In the Name of God

CASE NO. B-1 (Claim 5)
FULL TRIBUNAL
AWARD NO. 370-B1-FT

THE ISLAMIC REPUBLIC OF IRAN,
Claimant,

and

THE UNITED STATES OF AMERICA,
Respondent.

DISSENTING OPINION OF ARBITRATORS ASSADOLLAH NOORI, HAMID BAHRAMI-AHMADI AND PARVIZ ANSARI MOIN

TABLE OF CONTENTS

1. We dissent to the majority's decision because the Award facilely dismissed the Claimant's claim for over $241 million, which was based on abundant and compelling evidence, without concern for the available facts and without giving justifiable reasons.

In reaching the conclusion it envisaged, and in its decision finding the United States nonliable for breach of express or implied, and legal and contractual, warranties; or releasing the U.S. Government from its legal warranties; and, finally, absolving it of responsibility for latent defects, the majority acted hastily and without giving sufficient reasons, and it also committed errors and failed to take the manifest facts into account. Therefore, in this Dissenting Opinion, the facts shall first be set forth in one Section, and then the reasons for this dissent to the Award shall be explained in a separate Section.

SECTION I : THE FACTS

A. General Matters

2. After the 1953 coup d'etat, which took place with the direct support and intervention of the United States and resulted in the fall of the then legal government and the Shah's return to Iran after having fled the country, the Shah's regime set out, on the advice of the United States, to equip and organize its army along the lines of its American model. In order to implement this objective and advice, the United States sent its military and civilian experts in a variety of fields to Iran so that they could directly supervise, inter alia, the procurement, purchasing, and production of equipment and materiel, and the use thereof. In accordance with their respective duties, these advisors became entrenched in every unit and agency of the Army, including Logistics and the Staff.

The Claimant has clearly demonstrated that between the time of the 1953 coup d'etat and the victory of the Islamic Revolution in Iran, the only real source of weapons and military equipment and materiel was the United States, or the private United States companies selected by the United States, which Government also exercised control over those companies' dealings with Iran. Iran's Air Force and Army Aviation were totally under America's control. It was the United States and its experts that determined the kind and quantity of equipment and weapons, whether from the technical or the strategic point of view, as well as many other important matters, and the Iranian Army could equip itself with only those kinds of equipment and materiel which were permitted by the United States.

3. According to the available documents in this Case, in the early 1970's the U.S. advisors advised Iranian military officials, in view of the special mountainous and very elevated topography of western and northern Iran, and of the hot and arid climate of the central portion of the Iranian plateau and, finally, the very humid maritime climate of the southern and northern coasts, to purchase, for its Army Aviation, service and transport helicopters with high manueverability under special geographical conditions, capable of hovering at high altitudes or performing nap of the earth flights, and able to maneuver under all conditions with a heavy load and crew. According to the advisors, a helicopter with such specifications must be able to maneuver with a high speed of deployment and at all elevations, with a full load and the ability to use its motors at full capacity. Documents presented in this Case, and testimony of the Parties' witnesses during the Hearing conference, clearly show that the United States advisors, including Colonel Doiron, who was serving as an advisor to Iran's Army Aviation, recommended to the Iranian Army the Bell 214 helicopter, following test flights in various regions of Iran, in order to meet this objective, so as to

create effective airborne forces in whose formation helicopters would play a pivotal role. In view of the long history of their relations and the specialized nature of the equipment, the Claimant has noted that the former regime was not only under the complete political control of the United States, but also depended entirely on the technical experience and expertise of that country.

4. As stated in the affidavit of Mr. Charles C. Crawford and in the letter dated 12 October 1976 of AVCO-Lycoming to Colonel Stevenson (who held the rank of general at the time of the Hearing conference), this helicopter, and particularly its engine, were not unknown to the United States and the U.S. Army, because the Bell 214 helicopter was supposed to be built on the basis of the frame of the Huey helicopter, which the U.S. Army had used for years; and the engine, T-55-L7C, was in the T-55 series, which was well-known to the United States. The version of this engine recommended to Iran, called LTC-4B-8D, had been deployed since 1974 in the Vietnam war, before the first series of helicopters were delivered to Iran[1]. Page 1 of Letter of Offer and Acceptance (LOA) NO. DA-IRAN-UUC also reflects the fact that the Bell 214 helicopter was supposed to have the (improved) version of engine No. T-55-L7C (ie. LTC-4B-8D).

B. The United States Was the Seller of the Helicopters, with Designated Specifications

5. On 1st November 1972, the United States Government issued the first Letter of Offer and Acceptance, LOA No. DA-IRAN-UUC, wherein it was stated that:

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(1) In this letter, AVCO-Lycoming also stated that the T-55-L7C engine had been selected for the Bell helicopters with the full cooperation of the United States Government.

> "The Government of the United States hereby offers to sell to the above Purchaser [Government of Iran], the defence article(s) and defence service(s) listed below, subject to the terms contained herein and conditions cited on the reverse."

The then Deputy Minister of War accepted this offer on 2 November 1972, whereupon a contract for the purchase of 287 helicopters equipped with (improved) T-55-L7C engines conforming to the particular specifications desired, plus 75 spare engines and a quantity of other equipment, services and materiel, was entered into for the initial price of $407,991,975.

In light of the importance of the contract, General Ellis W. Williamson, Chief of the U.S. Military Advisory Group stationed in Iran, by a letter dated 6 December 1972 informed the then Deputy Minister of War that the U.S. Department of Defense wished to obtain the Iranian Government's consent to issuance of an announcement in the mass media. It was agreed to issue such an announcement, even though to do so was apparently contrary to the policy of the regime of the time, according to which military purchases were to be kept secret. The announcement stated, inter alia, that:

> "The Government of Iran announced today that it will purchase from the U.S. Government a total of 489 helicopters to be manufactured by Textron's Bell Helicopters... This procurement will be conducted on a Government to Government basis and was initiated by Iranian acceptance of U.S. Government Letters of Offer for 202 AH-1J twin Cobras and 287 Model 214A advanced utility tactical transports."

6. Finally, Iran ordered 39 helicopters and 15 spare engines and other parts and equipment pursuant to LOA DA-IRAN-VNT, and also 6 other helicopters, together with additional equipment and parts, pursuant to LOA DA-IRAN-VUB. However, it decided not to purchase the rest of the helicopters, and not to proceed on the program to build Bell 214 helicopters in Iran, because of the fundamental problem encountered with the engine, which has been

discussed in the majority's Award and which we shall address in this Dissenting Opinion as well. The letter dated 20 November 1978 of the then Deputy Minister of War states that:

> "It is therefore the intention of the IGOI [the Imperial Government of Iran] not to place further orders for 214A Helicopters in addition to what has already been procured and received. In addition the program for manufacturing of 50 each 214A in Iran is pending upon elimination of compressor stalls."

7. The detailed specifications of the Bell 214 helicopters, and the nature of the mission which the purchased helicopters were supposed to perform, were enumerated in detail in a manual which constituted an integral part of the Contract.

According to the mission planned for such helicopters, and as described in detail in the above-mentioned specifications manual, these aircraft were supposed to be able to function on the battlefield as a troop carrier and a military materiel and equipment transporter, as well as a support craft, and for marshalling forces and evacuating the wounded from the battlefield to behind the front lines. For this reason, the helicopter was to be maneuverable enough to be able to fly in all kinds of climatic conditions and over all kinds of terrain, at near ground-level and at high altitudes, and to land or take off in uneven rough terrain which had not been prepared for landings or take-offs.

8. Subsequently, in 1974, Iran paid the United States the sum of $5,712,000.00 pursuant to LOA DA-IRAN-VDR, for improvements which needed to be made at the recommendation of the United States in engine model T-55-L7C (after which improvement, it was known as helicopter engine No. LTC-4B-8D).

9. Pursuant to special conditions of the LOAs, the task of testing and accepting the helicopters had been entrusted to the United States Army in order to confirm their

construction and whether they performed in accordance with their contractual specifications. In order to carry out these tests in a similar climate and, in general, under comparable geographical conditions, Iran agreed, pursuant to LOA DA-IRAN-VGN, to pay the United States $3,461,591.00 to build facilities and to provide the means for these tests (inter alia, a local test-site, helicopter hangar, etc.). Because of these tests suggested by the United States, the program for testing in the Buyer country (Iran) was deemed to be unnecessary and was not proposed to Iran, as the testing under this LOA took the place of on-site (in-country) testing.

C. Contractual and Implied Warranties

10. Until the filing of its final submission (Doc. No. 504, rebuttal evidence filed on 31 October 1986), the United States alleged that under Clause A2 of the General Conditions of the LOAs, it could give Iran only that warranty which the former was itself able to obtain vis-à-vis its subcontractors. Moreover, since Iran did not request any warranty, the U.S. Government did not obtain any warranty from the contractors either, except for what it could acquire, in connection with the inspection clause, in accordance with Article 7-103.5 of the standardized Armed Services Purchasing Regulations (ASPR), which provides in relevant part as follows:

> "7-103.5, Inspection:
>
> ..."(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Except as otherwise provided in this contract, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud." (emphasis added)

11. Along with its final submission (Doc. No. 504), the United States filed a copy of terms included in certain contracts, alleging that they were excerpts from contracts between the U.S. Government, and Bell and AVCO-Lycoming[2].

In part, one clause excerpted from the alleged contract with Bell provides as follows:

> "Warranty: BELL HELICOPTER COMPANY hereby warrants to the original purchaser only each new helicopter and part thereof sold by it to be free from defects in material and workmanship under normal use and service, its obligation under this warranty being limited to replacing or repairing such part at its factory..."

And according to a provision excerpted from the alleged contract with Lycoming:

> "AVCO Lycoming Division, AVCO Corporation hereby warrants that at the time of shipment from AVCO Lycoming's plant each new T5508D Engine sold by it will be free from defects in material and workmanship under normal use and service. AVCO Lycoming's obligations under this warranty shall be limited to the repair or replacement, at AVCO Lycoming's election, of any engine or part thereof..."

12. In view of the fact that the helicopters' specifications and mission were set forth expressly and in detail in the LOAs and in the helicopter specifications details manual, the warranty that the helicopters would conform to the specifications was among the contractual warranties undertaken by the U.S. Government (as Seller), pursuant to

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2 The portion excerpted from the contract with Bell does not indicate at all to what contract, person, and helicopter model, the warranty related; and the excerpt from the contract with AVCO-Lycoming, in addition to the abovementioned problems, apparently relates to engine model No. T-5508D, whose relationship to engine LTC-4B-8D or its improved model, viz. T-55-L7C, has not been specified.

Clause A3 of the General Conditions[3]. However, as we have seen, since the U.S. Army was supposed to carry out the tests and certify that the helicopters met the specifications, it was provided in one of the clauses of the LOAs (for example, Note 12(b) of LOA UUC), in order to avoid duplication of warranties, that the U.S. Army did not guarantee the items covered by the LOAs[4]: "U.S. Army cannot warrant or guarantee item," while emphasizing the obligation on the part of the U.S. Army that

> "The U.S. Army will test the 214A helicopter and helicopter components and subsystems to confirm that the specifications are met."

13. In its pleadings, the Claimant argues extensively that as the Seller of the Goods (especially highly technical goods), the United States implicitly or explicitly guaranteed the helicopters' merchantability and their suitability for the objectives for which they were purchased. The Claimant adds that in this respect, it had relied upon the experience and expertise of the United States. The Claimant also holds that the guarantee that the helicopters would be suitable for the purpose for which they were purchased constituted an express and contractual warranty, in view of the fact that it was the United States itself that recommended the helicopters, and that the United States was fully aware of Iran's objective and the

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3 It is worth noting that the U.S. Government does not deny the existence of a warranty that the helicopters would conform to the specifications, but rather alleges that the United States was obligated to warrant only two of the helicopter specifications, as set forth in the specifications details manual.

4 Any interpretation other than that set forth here would be inconsistent with the warranty given by the U.S. Government that the helicopters would meet the contractual specifications, because the U.S. Government admitted, at least in connection with two of the detailed specifications, that such a warranty did exist; whereas any contradictory interpretation would disregard the given guarantee, even the one relating to the two specifications.

helicopters' intended function, as well as the fact that their mission was reflected, in terms of certain specification requirements, in the specifications manual (para. 6, supra).

D. Appearance of Engine Stall Immediately after Delivery

14. Immediately upon delivery of the first consignment of helicopters, it was discovered that the engines had a fundamental flaw which caused a stall in the turbine compressor. Iran asserts that the United States learned of the problem of the compressor stall at the time it carried out testing under geographical conditions similar to those in Iran, but did not report the problem to Iran. In order to prove this assertion, Iran relied, in addition to witness testimony, upon the fact that despite its contemporaneous written and verbal requests to the United States that the latter submit the test report, the United States never complied with this request[5]. Out of this correspondence, Iran relies as well upon the letter dated 20 September 1976 from the then Deputy Minister of War to the Chief of the U.S. Military Advisory Group, which states as follows:

> "2. Unfortunately till this date we have not received any information about the result of any test or any ECP because of tests...
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> 4. Please take expedited action to investigate the mentioned matters and inform us what has been done in respect to engine tests and the reason for incidents and many failures which... Iranian Army Aviation is experiencing and advise us about reliability of the engine and other components of the said helicopter."

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[5] Both at the stage of exchange of pleadings and at the final Hearing conference, the Claimant asserted -- and submitted affidavits in proof of its contention -- that it did not receive any report from the Respondent on the results of the testing at either that time, or at any other time. Throughout the course of the proceedings, the Respondent did not deny this assertion either orally or in writing, and it thereby confirmed the assertion by its silence.

15. There is no dispute between either of the two Parties over the point that the engine compressor stall defect appeared right from the initial delivery of the first consignment of helicopters, because it suffices for us to note that both the subcontractor and maker of the helicopters (Bell Helicopter Textron) and the Seller (the United States) have admitted this fact.

In a letter to Colonel R.H. Stephenson in 1978, Mr. A.C. Bozzelli, Bell's Director of Administration and Contracts, stated that:

> "Engine compressor stalls have been a frequently reported problem of the Model 214 helicopters since its [sic] introduction in country (April 1975)."

In a briefing session held on 3 November 1976 with Army officials of the time, General Johansen, Commander of the United States air-ground support systems, pointed to

> "Deficiencies in the 214A revealed by early operations in the field."

E. Recognition of the Engine Stall as a Fundamental Design Defect

16. The contemporaneous evidence clearly shows that in connection with two other fundamental issues, there was no dispute between the parties involved in buying, selling and building the 214 Bell helicopter, either. The first is that the engine compressor stall problem was a fundamental defect related to the design of the engine, which was latent at the time the helicopters were delivered. The second is that the United States was obligated to take measures to remedy the flaw, and that the responsibility

for doing so rested with the United States, through its subcontractors.

17. Both Bell Helicopter and AVCO-Lycoming themselves have noted and admitted the seriousness of the stall defect, and that it existed but was initially latent, and also that the defect related to the engine design. In his letter in 1978 to Colonel Stephenson, Mr. Bozzelli (of Bell Helicopter Textron) states that:

> "Engine compressor stalls have been a frequently reported problem of the Model 214 helicopters since its [sic] introduction in country (April 1975). Compressor stalls, which not being unique to the 214, have been highlighted as a major problem not only because of the frequency of reported stalls, but because it is a relatively new aircraft and the stalls seem much more severe..."
>
> ...At this point, the source (or sources) of the problem cannot be positively determined. Basic engine design, engine component design, and aircraft air intake design are all distinct possibilities."

In his letter dated 4 April 1978 to the then Deputy Minister of War, AVCO-Lycoming's Vice-President stated that:

> "During a recent briefing here [in U.S.A. with the representatives of U.S.G. and Bell], the continuing problem of compressor surge (or compressor stall) of the LTC4B-8D engine in the Bell model 214 was discussed in great detail...
>
> ...We had hoped that in fact, the anomaly in blades was the real cause of the surge problem in Iran but testing thus far does not yet provide this evidence...
>
> Further, it is my desire to impress upon you AVCO-Lycoming's commitment to support our products in the field and to insure that these products will continually be supported throughout the life of the program."

18. The United States (the Seller of the Bell 214 helicopter) acknowledges (or at least it alleges) that it became aware of the defect after the goods were delivered, although on each occasion it hoped that the defect could be

eliminated by making certain fundamental or minor changes. For example, in a briefing session on 3 November 1976, General Johansen told Iranian Army officials of the time, that:

> "Deficiencies in the 214A were revealed by early operation in the field. This led the U.S. Government and contractors to mutually develop improvements to assure required reliability."

At that same time, he admitted the existence of a new defect, stating that:

> "A deficiency that we discovered very recently involves the main transmission. During a cross check of quality we found that upper ring in transmissions in several 214 helicopters were manufactured with the wrong kind of metal..."

He also acknowledged that the United States could pursue the matter against the manufacturer even though the equipment had been inspected and accepted, because this was a hidden defect:

> "This is a hidden defect that could not have been discovered by the U.S. Government during a reasonable acceptance inspection."

At the end of the session, General Johansen informed those present that as a representative of the United States (the Seller), he was also aware of the importance of, and concerned about, the matter:

> "I will be formally outlining my assessment and concern to BHT in more detail upon my return to the U.S. The specific action I take will be based on further analysis of contract provisions by my legal staff. I plan to keep all practicable pressure on BHT until these problems are solved..."

On 27 January 1977, General Johansen informed the then Deputy Minister of War that the United States had succeeded in remedying the problem discussed at the 3 November 1976 briefing session, and that Bell Helicopter Textron had accepted its contractual obligations towards them. He concluded his letter with the following sentence:

> "Please be assured that the U.S. Government will maintain close surveillance of BHT during the replacement actions taken."

The United States was still admitting the existence of a technical problem resulting in engine turbine stall as late as 1978. In a briefing session on 22 May 1978, General Richard H. Thompson told Iranian Army officials that:

> "Compressor stall is the major technical problem in the 214 program. It impacts on operations and there are restrictions on 214A flying. In December I described several fixes to reduce compressor stalls."

The flight limitation eventually imposed on all helicopters as a warning and imperative directive on the advice and approval of the United States, which warning was left posted in all of the helicopters as evidenced by the slides shown at the Hearing conference, directed that the engines must not be operated at more than 91% of capacity at high altitudes. The directive set other limitations as well, inter alia that the time interval between each engine cleaning be cut in half, and later, as shown by Iran, to one-fourth, as a result of which the helicopters were unable to perform long missions (either in time or in distance)[6]. In its pleadings, and at the Hearing conference, Iran explained -- and the United States did not lodge any objection to that explanation -- that the

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[6] This same directive, which was issued by the United States, confirms the fact that the defect in the helicopters derived from a latent design defect; for according to the directive:

> "2. THE FOLLOWING INTERIM LIMITATION IS BEING IMPOSED ON MODEL 214A/C HELICOPTER UNTIL SUCH TIME AS DESIGN CHANGES CAN BE INCORPORATED WHICH WILL ELIMINATE SURGES/STALLS."

restriction against operating at more than 91% of engine capacity in reality substantially reduced the helicopters' coefficient of reliability in maneuvering and in carrying out the missions for which they had been purchased, to such an extent that the helicopters' level of efficiency was reduced to one third. For as General Stevenson testified at the Hearing, in order to avoid accidents pilots had to avoid flying over mountains, steep heights or waters, ie. places which would make a forced landing impossible.

19. In arriving at the figure of one-third, the Claimant pointed out the geographical conditions of Iran's strategic areas, which were mountainous with lofty peaks and precipices, or else maritime, and which encompassed more than two-thirds of the surface of the plateau. Iran then argued that according to the evidence submitted by the Respondent, and to the testimony of its witnesses at the Hearing conference, because the engine stalls caused forced landings:

> "The GOI did limit the helicopter flight profile to exclude nite flights and to only those geographical areas wherein a successful forced landing could be made."

20. As we have already seen, from the very outset Iran also informed the United States, both orally and in writing, of its dissatisfaction with the performance of the helicopters (particularly the engine), and regarded the defect as a fundamental problem. Iran continued to maintain this position until late 1978, and indeed, has done so from that time down to the present time. The then Commander of Army Aviation reported in a letter dated 30 March

1978 (10.1.1357) to the then Deputy Minister of War that [7]:

> "1. As you are aware, the engine of helicopters 214 repeatedly face compressor stall, and because of this defect, a large number of the helicopters cannot fly and those which are ready to fly have repeatedly compulsory landing... This defect has caused the pilots to lose their flight morale and as a result, their efficiency is being decreased day by day...
>
> ... considering the problems and the subject submitted by Lycoming representative, it is presumed that the manufacturing company has not yet found the defect, or they do not want to accept the design defect of this engine officially."

In a letter to Bell Helicopter Textron, a copy of which was sent as well to the Chief of the United States Military Advisory Group, the then Deputy Minister of War stated on 20 November 1978 that the defect was due to the design:

> "1. We have reminded you in [sic] many occasions of the critical problem of compressor stall arising during the operation of 214A Helicopters. As this problem is basically attributable to the engine design, the corrective actions implemented so far have not eliminated this problem."

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[7] In paragraphs 12 and 16 of his Affidavit, Mr. Crawford admitted that the engine defect arose from its design, and that the defect could be remedied only by making design changes in the Lycoming engine. Prior to that, between 1975 and 1978, the point that the engine stall defect constituted a fundamental flaw, and that there had been forced landings due to this flaw in the AVCO-Lycoming engine, was repeatedly brought to the attention of the United States representatives, and to that of Bell and AVCO officials. Inter alia, the then Deputy Minister of War stated in a letter dated 20.9.76 to the Chief of the Military Advisory Group, that:

> "3. ...since we have received these aircraft we had [sic] several engine and transmition [sic] failure [sic] and as you know we just had 2 accident [sic] 214A which was [sic] because of engine failure."

In a briefing session on 3 November 1976 with Army officials of the time, General Johansen referred to three accidents.

21. The fundamental nature of the compressor stall defect in the engine of this helicopter model has been confirmed as well by entirely independent sources completely unrelated to the sales and purchases which were the subject of the LOAs between Iran and the United States. By a document filed by it with the Tribunal, Iran proved that the compressor stall problem was the cause of the crashes of two Bell 214 helicopters sold to an American company called Croman Corporation. In a letter dated 1 December 1978 to the Iranian Embassy in Washington, D.C., attorneys for this company wrote that:

> "We are attorneys for the Croman Corporation... which has suffered the loss of two model 214 Bell Helicopters...
>
> It has come to our attention that the Government of Iran purchased some 200 similar machines from Bell for use by its Air Force, and that the experience of the Iranian Air Force with the machines has been unsatisfactory because of the propensity of the machines to stall in flight...
>
> ... We have developed extensive files showing the history of similar failures incurred by other operators in the United States and Canada..."

F. Subsequent Tests Showing That There Was a Latent Fundamental Defect in the Engine Design

22. After the failure of efforts to remedy the engine stall defect, which was not eliminated despite changing the compressor blades and transmissions, in August 1978 a program called the "Performance Verification Program" (PVP) was carried out with the participation of Iran's Army Aviation, the Helicopter Support and Renovation Company of Iran, Bell Helicopter Textron, and AVCO-Lycoming, together with the direct involvement of the United States Government, under the supervision of United States advisors, in order to determine the cause of the engine compressor stall. In this program, under which 12 helicopters flew

for a total of 1126 hours, 203 instances of engine stall occurred, under varying conditions and at various altitudes. Although the United States apparently never reported the exact results of these tests to Iran, the incomplete evidence filed by the United States during the course of the exchange of pleadings shows that all of the stalls occurred at over 8,300 feet density altitude, even though the temperature was in the appropriate range of 0° to 18°C[8]. The tests also showed that the engine compressor stalls at altitudes of over 8,300 feet and in atmospheric conditions between 0° and 18° C, occurred in all engines, whether dirty or clean. Finally, the test results showed that nearly 75% of all stalls occurred at times when the engines were being used at over 91% capacity; and in any event, all of the stalls in clean engines occurred when engines were at over 91% of capacity.

The Buyer's primary objective in entering into the transaction was, to be able to use over 91% of engine capacity (at high altitudes or close to the surface of the land and sea) for military missions and maneuvers. If the Buyer had known that the aircraft lacked such capabilities, this would not only have stopped him from entering into the transaction, but drastically reduced the value of Bell's helicopters as well. The Claimant has assessed this reduction as being equal to two-thirds of the cost.

23. Prior to carrying out the Performance Verification Program, the United States proposed other services in June 1978, pursuant to a LOA. The basis of this program, which the United States subsequently called the "...Production

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8 It must be noted that the helicopters ordered were supposed to operate at full power, ie. at over 91% of capacity, in Iran's variable climate, which ranges from -20° Centigrade in the winter, to 45° or even 50° C in the late spring, summer and early autumn.

Improvement Program" (PIP), was the subject of LOA IR-B-WEQ, the cost of which was reduced from the $24,666,925 proposed by the United States to $4,120,000 after numerous modifications and adjustments. In point of fact, the subject of this LOA included: (1) carrying out the tests assigned to the United States Army under LOA DA-IRAN-VGN, except that this time they were to be carried out in Iran rather than in comparable climatic conditions elsewhere (cf. para. 8 of this Opinion) and (2) the works carried out under the PVP (para. 20, supra). Although Iran signed this LOA on 9 September 1978, it was not carried out, because of the results gained from the PVP (which was underway while WEQ was being negotiated, and whose results were subsequently learned) and because of the outbreak of the Revolution[9].

SECTION II: REASONS FOR THE DISSENT TO THE AWARD

24. In our opinion, a consideration of the foregoing comments clearly shows that in rejecting Iran's claim and absolving the United States of liability vis-à-vis the

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[9] In its pleadings, Iran repeatedly stated that in pursuing its claim under this part of Case No. B/1, it was not seeking to recover damages arising from fault on the part of the United States Army in conducting the tests. Rather, the remedy sought in Claim Five of Case No. B/1 involved, apart from the United States' failure to carry out the tests properly, damages incurred by Iran as a result of the breach of the warranty that the helicopters would conform to the specifications and missions specified in the contract, or as a result of a latent defect. Therefore, despite the majority's attempt to attach importance to the impossibility of performing on LOA IR-B-WEQ, no matter what the cause of this nonperformance, it cannot negate the fact that the helicopters did not conform to the specifications and missions specified in the contract and suffered from a fundamental defect relating to design, which was latent at the time of delivery.

Claimant's losses, the majority has made four fundamental errors. For under each of the following reasons, the United States ought to have been held accountable for the Claimant's losses:

-- The United States was liable for breach of its warranty that the goods conformed to the specifications;

-- The United States was not relieved of liability with respect to its guarantee of the merchantability of the helicopters, and of their suitability for the purposes for which they were purchased;

-- The United States was liable for latent defects; and

-- The United States was responsible for pursuing the Claimant's damages and for ensuring that he was indemnified therefor by the subcontractors.

A. The Governing Law

25. Before turning to the substantive objectionable features of the Award, it must be noted that in our view, one of the basic deficiencies in the majority's Award is, that it has attempted to examine and decide the issues and disputes in the Case in vacuo, without determining the governing law (see para. 25 of the Award).

Although it can be inferred from the Award that the majority has properly refrained from accepting United States municipal law as the law governing the contractual relations between these two members of the international community (footnote to page 19 of the Award), at the same time it has not resolved the issue of what law does govern

those relations -- namely public international law and those principles of law which are accepted by the various legal systems -- and indeed, it has intentionally avoided dealing seriously with the issue of the governing law. This is because if it had determined the governing law, it would have had either to submit to the logical and entirely foreseeable conclusion thereof (ie. that the Claimant's claim is valid) or to bear the heavy burden of having rejected the Claimant's reasonable and justified arguments. Rather than accepting the above results, the majority has preferred to reach its decision in a vacuum and to base its Award on insubstantial grounds without help of the governing law.

26. There can be no justification for the majority's laxness in connection with the governing law, because Article V of the Claims Settlement Declaration requires that this Tribunal "decide all cases on the basis of respect for law." In other words, in addition to requiring the Tribunal to respect "contract provisions and changed circumstances," Article V also takes into account the established legal principle that in adjudicating a contractual claim, it is impossible to dispose of important issues such as the nature of the contract, the meaning of terse and ambiguous places and lacunae in the parties' agreement, and their mutual intent, in vacuo and without determining the applicable law.

27. In view of the international nature of the Tribunal, which[10] has been established pursuant to an international instrument [11], and given that the Parties to the dispute

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10 See, inter alia, J. Brown Scott, Hague Court Reports, 1916, p. XXI; Norwegian Shipowners Case, R.I.A.A. vol.1, p. 310.

11 The Governments of Iran and the United States have expressly stated their intention to establish "an international arbitral tribunal (the Iran-United States claims tribunal)" in Article II, para. 1 of the Claims Settlement Declaration.

are two independent sovereign States and members of the international community[12], the claims against which -- as well as the claims by which, within the framework of diplomatic protection of their nationals, and also the official claims -- have been brought as entirely inter-State claims, and given moreover that the disputes arise from contracts of a political nature or from major economic transactions between those States [13], it is our opinion that this Tribunal should first, without taking up tangential matters, have expressly determined that it is public international law, and consequently the general principles of law, that govern the LOAs for the purchase and sale of the helicopters, and it should then have settled the disputes on the basis of those principles. In setting forth our reasons for dissenting to the Award in the present Opinion, we have taken into account the principles of law recognized by a variety of nations, inter alia the United States in its Uniform Commercial Code (UCC), as an example of one of the members of the international community.

B. Liability Arising from Breach of the Warranty That the Goods Would Conform to the Specifications

28. As we observed in paras. 5 to 11, supra, the United States' obligation pursuant to the LOAs for the purchase

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12 See, inter alia, Delaume, Transnational Contracts, vol.I Section 1, 10 (Booklet 1, April 1980); Delaume, Legal Aspects of International Lending..., 1967 at 98 et seq; F.A. Mann, The Proper Law of Contracts Concluded by International Persons 35 BYIL (1959) at 34; J. Brown Scott, op cit; Lammasch, Die Rechtskraft Internationaler Schiedspruche, 1913, p. 37; Germano-American Mixed Claims Commission Administrative Decision No. II, R.S.A., vol. II, p. 1016.

13 F.A. Mann, Reflections on a Commercial Law of Nations, 33 BYIL, p. 20 at 29 et seq; Delaume, op cit.

and sale of the helicopters was, specifically, to provide a number of helicopters having certain set specifications and intended for certain missions -- missions and specifications of which the United States was not only fully informed, but which it had even proposed itself. As a result, there can be no doubt that the contracts for purchase and sale of the helicopters constituted sales of goods by express specifications and descriptions[14]. Moreover, there can at least be no doubt that the United States was not released in any way from the warranty which

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[14] To establish the existence of a warranty, particularly in such instances where the description and specifications of the goods have been expressly set forth in the contract, it is not a necessary condition that words such as "warranty" be used; for no terms can be more effective and explicit for demonstrating this obligation than stating the description and specifications for the goods in the contract (see, inter alia, Article 2-313, para. 2 of the United States UCC; also, Williston On Contracts (1961) vol. 5 Section 712). Article 2-313 (2) of the United States UCC provides that:

> "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty..."

Under United States law, not only is it unnecessary that such words as "warrant" be mentioned in order to establish the existence of a warranty, but it is unnecessary as well for the purchaser to have definitely bought the goods in particular reliance or emphasis upon the specifications thereof. Royal Business Machines, Inc., v. Lorraine Corp., v. Litton Business Systems, Inc., 30 UCC Rep. 463 (7th Cir., October 7, 1980, Nos. 76-1946-2256).

According to British law as well, the mere mention of the specifications of the goods in the contract is deemed to constitute a warranty (see Articles 11(3) and 12 of the Law on the Purchase and Sale of Goods, ratified by Britain in 1979; also, Schmitthoff, Export Trade, 7th ed. (1980) p.90).

arose on the basis of the specifications and descriptions expressly stated in the contracts[15].

29. Warranty by description is accepted under most legal systems, inter alia United States law which, the Respondent alleged, was the law that governed the contract[16]. Article 2-313 (1) of the United States UCC provides that:

> "(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of bargain creates an express warranty that the goods shall conform to the affirmation or promise.

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15 It must be recalled that in addition to setting forth in detail in the LOAs the specifications of the helicopters and their mission, which fall within the framework of an exception to General Condition A3 of those Letters -- i.e.,

> "The Government of the United States, however, makes no warranties other than those specifically set forth herein" (emphasis added)--

in detailing the helicopter specifications, the word "warranty" was used in connection with a number of specifications; and in this regard, the United States could not, as against Iran's highly varied and extensive evidence which proved the existence and persistence of a fundamental defect, possibly allege -- or could not prove, if it did allege -- that the helicopters met even those specifications.

16 The Claimant holds that only international law and the general principles of law accepted by the community of nations govern the contractual relations between the two States; and it has invoked sections from the United States UCC and laws of certain other states solely because it regarded them as reflecting those general legal principles.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."17

In such instances, United States law has even permitted a buyer who accepted and took receipt of goods, to recover his damages from the seller. Article 2-714 of the UCC provides that:

"(1) Where the buyer has accepted goods and given notification... he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

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17 The practice of the United States courts in applying Article 2-313 supports Iran's position and view:

"Response to a specific request from Plaintiff to furnish a good first class permanent type of anti-freeze for use in Plaintiff's heavy equipment created an express warranty under UCC Section 2-313 that the anti-freeze would conform to the general specifications regarding type and quality stated by Plaintiff in its initial request".

Numerous decisions have been rendered by the United States courts, wherein the description of goods in catalogs, specifications manuals and brochures has been deemed to constitute a warranty by description. See, inter alia, the following decisions: Limited Flying Club, Inc. v. Wood, 29 UCC Rep. (CA 8th Cir., Sept. 16, 1980, No. 79-2064); Gladden v. Cadillac Motor Car Division, 29 UCC Rep. 369 (N.J.S.C., June 30, 1979); Crest Container Corp. v. R.H. Bishop Co., 455 NE 2d 19 (III AC, 5th Dec. 21, 1982); Wisconsin Electric Power Co. v. Zallea Brothers, Inc., 606 F2d 697 (7th Cir. Sept. 7, 1979); Colorado-Ute Electric Assn., Inc. v. Environ-Tech Corp., 524 F. Supp. 115 (D. Colo, Oct. 26, 1981).

(3) In a proper case any incidental and consequential damages under the next section may also be recovered."

30. According to British law too, specifying the description and specifications of goods in a contract (as where the purpose and specifications of the helicopters were described in the LOAs) gives rise to an obligation to ensure that the goods conform to that description (Article 13 of the Law on the Purchase and Sale of Goods, 1979)[18]. Under British law, a breach of such a warranty entitles the buyer to demand the difference between the value of the defective goods and the value of sound ones [19].

31. Under the laws of the Federal Republic of Germany as well (Article 459 (2) of the Civil Code), describing goods and their specifications in a contract constitutes a warranty of those specifications (Zugesicherte Eigenschaftem). The practice of the West German Federal Court also confirms this point[20].

32. According to Iranian law, where the goods are not a specific item of sale, a breach of their description entitles the buyer either to cancel, or to oblige the

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18 "Once it is established that a given contract is a sale by description, the test applied by the courts to determine whether or not the goods correspond with the description is a strict one." Chitty On Contracts, 25th ed. Chap. 11, No. 4154.

19 See the work cited in footnote 18, p. 1169-70 (No. 4355, and footnote No. 16 thereto).

20 See Decision No. BGHZ 48, 118, in connection with the necessity that the specifications of textile materials be suitable for the production of clothing; BGHZ 50, 200, re. the efficacy of glue; BGH NJW 1955, 1313, which upholds the necessity that a truck purchased be suitable for hauling over long distances; and BGH WM 1977, 345, in which the assurance given that a heating system worked well was held to constitute an unconditional warranty.

seller to submit a qualifying item, without the contract having to be annulled[21].

33. The United Nations Convention concerning contracts for the international sale of goods (1980), which actually constituted, and constitutes, an effort to reconcile the theories and principles of the codified and common law systems of law with an aim to bringing about uniform international rules in sales agreements, also supports the Claimant's position. Article 35 of the Convention provides that[22]:

> "(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they...
>
> (a) are fit for the purpose for which goods of the same description would ordinarily be used;
>
> (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement..."23

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21 Prof. Dr. Nasser Katouzian, Civil Law (Introduction - Property - on Contracts in General), vol. I (1344/1965), p. 307.

22 The provisions of this Convention have been invoked because they reflect principles and rules accepted by a majority of the nations of the world, even though those provisions have not yet been extended to contracts for the sale and purchase of equipment such as that which is the subject of the transaction at issue here. In order to locate this Convention, the following sources may be consulted: John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (1982); and Majalleh-ye Hoquqi (Law Review) of the Bureau for International Legal Services of the Islamic Republic of Iran, No. 9, which contains the English text and a Persian translation of the Convention.

23 There can be no doubting that in this transaction, Iran was not unjustified in relying upon the United States' experience, expertise and judgment.

In the event that the seller fails to deliver to the buyer goods which conform to the specifications, the aforementioned Convention permits the buyer to seek damages for breach of warranty (Articles 45-74, and particularly Article 50, of the Convention).

C. The United States Was Not Relieved of Its Liability Arising from the Warranties That the Helicopters Were Merchantable and Suitable for the Purposes for Which They Were Purchased

34. In its Award, the majority did not deny the existence, from the legal point of view, of warranties that the helicopters were merchantable and that they were suitable for the purposes for which they were purchased. For this reason, here we too shall address the issue solely from the perspective of demonstrating that the majority has erred in releasing the Seller (the United States) from these warranties despite their existence. However, before all else, we must point out that in this Case, the warranty that the goods were suitable for the purposes for which they were purchased was an express (rather than implied) warranty, because not only was the United States aware of the helicopters' mission and the purpose for which they were purchased, but their mission was set forth in the LOAs (para. 7, supra), as one of the contractual conditions and as one of the specifications of the helicopters. Moreover, as we stated above, there can be no doubt that in purchasing these helicopters, Iran relied upon the knowledge, experience, expertise and capability of the United States, because: first, the helicopters were purchased on the advice of the United States military advisors; second, Iran itself lacked the necessary expertise, to such a degree that it assigned to the United States Army the testing of whether the helicopters and their components and subsystems conformed to the specifications, owing to the

latter's practical experience with this type of helicopter (paras. 4 and 12, supra); and third, Iran would have become a direct party vis-à-vis the manufacturer (or manufacturers) of the helicopter, if it was supposed to enter into the transaction without relying upon the United States' expertise, experience and capability[24].

35. Having set forth the above introductory remarks, we shall confine our examination of the issue to whether or not the United States was relieved of such warranties, or in other words, whether those warranties were disclaimed pursuant to the contract.

In order to arrive at such a conclusion, the majority has relied upon Articles A2 and A3 of the General Conditions, and on Note 12 (of the Special Notes) of the LOAs.

-- According to Article A2, when the United States Government procures for itself,

> "Its contracts include warranty clauses only on an exceptional basis. However, the Government of the United States shall, with respect to items being procured, and upon timely notice, attempt to obtain any particular or special contract provision and warranties desired by the Purchaser... Any additional cost resulting from obtaining special contract provisions or warranties, or the exercise of rights under such provisions or warranties... shall be charged to the Purchaser." (emphasis added)

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24 See: the United States UCC, Article 2-315; also, e.g. Colorado-Ute Electric Assn., Inc. v. Environ-Tech Corp. 524 F. Supp. 1152 (D Colo, Oct. 26, 1981); Article 35, para. 2(b) of the 1980 United Nations Convention on the Uniform Law for International Sales; Article 14, para. 3 of the British Law on the Purchase and Sale of Goods (ratified in 1979); Section 4166 of Chitty (cited in footnote 18, supra); and Article 459, para. 1 of the West German Civil Code.

--And according to Article A3, "the Government of the United States... makes no warranties other than those specifically set forth herein..."

--Finally, Note 12 states that the United States Armed Forces do not utilize the aircraft involved in the transaction at issue,[25] and that:

> "...Should purchaser accept procurement under the provisions of this Letter of Offer, the following must be clearly recognized and accepted.
>
> a. Item is not standard with U.S. Army.
>
> b. Item will be produced in accordance with contractor prepared specifications. The U.S. Army will test the 214A helicopter and helicopter components and subsystems to confirm that the specifications are met. U.S. Army cannot warrant or guarantee item..." (emphasis and footnote added)

36. Article A2 of the General Conditions does not apply in the least to the disputes at issue in the present Case, and on principle it is irrelevant to invoke that section. This Article deals with cases where the purchaser wants the United States to provide him with special terms or warranties in addition to those warranties which are presumed to exist even without being expressly stated. Nor does this Article bar the possibility of obtaining them; rather, it makes the purchaser responsible for bearing their cost. None of the warranties involved in this section (even if they are regarded as implied) is a "special" warranty as intended in Article A2. Furthermore, even if one were to accept the interpretation that such warranties lay within the framework of "particular or special" warranties, he would have to conclude, in view of the express statement of

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25 As stated in para. 4, supra (Part I), the allegation that this helicopter (its body or engine) was neither used by the U.S. Armed Forces nor standard with the U.S. Army, is totally untrue.

the purpose in purchasing the helicopters and of their mission, as set forth in the specifications manual (an inseparable part of the contract), that this (so-called particular or special) warranty was provided to the Purchaser in accordance with Article A2, and the consideration therefor was included in, and paid as a part of, the price of the transaction as well.

The situation with Article A3 is also more or less the same as that with Article A2, for that Article introduces an immediate exception to the so-called release or disclaimer clause which, that is, excludes the warranties expressly set forth in the contract. Apart from the fact that the helicopter description and specifications were expressly stated (as discussed in Section "B" of this Part, paras. 28-33 of Part II, supra), the Purchaser's aim and objective, as well as the helicopters' mission, were set forth in the contract as written and express conditions. Therefore, the obvious and definite conclusion is, that Article A3 has not excluded such warranties, either.

Finally, extending the provisions of Note 12 to the claims at issue in this Case would disregard the facts set forth (briefly) in para. 12 of Part I of this Opinion. Note 12 merely excused the U.S. Army from a double warranty; in other words, it prevented joint liability on the part of the U.S. Government (the Seller) and the U.S. Army (the tester of the helicopters at the time of delivery). The injurious consequence of any other interpretation than that set forth in the present paragraph would be, that the U.S. has seemingly been able, by such an interpretation, to withdraw with one hand the express warranties which it gave in the contract with the other hand.

37. In addition to the arguments set forth in para. 36 above, even if we were to construe either or both of the Articles, and the Note, mentioned in para. 35 as

constituting a release from, or a disclaimer of, the warranties, those warranties cannot be regarded as having been disclaimed according to the language used in those Articles and that Note, because:

Firstly, warranties (whether express or implied) are recognized by the law of various nations in order to protect the purchaser against possible claims of nonliability[26], and thus the allegation of release from and disclaimer of liability vis-à-vis express warranties is not admissible. Moreover, as against implied warranties, the language must be entirely clear and conspicuous; eg., as where it is stated that it is not agreed to warrant the merchantability of the goods, or their conformity to the specifications set forth in the contract[27].

Secondly, a release or disclaimer clause must be interpreted narrowly, and not so broadly that, as the majority has done, the provisions of Articles A2 and A3, and Note 12, are used in order to disclaim even express warranties[28].

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26 "In the option [to cancel due to] defect, consideration is given to remedying the buyer's injury and to preserving mutual rights, and the seller's liability is qualitative and absolute in nature; nor does proof of the seller's innocence have any effect thereon." (Prof. Dr. Nasser Katouzian, Civil Law - Specific Contracts, Univ. of Tehran (1353/1974), p. 207).

27 See Article 2-316 of the United States UCC and the official comments relating thereto; Hartwig Farms, Inc. v. Pacific Gamble Robinson Co. v. Tobiason Potatoes Co. Inc., Wash. App. 539 (Wash. CA Div. III, March 3, 1981); and W.C.H. Ervine, Protecting New Car Purchasers: Recent United States and England Developments, Compared, Int'l Comparative Law Quarterly vol. 34, Part 2, April 1985, p. 342 at 357.

28 See the Decision in Isaacson v. Motor Sales, 438 F. Supp. 1 (EDNC, June 28, 1976); and Note 5 to Article 1643 of the Civil Code of France: "Les clauses restrictives de garantie sont d'interpretation stricte" - Civ. 1re, 31 Mars 1954, d. 1954. 417.

Thirdly, under present-day law, it is presumed, in view of technological progress and the growing specialization of goods, that a professional seller is aware of defects in the goods sold, particularly in the case of the sale of technically sophisticated goods. The seller of such goods cannot relieve himself of his obligation under the shelter of clauses which limit, or release him from, his liability arising from his stipulated warranty[29].

D. Liability Arising from Latent Defects

38. It is an accepted general principle that someone who buys goods and pays a consideration therefor to the seller, enters into the transaction in the belief that the goods are sound, unless the contrary is expressly stated in the contract. The other side of the coin is, that "the seller is the guarantor of the soundness of the goods, and this warranty is imposed on him pursuant to the contract."[30]

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29 Pursuant to Note 2 to Article 1643 of the French Civil Code:

> "Le vendeur professionnel est presumé connâitre les vices de la chose vendue et ne surait se prevaloir de clauses exclusives ou limitatives de la garantie" - Com. 24 Oct. 1961, D. 1962. 46, note Hémart; Com. 4 Juin 1969, D. 1970. 51

See p. 207 of the work by Prof. Dr. Katouzian cited in footnote 26, supra; also, p. 356 of the article by W.C.H. Ervine, cited in footnote 27, supra. The last-named article states that under existing British law, releasing oneself from and disclaiming implied warranties relating to goods such as automobiles is not only impossible, but actions taken to this end are deemed to constitute a criminal offense as well.

30 Prof. Dr. Nasser Katouzian, p. 189 of the work cited in footnote 26, supra.

39. As was observed in para. 10 of the present Opinion, the United States itself admits the fact that even despite the provision of waiver and disclaimer clauses, Iran is entitled to recover damages under the theory of latent defects, even if the goods were tested and accepted, and the consideration was paid therefor[31].

The United States accepts this obligation both as a contractual obligation (by reason of its retention thereof in its relations with the subcontractors) and as a legal obligation; and in this connection, it has relied on numerous decisions by United States fora, inter alia the Board of Contract Appeal, which demonstrate that where there is a latent defect, or where acceptance took place as a result of fraud or gross error, the buyer is not deprived, by his acceptance of goods, of the right to seek damages.

In the course of remedying the problems arising from the compressor stall defect in the helicopter engines, the United States acted exactly in accordance with the above; it accepted that it and its subcontractors were responsible for remedying the defect, and it made an effort to eliminate the flaws. In certain instances, it replaced turbine

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31 Williston On Contracts (1961) vol. 5, Section 713.

parts -- eg., replacing all the turbine blades and transmissions[32].

Under United States law, the damages which the buyer is able to claim after acceptance as a result of discovery

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32 Right from the time that the problem of compressor stall in the helicopter engines appeared, the United States itself acknowledged that in case of latent defects, it was obligated to compensate Iran for its damages by holding Bell responsible. In this connection, for example, General Johansen stated to Iranian Army officers at the briefing of 3 November 1976 that:

> "To do this [to hold Bell liable] we must be able to prove existence of a 'latent defect.'"

Then, immediately after that sentence, he acknowledged that:

> "This is a hidden defect that could not have been discovered by the U.S. Government during a reasonable acceptance inspection."

On 27 January 1977, the U.S. Department of Defense admitted in a letter to the then Deputy Minister of War, that the United States and its subcontractors bore a contractual responsibility for replacing the transmissions (which were at one time thought to be the cause of the compressor stalls), and that Iran should not have to bear any loss of this account. It must be added that both the turbine blades and the transmissions were replaced at no cost to Iran, but the compressor stall defect continued as before, owing to its connection with the engine design.

of a defect, are apparently similar to the damages arising from a breach of the description -- ie. he may seek the difference between the value of the defective goods and the price of sound goods[33], and the consideration must be restituted to him if the goods have become totally worthless[34].

40. Under British law as well, a breach of any of the warranties, whether arising from a violation of the description or from a violation of the obligation that the goods conform to the purpose for which they were sold, or otherwise, entitles the buyer who has accepted the goods to demand the difference between their value and that of sound goods[35].

41. French law permits the buyer, where there is a latent defect, either to return the goods and recover the price thereof, or else to retain the goods and demand the difference in the value thereof (Article 1644 of the French Civil Code); and if the seller was aware of the defect, he will be liable for restoring the price of the goods and for compensating the buyer for any damages incurred by the latter (Article 1645 of the said Code).

42. Under Iranian law, the agreement between the buyer and seller is presumed to have taken place on the premise that the goods were sound, and therefore, if the goods are not sound, the buyer is permitted either to terminate the sale or to demand the difference in the value thereof on the

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33 See Article 2-714 of the United States UCC (para. 29 of this Opinion).

34 See Williston On Contracts (1961) vol.5, Section 716.

35 See Chitty On Contracts (1983) vol. II, pp. 1169-1173.

ground of a breach of condition or description, or by virtue of the option of defect[36]. The buyer's entitlement under the option of defect is not conditional or contingent upon the clause having been set forth in the contract, or upon the existence of a contractual warranty. On the other hand, a release of the seller from liability for defects requires an express stipulation to that effect in the contract; and in the instant case no such express stipulation exists. Moreover, the United States has never alleged that it was relieved of such an obligation, and up to the time of the proceedings in this Case, it acknowledged that it and its contractors were responsible for remedying the latent defect.

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36 Article 422 of the Iranian Civil Code provides that:

> "After the transaction, if it turns out that the goods are defective, the buyer has the option of either accepting the defective goods, accepting the difference in value, or cancelling the transaction."

See also Prof. Dr. Nasser Katouzian, Civil Law - Specific Contracts, Univ. of Tehran 1953/1974), p. 217.

It should also be stated that the necessity of depreciating the value of the goods and restituting the difference between the value of the defective goods and sound ones (arsh) to the buyer, is a rule of law whereby, under the heading of actio quanti minoris, a demand thereof has long been recognized (John Honnold, Uniform Law for International Sales, p. 326, Note 2). This rule has also been recognized within Islamic law, from which the Iranian Civil Code derives (see Articles 422-429 of the Iranian Civil Code).

We can also find guidance, from a consideration of Article 50 of the United Nations Convention concerning international sales, towards this general principle of law:

> "If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at the time..."

43. In para. 34 of the Award, the Tribunal acknowledges that to establish the existence of a latent defect, it is sufficient to prove that (1) the defect was already in existence at the time the goods were delivered; and (2) it was revealed only at some stage after delivery[37]. After mentioning these factors in para. 34 and accepting in para. 35 that the Claimant could base its claim on the theory of latent defect[38], the majority makes flagrant errors in para. 35; inter alia, it forgets those factors which it has itself enumerated in para. 34 as being necessary to prove the existence of a latent defect. The majority states:

> "However, because the Claimant cancelled the Product Improvement Program through its failure to fund the FMS Case WEQ, the cause of the compressor stalls was never discovered."

Firstly, in connection with LOA WEQ, although the necessary explanations were provided, albeit in brief, in para. 12, supra, we should note that the scope of this LOA did not go beyond that of LOA VGN or the Performance Verification Program.

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37 Although according to Article 424 of the Iranian Civil Code "A defect is deemed to be latent when the purchaser was not aware of its existence at the time of the purchase," Article 425 accepts that "A defect which occurs in the thing sold after the sale but before delivery, constitutes a prior defect." Article 36 of the United Nations Convention on the Uniform Law for International Sales provides that:

> "1. The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to buyer even though the lack of conformity becomes apparent only after that time."

38 In Award No. ITL 60-B/1-FT, dated 4 April 1986, the Full Tribunal has already accepted that claims relating to defects in items, the title to which has passed to Iran, are not subject to the statute of limitations provided under General Condition B6, if they were "hidden defects" (para. 30 of the said Interlocutory Award).

Secondly, it is not at all clear why the majority holds that Iran should have paid the costs of determining the cause of the latent defect which, as everyone has accepted, arose from the engine's design; nor is it clear why this pretext should serve to relieve the Seller and his subcontractors of their contractual/legal obligations.

More than three years passed from the time that the helicopters were delivered and the stalling defect appeared, to the time that the Product Improvement Program was allegedly cancelled, during which time the many tests and programs for discovering the latent defect, which was not found because it related to the engine design, failed to bear results. The majority has not explained why the Claimant should undergo further expense in time and costs in order to exercise and apply its legal and contractual rights.

Thirdly, it is not clear why the majority has forgotten that in order to establish the existence of a latent defect, the criterion is that the defect (here, the engine compressor stall) be in existence and hidden at the time of delivery; it is not a criterion that the cause of the defect be established[39]. It is unclear on the basis of what legal rule and principle the majority has reached the conclusion that in addition to proving the existence of the defect (the turbine compressor stall, which everyone knew

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[39] The Claimant is not even obligated to determine any specific defect (Worthey v. Specialty Foam Products, Inc. 27 UCC Rep. 4949 (Missouri C.A. S.D., Nov. 6, 1979, No. 10880)). Rather, it is sufficient that he show that the goods delivered do not work properly, or that they do not work as specified. A.A.A. Exteriors, Inc. v. Don Mahurn Chevrolet & Oldsmobile, Inc., 429 NE 2d (Ind. C.A., 1st Dist., Dec. 31, 1981).

about and admitted and still does, and which appeared right from the time the helicopters were delivered and has still not been remedied), the Purchaser must also establish the cause of the defect. It is unjustified and illogical to place the burden of such a responsibility on the Purchaser who, first of all, relied on the expertise and experience of the Seller because he himself lacked the necessary expertise, and who might, secondly, be obliged thereby to bear in certain cases expenses greater than the value of the goods themselves[40].

Fourthly, if the majority was pursuing the cause of the defect in order to establish whether it was a latent defect, then in that event -- aside from acting in violation of legal principles -- it has gone further in its Award than that which the Respondent and the manufacturers of the helicopters themselves believed, in evincing doubt on a matter which the Parties to the transaction do not dispute, since the contemporaneous evidence demonstrates that no one had any doubt that the stalling defect was a latent defect which came to light only after delivery. The majority would appear to have forgotten that:

-- Up to the second half of 1978 (towards the end of which year the relations between Iran and the United States were altered by the events of the Islamic Revolution), Bell Helicopter itself admitted the fact that the helicopters had a fundamental defect right from the time they were

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[40] As was stated above, the seller undertakes to sell sound goods, and it is therefore the duty of the seller (and a fortiori a professional seller or seller of specialized goods) to prove that the defect was not one which was latent at the time of delivery. Such a conclusion is also consistent with that rule whereby a professional seller or seller of specialized goods is presumed to recognize defects in the goods sold (cf. para. 37 of this Opinion, supra).

delivered to Iran, a defect which related to the design of the helicopter, its engine, or components thereof (para. 17, supra). None of the reasons enumerated by Bell as the cause of the defect can be regarded as being one which appeared after the helicopters were delivered, and as causing a defect -- one, at that, which took precisely the same form (the compressor stall) in every case.

-- Early in 1978, AVCO-Lycoming admitted that the measures which had been taken to remedy the problems which, it had been thought, might have caused the engine stall, had been unsuccessful; and it thus gave assurances that it considered itself responsible until the defect was completely eliminated (para. 17, supra). It is inconceivable that AVCO would have taken on such responsibility if it believed that the defect was related to factors other than the design (in short, to factors other than a latent defect prior to delivery, which was discovered subsequently).

-- The United States itself has acknowledged that the compressor stall defect, which appeared immediately after delivery, was related to the design, and on the basis of this belief, it stated in the directive of 9 August 1978 that the imposed limitations should be observed "until such time as design changes can be incorporated."

Before that time, General Thompson stated in a briefing session on 22 May 1978 that the compressor stall was a fundamental technical problem in the 214 Bell helicopter (cf. para. 18, supra).

-- Immediately following delivery, Iran repeatedly took the position, in contemporaneous correspondence and meetings, that the compressor stall defect arose from the engine's design, and it brought the matter to the attention of the United States, Bell and AVCO (para. 20, supra).

44. In para. 35, the majority also states that:

> "Moreover, under the LOAs, before the United States could be held liable for failure to pursue a claim against Bell on Iran's behalf, Iran would be required to request the United States to pursue such a claim against Bell. The Claimant has presented no evidence that it ever requested the United States to pursue a latent defect claim on its behalf against Bell."

Firstly, the majority's statement on this matter is very broad, vague and ambiguous; moreover, it fails to make clear according to which of the terms of the LOAs, Iran should have notified the United States of its obligation to pursue the matter of the latent defect against the manufacturers; nor does it indicate which Article of the LOAs specifically requires Iran to make such a request, or according to which clause Iran's failure to make the request deprives it of its contractual rights.

Secondly, the basic problem is that in arriving at this conclusion, the majority has unfortunately been compelled to obfuscate certain facts, and to disregard the totality of the facts. There is no way to justify the majority's disregard for Iran's statements and correspondence in connection with the engine stall defect, and its repeated requests that the defect be eliminated and, finally, the promises of the United States and the manufacturers. The evidence submitted to the Tribunal, which precisely proves these facts, is so ample and varied that there is not sufficient space in the present Opinion to cite and discuss each of those evidentiary documents; for in that event, one would have to invoke the contents of all the exhibits to the pleadings.

Not only did Iran request at all stages, prior to severance of relations between the two nations, that the issue be pursued and the problem eliminated, but the United States itself also repeatedly promised, in response to Iran's initiative in following up the matter, that it would

pursue it through various channels, inter alia legal avenues. Moreover, at certain stages it even took positive measures, pursuant to these efforts by Iran, to eliminate the defects thought to have caused the compressor stall problem.

In the briefing session of 3 November 1976, General Johansen stated, in response to efforts by then officials of the Army in following up the matter, and after stating that the stalls were possibly due to a defect in the transmissions, that:

> "As a matter or urgency, I have directed my legal counsel to determine whether or not we can hold Bell liable for costs to inspect and replace those transmissions."

He also promised Iran that:

> "...however, we will do everything possible to assure that GOI contractual rights are protected..."

Elsewhere in the proces verbal of the same briefing session, under "Overall Assessment," General Johansen states that:

> "I will be formally outlining my assessment and concern to BHT in more detail upon my return to the U.S. The specific action I take will be based on further analysis of contract provisions by my legal staff."

After following up the matter in the legal area, General Johansen informed the then Deputy Minister of War, in a letter dated 27 January 1977, that he regarded the problem as a latent defect, and that the United States' subcontractor could be held responsible for eliminating it. In concluding the letter, he gave assurances that:

> "Please be assured that the U.S. Government will maintain close surveillance of BHT during the replacement actions taken."41

This issue was pursued by then officials of the Army at a briefing session conducted on 22 May 1978 by another U.S. general (General Richard H. Thompson). At that meeting, the said U.S. general stated as follows in connection with the compressor stall in the helicopter engines, which had remained a defect in the helicopters up to that time despite the turbine blades and transmissions having been changed:

> "With regard to the compressor stall problem itself, I have directed my procurement and legal staff to determine if there are any remedies available for your benefit in either our contract with BHT or BHT subcontract with Lycoming. We will report any progress in this area." (emphasis added)

The majority has also forgotten that it was due to this pursuit of the issue that the United States arranged the Product Improvement Program with Bell and AVCO-Lycoming (p. 26 of the aforementioned proces verbal).

Finally, an internal report of the U.S. Department of Defense, filed with the Tribunal in the United States' final submission, makes it entirely clear that Iran had continually pursued the issue and that the United States was also fully aware of the responsibility which it or its

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41 Unfortunately, elimination of the transmission defect did not remedy the compressor stall defect, either.

subcontractors had to Iran[42]. This report states that pursuant to Article 7-103.5 (para. 10, supra), upon testing and acceptance of the helicopters the subcontractors would not be relieved of liability for any damages arising from defects, if the existence of latent defects, fraud or gross error were proved. Moreover, after noting that it would probably not be possible to pursue a claim under the heading of fraud or gross error, the report went on to state:

> "However, a principal focus of the investigative effort currently in process is to determine whether a latent defect situation exists. Should our investigation uncover facts which may be classified as a latent defect the Government will of course fully assert its right against the contractor."

In conclusion, it must be noted that it is not entirely clear what the majority intends in this part of the Award, by stating that the Claimant should have sought to pursue the "claim" against Bell. Whatever the purpose in choosing the word "claim" may have been, the evidence, inter alia what has been set forth in brief above, establishes that Iran always sought, and the United States intended, to pursue the matter legally. At any rate, it must be noted that if the majority's intent in using the word "claim" is that a suit should have been brought and pursued before the courts, one does not see what use or result bringing a suit could possibly have had, given the manufacturers' admission of the existence of their obligation, the promises given to eliminate the problem whatever the price and under any

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42 This report is an internal report dated 5 October 1978, by Colonel Donohue to the Commander of the U.S. Army Material Development, of whose existence Iran was unaware until it was filed with the Tribunal on 31 October 1986; at any rate, it cannot alter the effect of the United States' contractual obligations towards Iran. It would also appear that the majority has erroneously come under the impression, owing to the positions taken by the United States (as in this internal report), that Iran must first prove the cause of the defect in order for the United States -- or its subcontractors, through the United States -- to be held liable.

circumstances (inter alia, AVCO's letter of 4 April 1978)[43], and the promises by the United States as mentioned above. Furthermore, the United States' failure to pursue the issue through the courts or other competent fora should not be regarded as grounds for divesting Iran of its rights.

E. Liability Arising from Failure to Pursue the Subcontractors' Obligations

45. As was noted in para. 11, supra, in filing excerpts of conditions allegedly extracted from its contracts with Bell and AVCO concerning the manufacture of the Bell 214 helicopter and engine, the United States alleged that in connection with the contract for manufacturing the helicopters for Iran, its subcontractors had accepted only (in addition to the warranty against latent defects) the obligation that the helicopter and its engine would be "free from defects in material and workmanship under normal use"; and their obligation was limited to either repairing or replacing parts and equipment.

46. In its Award, the majority has totally failed to acquaint itself with, and to dispose of, this issue. In

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[43] See para. 18, supra. The final paragraphs of AVCO's letter dated 4 April 1978 state that:

> "I... assure you that AVCO Lycoming will do everything possible to give you the same service on LTC4B-8D engine as you presently receive on our T53 in the Bell model 205 and...
>
> We are fully prepared to spare no effort to meet this goal..."

view of the Respondent's assertion that under the terms of the LOAs, inter alia General Condition A2, it could give Iran those warranties which it had itself obtained from its subcontractors, the majority has failed to make clear why it has not held the United States accountable in any way under these contractual conditions. At the very least, the majority could have held the Respondent liable, under this obligation, for paying the costs of repairs or replacement (of the defective engines) to the Claimant[44].

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[44] The LOAs quote different prices for the engines. In LOA UUC, which included a total of 362 engines (including 75 spare engines), the price of each engine, sold separately, was quoted as $150,000, while in LOA VNT, which included a total of 54 engines, the price of each engine, sold separately, was quoted as $203,200. In LOA VUB, the separate price of the engines cannot be determined, because no spare engines had been ordered therein. However, in view of the Tribunal's practice, this matter should not have prevented it from arriving at a price for these six engines as well, by applying the price which was set in VNT and by accounting for certain other factors, inter alia the increase in the price of the engines purchased under VNT in comparison with those under UUC. In numerous prior awards, the Tribunal has availed itself of this prerogative, to the prejudice of Iran, even where it did not have the slightest basis for its calculations (see para. 48 of Award No. 297-209-1, in William J. Levitt v. The Government of the Islamic Republic of Iran, the Housing Organization of the Islamic Republic of Iran, et al; and the precedents relied upon in that same paragraph. In that Award, Chamber One of the Tribunal acknowledged that all of the evidence was at the disposal of the claimant, who could have produced it, but it nonetheless reached the conclusion that in this event, "given the Claimant's failure to provide documentary evidence establishing the actual expenditure of the sums claimed and their connection to the ... project," the Tribunal must "'determine equitably the damages to be awarded.'").

Conclusion

In light of what has been set forth in the preceding sections of this Dissenting Opinion, we are of the belief that the Tribunal has erred in dismissing the Claim brought by Iran and in absolving the Respondent of liability, and that it has failed to take into account the facts in the Case and the Respondent's obligations. It is our opinion that the Tribunal should have held the United States liable on any one, or all, of the theories set forth in Sect. II hereof, and that it should then have determined the difference between the price of the defective goods and sound goods, and ordered payment thereof to the Claimant.

In the Name of God In the Name of God In the Name of God

Assadollah Noori Hamid Bahrami-Ahmadi Parviz Ansari Moin

The Hague, 19 January 1989