Watkins-Johnson was reminded that the Buyer was paying the Systems Integration Contractor $67 million, the Systems Engineering Contractor $27 million, and Touche Ross $4 million (all of whom were United States contractors), to supervise the Project contractors' proper performance of their contracts and to provide services to the Employer in determining the progress of the works and the level of the contractors' entitlement to remuneration.

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[20] The writer of the report informs Watkins-Johnson's officers on page 3 thereof that Mr. Dick K. (one of the Project monitors, and a representative of the United States) asked for a rough schedule of shipments, whereupon he provided the latter with the following information:

Month	Approximate value
January 1979	$ 900,000
February 1979	900,000
March 1979	700,000
April 1979	1,000,000
May 1979	1,000,000
June 1979	1,000,000
July 1979	500,000

It is to be noted that even if this equipment had been manufactured and delivered in accordance with this new schedule, the Seller would still have had to deliver more than $1.5 million worth of additional goods in order to complete the Contract. It is also worth noting that this schedule itself reflects a one-year delay on the part of Watkins-Johnson in fulfilling its contractual obligations.

It was therefore out of the question to request the Employer to go outside the system, or even to anticipate that he might do so. At that meeting, the Contractor itself conceded that it had been told that it would need a 92% progress of works rating in order to receive the $2.4 million it sought. In the report dated 6 December 1978 allegedly prepared in connection with the above-mentioned meeting, Watkins-Johnson itself states that it was informed by Harris' representative that:

> he had recommended to the General [viz., General Asrejadid] that he not recommend the $2,400,000 invoice for payment as this would be outside the evaluation system and would most likely not be approved by General T.

29. The reports for the month of November during this period are all disappointing and disquieting. In practice, the gauge of the progress of works, indicating the number of items of equipment shipped, remained stuck at 341 (paragraphs 25-27, supra).

On the one hand, Harris reports that:

> An eventual 6 month slip is likely due to Category V unit technical problems, mainly in the Digital Control Unit software...

On the other hand, in his report prepared in December in connection with the progress of works through November, the Systems Engineering Contractor reports the situation as being even worse than this, stating that the Seller was behind schedule in manufacturing and testing the equipment as well:

> The Watkins-Johnson Group IV and V equipments [sic] are behind schedule on fabrication and test completion. Group tests which were scheduled for July 1978 are now planned for 18 December 1978 representing four and one-half month slip. Due to these delays, manuals are being delayed to Airborne Training and Ground Collection segments with impact not known.

> Watkins-Johnson is also reportedly holding equipment which are [sic] ready for shipment pending resolution of invoice processing and negotiation with buyer of CCN 1-4. 21

In arriving at the 83% progress of works rating for the month of November, Harris summarizes the matter on page 1 of its report, as follows:

- 2 of 3 Software problems solved; Group Test not yet achievable.
- 20 Data Deliveries behind Contract schedule.
- 262 Hardware Deliveries behind Contract schedule.
- Unresolved Software problems holding delivery of all available Category IV and V Hardware.
- The Contractor has refused to ship the available hardware directed shipped and needed for Buyer Personnel Training.

30. It is clear from the available evidence in the Case that under these pressures, which had seriously jeopardized the air and ground segments of the Project, at least, and in view of the promises given by the Seller through Colonel Jalali, the Project Director's representative stationed in the United States, that the equipment would be shipped, General Tavakkoli apparently agreed to pay Watkins-Johnson approximately $895,000, provided it delivered certain equipment and submitted an invoice for that amount, corresponding to the progress of works for the month of October. In connection with the balance of the amount sought, up to $2.4 million, General Tavakkoli responded that he did not think such a demand was valid, but stated that at any rate, since Watkins-Johnson had not been paid any down payment under the Contract, he was willing, in exchange for a bond from the Bank of America,

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21 This issue relates to alleged Contract change orders, but was withdrawn in the course of the present proceedings. (See: para. 16 of the majority's Award, and footnote 19 to this Dissenting Opinion).

> to in effect make such a down payment of 2 million at this time to aleviate [sic] [Watkins-Johnson's] cash flow problem...

(This point is, moreover, set forth in precisely these terms in a hand-written note and letter dated 12 December 1978 by Watkins-Johnson, filed by the Claimant on 19 December 1986.)

31. In view of the promises made to Colonel Jalali, and in hopes of finding a way out of this costly and injurious impasse, Iran approved invoice no. 70235 in the amount of $895,778, and delivered it to the United States Government's representatives, who were, within the framework of the Contract, to take receipt of the invoice and forward it to the Seller. Drawing upon the relevant letter of credit, Watkins-Johnson collected on the invoice on 19 December 1978, upon presenting it to the Bank of America.

In this way, the total amount paid to Watkins-Johnson in connection with manufacturing and providing the equipment came to $13,090,000, whereas the total value of the property which it alleges to have delivered as to that date was only $4,653,822.[22]

Not only did Watkins-Johnson fail to abide by its promise, but it also took a more belligerent position promptly after receiving the amount of invoice no. 70235. In a letter sent on 22 December 1978, it first alleged,

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[22] From this date on, no goods were delivered to Iran, except for certain goods with the inconsequential value of $16,333, which were delivered to the Training Segment Contractor, whereby the total value of the goods shipped was brought up to $4,670,155. Moreover, Watkins-Johnson has not only failed to rebut this fact at any stage of these proceedings, but even admitted it in one of its schedules filed with the Tribunal. (See footnote 14, supra).

contrary to the indisputable facts (see paragraph 27 and footnote 20 thereto, supra), that it had conducted the Group Testing on the remaining hardware items on 20 December 1978 and they were ready to be shipped. It then went on, however, to state that:

> Watkins-Johnson intends to withhold delivery of such equipment and to suspend work on the contract effective immediately...
>
> Watkins-Johnson has no alternative but to take steps to sell or transfer the hardware to other customers...

In the said letter, Watkins-Johnson not only refrained from reducing its claim from $2,400,000, of which it had already received $895,778, but requested payment of a further $4,049,572, plus $155,587 for alleged contract change orders.[23] Subsequently, in its letter dated 28 December 1978, Watkins-Johnson added to its previous terms the additional condition that it be reimbursed $52,000 in "sales and use taxes."

32. The evidence on file, inter alia the internal report prepared by officers of Watkins-Johnson's Recon Division, clearly demonstrates that steps to sell the (partially or fully manufactured) equipment had already begun well before Watkins-Johnson sent the letter dated 22 December 1978, and before it received payment on invoice no. 70235 (and also, most likely, before Watkins-Johnson made its promises to deliver), so that the results of the studies were reported to the company's officials on 19 December, in the form of projections on sales possibilities.

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[23] It is interesting that in its letter of 22 December, Watkins-Johnson, while admitting the fact that it was behind the contractual schedule for manufacturing and group testing, blamed this blatant breach, with whose dimensions we have become acquainted in the preceding paragraphs of this Opinion, on the failure to resolve the issue of the very trivial, baseless (and later withdrawn) claim for contract change orders.

33. It is not disputed that Watkins-Johnson halted all operations and activities in connection with the Contract as of December 1978 (if not, indeed, as from some months prior thereto). Moreover, it was because Watkins-Johnson regarded its contractual relations as terminated, that it refrained from sending any further work progress reports. The Systems Engineering Contractor reports that "no schedule analysis could be made" on Watkins-Johnson for the month of January, because the "monthly report with schedule status report was not received."

34. In January, measures to encourage or compel Watkins-Johnson to fulfill its contractual obligations were pursued with greater vigor. In a meeting on 12 January 1979, at which Colonel Jalali and representatives of Watkins-Johnson were allegedly present, a draft letter of agreement was prepared, as follows:

AGREEMENT OF UNDERSTANDING
12 January 1979

> It is hereby understood and agreed that upon Watkins-Johnson Limited commencing performance on the following specific tasks, the IIAF will immediately approve for payment Invoice No. 70239 in the amount of $1,529,412.00 (24) :
>
> (1) Return to work on the Category V equipment to the degree necessary to perform efforts required to complete and to prepare for shipment Ship Set No. 1.
>
> (2) Ready all equipment completed to date for shipment, i.e., packaging, labelling, etc.
>
> (3) Place all packaged equipment ready for shipment in a secured storage area specifically designated for Contract No. 108. (emphasis and footnote added).

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24 It should be noted that here, performance of the obligations was made a condition only of approval, and not payment, of the invoice. In view of what had been experienced in connection with the payment of invoice no. 70235, these precautions on Colonel Jalali's part were reasonable and justified.

35. From Watkins-Johnson's internal report dated 19 January 1979, which reflects this agreement, it appears that the said Agreement of Understanding was subsequently rejected by Watkins-Johnson's officials at an internal meeting, because:

> Perhaps such an agreement may not be in our best interest in the long run and that other approach should be considered. 25

Watkins-Johnson alleges that as a result of this internal decision, it sent another proposal on 15 January 1979 through Harris (rather than through Colonel Jalali, the Employer's resident representative, who was a party to the negotiations on 12 January). In that proposal, the steps to be taken were divided into six stages; stages one and two of the steps to be taken by the Seller were contingent upon "approval for payment [of] invoice no. 70239... and have it paid by the Bank of America in San Francisco." Apart from the fact that the evidence filed by the Claimant demonstrates that the counter step-by-step plan was notified to Harris by telex on 22 January 1979, and not at a date prior thereto, Iran was certainly unable to accept such a proposal, even supposing that it received it, in view of Watkins-Johnson's prior work record and behavior; for there was no way of knowing that such a payment of over $1.5 million would not meet the same fate as did the

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25 Although the Claimant stated this matter obliquely in the said document, the true reason for Watkins-Johnson's rejection of the agreement, as paras. 27-40 of this Opinion make clear, was that Watkins-Johnson neither had any goods ready for shipment, in order for it to be able even to pretend to be preparing them for delivery, nor intended to continue with the Contract. Therefore, Watkins-Johnson was certain that this being the case, it not only lacked any entitlement to receive payment on invoice no. 70239, but would also be obliged to continue with a contract which it had long since decided to repudiate, and the remainder of the equipment produced under which it had already sold off.

payment of more than $895,000. Watkins-Johnson itself was well aware of this fact. It is in all respects very important to consider, paragraph by paragraph, a further internal report of Watkins-Johnson dated 29 January 1979 (which allegedly reflects the events of 26 January 1979). Page one thereof states, in part, that:

> As long as he [i.e., the Program Director] makes no mistakes and is not vulnerable for [sic] personal criticism, i.e., [criticism for] approving payments to us..., he may be in a "safe" position.

Page two of the report states, in part, that:

> ... Scottie told me that Colonel J. is very upset with us because he feels that we went back on our word regarding the October invoice in the amount of $895,778, which made him look very bad in the eyes of his superiors. Colonel J. apparently recommended that we get paid the $895,778 October invoice and was under the impression, based on comments made by George M., that if we received such a payment, we would continue with the program and all would be well. Scottie said the P.D. even asked him while he was "In-Country" to call Mike McGuire and have Mike verify with Watkins-Johnson Limited that all would continue well if the P.D. went along with Colonel J.'s recommendation and the $895,778 invoice was paid. Scottie claimed Mike felt he got such verification from us. This was fed back to the P.D. and the invoice was approved and given to us and then the big blow came when we concurrently sent our "stop work" letter of 22 December 1978.

36. Now, for a better grasp of the events and of the substance of Watkins-Johnson's internal report dated 29 January 1979, we must refer back several days prior thereto, to a time when the results of the negotiations culminating in the preparation of the draft agreement dated 12 January 1979 pursuant to Watkins-Johnson's counter-proposal (which Iran never accepted) had not yet been frustrated.

Tampering with Harris' work progress reports, the original of which reflected an 83% progress rating, Watkins-Johnson removed the 83% figure and inserted "90%" in its place; then, making a photocopy thereof, Watkins-

Johnson used it as the basis for its demand on invoice no. 70239 in the amount of $1,529,412, which was prepared on 2 January 1979 and sent to Touche Ross on 9 January 1979. [26]

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[26] The majority's blatantly biased attitude in connection with this invoice, and especially the falsified progress report relating thereto, is the clearest evidence of the majority's unequal treatment of, and double standard towards, the arbitrating parties before this Tribunal, and it demonstrates the majority's highly solicitous policy towards the American companies involved in the IBEX Project, companies which, instigated by high-ranking officials of the Carter administration to abort and frustrate the Project, began to engage in pretexts and obstructionism and made idle, illogical demands and requests well before the victory of the Islamic Revolution in Iran; and to this end, some, such as the present Claimant, did not even shrink from brazenly tampering with and falsifying documents and reports. Neither the Parties to the claim nor the Members of the Tribunal would seem to have any doubt that the 90% work progress report is unaccompanied by the original copies and is merely a retouched photocopy of the report that Harris had previously prepared in connection with the month of November. The Respondent has produced strong and compelling evidence, including the results of the report by the "Criminal Laboratory - Documents Investigation Section" of the Islamic Republic of Iran Police in which it is certified that "the 90% progress of work report was prepared and forged by using the 83% progress of work report." The Claimant does not deny the fact that the work progress report attached to invoice no. 70239 is a retouched version of Harris' 83% work progress report, but it becomes caught up in a self-contradiction when it alleges, at one stage of the proceedings, that the report was altered by Harris, but at another stage states that it had altered the report itself, with Harris' knowledge, and finally, that it had altered the report, with the presumed knowledge of the Program Director. The only reason why the present Dissenting Opinion does not probe more deeply into the issue is that, as we shall see, Watkins-Johnson refrained from presenting the invoice to the bank and collecting on it, even though the invoice was approved (for whatever reason and purpose) and was sent to Watkins-Johnson by the United States representative. The majority's explanation, set forth in footnote 8 of the Award in order to allay the doubts arising from the issuance of invoice no. 70239 on a date prior to that of Harris' alleged statement accepting the 90% work progress rating, fails to dispel these ambiguities in any way; nor can it justify tampering with, distorting and falsifying the November 1978 report and using it as a basis for claiming on the aforementioned invoice.

This invoice was sent to the Project Director on 10 January 1979, and the available evidence shows that it was approved on 17 January 1979, after passing through all the necessary stages.

37. At this juncture the Project Director notified the Seller, in a letter dated 20 January 1979 in response to Watkins-Johnson's threats to sell the equipment, and in view of the harm that would be inflicted on the Project's airborne system segment, that:

> Your company will be held responsible for any costs that are incurred by E-Systems and the other [Project] segment contractors for the late delivery of the common equipment.

38. It was also at this same juncture, as stated by the majority in paragraphs 40 and 111 of the Award, that Watkins-Johnson filed claim with the U.S. District Court for Northern California, seeking an injunction blocking payment under the good performance guarantees.

39. Watkins-Johnson's internal report dated 29 January 1979 shows that Colonel Jalali intended to visit Watkins-Johnson's factories on 30 January 1979, in order to review the situation and determine whether the Seller's assertions that it was ready to ship the goods were true. Prior to this visit, Watkins-Johnson expressed its apprehension as follows:

> Colonel J. .. is now going to be placed in a new role of negotiating with us to be sure we make shipments, etc. if we are going to get additional invoices paid.
>
> It appears now that it is Colonel J.'s mission in visiting Watkins-Johnson on 30 January 1979 to negotiate with us, with instructions from the P.D. to make sure the customer gets hardware if they make further payments to us.

40. This visit did not take place, and there is no need to engage in exhaustive inquiries, or to go to great lengths, in order to ascertain the reason why it did not.

In the first place, the report dated 29 January 1979 states that:

> Colonel J. will be wasting his time in taking such an approach. I suggested that Scottie talk to Colonel J. on this matter and caution him against trying such "negotiations."

Both this apprehension (as described in paragraph 39) and the above-mentioned threat are understandable, in view of Watkins-Johnson's internal report of 19 January 1979, which states in one place that:

> Previously Dick had merely said we needed to show some "good faith move"... Now, he told Bill and I [sic] that we would need to do the following:
>
> (A) Return to work, or at least show signs of returning to work on Category V equipment.
>
> (B) Move completed equipment towards shipment, i.e. packaging, labelling, placing in shipping containers, etc.

And elsewhere, in describing the results of Colonel Jalali's visit on the morning of 15 January 1979 -- i.e., three days after the draft Agreement of Understanding was prepared, and on the date when there was an exchange of views between the writer of the report and "Dick" and "Bill," as set forth above -- Watkins-Johnson's representatives are quoted as saying, albeit with a certain degree of dissimulation, that:

> it was my understanding based on discussions with Bill that Colonel Jalali still seemed somewhat down on Watkins-Johnson and made the comment that Watkins-Johnson Limited has been overpaid to date on this contract.

In the second place, pursuant to a note mentioned at the end of the report of 29 January 1979, Dick K., one of the United States advisers stationed in Tehran whose duty it was, along with other individuals, to monitor the Project and take receipt of approved invoices on behalf of the IBEX Project contractors, telephoned the writer of the report at 11 o'clock on 26 January 1979 and informed him that:

> ... the $1,529,412 invoice for November... had been approved by General T. and would be coming back tomorrow by SIC... 27

41. Promptly after it was advised that invoice no. 70239 had been approved and dispatched, Watkins-Johnson prevented Colonel Jalali from making his visit and, in disregard of the agreements that had been made, it sent Touche Ross a

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27 Two points need to be explained here. First, in para. 31 of the Award, the majority has confused the date on which the report was written with that on which the events discussed in the report took place. Second, it was one of the terms of the Contract and a part of the invoice certification and payment procedure which the Parties (and all of the Project contractors) had followed from the very inception of the work, and to which they did not object at any stage thereof, that invoices were to be sent to the United States advisers and forwarded to the United States via the Systems Integration Contractor Courier for presentation to the bank by the Seller, and paid by drawing on the letter of credit (see also para. 31 of the majority's Award).

As for how and why this invoice was unexpectedly delivered to the Contractor's representatives before Colonel Jalali could make his visit and report on the steps which Watkins-Johnson would have to take before receiving the invoiced amount, this can be understood and justified only in light of the "state of administrative chaos [in the Army] which prevailed in Iran throughout the first few months" prior to the success of the Revolution (Award in Sea-Land Service, Inc., reprinted in 6 Iran-U.S. C.T.R. 149, 165) and the "riots and other civil strife in the course of the Islamic Revolution" (Interlocutory Award in Gould Marketing, reprinted in 3 Iran-U.S. C.T.R. 147, 152-53).

further invoice, no. 70241 in the amount of $1,624,382, and requested payment thereof. By this act, Watkins-Johnson intentionally added a new problem to the previous ones.

42. The Islamic Revolution of Iran gained victory over the previous regime on 12 February 1979. This far-reaching Revolution, which truly brought about fundamental changes in Iran's governmental structure and in the political/social life of the people, was inevitably attended and followed by the "foment and disorder which preceded and attended the Revolution."[28] The officials of the Shah's regime had inevitably to be swept away by the flood of such a Revolution, and this is indeed what happened. The new revolutionary officials were confronted by numerous and varied issues, about most of which, perhaps, they knew little. It was impossible to think about secondary (or perhaps even less essential) matters until relative calm was restored; nor would it have been reasonable or justifiable to expect otherwise. Great revolutions have always been confronted by the emergence of new problems and the appearance of counter-revolutionary movements, and sometimes a revolutionary nation has had to expend its life and energy for years in fending off and defeating such problems and obstacles. The Islamic Revolution was not immune to any of these difficulties.

43. Watkins-Johnson alleges that a mere three days after the victory of the Islamic Revolution of Iran -- that is, at a time when the great revolutionary storm had been unleashed upon the rule of the military authorities in every alley, street and quarter -- it sent the Program Director (a general in the by then disintegrated Army of

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[28] Award in Sea-Land (op cit, p. 166).

Imperial regime) its letter of 15 February 1979, in which Watkins-Johnson gave notice that since the negotiations with Colonel Jalali (see paragraphs 39-40, supra) had produced no result (!), Watkins-Johnson had decided to follow through with its intention of selling all the equipment in its possession in connection with Contract no. 108. This letter anticipated that the final sale of the goods would be consummated within 30 days after receipt of the letter, and that in any event, this process would be completed before 30 June 1979.

Iran states that it never received this letter and, what is more, that prior to the September 1979 meeting, it never received any letter or word from Watkins-Johnson following the approval of invoice no. 70239 and its submission to the representatives of the Advisory Group.[29] And even if Iran is to be deemed to have received such a letter under those circumstances, the issuance thereof must indubitably be regarded as a breach of the principles of good faith on Watkins-Johnson's part, for the letter was in reality sent in total disregard of all else, including the fact that invoice no. 70239 had been approved and dispatched, or was at least in the hands of the United States advisers, and that the amount thereof could easily be drawn from a valid letter of credit backed by sufficient funds.

44. As soon as the new authorities found an opportunity to turn their attention to contractual issues, they promptly sent out identical letters, without being aware of the

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[29] On the basis of the report by Watkins-Johnson's representative, which was filed with the Tribunal by the Claimant, at the September 1979 meeting the Employer's representatives told the representative introduced by Watkins-Johnson that they "had received no communication from Watkins-Johnson since the Revolution."

contractual issues at stake in each particular contract, but in the knowledge that in any case, the American contractors had abandoned the IBEX Project on dates prior to or contemporaneous with the Revolution. In the said letters, after noting the fact that "from the date Bahman 21, 1357 (Feb. 10, 1979), the accomplishment of all the works and expenditures under the Contract no. 108 has been considered to be stopped due to the recent transformation arising out of the Islamic Revolution of Iran," they invited the contractors, including Watkins-Johnson, to send their "fully authorized representative having the required documents for contractual negotiations" to Iran.

45. Instead of sending a fully-authorized representative acquainted with the issues involved, Watkins-Johnson introduced an Iranian legal firm to take part in the meeting of 15 September 1979 which had no substantive knowledge of the Project or of the issues pertaining thereto. At that meeting, Watkins-Johnson was requested to report on the status of the work performed or remaining to be performed under the Contract, and on the status of the goods and equipment produced. The attorney gave Watkins-Johnson his impression of the meeting as follows:

> All indications during the meeting were that ECO [Electronics Communications Organization Iran] is actively interested in continuing with the Project of which Contract no. 108 forms a part.

It is worth noting that at this meeting, Watkins-Johnson did not raise any claim or even assert that it had claims, or that it had been unable to receive the approved invoice no. 70239 or to collect the amount thereof. Nor, at this meeting, did it mention anything about selling the property, or refer in any way (even to any message) to the point that Watkins-Johnson intended to destroy, or scrap, the property for which it had allegedly not found a customer.

46. After a silence of nearly three months, Watkins-Johnson sent a letter on 5 December 1979 wherein it asserted -- in my view untruthfully -- that the manufacture of the hardware had been 100% completed prior to December 1978,[30] and furthermore declared that it had sold off much of the manufactured equipment, particularly the equipment relating to the Training Segment and to Categories II, III and IV, and that negotiations were under way to sell the Category V property. Here too, it did not mention that millions of dollars worth of goods were to be scrapped.

47. Iran states that following this statement and the break-down of the negotiations in 1980, it was obliged, by virtue of the breach of contract and in order to recover a part of the remaining $8 million worth of equipment that was supposed to have been prepared and shipped under Contract no. 108, to request Bank Saderat to pay it the monies under the good performance letters of guarantee.

III. REASONS FOR THE DISSENT TO THE AWARD

D. The Governing Law

48. It would initially appear, from a consideration of paragraph 93 of the Award, that the majority has endeavored in this Award -- contrary to its incomprehensible practice in the past -- to address the issue of the governing law. However, even a cursory glance at the contents of paragraph 93 of the Award makes clear that in keeping with its practice of dealing with issues in a hasty manner (experienced even in the Section wherein it recites the "facts"), the majority has attempted, by contenting itself with the assertion that "As a preliminary matter, the

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[30] See, in this connection, para. 27 and the footnote thereto, and paras. 37-40, of this Opinion.

Tribunal observes that Article 11 does not exclusively refer to Iranian law," to exclude the claim from the jurisdiction of the governing Iranian law.

49. In citing Article 11 and arriving at its hasty and incorrect conclusion, the majority has failed to take a number of issues into account. In the first place, it has failed to note the first sentence of that Article, which ends with a full stop -- thus constituting an independent statement -- and reads as follows: "The Governing law of this contract is the Iranian Law." Nor has the Award paid attention to the manifest fact that Contract no. 108 (the subject of the dispute) is an Iranian contract, and that this was precisely why, after stating that United States law would apply in certain exigencies, Article 11 goes on to provide that in the event of any difference between Iranian and United States law, "the Iranian law will govern".

There was no need to examine any complex issues or to embark on a laborious, lengthy inquiry, in order to perceive that the Contract is an Iranian contract. [31] The Contract itself could have guided the majority very well in this connection. The Contract was drawn up and concluded in Iran; it is in both Persian and English, and "the Farsi text will govern" (Article 13). Moreover, in the event of any difference concerning the applicability of any provision of the Contract, "the reasonable Article that the Buyer [i.e., the Iranian party, which was familiar with the

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[31] Even if it is conceded that the Tribunal might have entertained some slight doubt as to whether Iranian law was the governing law, the majority should have determined what law properly governed the contractual relations, by making an objective and substantive inquiry and by studying the Contract and its provisions. A.S. El-Kosheri & Tarek F. Riad, The Law governing a new generation of Petroleum Agreements: changes in the Arbitration Process, ICSID Review - Foreign Investment Law Journal vol. 1, No. 1, Spring 1976, p. 257 at 271-2.

Persian language and with Iranian law] selects" will govern (cf. Article 4.1 of the Contract). Because of this intimate relationship between the Contract and Iranian law, Appendix 5, paragraph 7 of the Contract authorized the Seller to engage "the services of one or more legal counsel" in Iran, to advise him in order to ensure that the terms and conditions of the Contract, and their application, conformed to Iranian law.[32] Pursuant to Article 9 of the Contract, "[a]ll disputes and differences... shall be settled in accordance with the rules provided by the Iranian Laws..."

The majority has not taken into account the point that in light of the Contract's terms, including the express provisions of Article 11 thereof, the agreement that United States law would apply on a secondary level was made in cognizance of the fact that the Seller had also undertaken certain obligations, such as the obligation to pay all taxes, fees and duties relating to the services under the Contract, or to its personnel, outside of Iran (i.e., in the United States). Obviously, then, only United States law would deal with those obligations, since they were not matters over which differences would be expected to arise between Iranian and United States law; and otherwise, if a difference did arise, the inevitable conclusion was that Iranian law was the governing law. Thus, given that Iranian law governed wherever Iranian and United States law contained similar provisions, and also that it was recognized as governing in the event of any conflict, it must be effectively concluded, by any interpretation, that the governing law was that of Iran.

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[32] In interpreting Section 1.105 of the United States Uniform Commercial Code, which provides for application of United States law in the absence of a choice of law clause or where the law selected has no bearing upon the transaction, it has been said that to understand the parties' meeting of minds as to the governing law, it is also necessary to consider whether or not the parties to the contract are, or can be presumed to be, familiar with that law. Issak I. Dare, Choice of Law under the International Sale Convention: A U.S. Perspective, AJIL vol. 77 (1983), p. 521 at 528.

Among other things, the majority has failed to take into account that the Party to the Contract with Watkins-Johnson was the Iranian Government; and it has long been a strong presumption and a general rule of law that the law of the contracting State party governs the relations between the parties, even where the contract is silent in that connection. In the absence of totally convincing evidence, incapable of being otherwise interpreted or impeached, and able to prove otherwise, it is an established rule and a compelling presumption that (as an independent sovereign subject of international law) the contracting State party does not yield to the jurisdiction of a foreign law -- let alone in a case such as that of the Contract at issue here, which expressly provides that the governing law is that of Iran.[33]

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[33] In 1929, the Permanent Court of International Justice ruled that "Any contract, which is not a contract between States acting as subjects of international law, is based on a municipal law." (Serbian Loans Case, Series A, No. 20/21, p. 41)

In 1951 the International Court of Justice, the successor to the Permanent Court of International Justice, confirmed this view in its judgment in the Anglo-Iranian Oil Company Case, ICJ Reports (1952), p. 112.

(See also, in connection with the point that a contract is governed by the law of the contracting State party, Certain Norwegian Loans, ICJ Rep. (1957) p. 879; also the Aramco decision, 27 International Law Reports (1963), p. 117 at 155). The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, pursuant to which a center called the International Center for Settlement of Investment Disputes (ICSID) has been established, gives a further stamp of approval to this rule in Article 42, para. 1, where it states:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party..."

(Footnote continues)

Lastly, the Tribunal has failed to take note of the fact that according to Article 968 of the Iranian Civil Code, contracts concluded in Iran are subject to the laws of Iran, and that even with respect to the relations

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(Footnote continued)

This issue has been given considerable attention in recent awards, some of which have been rendered by ICSID. (See, e.g., the following awards: Revere Copper & Brass Inc. v. OPIC, 17 ILM (1983) 1321; Benvenuti et Bonfant v. People's Republic of Congo 21 ILM (1982) 740; Kuwait v. American Independent Oil Co. (Aminoil) 21 ILM (1982) 976 at 1000; Amco Cpn v. Indonesia (ILM (1985) 1022).

The fact that these awards invoke international law cannot be construed as derogating from this rule or as elevating the contracts to the level of international law, for it is a long-established principle of international law that to attribute responsibility to a State, it is not a sufficient condition to establish (in arguendo) that said State is in breach of contract according to the law governing that contract; rather, a State can be held responsible only where it is in breach of international law and of its international obligations. The sources in support of this fundamental and elementary principle of international law are so numerous that the reader can, in fact, be referred to any book or article on international law which addresses the subject of State responsibility. It should be sufficient to refer, e.g., to the Advisory Decision of the Permanent Court of International Justice in Polish Nationals in Danzig (1932-A/B 44 p. 24), and to the following two sources: Bin Cheng, General Principles of Law, as applied by International Courts and Tribunals (1987), p. 170 et seq.; Oscar Schachter, International Law in Theory and Practice, General Course in Public International Law, Receuil des Cours (1982) - V p. 301 and 309.

Contemporary doctrine also recognizes as a settled rule the proposition that the law of the contracting State party governs the contract: D.W. Grieg, International Law (2nd ed.), 1976, p. 561-2; F.A. Mann, State Contracts and State Responsibility (1960) 54 A.J.I.L. p. 581; Fatouros, Government Guarantees for Foreign Investors (1962) pp. 190 et seq.; M. Sornarajah, The Pursuit of Nationalized Property (1986) p. 102-103; Samuel K.B. Asante, International Law and Foreign Investment: A Reappraisal, I.C.L.Q., vol. 37 (July 1988) p. 588 at 611 et seq.; also, an article by the last-named writer, entitled Stability of Contractual Relations in the Transnational Investment Process, I.C.L.Q., vol. 28 (April 1979), p. 401 at 406 et seq.
(Footnote continues)

between private Iranian persons, Iranian law does not permit a choice of foreign law "unless the contracting parties are foreign nationals and ... have stipulated that [the contract] is subject to the laws of another country." Therefore, where it is the Government itself that is a party to the Contract, a fortiori the proposition that the Government is subject to the laws of a foreign State will be contrary to law.

E. Jurisdiction

50. In taking up the jurisdictional issue, the majority has based its finding mainly on Award No. ITL 6-159-FT, in Ford Aerospace. As can be seen from paragraph 71 of its Award, the majority has also relied upon and taken into account the awards in Sylvania, Questech, Touche Ross and Harris, all of which are IBEX Project-related cases and were adjudicated by Chamber One. Except for the award in Sylvania which, as will be discussed below, the majority in this Chamber tried to vest with a semblance of legitimacy through a greater error than that committed by the Full Tribunal and by repeating the injustice done by the Full Tribunal's erroneous decision, the rest of these awards

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(Footnote 33 continued)
Contemporary doctrine also holds that a State cannot be compared to an ordinary person who enters into a contract with another individual: Ph. Khan, Contrats d'Etat et Nationalization. Les Apports de la Sentence Arbitrale du 24 Mars 1982, Clunet, 1982 p. 855; Joe Verhoeven, Arbitrage Entre Etat et Enterprises Etrangeres: des Regles Specifiques?, Revue de l'Arbitrage, 1985 - No. 1, Janvier - Mars.

invoke the Full Tribunal's Interlocutory Award in Ford Aerospace, in finding in favor of the Tribunal's jurisdiction; some of them also invoke the award in Sylvania, along with the Interlocutory Award in Ford Aerospace.[34]

Since Award No. ITL 6-159-FT is the corner-stone for the majority's jurisdictional decisions in all the IBEX Project cases, and because it has always been cited as a precedent in subsequent awards, I must examine Award No. ITL 6-159-FT, in setting forth my reasons for dissenting to

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[34] Although the Tribunal's awards must be made on the basis of respect for law, and although precedents -- even those set down by the Full Tribunal -- are not binding upon the Chambers in adjudicating their cases, it has regrettably been frequently observed at this Tribunal that a majority -- simply because it is a majority -- reaches a decision in some case by disregarding the most self-evident principles of logic, interpretation and law, and then refers in other cases to that very same earlier, unjust decision, in order to relieve itself of the burden of presenting arguments and reasons -- doing so, of course, in such a way as to make it seem as if that previous decision were a splendid achievement in the history of law and justice. This unbecoming approach constitutes a sort of deception, and an abuse of the fact that readers lack access to the case files and the awards cited. Here, readers of many of this Tribunal's awards should be cautioned against being taken in by the superficial grandiloquence of this Tribunal. In particular, they are well-advised to take the trouble of locating any precedential decision to which they are referred, so as to ascertain whether, and to what extent, the Tribunal has adhered to the most elementary principles of procedure and justice, in reaching the decision in question. I am most unfortunately compelled to state that the approach taken by the Full Tribunal in Ford Aerospace towards the jurisdictional issue, and its one-line argument relating thereto, fails to measure up to the way in which international jurists deal with important judicial issues. (The Interlocutory Award in Ford Aerospace, reprinted in 1 Iran-U.S. C.T.R. 268; the Award in Sylvania, reprinted in 8 Iran-U.S. C.T.R. 298.)

the Tribunal's jurisdiction over this Case. It is my belief that the Full Tribunal has erred grotesquely in its Interlocutory Award, wherein by an unjustified decision not supported by reasons, it has asserted this Tribunal's jurisdiction to hear the claims relating to the IBEX Project, contrary to the views of the two States party to the Algiers Declarations, and even contrary to the initial expectations of the United States claimants in those cases.[35]

51. Article II, paragraph 1 of the Claims Settlement Declaration excludes from the Tribunal's jurisdiction claims arising out of binding contracts which specifically provide that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the position of the Islamic Consultative Council (Majlis) of Iran. Pursuant to Article 9 of the Contract at issue in the instant Case:

> All disputes and differences between the two parties arising out of interpretation of the Contract or the execution of the Works which can not be settled in a

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35 A cursory look at the original Statements of Claim and memorials of the claimants in all these cases makes it clear that despite all their efforts to convince the Tribunal to rule in favor of its jurisdiction, even the United States claimants in these cases found it much more likely that the Tribunal would find that it lacked jurisdiction. It is of course understandable that if Iran's position had been accepted, most of the claims against the Iranian Armed Forces and the Ministry of Defense -- particularly the inflated multi-million dollar claims brought by all the IBEX contractors, namely the powerful multinational corporations supported by the United States government and engaged in the arms trade -- would have been excluded from this Tribunal's jurisdiction. The importance of this issue to the United States is easier to grasp when we learn that these contractors had, and still have, millions of dollars worth of Iran's assets, whether in the form of liquid assets or in military goods, in their possession, which assets they have in effect wrongfully confiscated pursuant to the policy of the United States.

> friendly way, shall be settled in accordance with the rules provided by the Iranian Laws, via referring to the competent Iranian Courts.

In my opinion, the Parties knowingly and deliberately provided that all disputes arising out of the Contract were to be within the sole jurisdiction of the Iranian courts, and were to be governed by Iranian law. As a result, the exclusion provided for in Article II, paragraph 1 of the Claims Settlement Declaration manifestly covers the present claim, and the Tribunal should have ruled that it lacked jurisdiction.

52. Generally speaking, the disputes arising out of any contract can be divided into two categories: first, disputes relating to matters of law, and second, disputes relating to matters of fact. In the present Contract, the Parties have taken both sorts of disputes into account with sufficient knowledge and awareness, and have placed both categories within the jurisdiction of the Iranian courts.

So that the condition for jurisdiction over matters of law would apply, the Parties have employed the words "all disputes and differences arising out of interpretation of the Contract". Then, in order to ensure that the same condition would apply to matters of fact, they used the words "the execution of the Works" immediately after the conjunctive particle "or". That is, all disputes over the interpretation of the Contract's provisions (matters of law), or all disputes arising out of the execution of the works (matters of fact) were placed within the sole jurisdiction of the Iranian courts.

Shortly after the Tribunal was established, an identical contractual provision was taken up in order to determine whether the Tribunal had jurisdiction. In that case, pursuant to Interlocutory Award No. ITL 6-159-FT, a majority of the Full Tirbunal held, without offering a single word of argument, that "in the present case, the

jurisdiction of the Iranian courts has been expressly limited to disputes arising from the interpretation of the contract and the execution of the works."[36] Emphasizing the English term "Works" (which does not appear in the governing text of the contract) in the abstract and outside the context of the contract, in reaching this finding the Tribunal failed to take into account the manner in which the issue of interpretation of the contract's provisions (which is nothing other than "matters of law") is counterpoised to and balanced by the issue of execution of the works (namely "matters of fact"). Then, attributing a highly circumscribed meaning to the term "works," it concluded that "... some of the Claimants' obligations to be performed outside Iran and all the Respondents' obligations such as payment have been left outside the jurisdiction of the selected courts." As a result, the Full Tribunal held that since not all disputes fell within the jurisdictional ambit of the Iranian courts, Article II, paragraph 1 of the Claims Settlement Declaration did not apply, and the Tribunal had jurisdiction over the claim. In my opinion, this finding by the Full Tribunal majority -- which was reached in a precipitious manner, without

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[36] Here, the emphasis is mine, in order to show how the majority, whether purposely or mistakenly, has replaced the conjunction "or" (which appears in the contract and gives "the execution of the Works" the same weight and importance as "interpretation of the Contract") with the conjunction "and," thereby doing away with the opposition and balance between "interpretation of the Contract" (i.e., matters of law) on the one hand, and "the execution of the Works" (i.e., matters of fact) on the other. It is also worth noting that in trying to render the meaning intended by the majority, the Tribunal's Division of Language Services happened to employ the word "'amaliyyat," in selecting a Persian equivalent for the term "work." It made this selection, and avoided using the term "kar," because it was fully aware that the word "kar" has a broader meaning than that intended by the Full Tribunal; and this constitutes further evidence in confirmation of the points set forth in this Dissenting Opinion.

setting forth any reasons, and without the slight effort to discover the meaning of the phrase "ijra-ye karha" ("the execution of the Works") in the Persian text, i.e., the governing version of the contract -- was incorrect for the following reasons:

53. One of the rules of interpretation of contracts is that the intent of the parties is to be accorded respect on the basis of the terms used and of the circumstances prevailing at the time the contract was concluded. In order to discover such intent, the contract must be examined as a single, inseparable instrument, and every particular provision thereof must be interpreted in that manner which conforms most closely to the over-all tenor and context of the contract. Where the contracting parties have made provision for settlement of their disputes, it would be illogical to imagine that they would provide means for resolving only one part of their potential disputes, without making provision for dealing with the rest. While it is not far-fetched to suppose that the contracting parties might foresee various solutions and adjudicative fora in order to deal with different kinds of disputes, one cannot entertain the implausible assumption here, where the Parties perceived the necessity of making provision for a means of settling their potential differences and consequently devoted one of the Contract's articles to this matter, that they made arrangements only for dealing with certain disputes, and remained silent on the means for resolving other major disputes.

54. The interpretation given to the English words "the execution of the Works" by the Full Tribunal majority in Award No. ITL 6-159-FT has led the Full Tribunal to regard disputes relating to important aspects of the contract as falling outside the meaning of this phrase. The Persian phrase "anjam-e karha," appearing in both the forum selection clause in the Ford Aerospace case and in Article 9 of the Contract at issue here, signifies "matters of fact,"

and not "accomplishment of the works." This assertion is borne out by three points of evidence:

Firstly, pursuant to Article 11 of the Contract, the governing law of the Contract is that of Iran, and for this reason the Contract's words must be understood within the context of current Iranian legal terminology and the manner in which that terminology is applied in conventional Iranian judicial usage and practice. The fact is that in Persian, a variety of phrases, such as "omur-e mowzu'i," "masa'il-e mowzu'i," "haqa'iq-e omur," "anjam-e omur," and "anjam-e karha," are used as equivalents for the English terms "fact" and "question of fact," and for the French "question de fait." The many memorials filed with this Tribunal by Iranian organizations, which were originally prepared in Persian and then translated into English, constitute the best evidence of this point. In the Persian version of those memorials, no single term has been used for "fact" and "question of fact"; rather, the various phrases given above have all been used interchangeably to mean the same thing.

Secondly, the contracting Parties have employed the phrase "anjam-e karha" in two different senses in two Articles of the Persian version of the Contract, and this is evidenced by the fact that this phrase is given different English equivalents: in Article 2.1.1, "accomplishing the works" is used, and in Article 9, "execution of works." It is quite understandable why two different phrases have been used in the English version for a single Persian expression appearing in a single Contract, because in the first place, as was stated above, the Persian word "kar" means both "fact" and "work." Thus, in Article 2.1.1 or Article 2.1.2, the Parties really had in mind "performance of works," rather than "omur-e mowzu'i" ("question of fact"). However, in Article 9 of the Contract, which relates to selection of the adjudicating

forum, "omur-e mowzu'i" ("question of fact") was intended, and thus the word "execution" was used in place of "performance," in order to render the Parties' intent -- which was not "performance of works" but rather "question of fact" ("omur-e mowzu'i") -- correctly and by a different term. In the second place, in English, "to execute" means "to carry into effect" a plan, order, law, judicial award, will, contract, and the like. Thus, wherever "anjam-e kar" is intended to be used in its narrow, specific sense, terms such as "accomplishment of works" or "performance of works" are used, rather than "execution of works."

Thirdly, in the Contract itself, the matter at issue here, namely the word "kar," has also been used specifically to mean "ta'ahhod" ("obligation" or "duty"). Article 2.2.5 provides that:

> If the Buyer would not be able to meet any of his duties on time, he will ask the Seller to accomplish that work and receive related charges according to invoices approved by the Buyer. (emphasis added)

The words "ta'ahhod" and "kar" ("duty" and "work") have both been used to denote a single meaning in both the Persian and the English versions. As a result, the invocation of the finding (unsupported by reasons) of the Full Tribunal in Ford Aerospace -- to conclude that in using the phrase "execution of the works" in the contract, "important aspects of the contract including some of the Claimants' obligations to be performed outside Iran and all the Respondents' obligations" were left outside the jurisdiction of the selected fora -- is extremely inequitable and results from (a) the prejudgmental manner in which the Full Tribunal majority dealt with the jurisdictional issue, whereby it ignored the incontrovertible fact that the Persian text was governing; and even (b) from that body's defective, incorrect, and out-of-context treatment of the English version of the contract.

As a consequence (even if we take the English version of the Contract as our criterion), in view of the preceding discussion and of the fact that in Article 9 of the Contract, the phrase "anjam-e karha" ("execution of works") means "omur-e mowzu'i" ("question of fact") and not "anjam-e karha," as intended in Article 2.2.5 of the Contract (namely "accomplish[ment] of works"), and also since any Iranian court would construe the phrase appearing in Article 9 of the Contract as signifying "omur-e mowzu'i" ("question of fact"), the Parties in actuality placed all of their potential disputes, whether over questions of law or over questions of fact, within the sole jurisdiction of the Iranian courts.

55. The record in Sylvania shows that Iran correctly drew the attention of Chamber One to the extensive meaning of the phrase "anjam-e karha," and to the broad and unambiguous meanings of the word "kar." On page 12 (of the English version) of Award No. 180-64-1 (reprinted in 8 Iran-U.S. C.T.R. 298, 306-7), the majority concedes that "in its Interlocutory Award No. ITL 6-159-FT the Full Tribunal did not refer explicitly to the interpretation of the Farsi word 'kar' and its impact on the scope of the Tribunal's jurisdiction." Unfortunately, however, instead of limiting the extent of the prejudice caused by the Full Tribunal's unjust judicial error by rendering an equitable and rational decision, and solely for the purpose of retaining jurisdiction over the claims relating to the IBEX Project -- at whatever cost, and by whatever means necessary -- the majority in Sylvania has suddenly become an expert in the Persian language even though totally unacquainted with that language and its literature. The majority there states, on the strength of the strange and astonishing pretext that the many different meanings of the Persian word "kar" lead to an ambiguity in the Persian text, that it is thus necessary to refer to the English text -- i.e., a text which was invalid against the Persian text wherever there

was a conflict between the two versions. This is absolutely unbelievable. Stating that the many different meanings (or, more correctly, the broad meanings) of the Persian word "kar" lead to an ambiguity in the Persian text, is just the same as if the majority were to say that water burns, instead of quenching thirst, and that fire quenches instead of burning.

In Sylvania, Iran appropriately requested Chamber One to refer the issue to Persian language experts, of whom there are also many in Western universities, if it entertained any doubts as to the clear, comprehensive and all-embracing language of Article 8 of the contract in covering any conceivable dispute. Unfortunately, in adjudicating cases brought against Iran, it seems as though the majority thinks it is omniscient and does not need the help of experts, even regarding a language to which it is totally alien. The fact is that the majority in Chamber One is attempting to conceal the unconcealable, by means of strange and astonishing inventions such as its assertion that the word "kar" in the Persian text -- the one expressly considered by the contract to be the sole governing text -- has a broad meaning leading to an ambiguity in that text.

The fact is that the broad meanings of the Persian word "kar" not only do not lead to the slightest ambiguity, but actually eliminate any possible ambiguity, and cause the Contract to cover every conceivable dispute arising out of the Parties' reciprocal obligations and works, and "questions of fact" in general. Even if, in arguendo, the several different meanings of "kar" did lead to an ambiguity -- which is not the case -- the majority cannot arbitrarily refer to the English text on this pretext and, by its erroneous understanding (even of the English text), forcibly make itself the arbiter of the fate of the IBEX cases.

As a matter of fact, the majority is precluded from disregarding the prevailing status of the Persian text, which is the sole governing text in the event of differences between the two versions, because no arbitral tribunal has the right to ignore elements of the contracting Parties' unquestionable and unambiguous intent and consent. Article 33 of the Vienna Convention on the Law of Treaties not only gives effect to an agreement by the parties to a treaty as to their choice of a governing text, but furthermore provides, in eliminating differences between the meanings of texts of equal authenticity, that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." That is to say, it burdens the interpreter with the task of reconciling the different meanings of those texts.

56. There can be no doubt that arbitrations, whether international or between subjects of private law, derive their mandate and competence from the consent and agreement of the parties to the arbitral agreement; therefore, it is the parties' consent that determines the scope, limits and area of certitude of an arbitration's authority and jurisdiction.[37] Moreover, it is an established principle

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[37] See, in this connection, the following awards and sources:

Chorzow Factory Case (1927) P.C.I.J. Series A, No. 8, p. 32; Mouromattis Palestine Concession Case, Judgment No. 2 (August 30, 1924) Ser. A, No. 2, at 16; The Free Zones Case (1932) P.C.I.J. Series A/B, No. 46, pp. 138-9; K.S. Carlston, The Process of International Arbitration (1946) p. 62 et seq.; Julian D.M. Lew, "Determination of Arbitrators' Jurisdiction and the Public Policy Limitation on that Jurisdiction", p. 73, published in Julian D.M. Lew, Contemporary Problems in International Arbitration (1977) p. 73; Sigvard Jarvin, "The Sources and Limits of the Arbitrator's Power," published in D.M. Lew, Contemporary Problems in International Arbitration (1987), p. 50 at 71.

of the interpretation of contracts and treaties, that the conditions which confer jurisdiction must be interpreted restrictively, "the reason for this being that 'no State can, without its consent, be compelled to submit its disputes with other States either to mediation, or to arbitration or to any other kind of pacific settlement.'"[38] International fora and arbitral bodies (whether international or not) have always applied the rule of restrictive interpretation very conscientiously and scrupulously, for their primary and most basic concern is to ensure that the award is not invalidated and made unforceable by virtue of any act of ultra vires.[39]

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[38] Dissenting Opinion of President Lagergren to the Award in International Schools Services, Inc. [citing the Decision by the P.C.I.J. in The Eastern Carelia Case, Series B, No. 5 (1923), p. 27], reprinted in 5 Iran-U.S. C.T.R. 348, 351; Dissenting Opinion of the Iranian Arbitrators in Case No. A/18, reprinted in 5 Iran-U.S. C.T.R. 275, 287-288; Ambatielos Case, ICJ Reports (1953) p. 33; Verzil, International Law in Historical Perspective, Vol. VI, Leiden (1973) p. 316; D.W. Greig, op cit (cited in footnote 33, supra), p. 481; Rousseau, Droit International Public, T. 1, 1970, pp. 273-275; Nguyen Qnoc Dinh, Droit International Public, Paris 1980, p. 247; Nicaragua v. U.S.A., I.C.J. Judgment No. 86/8 of 26/6/86, p. 9; Lillian B. Grimm, 2 Iran-U.S. C.T.R. p. 78 at 80; Award in Case No. B/16, 5 Iran-U.S. C.T.R. p. 94 at 95; Award in Case No. B/24, 5 Iran-U.S. C.T.R. p. 97 at 99.

[39] See Carlston (op cit, footnote 37), pp. 62-65, and the numerous sources cited by that writer; also the article by Sigvard Jarvin (op cit, footnote 37), p. 53. Regrettably, the existence of a Security Account containing a huge sum of money, upon which successful United States claimants can easily draw -- with its mechanism that is so exceedingly simple and yet so dangerous for Iran -- through a superficial interpretation of the provisions of the Declarations has made the Tribunal remiss in abiding conscientiously and scrupulously by the limits of its authority; or rather, perhaps, even reckless at times about violating those limits.

In this Case, and also in those awards relied upon as precedents for the decision, not only have established principles and rules of law been trampled upon, as set forth above, but the point has been disregarded that in providing for the exclusion made in Article II, paragraph 1 of the Claims Settlement Declaration, the two sovereign independent States party to the arbitral agreement have expressly cautioned the Tribunal against adjudicating this category of claims. In such a situation, where one Party to the underlying Contract in the dispute is that very State which made provision in that same Contract to vindicate the principle that its municipal courts have jurisdiction, and also insistently adhered to this intent in the arbitral agreement (the Algiers Declarations), the Tribunal should -- in keeping with Iran's views and to eliminate any possible doubt and misgiving -- have declined to extend its jurisdiction, in favor of this sovereign independent subject of international law.

57. If, in keeping with the Full Tribunal's interpretation, all or even the most basic obligations of the Buyer (Iran), and also the obligations of the Seller (Watkins-Johnson), could be considered as falling outside the jurisdictional ambit of the Iranian courts, and consequently as not being covered by the provisions of Article 9 of the Contract, it must then be concluded that adoption of that Article was illogical and unreasonable,[40] absurd and self-contradictory,[41] fruitless and with

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[40] Dissenting Opinion of Judge Anzilotti in the Meuse Case (1937), Neth/Belg P.C.I.J., Series A/B. 70, p. 47; and CBA International Development Corp. and The Government of Iran, Award No. 155-928-3 (1984), reprinted in 5 Iran-U.S. C.T.R. 177, 181.

[41] Advisory Opinion of the Permanent Court of International Justice, in Polish Postal Service in Danzig (1925), B.11, p. 39; and CBA International Dev. Corp., reprinted in 5 Iran-U.S. C.T.R. 181.

impossible consequences, [42] since the works relating to the manufacture and provision of the goods under the Contract were to be performed in the United States. The presumption that the Parties have acted in such an unreasonable, pointless and irrational manner must also be rejected, in view of law and logic.[43]

58. This kind of interpretation is also incompatible with the presumption that two parties act in good faith and honesty in entering into a contract.[44] Moreover, such an interpretation of Article 9 not only fails to give value to that provision, but in effect divests it of all its rational and logical effect. The harsh and peculiar result of this interpretation[45] for Iran is that an independent sovereign State supposedly acted contrary to the prevailing

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42 Dissenting Opinion of Judges Anzilotti and Huber in The Wimbledon Case (1923) P.C.I.J. A.1, p. 36; and CBA International Dev. Corp., 5 Iran-U.S. C.T.R. 181.

43 See Bin Cheng (op cit, footnote 33, supra), pp. 106-107.

44 "Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law." See Bin Cheng (op cit, footnote 33, supra), p. 106.

45 See L.P. Simpson, Contracts, pp. 211-212:

> "5- If possible without going contrary to the manifest intention of the parties, a contract will be interpreted so as to render it reasonable and fair rather than unreasonable and harsh to one of the parties.

practice and, notwithstanding its own efforts to ensure that its courts enjoyed jurisdiction, placed itself within the jurisdiction of the foreign courts, and indeed of any court which might in future assert its jurisdiction, whereas that same State could prosecute the other Party to the Contract only before its own municipal courts. This interpretation is diametrically contrary to the purpose and intent of that contractual provision; it is also precisely contrary to all the above-mentioned principles, and is therefore invalid.

Surprisingly, in the Interlocutory Award in George W. Drucker, which was issued contemporaneously to the Interlocutory Award in Ford Aerospace and other interlocutory awards on the jurisdictional issue, the Full Tribunal majority recognized that:

> It is in practice often difficult if not impossible to draw a demarcation line between disputes concerning the execution of an agreement, i.e. the performance of the parties' contractual obligations, on the one hand, and the interpretation or validity of the agreement on the other hand; disputes of the former kind will often inevitably entail questions of interpretation or validity, and disputes of the latter kind usually arise from performance. 46

F. Termination of the Contract

59. In order to reach its contemplated results, the majority has attempted, just as it did in the other IBEX Project cases, to suggest, by distorting the facts in the Case and by interpreting them in a blatantly erroneous

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46 See 1 Iran-U.S. C.T.R. 248, 254.

manner, that Contract no. 108, like the other contracts in the Project, was terminated as a result of a deliberate policy decision on Iran's part to halt the Project. This finding by the majority in connection with all the IBEX Project cases is highly incorrect and unjust; and in view of what has been set forth in Section II. B of this dissenting Opinion, supra, it does not conform in any way to the facts in this Case. In my opinion, the evidence in this Case clearly demonstrates, firstly, that the Claimants were in breach of the present Contract, and secondly, that the United States' military policy towards Iran changed with the advent of the Islamic Revolution of Iran, whereupon the IBEX Project was aborted, so far as its intended objective was concerned.

The Contractor was already in breach of Contract no. 108 well before the victorious outcome of the Islamic Revolution of Iran, having abandoned the Contract by December 1978 at the latest, without having performed thereon. Before the victory of the Islamic Revolution, the Contractor initiated and carried out the sale of goods already sold to the Respondent; and in January 1979, he resorted to the United States courts, sua sponte and in the belief that the Contract was no longer valid, and sought to have the good performance guarantees cancelled or, alternatively, to enjoin any potential attempt to collect on them. Even if the Claimants had desired to continue working on the Contract independently of the United States' military policy, they would have been unable to do so, because from the viewpoint of the United States Government, the basic objective in planning and carrying out the IBEX Project had been frustrated by the tempestuous events of the Islamic Revolution in Iran. Thus, the United States Government adopted a policy of cutting off military

cooperation of every kind, and in particular the sale of military services and equipment, whether under direct foreign military services sales (F.M.S.) contracts, or under contracts entered into with Iran via United States companies. As a result, the United States regarded the IBEX Project as having been aborted, inasmuch as the raison d'etre for completing the Project had been frustrated, and at this point that Government cut off its very life-line. Under such notorious circumstances, and in a situation where the United States Government has expressly stated, and continues to state, before the Tribunal that as a matter of political policy it will refuse to deliver military goods and services to Iran -- even those goods and services for which it was paid in cash a number of years ago, and several times over at that -- the majority's position that the IBEX contracts were terminated by the Iranian Government is equivalent to sentencing an innocent person, accused on the trumped-up charge of attempting to kill someone who was murdered long before, in order to conceal the culpability of the real criminal.

F.1 The Contract was breached by Watkins-Johnson

60. As stated in paragraph 72 of the majority's Award, and as is made clear from the detailed account of the facts in Part II of this Opinion and in scattered places in the Award itself (e.g., in paragraphs 50 and 56), Iran has argued that the Seller was in default and in breach of contract on two grounds: first, his failure to make timely performance on his basic duties and obligations under the Contract, in connection with delivering the goods in accordance with the agreed schedules and time-tables; and second, the Seller's unjustified halt of the operations

under the Contract and his termination of the Contract without cause, despite the unvarying good faith of the Respondent, and also the Seller's sale or destruction of millions of dollars worth of allegedly manufactured goods, for which he had already been paid by Iran.

F.1.1 Breach of contract due to nonperformance on obligations

61. There appears to be no disagreement between the majority and me over the fact that almost from the outset, Watkins-Johnson was clearly behind schedule in manufacturing and delivering the goods, and also that its default caused delays in the other contractors' performance (paragraphs 14-26 of this Opinion), and that Watkins-Johnson, being aware of this fact, refrained from sending any invoices for the period from May through September 1978 (paragraphs 20-23, supra and paragraph 53 of the Award). There can also be no doubt that Iran exercised forbearance with the Contractor despite Watkins-Johnson's flagrant default on the Contract, in order to save the Project and to enable it to continue and, ultimately, to prevent further injury and losses; and thus, in practice, Iran gave Watkins-Johnson ample opportunities to fulfill its obligations under the Contract (paragraphs 27-41, supra).

Under such circumstances, the matter is clear, so far as legal rules and principles are concerned. It is a well-established rule of law that in contracts where provision is made for performance within a specific period -- and particularly in contracts relating to the purchase and sale and delivery of goods -- the period within which the obligations are to be carried out constitutes a basic precondition for entering into the contract; or in more technical terms, the time of performance is of the

essence.[47] And in contracts such as the instant Contract, where the subject of the obligations undertaken

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[47] Under Iranian law, the obligation to make timely performance on the contract derives from Articles 219 and 220 of the Civil Code, which provide that "contracts made according to law are binding on the parties and their substitutes..." and that in performing on these obligations, performance includes not only "what is expressly provided for in [the contract], but also ... all of the consequences arising from the contract by virtue of customary usage and practice and law." Moreover, if it turns out that the time fixed for performing on the obligation, and the performance of the obligation itself, namely "the condition and the stipulation thereto... are both of the essence of the agreement, then in that event, performance outside the specified time is not what was contracted for"; and in any case, late performance of an obligation entitles the obligee to demand damages upon expiry of the allotted time (Dr. Sayyed Hasan Emami, Hoquq-e Madani [Civil Law] (Vol. I, 1356/1977), at 237-239; and Dr. Naser Katoozian, Hoquq-e Madani [Civil Law] - Specific Contracts (1353/1974), at 142-145; Dr. Sayyed Hosayn Safa'i, Hoquq-e Madani [Civil Law] (Vol. II), "Obligations and Contracts," at 228-230); see also in this connection Article 387 of the Civil Code.

The same situation obtains in the Common Law and under English, Australian and Canadian law, and if any differences are to be found between the Common Law and equity, owing to the flexibility of the latter, such differences are limited to instances where specific performance of the obligation is both requested and possible, and where under the particular circumstances of the case it is determined that performance is preferable to invalidation of the contract or to recognition of the right of termination -- albeit, none of these systems disagrees with recognition of the other party's entitlement to claim damages. J.W. Carter, Breach of Contract (1984) section 543 et seq.; Cheshire, Fifoot and Furmston's Law of Contract (11th ed. 1986) pp. 60, 539, 600; Chitty on Contracts (24th ed. 1983) sections 428, 1390-1391; Trietel, The Law of Contracts (7th ed. 1987) p. 631; Smith & Keenan's English Law (8th ed.) pp. 289-290; Corbin on Contracts (one volume, 1981 reprint), p. 669 ff; and L.P. Simpson (op cit in footnote 45, supra), at 335. It has even been expressly stated that with the exception of the times for payment, in most commercial contracts and in some noncommercial transactions, "time" is of the essence (Chalmers, Sale of Goods (18th ed. 1981), p. 107; Trietel, loc cit). In United States jurisprudence, certain writers hold that the rule has undergone certain developments, and are of the

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therein is connected, like a link in a chain, to the obligee's own obligations vis-à-vis other contractors, and where a delay by the obligor in performing on his own obligations thus delays the performance of the works on the

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(Footnote continued from preceding page)
opinion that the condition that the time of performance is of essence is not a rule from which there can be no derogation; they thus consider this factor together with the particular circumstances of each case (Corbin, op cit, p. 671 ff), although they have themselves resorted to this rule in a generic sense when embarking on a discussion of synallagmatic contracts and the interdependence of the contracting parties' obligations; moreover, such a concession to the particular circumstances of the case has no bearing upon the present discussion. Alluding to these same developments, Simpson agrees that "at Common Law time is of essence; so any delay, however short, justified the buyer's refusal to accept the goods." He then adds immediately thereafter that "even today, under the more liberal rule by which the buyer's discharge depends on materiality of the breach, a very brief delay may be deemed material" (Simpson, op cit, p. 336; see also Williston, On Contracts, Section 855 (p. 227), and Section 845-947). Moreover, if American jurists are in favor of greater flexibility and circumspection with respect to goods which are to be produced pursuant to a special order and over a period of time, they regard such flexibility itself as deriving from a concern that in such cases, an award which invalidates, terminates or nullifies the buyer's obligations might cause injustice to the other party (which categorically does not apply in the instant Case). Otherwise, jurists of that system regard such delays as constituting a breach of contract and as entitling the buyer to demand damages, both in these latter instances and in those mentioned hereinabove (see the aforementioned sources).

It is worth mentioning that in a similar situation where the works were to be performed in accordance with the contractual specifications and over a period of time, an arbitral forum, accepting the principle that the time of performance was of the essence, recently not only dismissed the claimant's claim for about $8 million, but also ruled that the claimant must make restitution of the monies received by it from the respondent, plus the latter's wasted expenses or damages, even though it had performed certain services under the contract. Christian Rosing A/S 1984 v. Air Canada, International Arbitration Report (1988), pp. 8-10 and A1-A31.

other units of the project or else to possible liability on the part of the obligee, then a fortiori the time of performance is of the essence of the contract, and performance within the time specified therefor constitutes, as a unit, the objective intended by the obligee.[48] The time of performance becomes an essential condition, both pursuant to an express condition and in view of the particular circumstances of each case, inter alia where provision has been made for a condition entitling the interested party to terminate the contract in the event of delay.[49] In such instances, mere proof of the delay has been deemed to be a sufficient condition for accrual of a right to terminate the contract and demand damages.[50] Furthermore, the Respondent's forbearance in not availing itself of its right to terminate upon expiry of the contractual deadlines, due to its having granted repeated extensions in hopes of ensuring that the obligation could be performed, does not deprive it of such a right or of its right to demand damages, because firstly, the Claimant's subsequent defaults are in themselves grounds for reviving this right; secondly, in 1978 Iran repeatedly reminded the Claimant of its responsibility (cf. paragraphs 23-30, supra); and finally, in January 1979 it notified the Claimant in writing that it would be held responsible "for any costs that are incurred by ... the other [Project] segment contractors for the late delivery of the common equipment" (supra, paragraph 37; and pragraph 34 of the

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48 Corbin, op cit, p. 676.

49 Carter, op cit, Sections 550-551. The provision made for certain pre-termination formalities such as the grant of a grace period within which to remedy defects, or even the deduction of a percentage of the price of the transaction for each day of delay, as provided for in Article 7 of Contract no. 108, not only does not diminish the effect of this condition, but is actually evidence that the time of performance was considered to be of the essence of the contract.

50 See Carter, op cit, Sections 569-572.

Award); and ultimately, in 1980, after all its efforts had proved unavailing, it took measures to collect on the good performance guarantees (paragraph 47).[51]

F.1.2 Breach of contract due to the halt of operations and sale of the goods

62. In addition to being in breach of the Contract as set forth in paragraph 60 above, immediately upon receiving the sum of $895,778 under invoice no. 70235, the Claimant halted the operations and sent the letter of 22 December 1978, wherein it revealed the secret steps it had been taking for the purpose of selling off the Respondent's properties [52] (paragraphs 31-33, supra). The Claimant took these measures nearly two months after the twenty-month term under the Contract had expired (paragraph 7, supra).

In an attempt to diminish the effect of Watkins-Johnson's blatant breach of the Contract, to

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[51] See Chalmers, loc cit; Williston, op cit, Section 849; and the judgment in Christian Rosing, A/S 1984, cited in footnote 47 above.

[52] The statement made in paragraph 38 of the Award, to the effect that after halting its performance Watkins-Johnson assessed the market value of the unshipped equipment for accounting purposes, is incorrect. This is because, firstly, this action was commenced well before that time, so that the results of the relevant studies were reported in detail on 19 December 1978, i.e., before the letter of 22 December 1978 was sent (para. 28 of the Award, and paras. 31-33 of this Opinion). Secondly, it is clear from a glance at the report that what was involved was an intention to sell the goods in the market, and not to estimate their market value for internal purposes. For example, the first lines of page one refer to "equipment that could be sold for the contractual prices within six months." This internal memorandum also reflects the results of studies on the possibility of selling various items of equipment, and the potential expenses required for selling them to other customers.

justify its illogical finding that the Contract was terminated pursuant to the Respondent's letter of 16 July 1979 and, finally, to find some way out of the delimma in which it found itself -- namely, that a dead man cannot be murdered more than once -- the majority alleges in paragraph 74, without having the slightest evidence in support of its finding, that Watkins-Johnson's sale of goods prior to January 1979 would not have prevented a resumption of the works. Firstly, in light of the facts in the Case, it is not at all clear how the majority has been able to determine that Watkins-Johnson intended to resume performance. In the face of these same facts, inter alia the fact that the Seller halted its performance in December 1978 (paragraphs 32, 42 and 86, and footnote 9 to the Award; also paragraph 33 of this Opinion), and that it went to court to prevent the Buyer from calling on the good performance guarantees, and finally that it frustrated all the latter's good faith efforts to save Contract no. 108, any presumption that it did intend to resume performance is in no sense either rational or impartial. Secondly, this account by the majority is totally inconsistent with evidence filed by the Claimant itself, which indicates that the process of selling off the goods must have been completed by June 1979 at latest. The Claimant alleges that in the penultimate paragraph of its letter of 15 February 1979 to Iran, it gave notice (see paragraph 43 of this Dissenting Opinion) that:

> It is our intention actively to pursue the sale of this equipment with the goal of consummating a final sale thirty (30) days after your receipt of this letter but in any event not later than 30 June 1979).

As for the Tribunal's principal arguments (paragraphs 78-88 of the Award) for surmounting these obstacles, they consist of the following: Since Iran refused to pay invoices no. 70239 (for $1,529,412) and 70241 (for $1,624,382) or to provide adequate guarantees and assurances that it would pay them, Watkins-Johnson was entitled (a) to halt its

operations relating to delivery of the goods under the Contract, and (b) to sell off those goods in order to mitigate its losses. The (factual and legal) grounds and arguments relied upon by the Tribunal in reaching the above findings are all either incorrect, circular, or foreign to the facts in the Case. (See also the Sections under "Exceptio non adempleti contractus" and "Mitigation of losses," in paragraphs 77-88 of the present Opinion.)

63. The majority lays the first uneven brick of its edifice when, despite admitting the connection between the progress of works and payment of the contractual price, and the fact that delivery of the goods constituted an essential element in assessing the progress of works percentage (paragraph 78), and without considering the contractual provisions, inter alia Appendix 2 to Contract no. 108 (paragraphs 51 and 77 of the Award, and paragraphs 8-12 of this Dissenting Opinion), it alleges that Watkins-Johnson was justified in relying on its previous practice (i.e., in collecting on the invoices up to December 1977, on the basis of costs). I simply do not know to what precedent and contractual practice the majority is here referring, such that it deems it to have changed and amended the provisions of the Contract, in the face of all that has been set forth above, including (a) the fact that the payments made in 1977 do not negate the connection between the rate of progress of works and the payments, since the delivery factor was not then a significant parameter for determining the work progress percentage, and those payments do not alter the synallagmatic nature of the Contract or the condition that any payments were to be made vis-à-vis the progress of works; (b) the fact that the Project supervisors and auditors, the United States representatives, and the Respondent all believed that Watkins-Johnson's invoices should be paid on the basis of the work progress percentage; (c) the Claimant's own conduct in refraining from sending invoices for five

months, due to the imbalance between the work progress rate and the monies already received; (d) the nonpayment of the subsequent invoices sent in October and November; and finally, (e) the fact that payment on invoice no. 70235 was agreed to solely because the work progress percentage permitted a payment to be made under the contractual invoice processing procedure. What is most important of all is the fact that contrary to the majority's allegation, the invoices prepared and paid in 1977 and filed with the Tribunal by the Respondent (e.g. Annexes no. 5-10 to Doc. no. 179) clearly show that those invoices were prepared on the basis of the performance evaluation made by the "System Engineering Contractor" (Harris' predecessor) "on the basis of progress of works in accordance with paragraph 1.3 of appendix 2 of Contract No. 108."

64. The next error by the majority arises from its allegation (in paragraphs 79 ff) that Iran agreed to make prompt payment to the Claimant of the sum of $2.4 million (on invoices no. 70235 and 70239). As the majority concedes (in paragraph 80), however, invoice no. 70235 was considered payable, and was paid, within the contractual invoice processing procedures, because the work progress rate reached 83% in October, after Watkins-Johnson shipped certain goods (paragraph 25, supra). Therefore, this invoice is not at issue here. What does raise a question, however, is on what basis the majority presumes that the Respondent agreed to pay invoice no. 70239 (prior to the halt of the works and to the measures to sell off the goods). In memorials and evidence filed by it, Watkins-Johnson has itself admitted that after it sent the two above-mentioned invoices, everyone (including the Systems Integration Contractor and the United States representatives) informed it that the Project Director was unable to make any payment without receiving some tangible return for value -- i.e., unless he received goods worth at least $3.4 million;

moreover, everyone believed that the Seller and Buyer should remain within the invoice processing procedures (paragraphs 27, 28 supra). The majority would also appear to have forgotten that the Buyer's sole proposal for saving the Project and eliminating the Seller's excuses was to "make... a down payment of 2 million [dollars to Watkins-Johnson]..." (paragraph 31, supra, and footnote 6 to the majority's Award).

65. The majority's Award also relies on a whole series of events and actions in order to justify the Seller's halt to the operations under the Contract -- events and actions which, even assuming in arguendo that they actually occurred, relate to a period after the Seller halted the operations under the Contract and initiated steps to sell the goods. While conceding (in paragraphs 82-83) that the progress of works report for the month of November 1978 was altered in January 1979 solely so that payment could be made on invoice no. 70239 (without the progress of works actually having reached 90%),[53] the majority alleges that the Respondent's obligation to pay this invoice, and even to pay invoice no. 70241, constituted a part of the step-by-step plan agreed to by Watkins-Johnson and Iran, pursuant to which Iran supposedly undertook to pay both invoices even before entertaining hopes that Watkins-Johnson would carry out any of the operations foreseen within the framework of the Contract.

66. Here, the majority has made a number of errors:

First, Watkins-Johnson's halt of operations some months earlier, in 1978, and its notice of this halt and of

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[53] As noted above, the Respondent proved through unimpeachable evidence that these documents were forged (footnote 26, supra). This Dissenting Opinion does not address the issue of the forgery only because the majority's Award is, in any event, invalid for a number of reasons, and I therefore need not enter into this issue, one which is particularly repugnant to the majority.

its intention to sell the goods, which notice was sent on 22 December 1978, cannot possibly have been due to the hypothetical break-down of the agreed step-by-step plan, which occurred on a later date.

Second, the majority bases and predicates its decision on the step-by-step plan, which had not yet been agreed to by the Parties. The only agreement of understanding for which a draft was, as alleged by Watkins-Johnson itself, prepared by that company and Colonel Jalali, is the instrument which we have discussed in paragraph 34 of the present Opinion. As alleged by Watkins-Johnson in the course of the present proceedings, this agreement of understanding was rejected a few days later, namely on 15 January 1979, by Watkins-Johnson's management, on the excuse that it would not be in that company's best interest in the long run (paragraph 35, supra). At a late stage of these proceedings, Watkins-Johnson alleged that it thus sent Iran another plan, via Harris.[54] Yet, the Claimant has not been able in these proceedings -- nor has the majority been able in the Award -- to assert, even supposing that Iran did receive the counter-proposal,[55]

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[54] It has not been explained why, if this assertion is true, Watkins-Johnson did not submit its counter-proposal to Iran's representative stationed in the United States, who had been a party to the negotiations.

[55] Although a mere notice of receipt of an offer does not constitute acceptance thereof, acceptance of an offer does constitute de facto notice of receipt as well, because a party cannot be presumed to have accepted an offer without having received it. In Iranian law, this concept can be easily inferred from numerous provisions in the Civil Code covering intention and consent of the parties in general, or relating to specific contracts. This is because when, for example, the Civil Code speaks of the materialization of the contract "through an intention of entering into it, provided that this intention is accompanied by something which points to that intention" (Articles 191-194), or when it notes that the language and terms of the offer and

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that Iran ever agreed to it. Under such circumstances, whether Watkins-Johnson's proposal is deemed to have been an independent offer or a counter-offer, the conclusion is, legally, entirely clear and categorical: namely, the new offer or counter-offer did not give rise to any obligations, because it was never accepted by the other Party.[56]

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acceptance must be unequivocally clear in meaning (Article 340), it signifies that the declared intention, and the words and terms used to express that intention, must be unambiguous and must indicate that same intention to the other party. See: Dr. Katoozian, Hoquq-e Madani ["Civil Law"] (vol. I) Introduction - Property - On Contracts in General (1354/1975), para. 247. This has been accepted in nearly identical fashion by most nations of the world. See: Cheshire, op cit, pp. 52-53; Chitty, op cit, pp. 38-39; Trietel, op cit, pp. 13-30; Simpson, Contracts (1965), p. 16; Corbin's one-volume On Contracts (1981 reprint), p. 93. All of these sources are cited in footnotes 45 and 47, supra. See also J.D. Calamari & J.M. Perillo, Contracts, 3rd ed. (1987), p. 73. For a comparative study, see Schlesinger, Formation of Contracts, A Study of the Common Core of Legal Systems (vol. I - 1968), Section A-8.

[56] "From the language of Article 183 of the Civil Code (where the parties mutually agree on a certain obligation and [it] is accepted by them), it can be seen that in order for an obligation to arise, the person who is the obligor and thereby becomes the debtor must declare his intention; and then the other party, who is the obligee and beneficiary of that obligation, must accept it... In acceptance, as in the offer, the intention must be declared; a real intention, presuming that one exists, is insufficient to give rise to a contract. This is because silence cannot signify intent... Therefore, a failure to declare one's intention cannot substitute for a declaration of intention to enter into an agreement; furthermore, Article 191 of the Civil Code provides that an intention to conclude an agreement gives rise to a contract when accompanied by something which indicates such intention." (Dr. Sayyed Hasan Emami, op cit in footnote 47 above, pp. 187-188.)

See also: Dr. Katoozian, op cit in the preceding footnote, paras. 247, 252 and 267; Prof. Dr. Ja'fari Langaroudi, Ta'thir-e Iradeh dar Hoquq-e Madani ["The Effect of Intention in the Civil Law"], paras. 268-269, 458-460; Prof. Dr. Hosayn Safa'i, Hoquq-e Madani ["Civil Law"], vol. 2, Obligations and Contracts, pp. 72-77, 81-83; and Dr. (Footnote continues on following page)

Therefore, it must be held either that the agreement of understanding dated 12 January 1979 did exist, or else that no understanding was reached in connection with the step-by-step plan which is the cornerstone of the majority's arguments. What is certain is that the majority cannot allege that in effect, Iran accepted the new proposal or counter-proposal, because aside from the fact that a totally clear and unambiguous conduct and act was required in order to reach such a conclusion,[57] the actions attributed to Iran can in no way be construed as meaning that it accepted the step-by-step plan which the majority has in mind. Iran's confirmation and final approval of invoice no. 70239, owing to manipulation of the progress

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(Footnote continued from preceding page)
Amiri Qa'im Maqami, Hoquq-e Ta'ahhodat ["The Law of Obligations"] (1356/1977, 2d. ed), p.182. See, for a comparative approach, Schlesinger, op cit, vol. 2, pp. 35-39; Cheshire, op cit, pp. 45, 47; Chitty, op cit, pp. 48-49; Trietel, op cit in footnote 47, supra, pp. 13-30; Corbin, op cit, pp. 88, 118-120, 137-142; Simpson, op cit, pp. 30-32, 44-46, 59-60; and Calamari & Perillo, op cit in footnote 55, supra, pp. 73, 83-88, 98-99.

57 Although certain jurisconsults of Islamic law hold that intent can be ascertained only from the literal terms themselves, Iranian law acknowledges that intent is also revealed through one's acts, "except where precluded by law" (Article 193 of the Civil Code). However, even where, as in sale agreements, the ability of acts to demonstrate intent has been acknowledged, it has been held that there must be an act which is clear and unambiguous ("express in meaning"), one which "reveals the intent and consent" of the acting party (see: Dr. Sayyed Hasan Emami, op cit, pp. 181-182; also the other sources cited in footnote 56, supra, including Dr. Ja'fari Langaroudi, op cit, paras. 262, 500-501).

In the law of other nations as well, an act by the other party to the offer is deemed to constitute acceptance only where it is clear and unambiguous, because the corollary to holding that someone is bound to his obligations is that it must have become reasonably certain that a contract actually exists. In this connection, see: Cheshire, op cit, pp. 36-40; Chitty, op cit, pp. 33-34; Trietel, op cit, pp. 13-30; Simpson, op cit, pp. 57-58; Calamari & Perillo, op cit, pp. 89-90; and Schlesinger, op cit, Part B.6.

evaluation rate, are actions taken prior to the date on which the step-by-step plan was presumably proposed (paragraphs 81-82 of the Award); and the act of finalizing the approval of the invoice on 17 January 1979 (paragraph 31 of the Award) cannot be related to the proposal of that supposed plan, the text of which cannot conceivably have been received by, or at least sent and notified to, the other party before the invoice was approved (paragraph 35 of the present Dissenting Opinion). Relying on the Claimant's representations made nearly ten years after the events in question, the majority attempts in paragraphs 84-85 to make it appear as if invoice no. 70241 was also prepared on the basis of the step-by-step plan proposed by the Claimant. However, it has been unable to adduce any evidence in the Case record which proves, or even points to any allegation anywhere made by the Claimant, that the Respondent ever approved the said invoice. The Claimant did not make any such assertion at any stage of these proceedings.[58]

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[58] The majority has resorted to two points in order to counter Iran's objection that it never received this invoice. The first is the Claimant's allegation that it sent invoice no. 70241 to Touche Ross on 30 January 1979. The second is Touche Ross' letter dated 8 February 1979, wherein it is stated that the invoice was being forwarded to General Asrejadid along with that same letter. The majority concluded therefrom that since Touche Ross was acting as Iran's agent, the Respondent can be presumed to have received the invoice. To buttress its argument, the majority adds that since Iran had not previously mentioned any problems [in communication] and had not requested that any documents previously sent to Touche Ross be resubmitted, it is precluded from now denying that it received the invoice through Touche Ross. While this conclusion by the majority adds nothing to its finding and does not detract in the least from the validity of the points raised in this Opinion, a consideration of these issues can lead to an understanding of the problem. The fact is that Touche Ross itself, if not actually obstructing the Project and creating problems for Iran from late 1978, was at least having difficulties with Iran in connection with its own Contract; and it has alleged in another Case before this same Tribunal that "by the

(Footnote continues on following page)

Based on the foregoing, and given that the Iranian officials of the time refused to approve invoice no. 70241, in contrast to their approval of invoice no. 70239, which constituted the first condition of the step-by-step plan dated 12 January 1979 (paragraph 34, supra), and given the fact that plans were later made to determine whether or not Watkins-Johnson had fulfilled its own obligations in return for approval of the invoice (paragraphs 39-40), it is quite clear that Iran acted in accordance with the initial step-by-step plan, and that it regarded that plan as governing its relations with Watkins-Johnson. This fact is corroborated by Watkins-Johnson's own conduct, as reflected in its internal reports of 19 and 29 January (cf. paragraphs 33-35 and 39-40, supra), because they demonstrate that it was aware that Colonel Jalali intended to make a visit in order to determine whether or not the Seller had performed on the obligations which it assumed following the approval of invoice no. 70239.

The majority also totally disregards the point that Watkins-Johnson should (even according to the step-by-step plan which the majority has in mind) have taken certain

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(Footnote continued from preceding page)
beginning of 1979 further performance had become almost impossible owing to the disruption occasioned by the Revolution and the impossibility of identifying or contacting persons responsible for the Contract who could give instructions as to the work to be done." (9 Iran-U.S. C.T.R. 284, 288). February, the month when Touche Ross allegedly delivered the invoice, coincided with the climax of the Revolution, the time of street clashes between the revolutionaries and the Army, and the disintegration of the latter. Moreover, given Iran's assertion that it had no knowledge of the purported sending of the invoice to Touche Ross or of its having been forwarded by the latter, it is entirely unfair to expect Iran to have requested the Claimant to send it a copy of the invoice since it had not received the original.

acts before invoice no. 70239 could be approved and, following such approval, further acts prior to approval of invoice no. 70241. It was required, inter alia, to package all of the equipment ready for shipment and to place the packages in a designated secured storage area ready for shipping, before invoice no. 70239 could be approved. Then, after invoice no. 70239 was approved, Watkins-Johnson was to resume work on the Category V equipment and to prepare ship set number 1 for shipment .

67. In view of the foregoing, Watkins-Johnson was clearly not entitled in any way to halt its performance or to take steps in 1978 towards selling off the goods under the Contract; it is equally clear that the majority's representations about the agreement of understanding regarding the step-by-step plan can in no way exonerate Watkins-Johnson retroactively from the consequences of its default, or justify its prior halt to the operations and its actions taken for the sale of goods.

68. Disregarding the facts set forth above, the majority holds in paragraphs 87-99 that although the operations were halted from sometime in 1978 (at latest, from 22 December 1978), the sale of the goods commenced at some point after the letters dated 30 January and 15 February 1979 were sent. To justify Watkins-Johnson's actions, the majority argues that since Watkins-Johnson did not receive a significant part of the consideration due it for works performed, and since Iran was unable to give adequate assurances that such payment would be forthcoming, Watkins-Johnson was entitled to withhold delivery of the goods under the Contract, and to sell them off in order to mitigate its losses. Regrettably, the majority has erred in this respect as well, by applying legal rules and principles carelessly and thoughtlessly. In order best to elucidate the objections to which the majority's findings are susceptible, I will take up these issues under two separate headings (Sections "G" and "H") in this present

Opinion.

F.2. Frustration of the Contract

69. As noted above in Part I, paragraph 3 and Part III.F, paragraph 59, in view of the sensitivity of the IBEX Project, its continuation or termination depended upon the state of the relations between Iran and the United States. For this same reason, although the contracts concluded between Iran and the United States contractors running the IBEX Project (including the contract with Watkins-Johnson) required the contractors to obtain the necessary permits from the United States for the sale of the goods and services involved, other provisions of those same contracts provided that a refusal by the United States to issue permits for the sale of such goods and services would constitute force majeure and would frustrate the contract (see, e.g., Articles 1 - 5 of Appendix 5 to Contract no.108).

Moreover, as was indicated above, the United States considered the Project so sensitive that it directly intervened in, and monitored, all of the operations and routine decisions involving the Project by sending separate advisers and monitors known as the Support Services Group,[59] in addition to exercising supervision over it through its military advisory group in Iran. In the Award in Questech, this same majority could not conceal the fact that "[the Contract being part of] the IBEX program was rooted in military cooperation, and even belonged to a highly secret intelligence gathering system. As such it touched on especially sensitive aspects of... defence

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[59] See, inter alia, paras. 26, 27, 30-32 of the majority's Award; also para. 27 and footnote 20, and paras. 28, 31, 40 and footnote 27, and para. 43 to the present Dissenting Opinion.

interests and policy." In that Award, the majority acknowledged that "in this particular situation the political relationship between the States concerned was of greater importance than in ordinary commercial relations."[60] It was in view of this very sensitivity that all the IBEX Project contracts (inter alia the Contract at issue in this Case) provided that the technical information and equipment relating to the Project must not under any circumstances be placed at the disposal of the Eastern bloc or any other nation, unless with the permission of the United States.[61]

70. At the most critical stage of the Revolution (i.e., on 3 February 1979, only a few days before the fall of the Shah's regime), the United States took the step, in line with its policy of cutting off the sale of military services and goods to Iran, of imposing a memorandum of understanding on the puppet government of the time, whereby the latter cancelled or withdrew a large number of orders, particularly those for goods with military significance, some of which were in the process of being manufactured or shipped and had already been paid for in full or in part.[62] After that date, the United States refused to sell

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60 The Award in Questech, reprinted in 9 Iran-U.S. C.T.R. 108, 121-122.

61 See, inter alia, the Dissenting Opinion of Judge Mostafavi to Award No. 180-64-1 ("Sylvania"), issued in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, p. 3 (1985), reprinted in 8 Iran-U.S. C.T.R. 298, 338.

62 For further information on this issue, see the Memorials submitted by Iran and the United States in Case No. B1 (in particular Claims 2 and 3), The Islamic Republic of Iran and The United States of America, which has unfortunately not yet been terminated by an Award despite the passage of so many years since it was brought, and despite the great significance of that Case in terms of both content and magnitude. See also, in connection with the importance attached by the United States to the signing of the Memorandum of Understanding of 3 February 1979, Gary Sick, All Fall Down, America's Fateful Encounter with Iran (1985), pp. 148-149. At any event, this does not mean that

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military services and equipment by advancing a variety of pretexts in continuing with its policy adopted upon the culmination of Iran's Islamic Revolution. At any event, from 1979 on, it halted the sale and transfer of all such goods and services, whether sensitive or not.[63]

71. Given the available evidence in the IBEX Project-related Cases decided by this Tribunal, it is unnecessary for us to investigate further in order to discover the United States' over-all policies on the sale of military services and goods, because even though that evidence is insignificant in quantity in comparison to the vast amount of documentary evidence to which the Tribunal has been denied access owing to the Claimants' adoption of a selective and self-serving policy and approach to the filing of evidence, it nonetheless confirms and demonstrates the United States' policy towards the IBEX Project.

(footnote continued from preceding page)
the United States initiated its move only by, and pursuant to, entering into the Memorandum of Understanding of 3 February. The United States had, on earlier occasions since October 1978, refrained from granting export licenses for the sale of military services and goods to Iran. (FMC Corporation and The Ministry of National Defence et al, Award No. 292-353-2. reprinted in 14 Iran-U.S. C.T.R. 111,117).

63 See para. 13 of the Full Tribunal Award in Case No. B1 (Claim 4), The Islamic Republic of Iran and The United States of America, Award No. 382-B1-FT. Bell Helicopter International, Inc. ("BHI") started evacuation of its personnel in Iran under the contracts it had with Iranian military organizations, from late 1978 and early 1979, pursuant to the United States Government's instructions. BHI evacuated its personnel in groups of 300, and about 900 or more of the personnel did leave Iran by or around 12 to 21 February 1979. (See Jack Rankin, Award No. 326-10913-2, reprinted in 17 Iran-U.S. C.T.R. 135, para. 47; Kenneth P. Yeager, Award No. 324-10199-1, reprinted in 17 Iran-U.S. C.T.R. 92, 106; and my Separate Opinion in Jimmy B. Leach, Award No. 440-12183-1, paras. 5 to 7).

Beginning in early 1979, Ford Aerospace, one of the Project contractors, experienced difficulties in obtaining licenses for the sale of services and goods for the IBEX Project.[64] Finally, in response to Ford Aerospace's written request dated 8 March 1979 for a renewal of its license to continue with its contract with Iran, the United States formally declared on 1 May 1979 that it could not issue the license "until the situation in Iran has been clarified."[65]

On 30 April 1979, the United States informed Sylvania, another contractor on the IBEX Project, that Sylvania's license for the export of services and goods on the IBEX Project was invalid and would not be renewed.[66]

72. Except for Watkins-Johnson, which had totally halted its performance in December 1978 on the basis of other pretexts, and had begun to sell off Iran's goods and property under the Contract,[67] all other American IBEX Project contractors invoked force majeure as an excuse for halting their operations and terminating their contracts.

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64 See para. 52 of the majority's Award in Ford Aerospace and Communications Corporation and The Islamic Republic of Iran, Bank Markazi Iran, Award No. 289-93-1 ("Ford Aerospace") (1987), reprinted in 14 Iran-U.S. C.T.R. 24, 37; also page 5 of the Dissenting Opinion of Judge Mostafavi in that same Case (ibid, p. 57).

65 Dissenting Opinion of Judge Mostafavi in Ford Aerospace, ibid, p. 58.

66 Dissenting Opinion of Judge Mostafavi in Sylvania, op cit in footnote 61 supra, p. 340.

67 "As force majeure arises out of and depends on factual circumstances, it will affect a contract as soon as the circumstances emerge which create the obstacle to performance... Consequently, the existence of force majeure does not depend on, or arise out of, an agreement between the parties as to the existence of such circumstances." Para. 42 of Interlocutory Award No. ITL 64-167-3 (1986), in Anaconda-Iran Inc. and The Government of the Islamic Republic of Iran, et al, reprinted in 13 Iran-U.S. C.T.R. 199, 211.

Two days after announcing force majeure conditions on 13 February 1979, Sylvania terminated its contract (i.e., on 15 February 1979).[68]

Questech also finally announced the existence of force majeure conditions on 1 May 1979, after having halted its performance and recalled its personnel from Iran on 16 February 1979.[69] Touche Ross, which alleged that force majeure conditions existed from the beginning of 1979, invoked force majeure on 10 April 1979 in declaring performance on its contract to be impossible, and on 17 April 1979 it terminated the contract.[70]

73. In a letter and telex dated 26 February 1979, Ford Aerospace gave notice that the existence of force majeure conditions had made performance on its contract impossible.[71] Harris, the Systems Integration Contractor, also declared the existence of force majeure conditions pursuant to its letters of 2 and 5 March 1979 (with identical texts), stating therein that owing to events beyond its control, "it had to reduce its performance...and that it had been forced to withdraw all personnel from Iran on or about 16 February 1979." Finally, for this same reason, it terminated its contract pursuant to its letters dated 14 and 25 June 1979.[72]

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68 Award in Sylvania, op cit in footnote 61, pp. 305, 312; also Dissenting Opinion of Judge Mostafavi, ibid, pp. 337, 339.

69 Award in Questech, op cit in footnote 60, p. 112.

70 Award No. 197-480-1 in Touche Ross and Company and The Islamic Republic of Iran ("Touche Ross"), reprinted in 9 Iran-U.S. C.T.R. 284, 288.

71 Ford Aerospace, op cit in footnote 64, para. 16.

72 Award No. 323-409-1 in Harris International Telecommunications, Inc. and The Islamic Republic of Iran, et al ("Harris"), paras. 9, 13, reprinted in 17 Iran-U.S. C.T.R. 31, 35-36.

Rockwell International Systems, Inc. went one step further than the others in declaring the existence of force majeure conditions. This contractor announced force majeure and withdrew its personnel from Iran in connection with contract no. 119 and contract no. 120 on 30 December 1978 and 1 February 1979, respectively.[73]

74. Furthermore, in view of what has been set forth in paragraphs 69-73 above, it is clear that the majority's interpretation of the letter dated 16 July 1979, as manifesting a deliberate policy decision by Iran to abort the IBEX Project (paragraph 75 of the Award) is totally inconsistent and incompatible with the facts in the Case.[74] In interpreting and assessing the situation, the majority has

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[73] Award No. 438-430-1 in Rockwell International Systems, Inc. and The Government of the Islamic Republic of Iran (Ministry of Defence), para. 23.

[74] The words and contents of the Separate Opinion of Judge Howard M. Holtzmann in Questech (op cit in footnote 60, p. 138) provide the best witness to the errors in, and baselessness of, the majority's Award, which everywhere interprets circumstances in accordance with its own arbitrary inclinations. Judge Holtzmann, who formed a majority with the Chamber Chairman for the Award in the instant Case, points out in footnote 13 of his Separate Opinion that "because of the common factual and legal issues in various IBEX cases, all have been assigned to Chamber One, and there is essentially the same Respondent in each of those cases." He then goes on to argue elaborately, on the strength of considerable evidence, that at least up to 6 November 1979, the Government of the Islamic Republic of Iran not only had no intention of severing its ties and cooperation with the United States, including highly sensitive military cooperation (even in connection with military intelligence data-gathering), but even, he asserts, all the available information and data show that "the government that was in power from the Revolution to 6 November 1979 was not impelled by political conditions to sever contacts and cooperation with the United States even in the sensitive area of military intelligence." He cites in detail a considerable number of instances where Iran sought specific performance on contracts:
(Footnote continues on following page)

failed to consider how the IBEX Project contractors viewed and interpreted that same situation at the time the letter was sent. An examination of the mutual understanding of Iran and the IBEX Project contractors as to Colonel Eskandarzadeh's letter of 16 July 1979 (identical copies of which were sent to all the contractors and vendors of goods and services) clearly reveals the untenability of the majority's decision. As noted in paragraph 44, supra, the letter invited the other parties to engage in negotiations, after stating the fact that:

> ...from the date Bahman 21, 1357 (Feb. 10, 1979), the accomplishment of all the works and expenditures under the Contract no. 108 has been considered to be stopped due to the recent transformation arising out of the Islamic Revolution of Iran.

(Footnote continued from preceding page)

> "For example, there is documentary evidence in another IBEX case before the Tribunal that appears to indicate that as late as August 1979 Iranian military authorities and another United States contractor that had been involved in the project were considering proposals for future services in view of the possibility of reinstituting IBEX, albeit on a scaled-down basis.
>
> Other recent cases before the Tribunal further illustrate Iran's continued willingness to make purchases of sensitive equipment from American companies. In ... Case No. 302, International Technical Products Corp. et al v. The Government of the Islamic Republic of Iran et al., Award No. 186-302-3 ... the Air Force.. sought specific performance of the contract... [and] sent a letter on 30 October 1979 requesting that the Claimants return to Iran for negotiations concerning resumption of the project... Similarly, in Case No. 359 [pursuant to a settlement agreement which culminated in Award No. 185-359-3]... the Iranian Plan and Budget Ministry [sic] [requested General Electric Company to aid that Ministry] in completing installation of a satellite tracking station in Iran." (See pp. 143-147 of the source cited in footnote 60; the footnotes cited therein are here omitted).

Under such circumstances, it is inconceivable to me how the majority (Judge Holtzmann being one of the two Members who formed that majority) could reach the conclusion that by sending the letter of 16 July 1979, Iran made a deliberate policy decision to terminate the IBEX Project.

Questech allegedly understood from the letter of 16 July 1979, and from the meeting of 19 September 1979 which was convened following the invitation expressed in the said letter, that "the Contract was terminated pursuant to the contract provisions pertaining to cancellation for force majeure."[75] Although this interpretation is also contrary to the facts, it does at any rate show that Questech did not believe, when it received the letter, that Iran intended in this way to declare and give effect to a deliberate policy decision to stop the Project. Prior to the establishment of the Iran-United States Claims Tribunal, Questech had sought, in its Statement of Claim filed on 28 October 1980 with the United States District Court for the Eastern District of Virginia, a declaration by the Court "that the contract was terminated by reason of force majeure."[76] In the Award in Questech, this same majority has recognized that force majeure conditions on or about 10 February 1979 prevented the performance of the Parties' obligations; and this is precisely what Iran stated in Colonel Eskandarzadeh's letter of 16 July 1979 to the Project contracts.[77]

Touche Ross, holding that force majeure conditions existed from the beginning of 1979 and continued until 17 July of that year (one day after the date of Colonel Eskandarzadeh's letter), sent a letter on 17 July 1979, whereby it terminated its contract on grounds of force majeure.[78] Invoking Tribunal practice which agreed that force majeure conditions prevailed from sometime in

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75 Award in Questech, op cit in footnote 60, p. 112.

76 Ibid, p. 114.

77 Ibid, pp. 116-120.

78 Award in Touche Ross, op cit in footnote 70, vol.9, at 288.

December 1978 and through June 1979 (relying, inter alia, on Gould Marketing, Inc. and The Government of the Islamic Republic of Iran et al, Interlocutory Award No. 24-49-2; Sea-Land Service, Inc. and The Government of the Islamic Republic of Iran et al, Award No. 135-33-1; and the Award in Sylvania), Chamber One concluded in Touche Ross that the force majeure conditions affecting that contract (in connection with which, it is alleged, "almost all Touche Ross's duties under the Contract were performed in the United States..."),[79] lasted until 17 July 1979. Chamber One held further that "far from indicating disagreement with Touche Ross's evaluation of the situation, the letter eventually written by Colonel Eskandarzadeh on 16 July 1979 confirmed [the existence of force majeure conditions]".[80]

Following his attendance at the meeting which was held in September 1979 with the participation of a number of contractors pursuant to Colonel Eskandarzadeh's letter of 16 July 1979, Watkins-Johnson's representative reported that [81]:

> All indications during the meeting were that the CEO is actively interested in continuing with the Project of which Contract 108 forms a part.

Ford Aerospace's correspondence and report in connection with the September 1979 meeting also confirm the fact that the Employer had stressed that "all work under the said Contracts was considered stopped but that the said Contracts were not terminated..."[82]

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79 Ibid, Award in Touche Ross, p. 288.

80 Ibid, same Award, p. 295.

81 See also para. 55 of the present Award.

82 See the Dissenting Opinion of Judge Mostafavi, reprinted in the source referred to in footnote 64 above, p. 55.

75. Therefore, the only correct and logical interpretation of the letter of 16 July 1979 is that Iran took the first opportunity afforded it, following a relative lessening of the revolutionary crisis, to inform the Claimants that the works under the Contract, and consequently the expenditures relating thereto, had been stopped, at least from 10 February 1979 on, owing to circumstances of force majeure.[83]

F.3 Conclusion to this section

76. In view of the outrageous facts set forth in the section on the "Factual Background," and also in light of the points made in the foregoing paragraphs, I believe that Watkins-Johnson should have been found to be in breach of Contract no. 108, and held responsible for the losses incurred by Iran as a result of its actions, including the nonperformance of its obligations and the sale and destruction of goods.

Even if the majority was able, through an indescribable leniency and by disregarding much of the revealing evidence in the record, to convince itself to excuse Watkins-Johnson from its breach of contract and from bearing the consequences thereof, both reason and justice would have dictated that it at least find that the Contract was affected by conditions of force majeure, owing to the existence of circumstances which, as all American contractors (including those parties to the other contracts) believed, had made it impossible to continue with the works thereunder; or else it should have found the Contract to have been frustrated, owing to the fundamentally changed

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83 The facts confirmed by the majority in this same Case demonstrate (paras. 32 and 62 of this Opinion, and paras. 32, 42, 86, 90 and 101, and footnote 9 to the majority's Award) that Watkins-Johnson stopped its expenses and works under the Contract as from 1 December 1978.

circumstances set forth above in paragraphs 69-72, which brought about a shift in the United States' political-strategical stance toward Iran and consequently led it to prevent the export of services and goods to Iran. In that event, in accordance with Article 7.6 of the Contract, the Buyer should only have been required to pay for the equipment already supplied or in the process of being manufactured, plus the price of services rendered up to that date, according to the original report and to the latest monthly progress report accepted by the Buyer. Obviously, if the consequences of force majeure were applied to the Contract, Watkins-Johnson would have had to return to Iran the exorbitant amounts of money it had received for the services and goods not provided. Due to its Americo-Euro-centrist mentality, the majority did not see fit to require any of the American contractors on the IBEX Project to restore to their true owners even a small portion of the millions of dollars worth of assets that were plundered from the oppressed Iranian nation as a result of the United States Government's aborting of the Project.

G. Exceptio non Adempleti Contractus ("Exceptio")

77. The first part of the majority's Reasons for the Award, wherein it attempts to justify Watkins-Johnson's breaches of the Contract and to relieve it of responsibility for the consequences thereof, can be analyzed under this heading, particularly in view of footnotes 13 and 14 to the Award, which imply that since the Buyer refused to pay for the goods, or to give assurances that he would do so, the Seller was entitled to refuse to deliver those goods.

I am unable to concur in the majority's finding; rather, I believe that Watkins-Johnson was continually in search of some pretext for taking improper advantage of the

disorder and upheavals brought about in the Iranian Army upon the onset of the Revolution. It is the Respondent that could have resorted to the principle of Exceptio, and not the Claimant, who had acted in bad faith and in breach of contract. Such a right has an entirely specific application in connection with synallagmatic contracts whereby both parties have undertaken reciprocal obligations, and it "entitles either party to the transaction to refuse to deliver the object of his obligation until the other party fulfils his own obligation," because it derives from the reciprocity intended in that transaction; moreover, "each of the transacting parties gives possessions and assumes obligations in exchange for the possessions given, and the obligations assumed, by the other party." It is, therefore, clear that the right to invoke the principle of Exceptio accrues to both parties to a contract (here, the Buyer and Seller), and for this reason it is said that someone who fails to fulfil his own obligations cannot demand that the other party fulfil his.[84]

78. In the instant Case, the majority should have made clear which of the transacting Parties was to perform on its obligations first. Only in one sentence of paragraph

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[84] Article 377 of the Iranian Civil Code; Article 371 of the Iranian Commercial Code; Dr. Sayyed Hasan Emami, op cit in footnote 47, p. 458; Prof. Dr. Katoozian, op cit in footnote 55, para. 98; Prof. Dr. Sayyed Hossain Safa'i, op cit in footnote 47, p. 287; also Cheshire, pp. 515-520; Chalmers, pp. 175-176; Trietel, pp. 578-579; Calamari & Perillo, pp. 457-458; Corbin, p. 671; Williston, Sections 817, 827 893 (op cit, in footnote 55, supra). See also Mazeaud & Chabas, Lecons de Droit Civil, T.II vol. 1 (1978) No: 1127; and Weill et Terre, Precis de Droit Civil, Les Obligations (1980), No:474. This rule, which has long been recognized under the heading of "exceptio non adempleti contractus," is also at the present time being made the object of efforts to develop uniform and standard legal institutions and codes, among which can be mentioned the UN Convention on Contracts for the International Sale of Goods (Article 71), and the United States Uniform Commercial Code (Section 2.609).

92 of the Award can some faint trace be seen of an effort on the majority's part to determine this point, where it states that "Watkins-Johnson had not received a substantial part of the price of the work it had performed." It is very easy to discover whether or not this statement is valid, because clear and varied evidence can be invoked in this connection. Apart from the Claimant's default due to its repeated delays, the majority acknowledges (in footnote 9 to the Award) that Watkins-Johnson was paid $13,090,030 of the contractual price up to the time it stopped the works. The majority also admits (paragraph 38 of the Award), and this Opinion demonstrates (paragraph 31, and footnote 22), that Watkins-Johnson delivered goods worth only $4,670,155 to the Respondent, although the scheduled delivery dates for the goods had already passed, and even though the 20-month period within which the works under the Contract were supposed to have been completed had lapsed. Consequently, the Seller received $13,090,030, whereas he was only entitled to receive $7,005,233, at most, of the contractual price.[85] Therefore, the Buyer was the only party that could have resorted to the principle of Exceptio and to demand damages, while suspending performance on his obligations and asking the Seller to fulfil his part of the agreement. This is so because it was the Buyer who, while receiving only an insignificant part of the goods -- and after lengthy delays at that -- in exchange for his payment of a substantial part of the contractual price, had been exposed to numerous other losses, including the claims of other contractors such as the Airborne Segment Contractor,

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[85] The total contractual price, which involved planning, preparation, manufacture, and FOB shipping and delivery of the equipment, included two amounts: one was $12,072,226 for the equipment, and the other $5,996,340 for the remaining tasks and duties. Therefore, the other tasks and duties amounted to approximately 49% of the value of the equipment. It can thus be concluded that at most, the Seller was entitled to receive 1.5 times the value of the goods delivered, i.e., $7,005,233.

who was supposed to have received a considerable portion of the equipment (paragraph 13 of the Award). In its internal report dated 29 January 1979, Watkins-Johnson itself mentions that E-Systems had given notice to Iran concerning the impact of delays in the delivery of goods upon its costs.

Moreover, even if we were to assume that the Claimant was entitled to those monies which it had received up to that time, it had to deliver additional goods before being entitled to receive additional consideration, because whether or not these contractual obligations can be broken down into a number of severable obligations,[86] delivery should in principle have preceded receipt of the contrac-

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[86] Even if we regard the Contract as a divisible contract, in view of the separate prices and delivery dates specified for each particular item of equipment or piece of goods, taking into account that pursuant to Attachment 3 to the Contract, the one-year warranty period for each piece of equipment was to commence from the date on which that particular equipment was accepted and delivered, then the Buyer was still the only party that could refuse to make payment on the subsequent contract instalments, because in such an event, payment on each instalment of the overall price was dependent upon manufacture and delivery of certain specific goods, for which a completely specific delivery time had been anticipated in the Contract (see Williston, Section 864, pp. 282-283). Because the Buyer had received goods and services worth only $7 million in exchange for payment of $13 million, it was entitled to refuse to make any further payments until it received enough goods to redress this imbalance. With even this rough calculation, it is easy to understand why all the persons involved in the Project, from the Program Director to the System Engineering Contractor, the Systems Integration Contractor, the Auditor, and finally the United States' representatives, pointed out to the Seller that to receive any monies beyond those which it had already obtained up to that date, it would have to ship and deliver additional goods worth $3.4 million (para. 27, supra), since only in that way could the gap between $7 million and $13 million be partly filled.

tual price,[87] and because the time of payment is not of essence to the some degree as is delivery of the goods.

79. In light of the foregoing, the Seller had an obligation, in view of his prior record which discouraged the Buyer from having any confidence in him, to provide the Buyer with adequate assurances that any further payments would not meet the same fate as the payments made up to that date, including the payment made on invoice no. 70235. At any event, it is worth noting that the majority has also failed to consider the fact that the Buyer took sufficient

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[87] In contracts where the works are performed pursuant to orders and over a period of time, "the first and simplest rule is that ... a party who is to perform work over an extended period of time must substantially perform before he becomes entitled to payment. In other words, performance of the work is a constructive condition precedent to the duty to pay." And even where payment must be made within a specific time, "performance is a constructive condition precedent to the first payment and the first payment is a condition precedent to the next stage of the works." (See Calamari & Perillo, op cit, pp. 456-457.) In United States law too, in a situation similar to that facing us in the present Case, where payment was to be made as against the progress of the works and pursuant to monthly invoices, and where the claimant filed a plaint because it had not received an instalment of the contractual price according to schedule, it was ruled that:

> "We have no hesitation in holding that the promise and counter promise under consideration here were mutually dependent, that is to say, the Parties intended performance by one to be conditional on performance by the other party, and subcontractor's promise was by explicit wording of the Contract, precedent to the promise of payments, monthly, by the contractor." (Williston, Section 817, who states, in light of rulings by the United States courts, that the applicable principle here is the reciprocity and interdependence of promises [Sections 849, 817-824], and that the courts are reluctant to classify promises as independent -- Section 827.)

Trietel states, after noting the reluctance of the British courts to hold promises as being independent, that under British law, the general rule is that the obligation to perform must precede the obligation to pay (Trietel, op cit, pp. 579-580).

additional steps, over and above what was required of it, in order to save the Project, which steps could easily have reassured any Seller who actually intended to perform on his own obligations and to continue working on the Contract. [88] Furthermore, the Seller was kept fully and accurately informed of those steps. [89] What further step could the Buyer possibly have taken, in order to provide assurances, than its proposal, at one stage, to pay the Seller $2 million by way of an advance payment (footnote 6 to the Award, and para. 30 of this Opinion), and, at a later stage, its approval for payment of an invoice for $1,529,412, which it turned over to the Seller (paragraph 87 of the Award, and paragraphs 36-40 of this Opinion)?

80. Aware of the most obvious objection to which its decision is vulnerable, the majority has expressed doubts about an undeniable and proven fact that was never at issue between the Parties, in order to denigrate the importance of the steps taken by the Respondent, and to reach the totally inequitable conclusions which it had in view and, finally, to absolve the Claimant of liability. In its memorials, the Respondent repeatedly stated, and it proved through submission of unrebutted evidence, that in January 1979, it approved invoice no. 70239, for the amount of $1,529,412, and that it provided the Claimant with the invoice through the United States representatives, so that the Claimant could draw upon the letter of credit opened for that purpose. The available evidence, in particular the evidence submitted by the Claimant itself, demonstrates that the invoice was sent to Watkins-Johnson in the United States via "SIC Courier." Throughout the course of these proceedings, the Claimant never denied having received the invoice. In all its memorials, the Respondent also

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88 See paras. 27-40 (especially paras. 30, 34-35, and 39-40), supra.

89 See the paragraphs referred to in the preceding footnote, especially paras. 34-35, 39-40, supra.

repeated, again and again, that despite this act of good faith on Iran's part, the Claimant refrained from drawing upon the valid letter of credit in order to collect on the invoice, and instead persisted in being in default and in failing to perform on the Contract. Even though the Claimant never disputed the validity of the letter of credit at any stage of the proceedings, the Respondent filed two documents with the Tribunal which showed that it had requested Bank Markazi to renew the letter of credit before it expired; and it also filed a contemporaneous certificate issued by Bank Markazi demonstrating that the letter of credit remained valid until 25.10.1358 [15 January 1980], on which date (i.e., after all the attempts to save the Contract had failed) it became null and void, with a balance remaining of $5,907,834. The Claimant did not dispute any of these facts, either; nor did it file any rebuttal evidence in that connection, even though it could easily have referred to the Bank of America, the advising bank for the letter of credit, if it had believed otherwise, in order to prove, by obtaining a document or an affidavit from that Bank, that the Respondent's statements were incorrect. It is, further, interesting to note that wherever the Claimants' own documents, dated from considerably earlier than 10 January 1979, mention the matter of the expiration date of the letter of credit, they all proceed immediately to note the Respondent's steps aimed at renewing the letter of credit, and to state that there appeared to be no obstacle in that connection. Moreover, the file supports the fact that Watkins-Johnson "made no extension request... [Therefore,] even under the particular circumstances of the time, the Tribunal [should not] find [Watkins-Johnson's] actions entirely appropriate." (Para. 60 of the Award in FMC Corporation and The Ministry of National Defence et al, referred to in footnote no. 62; see also Agrostruct International Inc. and Iran State Cereals Organization, Award No. 358-195-1, para. 44, reprinted in 18 Iran-U.S. C.T.R. 180 at 193).

Therefore, the statement made in paragraphs 33 and 87 of the Award, to the effect that "the status of the letter of credit in Watkins-Johnson's favor, which was due to expire on 10 January 1979, was still unclear at least at the end of January 1979," is unfounded and merely a product of the majority's imagination, and the Tribunal is not allowed to resort to pretexts not advanced by Watkins-Johnson itself, in order to exonerate the latter from its liability. Moreover, even assuming in arguendo that the majority can arbitrarily cast doubt on whether the said letter of credit was valid over a certain brief period, the fact that the invoice could be cashed at some not-distant time constituted a sufficient assurance to the Seller.[90]

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[90] This is not the first time that this same majority has cast itself in the role of the Claimants, to either search for evidence or to build a case for them by making assumptions concocted by its own imagination. (See, inter alia, my Dissenting Opinion in The United States of America [representing Leonard and Mavis Daley] and The Islamic Republic of Iran, Award No. 360-10514-1, in particular paragraphs 36-40 thereof). The injustice arising from the approach taken in paragraph 87 of the majority's Award becomes more palpable when we observe that this same Tribunal has not even adopted a similar approach vis-à-vis the Claimants, who in principle bear the burden of proving their own claims, at the risk of having their claims dismissed in the absence of compelling and convincing evidence (cf. my Dissent in Daley, footnote 25 and paras. 31.3 and 36-40). There are cases where this Tribunal has unjustly held that the claimants' allegations, even concerning the facts relating to the claim, had been proved, on the mere pretext that the respondent had failed to present evidence in rebuttal thereof. (See, for example, Alan Craig and Ministry of Energy of Iran et al, Award No. 71-346-3 (1983), reprinted in 3 Iran-U.S. C.T.R. 280, 288; and International Technical Products Corporation et al and The Government of the Islamic Republic of Iran et al, Award No. 186-32-3 (1985), reprinted in 9 Iran-U.S. C.T.R. 10,12.) Moreover, even if one were to concede -- notwithstanding the fact that the Claimant in this Case was blatantly in default at every stage -- that some degree of assurance was needed in order to require the Seller to perform on his obligations, the steps taken by the Buyer (as described hereinabove) were, legally, well beyond the necessary degree of assurance (see Williston, Section 822). (Footnote continued)

81. The majority's final argument aimed at its preconceived conclusion is no more valid than the other arguments put forth in the Award. In paragraph 87, in fine, of its Award, the majority invokes the Respondent's letter of 16 July (wherein it stated that the expenditures under Contract no. 108 had, or were considered as, stopped, as of 10 February 1979), in order to justify the Claimant's halt of the works (and perhaps its sale of the goods). The majority considers this notice strong circumstantial evidence showing Iran's unwillingness to honor invoice no. 70241. This argument has several defects. Firstly, because we are confronted, at this stage, with Watkins-Johnson's failure, and unjustifiable reluctance, to collect on the amount of invoice no. 70239 by drawing on the valid letter of credit, a Gordian knot-like enigma which the majority has been unable to unravel convincingly, we cannot address invoice no. 70241, which had not yet been prepared or issued, or which the Respondent had, at least, not yet received (see paragraphs 32, 84, and 85 of the Award). Secondly, such recourse to alleged events that occurred months after the halt to the works and the measures taken to sell the goods cannot be regarded as factors justifying those actions. Thirdly, the most fundamental objection to this unwarranted justification by the majority is that it fails to take into account the fact, reflected in its own findings, that it is undisputed that the work and expenses under Contract no. 108 were halted as from 1 December 1978 (paragraphs 32, 42, 86, 90 and 101, and footnote 9, to the Award). Therefore, under

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(Footnote continued from page 97)

On the other side of the coin, the majority's Award does not refer to any actions which would demonstrate that the Seller had provided the Buyer with even a modicum of the necessary assurance. On the contrary, it has been shown in this Dissenting Opinion that the Seller's actions, if not from the beginning of 1978 then at least after it received payment on invoice no. 70235, served to aggravate the Buyer's lack of confidence in him, a fact of which the latter was admittedly aware (paras. 35-40, supra).

such circumstances where neither the Parties nor the Tribunal disputes the fact that the expenses were halted in December 1978, it is not at all clear how the Respondent's emphasis and reminder to the effect that the expenses under the Contract had been halted at least as from 10 February 1979, can be invoked against the Respondent.

82. In actuality, the majority has disregarded all these factors and joined hands with the Claimant in its illogical and unjustified expectation that the Buyer should have paid the Seller a further $3,153,794 ($1,529,412 of which Iran had made arrangements to pay in accordance with the step-by-step plan of 12 January 1979), in order to encourage the Seller to fulfil its contractual obligations. The practical result of the majority's expectation is that Iran should have paid a total of $16,243,824 by late November, or at latest by 22 December 1978, notwithstanding the fact that it received goods and services worth only approximately $7 million.[91] The majority has not bothered to think about what could possibly have served to reassure the Buyer, in view of the Seller's past record and conduct and under circumstances where it was preventing Iran's representative from making an inspection in order to determine what actions had been taken on the first step of the step-by-step plan, and also where the Seller was not performing on any of its obligations, even under the majority's presumed step-by-step plan. The majority has totally failed to take into account the fact that prior to, or at least on a date contemporaneous with, the preparation

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91 It is to be noted that at this stage, it is entirely irrelevant whether or not all of the expenses allegedly incurred would have been paid at the time the Contract was terminated by the Employer for convenience (see para. 108 of the Award, and paras. 86, 89-91 of the present Dissenting Opinion), because we have not yet come to the stage where the Contract was terminated; rather we are at that stage of the performance on the Contract where an alleged default by the Buyer is regarded as a/the factor which gave the Seller the right to halt the works.

of invoice no. 70241, and at any event before it was sent, the Seller acted sua sponte in seeking recourse to the United States courts, in order to enjoin any payment under the good performance guarantees,[92] which constitutes very clear and compelling evidence that the Seller had no intention of continuing with the Contract, as well as being highly instrumental in lessening the Buyer's trust and confidence in the Seller.

H. Mitigation of losses

83. The second part of the majority's arguments aimed at justifying Watkins-Johnson's actions in breach of the Contract, and at relieving it of liability, can be examined under the above heading. I must first note that the majority has no right to resort to this theory, because the governing law is that of Iran, and there exists no such institution in Iranian law, in the form advanced by the Claimant and presumed by the majority. In applying this theory, the majority has also made a fundamental error, because it has equated mitigation of losses with the infliction of injury on others. The Claimant and majority state, in brief, that by resorting to the abovementioned theory, the Claimant acted correctly in selling 183 items of Iran's property [93] for the sum of $1,423,588, and in destroying the remainder of the goods, amounting to approximately 600 items (the contractual value of the items under both headings being a total of $7,529,488). However, it fails to make clear, firstly, how it has been able to determine that this quantity of goods was actually manufactured; secondly, precisely which items were sold, and what was the value and sales price of each; thirdly,

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92 Paras. 40, 111 of the Award, and para. 38 of this Opinion, supra

93 In footnote 7 to the Award, the majority states that there were 186 items of goods; the discrepancy has little impact on this issue.

just what greater loss it was necessary to mitigate by selling or scrapping all those goods; and finally, whether or not Watkins-Johnson complied with the necessary requirements, in taking such measures.

84. Before turning to this issue from the legal point of view, I must first state my opinion in connection with two arguments invoked by the majority as justifying Watkins-Johnson's scrapping approximately 600 items of goods. In paragraphs 36 and 96 of the Award, the majority asserts that it finds convincing Watkins-Johnson's explanation that it was unable to sell the manufactured equipment on the market (the manufacture of which has not yet been proved), because it had been designed for the special requirements of the Iranian Air Force. The majority fails to indicate on what convincing evidence it has founded its justification. Both the majority and I know very well that no evidence exists in this Case that might corroborate this allegation. On the contrary, the Iranian experts on the Project offered the convincing and unrebutted explanation that the goods ordered could form a data-gathering system only after being combined and integrated with other equipment, and at any event, those goods could be used for other industrial/commercial purposes (footnote 7 to the present Dissenting Opinion). I find particularly astonishing the other argument (in paragraph 97 of the Award) that since it was in Watkins-Johnson's own interest to sell as much equipment as possible, there can be no reason to doubt the Claimant's assertion that there was no market for the goods! This is the most illogical and unfair, and certainly the most ridiculous, argument that might be expected of an adjudidicative forum, because here, an allegation is advanced as its own proof. The majority treats Watkins-Johnson as an innocent who tells nothing but the truth. It therefore considers it inconceivable, for example, that Watkins-Johnson might have sold the goods or used them for some other valuable purpose, and yet concealed this fact from the Tribunal. Moreover, given that

the proceeds realized from the sale of the goods had to be credited to the account of the Customer, I do not see how the majority can possibly justify its argument made in paragraph 97.

85. As the Respondent stated in the course of the proceedings, Iranian law, as the governing law of the Contract, does not permit someone to sell property belonging to others, to the detriment of the latter, on such various pretexts as preserving one's own interests or mitigating one's losses. Moreover, pursuant to Article 247 of the Iranian Civil Code, [94] even if the sale is done on behalf of, and in the interest of, the owner of the property, the validity of an unauthorized transaction with respect to someone else's property depends and is contingent on acquiring the subsequent consent of the latter. Under the Iranian penal code, engaging in transactions with someone else's property is a crime and entails penal sanctions.[95]

Aware of this point, and in order to evade the consequences thereof, the majority invokes United States law in paragraph 93, while making a cursory reference to Article 11 of the Contract wherein Iranian law is stated to be the governing law.[96] The majority could not, and should not, so facilely have excused itself from examining Iranian law

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94 Footnote 13 to the majority's Award.

95 The Iranian penal code imposes numerous penalties upon the transferor and transferee of property belonging to a third party. To study these regulations, see, inter alia, the provisions of the "Code Relating to Persons Who Transfer or Appropriate the Property of Others, and the Penalties to Which They Are Subject," and the "Code on Penalties for the Conversion of Property Belonging to Others," printed in Majmu'eh-ye Kamel-e Qavanin o Moqarrarat-e Jaza'i ["Complete Corpus of Penal Codes and Regulations"] (2nd printing 1360/1981), compiled by Gholam-Reza Hojjati Ashrafi, pp. 207-213.

96 See the discussion under "The governing law [of the Contract]", paras. 48-49, supra.

in order to extract and apply the rules governing the contractual relations between the Parties to Contract no. 108.

In view of the majority's next argument in paragraph 94, to the effect that title to the equipment had not yet passed to Iran, it might seem, as the majority imagines, as though discussions over the consequences of transactions involving the property of others were closed. Yet, in light of the conclusion reached in the Award, the issue remains open. Of course, if the majority had been logically consistent in this discussion and had argued (accepting as alleged that the Respondent was in breach of contract) that the Claimant deemed the Contract to be terminated as of the time it halted the works and commenced its measures to sell off the goods -- and if the majority had also concluded that the Respondent was entitled to restitution of that part of the consideration against which it had not received goods or services, and had then proceeded to a determination of the quantum of damages due the Claimant -- then and only then could the issue related to transactions involving the property of others be regarded as closed. In this Award, contrary to what it says in paragraph 94, the majority has in effect found that the property belonged to the Respondent, and has credited the proceeds realized from the sale thereof to the Buyer's account by setting the instalments paid on the contractual price against the cost of the goods and services allegedly provided, including the very same sold or scrapped items. For this reason, it will be necessary to enter briefly into the subject of Iranian law, in order not to pass over the relevant points and issues.

The Iranian Civil Code deals severely with transactions involving the property of others: viz., it holds the seller responsible with respect to the actual property sold and its usufruct, and for any defects that may occur

thereto (Articles 259, 261); it also regards the possession thereof by the buyer (and any subsequent buyer) as usurpation, whether or not they were aware of the unauthorized nature of the sale (see, inter alia, Articles 263, 303, 308, 317 of the Iranian Civil Code). In keeping with this severe position and treatment, Iranian law permits the management of, and transactions concerning, the property of others solely in limited instances, where the owner cannot be contacted, in order to safeguard his benefits and to prevent him from suffering loss -- and that only through, and under supervision of, the public prosecutor's office, i.e., via the judicial branch -- but not for the purpose of mitigating the losses of the person managing or transacting in those goods, and not where one party to the contract appropriates to himself the role of seller, creditor, debtor, adjudicator, and executor. Fortunately, such a degree of legal chaos has not yet become rooted in the Iranian legal system, or in that of many other countries.

86. Even if we consider the theory from the standpoint of Anglo-American law, the majority has failed, as we indicated above, to take the pertinent rules and conditions into account in applying that theory.

It must be stated at the outset that in a comparative study on the law of countries with totally dissimilar legal systems, Trietel says:[97]

> The "duty" to mitigate loss may be said to have two aspects. First, the plaintiff may be bound to take positive steps to minimize the loss which would otherwise flow from the defendant's default. Secondly, he may be bound to refrain from taking steps... which in view of the default may unjustifiably augment the loss.

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97 G.H. Trietel, Remedies for Breach of Contract, in vol. VII Int'l Ency. Comparative law, Chapter 16 p. 75 at 76.

Taking into account what may be learned from a study of the legal works of jurists of the Anglo-American legal system, it must first and foremost be noted that (1) this theory gives rise to duties on the part of the person taking the measures (the Claimant),[98] rather than to rights, and 2) applies to cases where the other party (the Respondent) is guilty of default and breach of contract;[99] (3) in such instances, the Claimant must take such measures, and must not be guilty of omission concerning any such measures,[100] as (4) are necessary in order to prevent or to mitigate injury and loss.[101]

In light of these considerations, it can be categorically stated that even from the viewpoint of the Common Law system, the theory invoked by the majority has no bearing whatever upon the issue before us in this Case, because (firstly) the majority admits in paragraph 73 that "[n]either is the Tribunal persuaded that Iran must be deemed to have 'repudiated' Contract No. 108 merely because it did not make payments in early 1979"; and (secondly) it is not clear just what greater loss the Claimant prevented or mitigated by selling and scrapping goods worth more than $7.5 million. The measures taken by the Claimant in this Case not only failed to result in any mitigation of

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98 See Chitty, Section 1714 ff; Cheshire, pp. 598 ff; and Trietel, pp. 754-758 (op cit, works referred to in footnote 47, supra); also Corbin, vol. 5, Sections 1039 ff; Williston, vol. 11, Section 1353ff; Simpson, pp. 401 ff; and Calamari & Perillo, pp. 610-611 (op cit, works referred to in footnote 55, supra); and T.E. Carbonneau, The Elaboration of Substantive Legal Norms and Arbitral Adjudication: The Case of the Iran-United States Claims Tribunal, in the Iran-U.S. Claims Tribunal 1981-1983 Seventh Legal Colloquium edited by R.B. Lillich p. 104 at 120 et seq.

99 The sources cited in footnote 98 above, loc cit.

100 Sources cited in footnote 98 above, loc cit.

101 Sources cited in footnote 98 above, loc cit.

damages, but caused much greater losses instead, [102] losses which did not have to be incurred and which were unrelated to whatever losses might potentially have resulted from the alleged breach of contract. The Claimant's actions or inactions should have been directed towards mitigating losses and injuries arising from the Respondent's default. The other side of the coin is that the action or inaction should ultimately have resulted in reducing the award (i.e., in reducing the potential losses and injury to the Respondent), rather than increasing it by selling millions of dollars worth of property for a paltry sum. [103]

On the other hand, we are aware that in this Case, the Tribunal has by its Award required the Respondent to pay invoices no. 70239 and 70241. Therefore, by this Award, the Claimant has in effect been paid every last penny of its alleged expenses. Under such circumstances, where the remedy sought and the amount which the majority has seen fit to award are precisely equivalent to payment of the contractual price for the alleged costs of performing the services under the Contract, such recourse to the aforementioned theory is totally groundless.[104]

In view of the type and specifications of the goods, which included equipment or panels, cards, and circuits relating to receiving and transmitting apparatus, it would

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[102] As Corbin notes (op cit, Vol. 5, Section 1042, p. 271), quoting a United States court ruling:

> "The duty of the plaintiff to keep the damages as low as reasonably possible does not require of it that it disregard its own interests, or exalt them above those of the defaulting defendant." (emphasis added).

[103] See Trietel's article, cited in footnote 97 above, pp. 75-77.

[104] Chitty, op cit, Section 1723; article by Trietel (cited in footnote 97, supra), p. 80.

not, in principle, have cost the Seller anything to maintain them in a corner of its warehouse, and to claim the storage costs, which should have been quite negligible, if any, given the small volume of the equipment involved. Moreover, the alleged sale of the property for an insignificant price, and the allegation that a large number of the goods manufactured were scrapped on the pretext (or on whatever other pretext) that they had been manufactured in accordance with the Buyer's orders and specifications, could not detract in the least, even if such allegation were true (see footnote 7, and paragraph 84, supra), from the value and importance which these goods had for the Respondent, namely the party that had ordered goods with those particular specifications.

In addition to the foregoing, and aside from the fact that the majority ought, for the above-stated reasons, to have held that the Claimant was in breach of the Contract, the majority has not taken into account that in refusing to accept the advance payment or to collect on invoice no. 70239, the Claimant actually failed, in fact, to comply with its duty to mitigate its losses; [105] instead, by needlessly halting the works and selling the goods, it caused the Respondent to incur heavy losses.[106]

87. In order to justify the Claimant's actions, the majority has attempted to portray the Claimant as having given the Respondent the necessary notification on 30 January and 15 February 1979, in accordance with the provisions of Article 88 of the United Nations Convention on Contracts for the International Sale of Goods (paragraph

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[105] See Cheshire, op cit, pp. 599, 602-603; Chitty, op cit, Section 1718; T.E. Carbonneau (article cited in footnote 89, supra) p. 124.

[106] Corbin, vol. 5, Section 1042.

95 of the Award).[107] However, with a little attention to the recitation of the facts and the points set forth above, one can easily discern the baselessness of this argument put forth by the majority as well. Firstly, the letter of 30 January 1979 (assuming that it was actually sent and received) intentionally ignored the events and actions relating to the period after 22 December 1978, culminating in Iran's notice of 30 January 1979 wherein it warned the Claimant that it would hold the latter responsible for the consequences of its default, and for any damages suffered by the contractors to whom the goods were supposed to be delivered so that works on other segments could be performed. Moreover, it is not at all clear how the allegation that the Claimant gave Iran notice of its intent to sell on or about the same time as invoice no. 70241 was prepared, or rather even before it was sent for payment (paragraphs 35-36, 84-85 of the Award) can be reconciled with the contemporaneous efforts to implement the purported step-by-step plan. Secondly, the alleged issuance of the letters of 30 January and 15 February 1979 relates to a period when entirely classical conditions of force majeure prevailed, a time of street clashes and of the disintegration of the Imperial Army and regime; and also a time when nearly all American IBEX Project contractors alleged, in order to relieve themselves of their obligations and responsibilities, that their contacts had been cut off and force majeure conditions existed (paragraphs 72-74 of this Dissenting Opinion). The Claimant itself filed a document with the Tribunal which indicates that it had been unable at any point to communicate the letter of 15 February 1979 to the Iranian authorities. In its letter of 14 April 1979, the United States Embassy in Tehran pointed out to

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[107] At every stage of these arbitral proceedings, Iran denied having received these letters, and the Claimant failed to prove that they were received.

Watkins-Johnson that General Asrejadid, to whom the letter of 15 February 1979 was addressed, had retired; and it thus advised Watkins-Johnson to address any correspondence it intended to send to the relevant office of the Iranian Air Force, in view of prevailing conditions in Iran. There is no evidence on record which might indicate that this advice was ever acted upon.

The majority has also failed to take into account that, as evidenced by the Claimant's own documents filed in this Case, Iran pointed out at the September 1979 meeting that it "had received no communication from Watkins-Johnson since the Revolution" (paragraph 43 and footnote 39, supra), and Watkins-Johnson never asserted, either at that meeting or thereafter prior to the proceedings before this Tribunal, that those communications had been sent; nor did it make any effort to submit a copy thereof to the Respondent at that same meeting. The veracity and candor of Iran's statements are confirmed by the fact that it knew nothing of the measures being taken to sell off the goods, and also by its interest, which it expressed at the September 1979 meeting, in continuing on the Project in earnest, as well as its request for a report on the status of the works and equipment and, finally, the silence of Watkins-Johnson (until the proceedings before the Tribunal), which never at any point informed the Respondent that only 183 items of the goods could be sold, and that the remaining 600 items would have to be scrapped. In itself, this point leads to a further conclusion. Supposing that the Claimant did give the Respondent notice of the sale, this notice -- which could logically be deemed to signify that the property would be sold at a reasonable and fair price -- cannot take the place of the necessary notice of intent to scrap those goods, because if the Claimant had notified Iran that it had realized only $1,423,588 in selling a mere 183 items out of its equipment worth a total of $7,529,488, and that the remainder of the goods were going to be destroyed althogether, then the

Respondent would surely have taken a decision befitting this totally special and exceptional situation, in the same way that a number of properties belonging to Iran, including certain IBEX Project properties worth far less, are even now still being kept in storage in the United States, subject to various charges including warehousing costs, which charges Iran regularly pays, solely in the hope that one day, it might gain possession over those goods. As a matter of fact, the majority is well aware that the Respondent sought the delivery of the equipment the Claimant actually delivered to some other IBEX Project contractors such as Ford Aerospace, over which the majority has retained jurisdiction pending a decision in this Case (see Ford Aerospace, op cit in footnote 64, paras. 101-105 and para. 11 of the majority's Award in the instant Case).

88. The final important point in connection with the facts pertaining to this section is that the majority has in reality reached the conclusion in its Award -- and here too, in keeping with its usual approach, without any evidence whatsoever but merely in reliance on the allegations made by the Claimant itself and by the latter's employees [108] -- that as of 22 December 1978, the date when Watkins-Johnson halted its operations, it had prepared and

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[108] Not only should the allegations made in the affidavits of Watkins-Johnson's personnel be disregarded, inasmuch as their contents are contradicted by the contemporaneous evidence filed by the Claimant itself, but it has also been the practice of this Tribunal, as well as of other international fora, not to give such affidavits the same weight as it affords substantiating evidence, and indeed to reject allegations based on such affidavits and even on corporate internal papers and documents. (Avco Corporation and Iran Aircraft Industries et al, Award No. 377-261-3, paras. 90-99, reprinted in 19 Iran-U.S. C.T.R. 200; Morrison-Knudsen Pacific Limited and The Ministry of Roads and Transportation, Award No. 143-127-3, reprinted in 7 Iran-U.S. C.T.R. 54, 79; Claim of Nicaragua v. The United States of America, International Court of Justice, Decision of 27 June 1986, paras. 64-65; Administrative Decisions and Opinions of the United States-German Mixed Claims Commission (1926), pp. 548, 798; and Sandifer, Evidence Before International Tribunals, 1957, pp. 351-354.)

manufactured all of the goods under the Contract. [109] And yet, the available evidence in this Case, particularly the Claimant's own evidence, demonstrates that the work of preparing, manufacturing and delivering only $6 million out of the remaining $7.5 million worth of goods would have taken until sometime in the latter half of 1979 (see paragraph 27, and footnote 20, supra), even by the most optimistic projections, and assuming that Watkins-Johnson were really willing and able (in contrast to its prior conduct) to abide by its promises.

I. The Award for payment of the invoices is inconsistent with the Contract's provisions and with other findings in the majority's Award

89. Aside from the majority's errors set forth up to this point, an important fact about the Award is that in granting payment of invoices no. 70239 and 70241, and in its arguments underlying this decision, the majority disregards the express terms of the Contract; and in so doing, it has not even been logical, self-consistent, or true to the findings made in the other parts of its Award. This objection to the majority's Award applies whether we hold that the performance under the contract was rendered impossible owing to force majeure or frustration of purpose, in view of the United States' policy, or even whether we hold that the Contract was terminated for convenience by the Buyer, without any default on the Seller's part.

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[109] Accepting the Claimant's assertion that when it halted its operations in December, it had in its possession $7,529,488 worth of undelivered goods relating to the Project, and given that goods worth some $4,670,155 had already been delivered, the majority arrives at the amount of $12,199,643 as representing the sum total of the value of the goods (both delivered, and manufactured but not delivered)-- i.e., slightly more than the total value of the goods under the Contract!

In order to understand these errors, or rather, perhaps, instances of negligence on the majority's part, it is necessary to examine the terms of the Contract and the findings reached by the majority in its Award.

90. Article 7.6 of the Contract provides, in connection with termination due to force majeure :

> In this case... the price of equipments which have already been supplied or are under manufacture according to original and the latest monthly progress report accepted by the Buyer and also the price of services rendered up to this date must be paid.

Article 7.4 of the Contract, concerning cancellation of contract by the Buyer "for any reason not attributable to the Seller's negligence," provides that in such a situation, the Buyer shall:

> ... take over responsibility of paying the price of all equipment and materials shipped to the Buyer and works performed including those equipments and materials for which the manufacturing has already started.

91. Therefore, even if we were not to accept any of the following alternatives, namely that the Contract with Watkins-Johnson was terminated because of negligence on the Seller's part or because of the United States' refusal to issue licenses for the sale of the goods and services under the Contract, or at any event due to the existence of force majeure conditions, and if we were instead to concur with the majority in assuming that the Contract was terminated owing to a deliberate policy decision on the part of the Buyer, the conclusion would still be contrary to that reached by the majority. In such a situation too, the Buyer's responsibility is limited to "paying the price of all equipment and materials shipped to the Buyer and works performed including those equipments and materials for

which the manufacturing has already started" (emphasis added). There is no interpretation by means of which the scope of this contractual provision can be so extended as to permit the majority to take the Contractor's alleged expenses as the basis for its decision, without taking into account the actual progress of the works. As it so happens, there does not appear to be any divergence in this connection between my interpretation of Article 7.4 of the Contract and that of the majority, because the latter states in paragraph 108 of the Award, in dismissing certain of the Claimant's claims for alleged costs, that:

> Here, the Buyer is permitted to terminate the contract for convenience and in that event Article 7.4 requires payment only of the "price of all equipment and materials shipped to the Buyer and works performed..."

Based on the foregoing, without a determination of the value of the goods and services delivered to the Buyer, and of the value of the equipment being manufactured, the award for payment of invoices no. 70239 and 70241, which simply constitute the balance of Watkins-Johnson's alleged costs (totalling some $16,243,824; cf. paragraph 86 and footnote 9 to the Award), is totally in error. Moreover, it is inequitable for us to take the approval of invoice no. 70239 and, assuming in arguendo only, the approval of invoice no. 70241[110] (paragraph 87 of the Award), for

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110 Not only was invoice no. 70239 issued by falsifying the report confirming a work progress rate of 83% (para. 36 of this Opinion, and paras. 81-82 of the Award), but what is more, the issuance of invoice no. 70241 is not supported by any progress of works report confirming the performance of services and goods worth $16,243,824. Moreover, Touche Ross, the Project Auditor, expressly stated in its letter of 8 February 1979 to General Asrejadid (para. 85 of the Award), in order to relieve itself of any possible responsibility, that it had only examined and approved the clerical accuracy of the invoice.

payment as grounds for awarding payment of those invoices against Iran, because those actions taken pursuant to the step-by-step plan (whichever of the plans one may have in mind) were among the efforts that were made in order to save the Project. Such arguments do not relieve the majority of its obligation to respect the provisions of Article 7.4, on termination. Nor can the majority evade its responsibility by positing on the one hand that the invoices were approved and accepted by the Buyer for payment, and then, on the other hand, despite this finding, extending rights to the Seller, who was able, without being held to have been in breach of the Contract, to halt the works under the Contract and to sell the goods and properties allegedly manufactured for the Buyer -- goods whose price unquestionably made up a part of the Seller's alleged costs of $16,243, 824.

J. Other exceptions to the Award

J.1 The December 1978 invoice for field support services

92. In paragraph 101 of the Award, the majority has adjudged against Iran for payment of $4,976.92 for invoice no. 70240, even though no progress of work evaluation report was made for the month of December 1978 (see, inter alia, paragraph 101 of the Award, and paragraph 33 of this Dissenting Opinion), and without taking into account that the Seller's costs halted from 1st December 1978 (paragraphs 23 and 81 of this Opinion; and paragraphs 32 and 86, and footnote 9, to the Award), both of which points confirm that the works in connection with manufacturing and preparing the goods, and the support services, had halted altogether.

In order to accept invoice no. 70240, the majority once again distorts the facts, arguing that although

"Touche Ross forwarded this invoice to Iran without any recommendation regarding payment... Touch Ross did not, however, object to the underlying costs on which the invoice was based." In reality, the majority has not only ignored the fact that Watkins-Johnson halted all of its works and expenses on the Project as of 1st December 1978 at the latest, but it has also overlooked the point that in its letter of 21 March 1979 (which letter, and consequently invoice no. 70240 as well, Iran denies having ever received), Touche Ross stated, after pointing out that invoice no. 70240 was unaccompanied by any work progress report for the period ending in December 1978, that "we, therefore make no recommendation as to the processing for payment of the invoice described above."

J.2. Bank fees for the good performance guarantees, and costs of maintaining injunction bonds

93. The majority has awarded against Iran for payment of the bank fees (from 1st November 1979) and costs of maintaining injunction bonds enjoining payment of the good performance guarantees (as from May 1980) (paragraphs 115 and 120 of the Award).

I must first point out that under the terms of the Contract (inter alia, Article 7.1) and the conditions of the good performance guarantees, Iran was entitled, in belief that Watkins-Johnson had defaulted on the Contract, to draw on those unconditional guarantees so as to recover at least some part of its losses. The right to exercise this prerogative was not contingent or conditional upon its taking any measures through the administrative or judicial authorities.

As will have become clear from an examination of the Award and of this Dissenting Opinion up to this point, Watkins-Johnson took unfair advantage of the anti-Iranian

climate then prevailing in the United States courts, thereby preventing Iran from enforcing its legal and contractual rights. Therefore, under such circumstances, I cannot concur in awarding against Iran for payment of the Claimant's alleged costs. Instead, I believe, in sum, that the Tribunal should have awarded in favor of Iran for the payment of the proceeds under the good performance guarantees, as compensation for a small part of its losses.

Aside from the above argument, the majority accepts that prior to the issuance of the Award, the Parties disputed which of them was in default and breach of the Contract; moreover, the majority itself is (ostensibly) unable to attribute such default to any of the Parties (paragraph 73 of the Award). Under these circumstances, the majority should not have required Iran to pay the costs of maintaining the injunction bonds against payment of the guarantees and the bank fees relating thereto, payment of which was ultimately in the Claimants' own interest anyway.

94. Apart from the objections to which the Award per se is susceptible in this connection, I also take exception to the arbitrary and unfounded choice of 1st November 1979 as the date from which interest is calculated in connection with the bank fees. From beginning to end, the Award clearly demonstrates, as does every paragraph of this Dissenting Opinion, that for some time, even after 31 October 1979, Iran was kept in suspense as to the fate of the Project, since it was not informed of the Claimant's final decision or of the status of the goods. Before receiving the letter of 5 December 1979 (paragraph 39 of the majority's Award), Iran did not have any precise information as to the fate of the Contract or the status of the goods, and until that date it still did not know how the Claimant would react to its invitation, at the

September 1979 meeting, that the former resume work. For this same reason, it did not abandon hope of continuing on the Contract until March 1980, on which date it called on the guarantees. In view of the foregoing, in my opinion it is illogical and unfounded to specify 1st November 1979 as the date from which interest shall run.

J.3. Declaratory relief

95. I must note that the majority's decision in paragraphs 122 and 135 (2), wherein it obliges Iran to take "all action necessary" to ensure that Bank Saderat cancels the good performance guarantees and that Wells Fargo Bank releases the corresponding standby letters of credit, is -- logically, rationally and in view of the practice invoked by the majority itself -- limited to those actions that can justifiably be deemed to be within Iran's ability and scope of control.[111] Therefore, the majority's inadequate language cannot be construed as signifying anything more than that the Respondent is only obligated, by releasing the good performance guarantees, to ensure that Bank Saderat is free to release the letters of credit. This is because the Respondent has no obligation to intervene in the banking relations (whatever they may be) between Bank Saderat and Wells Fargo Bank. Nor does Iran exercise any control over Wells Fargo bank, and it cannot compel that

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[111] The majority's invocation of the Award in Harris in para. 122 demonstrates that the majority shares my interpretation of the paragraphs in question, because in para. 162 of the Award in Harris, which was made in reliance on para. 89 of the Award in Ford Aerospace, the respondent's obligation was limited to cancelling the "bank guarantees" and "ensuring the release of the corresponding letters of credit," which measures were limited to the respondent's relations with an Iranian bank.

bank to take any action which the latter is perhaps, for whatever reason, unwilling to take.

J.4 The issue of interest and costs of arbitration

96. I dissent to the award of interest to the Claimants. Since I have previously set forth my principal reasons for this position in my Dissenting Opinion in Agrostruct International, Incorporated (Award No. 358-195-1), paragraphs 45-46, I shall refrain from reiterating those reasons here, in order to avoid prolonging the present discussion.

97. I also strongly oppose any award of costs in favor of United States claimants, because they already have access, free of charge, to this unique forum whose expenses are borne by the two Governments, and also to the Security Account established by the Government of Iran, so that there remain no grounds for being overly indulgent towards them.

I also hold that the Award of $30,000 to the Claimant for its costs of arbitration is derisory and inequitable, because this majority acts as though it were unaware of the generosity that has been extended to the United States claimants before this Tribunal, as though the majority did not know that the United States claimants can obtain judgment amounts from awards, to which they were never entitled in most cases, without having to bear the arbitration costs incurred by other litigants before other fora, and without having to get caught up in the numerous difficulties and labyrinthine processes normally required to enforce awards. The majority has disregarded the fact that for these reasons, and for a number of other valid reasons, it has been Chamber Two's broad and general practice, and Chamber Three's practice in most Cases, not to award costs of arbitration.

K. The counterclaims

K.1 Counterclaim for damages arising out of breach of the Contract and sale of the goods

98. Obviously, in view of the facts as discussed in this Dissenting Opinion, as well as the points raised in Part III, F.1. and its sub-headings concerning Watkins-Johnson's breach of the Contract, I strongly dissent to the Tribunal's decision in dismissing Iran's counterclaim for damages incurred (equal to the actual value of the undelivered equipment), and for damages arising out of the Claimant's nonperformance of the Contract, inter alia the payments which it was obliged to make in order to settle its disputes with E-Systems (paragraphs 57, 130 of the Award). I therefore believe, for the reasons explained in this Opinion, that the Tribunal should have not only dismissed Watkins-Johnson's claims, but also awarded against it for payment of fair compensation as a result of its breach of contract and its sale of Iran's property.

K.2. Counterclaims for taxes and Social Security premia

99. In order to dismiss these claims, the majority bases its findings solely upon the flimsy foundation of its previous awards in Sylvania, Questech, and Ford Aerospace, thereby dismissing all of the Respondent's counterclaims for taxes and Social Security premia "for lack of jurisdiction." I could have concurred in the dismissal of these claims from the viewpoint of jurisdiction, only if the United States Claimants had not assumed those obligations under the terms of the Contract, or in other words, only if those obligations did not arise "out of the same contract, transaction or occurrence that constitutes the subject matter of" the Claimant's claim (cf. my Dissenting Opinion to the Award in Agrostruct International, Inc. Award

No.358-195-1, paragraphs 56, 57), or if they could not be brought under the heading of a set-off (paragraph 58 of that Opinion).

The correct and logical way to deal with this issue would have been to examine whether or not Watkins-Johnson was obligated under the terms of Contract no. 108 to pay taxes and Social Security premia. Only if it determined that there was no such obligation, should the Tribunal have found that it lacked jurisdiction over the counterclaims, for the reason that those debts arose from law and were not related to the same transaction, contract or occurrence that underlies the claim.

L. Conclusion

100. In view of the facts set forth above, I totally dissent to the majority's decision, and I consider it a blatant example of the numerous injustices that have been perpetrated upon Iran in numerous cases by means of this Tribunal and its often imposed composition -- an example that demonstrates the extent to which the majority abides by the principles of impartiality and judicial fairness.

Dated, The Hague,

8 Jan 1990 18 /10/ 1368

Assadollah Noori