CASE NO. B1
FULL TRIBUNAL
AWARD NO. ITL 60-B1-FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.

INTERLOCUTORY AWARD

Appearances:

For the Claimant:

Mr. Mohammad K. Eshragh,
Agent of the Government of the Islamic Republic of Iran,
Mr. Aliakbar Ryazi,
Legal Adviser to the Agent,
Mr. Seyed Alavi,
Lawyer to the Ministry of Defence,
Col. Mahmood Gerami,
Mr. Mohammad Bahrami,
Representatives of the Ministry of Defence,
Mr. Davood Amini,
Representative of the Iranian Army,
Mr. Gholam Moghaddam,
Representative of the Iranian Air Force,
Mr. Parviz Shajareh,
Representative of the Iranian Navy,
Mr. Nozar Shaban,
Representative of the Helicopter Support and Renewal Company.

For the Respondent:

Mr. John R. Crook,
Agent of the United States of America,
Mr. Daniel Price,
Deputy Agent of the United States of America,
Ms. Sally J. Cummins,
Mr. Jose D. Alvarez,
Attorneys-Advisers,
Department of State,
Ms. Diana Blundell,

Ms. Kay O'Brien,
Representatives of the Department of Defense,
Ms. Sandra Zinn,
Ms. Brita Lineberger,
Office of the Agent of the United States.

## I. Procedural History and Issues

### 1. Procedural History

1. On 18 November 1981, the Ministry of National Defence of the Islamic Republic of Iran filed its Statement of Claim in this case against the "Government of the United States of America." This Statement of Claim set forth six separate claims which have come to be designated as Claims 1 through 6. On 18 January 1982, Iran filed a Supplement to its Statement of Claim. The United States of America filed its Statement of Defense and Counterclaim on 31 March 1982. This case was originally assigned to Chamber Three; Chamber Three relinquished the case to the Full Tribunal on 15 April 1982.

2. Iran filed its Statement of Defense to the Counterclaim of the United States on 8 July 1982 and a Supplement 2 to its Statement of Claim on 12 August 1982. On 24 August 1982 the United States filed a Petition seeking an Order striking certain matters from the case and requiring a more specific Statement of Claim.

3. The United States on 1 October 1982 filed its Reply to Iran's Statement of Defense to the Counterclaim of the United States. On 29 November 1982, Iran filed its Reply to the Statement of Defense of the United States. The United States filed its Rejoinder to Iran's Reply on 15 April 1983.

4. A Pre-hearing Conference to discuss the procedure to be employed in this case was held on 7 and 8 November 1983 before the Full Tribunal. A Supplemental Meeting to discuss such procedures was held before President Lagergren and Arbitrators Kashani and Aldrich on 4 May 1984.

5. In its Order filed on 16 May 1984 the Tribunal set forth the initial procedures to be used with respect to Claims 2 and 3 in this case. Paragraph 5 of that Order states:

> "The Respondent shall file with the Tribunal by 1 August 1984 a memorial on the question of whether claims for non-receipt of items sold under FMS cases at issue are barred unless notice was given within one year from the date of passage of title or billing, whichever, is later under Article B(6) of the General Conditions of the Letters of Offer and Acceptance. The Respondent shall include a reply to the objection raised by Claimant concerning the timeliness of the assertion of that defense. The Claimant shall file a counter-memorial by 15 October 1984."

6. The United States filed its "Memorial of the United States concerning one-year limitation on FMS claims" on 9 August 1984. Iran filed its "Counter-Memorial of Iran on the scope of General Condition B6 of the LOAs concerning one-year limitation" on 4 March 1985.

7. On 5 August 1985, the United States requested leave under Article 20 of the Tribunal Rules to submit further documents as a supplement to its Memorial on the one-year limitation issue. In doing so the United States asserted that Iran had in its Counter-Memorial restated the issue presented as "whether Iran's Claim 3 for defense services and defense articles billed in excess of those rendered or delivered or for other billing discrepancies, comes within the purview of General Condition B6 on the one-year limitation or not". The comments of Iran were requested and filed with the Tribunal on 30 August 1985. Iran attached several pieces of documentary evidence to its comments.

8. The Hearing in this case was held in the Peace Palace, The Hague, on 3 September 1985. Both Parties appeared before the Full Tribunal and presented oral argument. During the Hearing the United States introduced several further items of documentary evidence. At the request of the Tribunal, both Parties, shortly after the Hearing, submitted in writing the rulings they requested in respect of this case.

## 2. Procedural Issues

9. With regard to the Respondent's submission filed on 5 August 1985 and the Claimant's response to this submission filed on 30 August 1985 pursuant to the Tribunal's Order of 8 August 1985, the Tribunal notes that both were brief enough for the Parties to be able to take them into account and comment upon them at the Hearing. Both Parties did so. Because there was, therefore, no prejudice to either Party, and since these submissions and the evidence attached helped the Parties and the Tribunal to clarify certain issues in this case, both submissions are allowed.

10. During the Hearing the Respondent submitted copies of several sample "Report of Item Discrepancy" (ROID) forms that had been filed by Iran with United States military services. The Parties agreed that these ROIDs related to shipping discrepancies. In view of this and because the Tribunal does not consider these sample ROIDs to affect the conclusions in this Interlocutory Award, they are allowed and no further comments are required from the Parties in that respect.

11. Iran argues that the one-year limitation defense was not raised by the United States in a timely fashion. The Tribunal notes that Iran's Statement of Claim was, exclusive of Exhibits, relatively brief. In its Statement of Defense the Respondent stated that it was "unable to respond in

detail to Iran's allegations in this matter" and in August 1982 requested a more specific Statement of Claim from Iran. Despite the lack of specificity, the Respondent requested at that same time that the Tribunal strike from this case all claims based on Letters of Offer and Acceptance closed on or before 30 September 1978. Given the history of this case, the lack of prejudice to Iran in this case and the practice of this and other Tribunals, the Tribunal concludes that the defense should not be barred on the grounds of having been raised in an untimely fashion. Unlike the case with counterclaims, the Tribunal Rules do not prohibit subsequent reliance on defenses not articulated in the Statement of Defense.

## II. Facts and Contentions of the Parties

### 1. Factual Background

12. In Case No. B1 the Islamic Republic of Iran has brought a number of claims against the United States with regard to the "Foreign Military Sales" (FMS) program that existed between the two Governments. Under an FMS program, the United States Government engages in the sale of defense articles and services to a foreign Government. The FMS program with Iran began in 1964 and grew rapidly from the early 1970's on. By 1979 its aggregate value had reached over $20 billion.

13. The main features of an individual sale under an FMS program are as follows. When a foreign Government has made a request to purchase either defense articles or defense services from the United States Government and the latter is prepared to sell those articles or services, the relevant United States military agency issues a standard form "Letter of Offer and Acceptance" (LOA) containing General Conditions and setting out the particulars of that sale. Acceptance of the LOA by the foreign Government constitutes conclusion of

the contract, called an "FMS case", for an individual sale under the program. Defense articles and services under an FMS program either come from existing stocks and resources of the United States Department of Defense or they are procured by the Department of Defense from private contractors.

14. As required by the General Conditions of LOAs and United States practice under the program, Iran initially had and later kept funded an account which the United States held with its Treasury and which was known as "FMS Trust Fund." During the course of the program, disbursements were made from this Fund by the United States Government to pay the agreed charges under each LOA, and an accounting was given for the Fund. Billing was typically done on a quarterly basis. Delivery of a particular item and passage of title to an item took place, according to the General Conditions, at the initial point of shipment.

15. In that part of Case No. B1 which has been designated as Claim 3, the Islamic Republic of Iran seeks delivery of defense articles allegedly billed, but not received, the refund of the purchase price of defense services allegedly billed, but not provided, and the cost of other charges allegedly not owed, worth a total of $1,428,800,000. This amount represents the difference between the value of defense articles and services that the Respondent asserts to have delivered as of 30 June 1979 and that the Claimant asserts to have received to date.

16. The Respondent argues that a considerable number of FMS cases at issue in Claim 3 are barred by a provision of the General Conditions that stipulates a time-limit within which claims for non-delivery must be made. In the 1977 version of the General Conditions, Clause B.6., upon which the Respondent relies, reads as follows:

> "Standard Form 364 shall be used in submitting claims to the USG for overage, shortage, damage, duplicate billing, item deficiency, improper identification or improper documentation and shall be submitted by Purchaser promptly. Claims of $100.00 or less will not be reported for overages, shortages, or damages. Claims received after one year from date of passage of title or billing, whichever is later, will be disallowed by the USG, unless the USG determines that unusual and compelling circumstances involving latent defects justify consideration of the claim."

2. Contentions of the Islamic Republic of Iran

17. The Claimant the Islamic Republic of Iran contends that no portion of its Claim 3 is barred by General Condition B.6. It argues that, with the exception of duplicate billing, all claims covered by Clause B.6. relate to shipping rather than billing discrepancies. It further argues that only claims for the types of shipping discrepancies specifically enumerated by Clause B.6. are barred. However, claims for non-receipt of a total shipment of defense articles not evidenced as received on receipt Forms DD 1348-1 and DD 250 as well as claims for services and charges other than duplicate billing are excluded from the scope of that clause, and it is those types of claims that make up the bulk of Claim 3. The Claimant contends that for the few cases of Claim 3 to which Clause B.6. applies, namely shortages in or damages to a shipment of defense articles, it has submitted ROIDs in time.

18. With regard to defense articles, the Claimant asserts that the ordinary meaning of the term "shortage" as used in Clause B.6. only refers to shortages or non-receipt of items within a particular shipment inasmuch as in both instances the defense articles received are less than the quantity on the receipt documents, but that it does not embrace non-receipt of a complete shipment. This is confirmed by

the mentioning of two requirements in the clause that can start the one-year limitation, and by the fact that, in the Claimant's view, one of these requirements, i.e. passage of title, can only be established by receipt of documents that accompanied an actual shipment. Those receipt Forms DD 1348-1 and DD 250 being evidence of shipment and passage of title of defense articles, where no such evidence exists, the time limitation cannot be deemed as having been triggered. In this context the Claimant asserts that the delivery listings attached to billing statements can only be part of the billing, but cannot constitute evidence of the passage of title or shipment.

19. The Claimant asserts that where there are charges for certain defense articles on a billing, but such items are not acknowledged as having been received on receipt documents, this constitutes a billing discrepancy rather than a shipping discrepancy, and that with regard to billing discrepancies, the only claims barred by Clause B.6. are claims for duplicate billing. To none of the other charges and expenditures, which the United States has allegedly debited to Iran's FMS Trust Fund, is the one-year limitation applicable because the enumeration in Clause B.6. is exclusive, and any possible ambiguities would have to be construed against the Respondent as the drafter of the "General Conditions".

20. The Claimant asserts that the same argument holds true for the exclusion of defense services from the scope of Clause B.6. Not only does the clause not speak about "services", but its whole wording and structure, the Claimant argues, point to "shortages" as the only shipping deficiencies covered by the clause.

21. While the Claimant maintains that the "General Conditions" of the LOAs alone, and Clause B.6. specifically, determine the scope of the one-year limitation's

applicability, it disputes that the formulations used in ROID Form 364 and relevant United States instructions would lead to a different result.

3. Contentions of the United States of America

22. The Respondent the United States of America contends that General Condition B.6. is a valid and enforceable contract term which bars claims on FMS cases closed by 1 October 1978 and claims as to specific items or services where title passed and billing occurred prior to that date.[1] Counsel for the Respondent at the Hearing stated that the purpose of the one-year limitation is "to preclude the presentation of [such] stale claims ... and to assure a measure of finality."

23. Identifying the prime issue presented as the applicability of Clause B.6. to total non-receipt of a shipment of defense articles, the Respondent argues that the Clause B.6. term "shortage" embraces claims not only for shortage within a shipment but also for non-delivery of entire shipments. The Respondent observes that the Foreign Military Sales Customer Supplies System Guide (Naval Supply Publication 526) states that "typical discrepancies include: Material Shortage (i.e., only part of the quantity ordered is received) [and] Missing material (i.e., none of the material ordered is received)". The Respondent contends that Iran was aware of this construction and filed ROIDs for non-receipt.

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[1] The Respondent uses the date of 30 September 1978 because "normal relations between the two Governments were disrupted on 4 November 1979" and because "30 September rather than November of 1978 provides a margin of error in Iran's favor and facilitates record keeping because it coincides with the end of the United States Government's fiscal year".

24. With regard to the Claimant's reference to shortage code "S 1" in the ROIDs and its contention that ROIDs could not be filled out unless a shipment was received and the examination of its physical contents revealed that certain items were less than the quantity on the receipt documents, the Respondent argues that a customer could know that an entire shipment has not been delivered because in addition to the shipping documents accompanying the shipment, the customer also periodically received (1) a billing statement with a delivery listing attached, (2) the advance copy of the shipping documents sent by mail to the customer, (3) delivery status reports sent by the relevant military service, and (4) quarterly requisition reports summarizing such status reports.[2]

25. As regards the Claimant's argument that none of these means of notification, and in particular the delivery listing, legally constitutes notice of the "passage of title" required by General Condition B.6., the Respondent observes that unless there are special contractual terms, legal title passes when the articles leave the hands of the United States and, as stated in the FMS Billing Manual prepared by the Security Assistance Accounting Center, the delivery listing

> "identifies items physically or constructively delivered and services performed.... It is cross referenced to specific document number and allows FMS customers to validate receipt of the material or services".

Moreover, Counsel for the Respondent at the Hearing stated:

> "Under U.S. accounting procedures, at the time the goods leave this initial point of shipment, the

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[2]The Respondent observes that the Claimant has submitted such a Quarterly Requisition Report as one of the Exhibits to its Statement of Claim.

> military service notifies the accounting office and at that time the accounting office places a charge on the quarterly bill. In fact, the delivery listing is made up directly from these reports of shipment...."

26. This two-fold means of notice of shipment (i.e., the shipping documents or the delivery listing attached to the billing) is argued to be reflected in the language of General Condition B.6. in that claims are to be filed within one year from "passage of title or billing". The term "shipped/billed" on line 11 of ROID Form 364 is argued also to confirm this dual documentation. In addition, it is contended that the practice of Iran supports this interpretation. The Respondent notes that ROID Nos. E-03315, 5010, A-JAN-73-3213 and 1-0357-IR-LSY show a certain number of an item "SHIPPED/BILLED" with none of such items "RECEIVED". The remarks following on the ROID indicate that Iran learned of the discrepancy from the billing listing.

27. While requesting that it be given the opportunity to brief more fully the issues later, the Respondent observes that as regards the applicability of Clause B.6. to services and billing discrepancies, "the claims limitation is broader than the enumeration attached to the RO[I]D in the preceding sentence...." The Respondent notes that the majority of possible billing charges are related to the value of the article involved and "[b]ecause the charges are geared to value of the goods ... any challenge of them is also controlled by the one-year limitation...." Moreover, given that (1) the same accounting system is used, (2) the same desire to bar stale claims applies, and (3) the language of Clause B.6., the United States contends that the one year limitation applies equally to services.

## III. Reasons for Interlocutory Award

### 1. General Considerations

28. General Condition B.6. is one paragraph of several pages of standard terms and conditions applicable to all military sales contracts concluded between the Government of the United States and the Governments of other States. These standard terms and conditions, unless varied in individual contracts, constitute, in effect, the common "fine print" applicable as a whole to all such sales of defense articles (equipment) or defense services. Apparently, as the Tribunal was belatedly informed during the pleadings, these standard clauses were changed several times over the years covered by sales to Iran, but as the question posed by the Tribunal and addressed by the pleadings filed by the Parties focused on the version in use since 1977, this Award will be based on that version except to the extent earlier versions are specifically referred to below.

29. Clause B.6. is one of the standard obligations of the purchasing State, and it is the only one to establish a time limit for the notification to the United States of claims. In this connection, the Tribunal wants to emphasize that Clause B.6., like the other clauses of these "General Conditions", is part of a form prescribed by the seller, the United States. If the seller wishes to create by such a clause an absolute bar to the claims for non-receipt of items that are not asserted within a year, it could be expected to do so clearly. A failure to do so clearly resulting in an ambiguity of such a clause would have the consequence that the buyer could be expected to rely on that one of several possible interpretations which would be in its favor, and such ambiguity could be expected to give rise to difficulties in enforcement. This would be true whether the sales contracts are considered as international agreements subject to international law, as argued by Iran,

or as commercial contracts subject to United States law, as argued by the United States, for these "General Conditions" are evidently prescribed by the United States (and some are required by United States laws), rather than negotiated freely between the Parties. Therefore, the Tribunal does not find it necessary for purposes of this Interlocutory Award to decide the question of the law to which the contracts are subject.

2. Equipment

30. With respect to equipment ("defense articles" in the terms of the contracts), Clause B.6. prescribes two conditions, following the second of which the one-year period for notification of claims begins. Those two conditions are passage of title, which the seller shall effect and the buyer shall accept at the initial point of shipment, and billing. There is no question but that in any case where it is established that a defense article has in fact been shipped and the purchaser has been billed for that article, the one-year claims period begins with the later of those two acts and that a claim not raised within that period is thereafter barred unless the United States determines that unusual and compelling circumstances involving latent defects justify consideration of the claim.

31. The type, quantum and burden of proof required to establish whether an article was shipped cannot be determined definitively in the abstract, because these questions may well vary with the nature and circumstances of particular transactions. The Tribunal does not believe it feasible to decide these questions in the present proceeding, which is in advance of consideration by the Tribunal of actual disputes as to shipment of particular articles. However, for the guidance of the Parties in their present efforts to define the nature and extent of such disputes, the Tribunal is prepared at this stage to decide

the adequacy of two types of evidence. First, the Tribunal holds that a shipping document which shows receipt by a carrier, freight forwarder or authorized representative of the purchaser and which identifies the defense article in question as having been shipped shall, by itself, constitute conclusive evidence of shipment. Second, the Tribunal holds that a delivery listing (a document attached to each quarterly billing statement for each contract), by itself, does not constitute such evidence. What other documents or combinations of documents may suffice to establish shipment, the Tribunal will decide only in the context of concrete disputes about shipment of particular defense articles.

32. In explanation of these holdings, the Tribunal notes that, while a delivery listing constitutes notice that the listed equipment has been shipped on a certain date, it is not conclusive evidence of shipment, and therefore of passage of title. A delivery listing is a unilateral document, whereas a shipping document records receipt of defense articles from the shipper and thus involves at least two parties. A delivery listing contains no identification of the means of shipment, carrier or destination. In this connection, the Tribunal notes the apparent connection between the one-year notice period and the question of the possible liability of the carrier. The purchaser is responsible for settlement of claims against common carriers under Clause B.6., but it is not informed by a delivery listing alone of the identity of the carrier, or even whether a common carrier was involved.

33. Certainly it is true that the delivery listing puts the purchaser on notice that the seller believes the identified article has been shipped, and such notice may be relevant to the burden of proof. But the Tribunal does not consider the delivery listing as conclusive with respect to passage of title for purposes of the one-year period after which a claim is totally barred by virtue of Clause B.6.

3. Services and Other Charges

34. During the course of the pleadings on the present question, the Tribunal was informed that billing statements customarily include charges, not only for defense articles, but also for defense services and for certain other charges, such as administrative, accessorial and termination charges applicable to the contract. The word "items" used by the Tribunal in the question which is the subject of this Award is a term used in the contracts to cover both defense articles and defense services, and therefore whether the bar to claims not raised within one year applies to services would seem to be included in that question. It seems doubtful, however, that other charges were covered by that question. In any event, the United States, while asserting that the bar to claims not raised within one year which is established by Clause B.6. applies to defense services and other charges as well as to defense articles, has not introduced any evidence with respect to services and other charges and has suggested that the issues might be the subject of separate briefing. The Islamic Republic of Iran, on the other hand, has briefed that issue and objects to a further briefing of the subject.

35. The sentence in Clause B.6. establishing the one-year limitation refers simply to "claims", but the Tribunal considers it significant that the sentence occurs at the end of a paragraph that appears to deal solely with the transfer of title to defense articles upon shipment and the method of filing claims with respect to such articles. The context thus suggests that the one-year limitation applies only to shipment of defense articles, not to defense services or other charges for which the purchaser might be billed. Moreover, the sentence establishing the limitation itself refers to passage of title and latent defects, which are both relevant to equipment, but not to services or other charges. Whether in practice the Parties have considered

the bar to claims not raised within one year to apply also to claims for services and other charges, the Tribunal is thus far uninformed, and the present decision does not reach that question and is thus limited to the wording of the clause.

4. Different Versions of the Contracts

36. Only at a very late stage of the pleadings was the Tribunal informed that the version of the "General Conditions" it had been given by the Respondent had been in use only since 1 August 1977 and that there had been at least two earlier versions during the years covered by the Iran military sales program. The Tribunal has examined the 1969 and 1973 versions made available to it and notes the views expressed by both Parties during the Hearing to the effect that the earlier versions would not warrant a different result from the 1977 version. It appears to the Tribunal that the considerations set forth above in the Award would, on the basis of this common understanding of the Parties, apply also to the 1973 version of the "General Conditions". The Tribunal notes, however, that the wording of the relevant provision in the 1969 version is substantially different from the 1973 and 1977 versions in that it begins the one-year notice period from the "... date custody of the items is transferred to Purchaser's authorized representatives ..." and makes no reference to the date of billing. In the absence of further argument by the Parties, the Tribunal is not prepared to make any holding with respect to the 1969 version or the shipping, custody or other documents that might be relevant thereto.

IV. Award

37. For these reasons,

THE TRIBUNAL DETERMINES

with respect to defense articles where it is established that they were actually shipped, that Clause B.6. of the "General Conditions" bars any claim not raised within one year of the date title to the article in question passed or the date of billing, whichever is later;

with respect to the evidence adequate to establish shipment of a defense article, that a shipping document which shows receipt by a carrier, freight forwarder or authorized representative of the purchaser and which identifies the article as having been shipped shall, by itself, constitute conclusive evidence of such shipment and that a delivery listing, by itself, does not consitute such evidence;

with respect to defense services and other charges, that claims relating to them are not covered by the language of Clause B.6.; and

with respect to the 1973 version of the "General Conditions," it appears to the Tribunal that the above

conclusions apply also.

Dated, The Hague
4 April 1986

Karl-Heinz Böckstiegel
President

In the name of God

Robert Briner

Michel Virally

Hamid Bahrami-Ahmadi
Concurring

In the name of God

Howard M. Holtzmann
Dissenting Opinion

Mohsen Mostafavi
Concurring

George H. Aldrich

In the name of God

Parviz Ansari Moin
Concurring

Charles N. Brower
Dissenting Opinion