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ES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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ORIGINAL DOCUMENTS IN SAFE

Case No. 829 Date of filing: 8 July 88

** AWARD - Type of Award _____
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- Date 8 July 88
41 pages in English _____ pages in Farsi

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In the Name of God

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CASE NO. 829
CHAMBER TWO
AWARD NO. 367-829-2

LOCKHEED CORPORATION,
Claimant,

and

THE GOVERNMENT OF IRAN,
THE IRANIAN MINISTRY OF WAR, and
THE IRANIAN AIR FORCE,
Respondents.

DISSENTING AND CONCURRING OPINION OF SEYED KHALIL KHALILIAN

Introduction

1. It goes without saying that divergences of opinion between the members of a judicial forum arise mostly from the way in which the principles of adjudication and the rules of evidence are applied. On this same basis, I shall now proceed to recount my views, which I have already set forth in the deliberative stages of this Case, whether in concurrence or in disagreement with the opinions of my colleagues.

2. Unfortunately, it must be noted that on the whole, the Award at issue here has in a number of places failed to conform to principles accepted by the Tribunal. For example, the "facts" should be recited correctly in all places, as required by the principle that the facts

must be reported faithfully. In a number of instances, there is a very perceptible lack of "equal treatment" in assessing the evidence of the Claimant and Respondent. In instances where the burden of proof is upon the Claimant, the Respondent has been made to bear it -- meaning that the Tribunal, dissatisfied with the Respondent's denial of an unsubstantiated allegation on the part of the Claimant, has required the former to substantiate his denial; and as the Respondent was unable to prove a nullity, the Tribunal has then made an award against him for payment of damages. (See: paras. 35 and 36, infra). Even those same discretionary assumptions of plausibility and implausibility which the majority has made the basis of its findings in certain places in the Award, to the benefit of the Claimant, have been withheld from the Respondent in comparable instances. (See: paras. 9, 10, 30, 41, 45, and 46, infra).

3. Therefore, my main line of reasoning in the present Opinion will be, to assess the Award by determining where it conforms to or deviates from the fundamental rules of evidence and adjudication. Legal rules are general propositions, whereas events are particular instances and special issues, to which those general propositions should be applied. For this reason, the subtlety and, at the same time, the difficulty involved in the decision-making process for a court lies in how to employ the rules of evidence and the standards of adjudication -- that is, how to employ them so that a general legal rule can be suitably applied to some particular case. What the facts are said to be, or how the decision-making body depicts them -- at its own discretion and at times according to its own predilections -- makes all the difference in how legal rules are applied. This is why the first section of every award is devoted to the recitation of the facts, which

is the key to what follows. (See: my Separate Opinion in Award No. 363-11377-2 (25 May 1988), paras. 2 and 4). There is no doubt that compliance with the obligation to report the facts in the Case faithfully constitutes one of the most important rules and principles of adjudication; and upon it depends the validity of the Tribunal's decision. (Paras. 5, 11, 32 and 40, infra).

4. Alongside this principle, there are also other cardinal principles which, if they are all properly and appropriately respected, ensure that an award will have weight and validity; while if they are not, the award can be criticized and disparaged by legal scholars. Among these other principles are: probandi necessitas incumbit illi qui agit (Tribunal Rules, Article 24, para. 1; see: paras. 9, 10, 13, 32, 33, 35, 36, 43, 44 and 50, infra); the necessity of equal treatment of the parties (TR. 15 (1); see: paras. 10, 11, 24, 30, 32, 33, 34, 39, 41 and 43, infra); and the principle that an award unsupported by reasons is invalid. (TR. 32 (3)).

In the following sections of this Opinion, it shall be seen to what extent the majority has succeeded in bringing its findings into conformity to these principles (para. 22, infra).

- I -

THE TRIBUNAL'S FINDINGS IN CLAIM TWO (A)

5. Facts which were omitted from the Award:
This claim arises from a contract whereby Lockheed (the Claimant) was obliged to render certain services to the Air Force at the Bandar Abbas airbase through 30 June

1979 (9.4.1358). (Para. 27 of the Award). It must also be noted that Bandar Abbas is a small, nonindustrialized seaport 1500 kilometers from Tehran, where there were no reports of any severe or remarkable events during the course of the Islamic Revolution in Iran. Moreover, Lockheed was serving in a location some kilometers from that town, and at that, in a highly-guarded area (viz., an airbase), which was off-limits to all but military personnel, who were themselves under the strict surveillance of the regime then in power. It was in such a secure environment that Lockheed's personnel were busy with their technical services and with maintaining the P-3F aircraft when suddenly, in the latter half of December 1978 (late Azar or early Dey 1357) -- that is, six months before the contract was to expire -- Lockheed decided to cut off its operations and evacuate its personnel from the airbase. The various aspects of these facts have not been reflected in the majority's Award.

6. The justification of Lockheed's evacuation: We do not know what motivated Lockheed to take those steps at that time - whether it did so on the advice of U.S. Government authorities, or else it perceived that things would be fruitless and deadlocked in a future which seemed dark and vague in those days. At any rate, Lockheed took this decision unilaterally, and it abandoned its obligations halfway and evacuated its personnel from the military airbase. The assassination of Paul Grimm in the vicinity of NIOC's operations in Ahvaz (that is, in another corner of Iran's far-flung reaches) never caused force majeure conditions in Bandar Abbas. In addition, an Iranian was assassinated in Ahvaz at the same time as the assassination of Paul Grimm. It would be highly fanciful for one to imagine

that the situation in Ahvaz, owing to its oil industry and to those two individuals' direct cooperation with the ruling regime in putting down the revolutionary activities of the oil workers and employees, had brought about a general atmosphere of force majeure throughout Iran, whereby Lockheed would be excused from fulfilling its contractual obligations in Bandar Abbas as well.

7. Lockheed resorts, as its pretext, to Article 10 of the contract ("Hazardous Conditions"). For its part, however, the Respondent argues that in the first place, Lockheed is not entitled to rely on that provision, because there were no "hazardous conditions" in Bandar Abbas, such as would threaten its personnel. In the second place, even assuming that hazardous conditions did exist, pursuant to the same Article 10, Lockheed was obliged to take certain steps, which it refused to do[1]. The most important point of dispute between the

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[1] "ARTICLE 10. HAZARDOUS CONDITIONS: PROPERTY OF SELLER OR SELLER'S EMPLOYEES

Notwithstanding anything to the contrary contained herein, Buyer agrees to relieve Seller's personnel from rendering services hereunder in the following circumstances:

10.1 In the event that Buyer has made a declaration of war or;
1. Buyer is in a state of war, or
2. There is armed conflict involving Buyer's armed forces, or
3. There is insurrection threatening the lives of Seller's personnel, or
4. There is civil strife,

if in the judgment of the Seller such hazardous conditions exist (hereinafter called the Hazardous Conditions) threatening Seller's personnel; and in compliance with Seller's request, its personnel will remain in Iran upon condition that they (Seller's personnel) receive additional compensation and/or

(Footnote Continued)

Claimant and Respondent is, whether we should hold that Lockheed's step constituted a breach of contract (the Respondent's position), or whether we should regard it as a termination owing to force majeure conditions (Lockheed's position). Here, in issuing its Award the majority has accepted Lockheed's position, even though it is only the theory of breach of contract, even if hazardous conditions did exist, that conforms to the facts of the matter. We shall now examine the matter in two sections, one on the issue of "breach" of contract, and the other on "termination" thereof. In this connection, it must be seen, even on a presumption that it is valid to apply the theory of

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(Footnote Continued)
insurance coverage, as agreed by the parties hereto, and Seller pays such additional compensation to retain Seller's personnel, then Buyer shall reimburse these additional compensation and insurance costs. Such costs shall require prior Buyer approval.

10.2 In the event that Seller's personnel, because of Hazardous Conditions wish to be relieved of their responsibility and such relief is approved of by the Seller's Program Director, and coordinated with Buyer, then Buyer will reimburse Seller for additional costs, as agreed by the parties hereto, resulting from earlier than planned return of those personnel to their place of residence. Seller will use its best endeavors to reduce the amount of such costs.

10.3 In the event of Hazardous Conditions, Buyer shall reimburse and pay to Seller all its costs which are incurred to induce replacement personnel to perform services in Iran on behalf of Seller for Buyer. Such costs shall require prior Buyer approval.

10.4 Any failure to perform services under the conditions set forth above which cannot be cured by Seller after reasonable efforts shall be considered excusable nonperformance."

(quoted from the English version of the Statement of Claim)

termination, whether or not the amount granted to Lockheed as damages in the majority's Award conforms to valid principles of computation with respect to cases of termination.

(A) Breach of contract

8. Lockheed has relied on Article 10 of the contract, and yet it is unable to explain how it dealt with its obligations under this same Article. Now, upon a look at the text of the Article, as quoted in footnote (1) above, we shall observe that "hazardous conditions" have been defined in para. 1, which then goes on to set forth the degree of seriousness of such conditions, providing at the extreme for the existence of a situation "threatening the lives of Seller's personnel." As for para. 3, Lockheed cannot invoke this section, because its personnel did not remain at the airbase, and they were not replaced. Para. 4 does no more than express the legal rule, lex non cogit ad impossibilia[2]. There remains para. 2, pursuant to which Lockheed was required to comply with the procedures for exchanging views and carrying out the necessary coordination, in order to wind up the sensitive services which it had undertaken to perform for the Iranian Air Force.

9. A look at the Claimant's pleadings and arguments will very quickly reveal that Lockheed has failed to prove either that life-threatening conditions existed at the Bandar Abbas airbase during Dey 1357 (December 1978/January 1979), or that it carried out the necessary measures as provided under Article 10.2.

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[2] Lex non cogit ad impossibilia: In Islamic law, "rufi'a al-qalamu'an ummati... fima la yatiqun" ("my community has been spared injunctions ... concerning that which it cannot do").

The sum total of the evidence -- and noncontemporaneous evidence at that -- submitted by the Claimant in order to establish that it was not guilty of breach of contract was: the statements by two Lockheed employees (Galli and Scruggs), which were written for the sole purpose of their filing with the Tribunal; Lockheed's letter of 23.4.58 (14 July 1979) ie., more than six months after its personnel were evacuated; and the fact that an Air Force plane was used to transport the personnel from Bandar Abbas to Tehran. It is astonishing that the majority has accepted Lockheed's allegation, even in the face of such incredibly weak evidence. Even though the majority expressly concedes in the Award that "it is not clear" whether the Air Force officials concurred in the decision to evacuate the personnel (para. 71 of the Award at issue), it fails to note that the Tribunal's uncertainty indicates a failure on Lockheed's part to prove its allegation that it carried out the provisions of Article 10 (the need to confer and coordinate with the Air Force). As for the point that an Air Force plane was used to transport the employees to Tehran, the Respondent has explained to the Tribunal that it is quite normal for Air Force-related passengers in locations where there are airbases to be transported by Air Force planes flying to the capital or other places in Iran; and this fact should not be given such an improper legal significance as that given here by Lockheed. The office in charge of such flights has independent functions which are totally separate from the contractual obligations of the airbase commanders or Air Force.

10. We have seen that Lockheed, as conceded in para. 71 of the Award, has failed to meet its burden of proof that it acted in accordance with Article 10.2. As for proof of the existence of hazardous conditions, there can also be no doubt that Lockheed has not submitted any

contemporaneous evidence to the Tribunal. The statements of Messrs. Galli and Scruggs, who speak of the anti-American sentiments of the people, are rebutted by the statements of Messrs. Ghaffari and Moshrifi in their affidavits filed on behalf of the Respondent -- aside from the fact that in November-December 1978 (Azar and Dey 1357), there could not possibly have been any propaganda of this sort on a military base. One would have expected the majority not to base its findings solely upon the statements of Lockheed's employees, but rather to give impartial consideration to the rebuttal statements by the Respondent's witnesses as well, in keeping with the principle of equal treatment of the Parties (TR 15 (1)). It is astonishing that the majority has awarded in favor of Lockheed, even though it did not have sufficient information to assess the seriousness of the situation at the airbase:

> "Although the Tribunal cannot assess the seriousness of the threats and risks that Lockheed alleges its personnel encountered, it is satisfied that these threats, coupled with growing revolutionary violence elsewhere in the country, raised a reasonable perception of danger..." (para. 33 of the Award)

11. Article 10.1 expressly provided that there must be a threat to the lives of Lockheed's personnel before Lockheed could be excused from carrying out its contractual obligations. The majority, however, while admitting its ignorance as to the level of danger, concocts an atmosphere of fear on the part of Lockheed's personnel at the secure Bandar Abbas airbase out of the growing violence in certain large Iranian cities, and speaks of a "reasonable perception of danger." The majority should be asked whether it has at its disposal even a single evidentiary document indicating that there was any threat to the life of any Lockheed employee, or indeed, to that of any other American who was living not at the airbase, but right

in the heart of Bandar Abbas itself. In making this statement in the Award, the majority has revealed the invalidity of its decision, whereby in addition to giving unequal treatment to the Parties' witnesses, it has failed to observe the legal principles relating to force majeure.

12. The phrase "hazardous conditions" appearing in the contract is another name for force majeure. In awards wherein it dealt with force majeure, the Tribunal has emphasized that its existence is "relative." The Tribunal has not only circumscribed force majeure in terms of time, but it has also held, even with respect to place, that the existence of such force majeure conditions can be established only in the large cities; and it has argued as well that one must discriminate according to the kind of work involved. (See: Sylvania Technical Systems, Inc. and Iran, Award No. 180-64-1, reprinted in 8 Iran-U.S. C.T.R. 308; Exxon Research & Engineering Co. and Iran, Award No. 308-155-3, para. 37; American Bell International, Inc. and Iran, Award No. 255-48-3, para. 47; Touche Ross and Iran, Award No. 197-480-1, reprinted in 9 Iran-U.S. C.T.R. 298; Dissenting Opinion of Judge Bahrami in connection with Award No. 192-285-2, reprinted in 9 Iran-U.S. C.T.R. 176.

It can therefore be conclusively stated that according to the standards applied by this same Tribunal in other awards, neither the place where Lockheed was supposed to render its services, nor the kind of services to be rendered, were subject to force majeure conditions (paras. 5 and 6, supra).

13. Certainly, if the Tribunal had awarded against Lockheed for breach of contract, this claim would have had a totally different fate, and there would have been a

firmer basis for the Respondent's counterclaim. And yet, the majority has exonerated the Claimant of the charge of breach of contract, even in the total absence of any contemporaneous evidence, and also despite the existence of rebuttal testimony in favor of the Respondent -- and even despite the majority's own admission in the text of the Award that it is ignorant of the nature or extent of the hazardous conditions allegedly faced by Lockheed. If the majority was still unable to determine how serious the alleged conditions were (para. 33 of the Award), and if it had still not been proved to its satisfaction that Lockheed had obtained the agreement of Air Force officials (para. 72 of the Award), then why has it relieved the Claimant of its burden of proof on the basis of these unknown factors, and then awarded in its favor -- by an Award which firstly, should have been based on proof of the existence of dangerous conditions amounting to a threat to the lives of Lockheed's personnel at the Bandar Abbas airbase, and secondly, should have been founded upon proof that Lockheed took action in accordance with Article 10, ie. that it obtained the consent of Air Force officials?

(B) Termination of contract, and assessment of damages

14. At any rate, Lockheed alleged that it terminated the contract unilaterally and in mid-course, and it sought $1,050,000 in damages thereon. The majority accepted the allegation that the contract was terminated, and it awarded Lockheed $350,000. Let us now presume that the termination was both legal and proper, in which event it must be seen whether Lockheed was entitled to receive $350,000 in damages. One legal error committed by the majority appears in para. 40 of the Award, where it holds that Lockheed's nonperformance of contract was

justified under Article 11 of the contract [3] ; whereas firstly, Article 11 deals with a delay, and not a permanent interruption, of services, and secondly, if Lockheed was excused by Article 10 from its duty to perform on the contract, then Article 10.4 thereof constituted sufficient legal justification for such nonperformance. (Footnote (1) and para. 8, supra).

15. In reliance on Articles 4 and 5 of the contract, Lockheed sought $1,050,000 for installments 3 and 4 (through January 1979), even though it had already received $825,000 for installments 1 and 2. Added together ($1,875,000), these sums amount to 70% of the total contract price ($2,652,550), whereas in terminating the contract in mid-course, and if not in default thereby, Lockheed would have been entitled to only 47% of the total price, viz., $1.24 million.[4] However, the majority believes that in such an event, it would be entitled to 50%, viz., $1.33 million. Para. 42 of the Award. This point will be addressed in para. 25, infra.

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[3] "ARTICLE 11. DELAY

Seller shall be excused from, and shall not be liable for, any delay in its performance under this Contract, and shall not be deemed to be in default for any failure of performance hereunder, due to causes beyond its control and not occasioned by its negligence or fault. Such causes shall be deemed to include, without limitation, war; warlike operations; armed aggression; insurrections; riots; fires; weather unfavorable for flying; explosions; accidents; governmental acts or omissions; regulations or orders; acts of God; acts of the public enemy; failure of or delays in transportation; epidemics; quarantine restrictions; and labor troubles causing cessation, slow-down or interruption of work."

[4] For the most part, the figures given in this Opinion have been rounded off for the sake of convenience.

Lockheed's legal argument was that the contract price was not determined on the basis of "man-months", so that it would be incorrect to apply the factor of 50%, reflecting the fact that the contract was terminated half-way along; rather, it contended, pursuant to Article 4.1, the contract was drawn up on the basis of a "firm fixed price" [5], and according to Article 5.1, payments were supposed to be made in fixed installments at fixed times [6].

16. The Respondent rebutted Lockheed's position, on grounds that the "firm price" mentioned in the contract was in fact based on "man-months." Fortunately, the Tribunal did not accept the Claimant's argument either, but instead held that it was entitled to 50% of the total contract price -- taking into account, of course, an "equitable adjustment" in order to deduct from this 50%, owing to breaches of contract on Lockheed's part. Now, in the following two sections, I shall take up this methodology and basis of the Tribunal's calculations, as well as setting forth my own opinion.

The legal basis of the calculations

17. Notwithstanding the Claimant's allegation and argument, the Tribunal gave due consideration to the point that

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[5] "ARTICLE 4. PRICE

4.1 Firm Fixed Price
The total firm fixed price for the services described in Article 1 of said contract, in accordance with the Schedule in Article 2 of said contract and the staffing in Article 3 herein, is $2,652,550 for additions of Amendment No.1."

[6] ARTICLE 5.1 - Payment Schedule: This Article provides that Lockheed is to be paid in installments of $300,000, $525,000, $525,000, etc., on the first day of August, October, December, February, etc., respectively.

"the Contract, in Article 4.1, clearly tied the fixed price to both the schedule and the staffing requirements" (para. 43 of the Award). In short, while it is true that the contract did not expressly stipulate man-months, the Tribunal was led, by the nature of the contract, to the same conclusion. That is, the contract was de facto predicated on man-months, even though this was not expressly stated in setting the contract price.

18. A similar situation arose in Gould Marketing, Inc. and Ministry of National Defense of Iran (Case No. 49), wherein the Tribunal had to decide whether it "should conduct an accounting to determine whether the Claimant has been paid more or less than its performance would justify" (Award No. ITL 24-49-2, reprinted in 3 Iran-U.S. C.T.R. 154). In that case, the claimant had received certain amounts pursuant to a contract into which it had entered with the respondent. Item 7 of that contract related to special support services involving spare parts. The services were supposed to be rendered over a ten-year period, but were in fact rendered for only three years. In that case, the Tribunal concluded that "the measure of the value of that performance can be found by dividing the relevant contract price by ten and then multiplying the resulting figure by three" (Award No. 136-49/50-2, reprinted in 6 Iran U.S. C.T.R. 279). As a result of the Tribunal's calculations, the claimant was ordered to repay the respondent the excess monies it had received pursuant to the schedule of payments provided for by the contract.

It should be emphasized that the Tribunal based its finding in that case on a general principle of the law of contracts. Citing legal authorities such as Corbin, Williston and others, the Tribunal found that where a

contract is terminated owing to frustration of contract or, in more general terms, hazardous conditions, as invoked by the Claimant in the present Case, the following principle applies:

> "If payment has been made, the Party which received such payment is entitled to retain that amount of money proportionate to its performance and must return any money in excess of that amount." (6 Iran-U.S. C.T.R. 274).

Then, applying this principle, it ordered the claimant to repay the respondent $2,980,000. In my opinion, this principle should have been observed in the present Case as well. Indeed, the application of this principle results in the same calculations as those submitted by the Respondent in this Case in its counterclaim against Lockheed.

19. In Intrend International, Inc., and The Iranian Air Force (Case No. 220), the Tribunal found that there was "less than complete fulfillment" by the claimant of its contractual obligations regarding the amount of time to be worked during a certain quarterly period, and then concluded that "some reduction in the amount owing to the Claimant is justified" (Award No. 59-220-2, reprinted in 3 Iran-U.S. C.T.R. 114). On this basis, the Tribunal reduced the installment for one quarterly period by a third.

20. In discussing Article 4.3.1 of the contract, Lockheed stated that where the Respondent desired to avail itself of its right to reduce the number of personnel pursuant to that Article, the contract price should not simply be reduced; rather, there should be an "equitable adjustment" thereof.

However, the Tribunal has disregarded the fact that the circumstances referred to in Article 4.3 are totally

different from the situation in which the Parties found themselves on 2 January 1979. In other words, Article 4.3 anticipates a situation where the contract price will be reduced in the event that the Buyer willingly changes his decision and reduces the number of personnel. In this way, the terms of Article 4.3 are not dissimilar to those normally seen in provisions for an "option to terminate in the buyer's interest," of which only the buyer can avail himself (observing, of course, those conditions provided for the seller's protection).

For this reason, therefore, and also in light of the fact that the contract was not halted by the Air Force in exercising its right under Article 4.3, the Tribunal should not have adopted the Claimant's proposal to apply an "equitable adjustment" in this Award.

21. In addition, in the present Award the Tribunal was seeking a method of calculation whereby to determine the global amount of Lockheed's entitlement vis-à-vis the services rendered by it. Although the legal principle behind this calculation has been accepted in the Award, the majority has, first of all, declined to use clear and carefully reasoned legal language in justification of its finding. In the second place, it has made two errors in determining the amount of Lockheed's entitlement. One error is that at the Claimant's suggestion, it applied an "equitable adjustment" in the amount, whereas it should have made a "fundamental and realistic adjustment" on the basis of facts which Lockheed, at least, has submitted to the Tribunal. The second error is that in this same "equitable adjustment," the majority has ignored certain factors which would have led to a reduction of the contract price.

22. To apply an equitable adjustment, recourse must be had to the rule of equity. However, this Tribunal certainly has no right to render an award on any basis other than that of law (Article V of the Claims Settlement Declaration), and it can resort to equity only in the event that the Parties expressly permit it to do so (TR. 33, (2)). In the instant Case, however, the Parties have not asked the Tribunal for an Award based on equity, and there is nothing in the terms of the contract which would permit the Tribunal to proceed on such a basis.

23. If Lockheed had fully performed on its contractual obligations right up to January 1979 when it abandoned its operations, it could have received no more than roughly half of the total contract price. The Tribunal, however, held that Lockheed had committed certain violations which would reduce the amount of its entitlement. According to the Respondent, one of Lockheed's violations of the contract was that it was understaffed; the other was that some of the personnel were unqualified. The majority has accepted the charge of understaffing, but it has not given any weight to the charge that certain employees were unqualified, despite the existence of abundant evidence in the Case.

Lack of qualifications of personnel:

24. Both the Claimant and the Respondent have filed

abundant contemporaneous evidence in their pleadings[7], indicating that a lack of qualifications on the part of certain personnel constituted a serious point of disagreement between the Parties from July 1978 onwards, when the amendment to the contract was executed. The timely and contemporaneous objections made by the Respondent constitute precisely that sort of evidence which this Tribunal has invoked in similar instances, in awarding in favor of American claimants. In the awards issued to date by this Tribunal, we have seen time and time again that a failure to make a timely objection has caused respondents to be found against, and their counterclaims against claimant United States companies dismissed. See: R.J. Reynolds Tobacco Company and Iran, Award No. 145-35-3, reprinted in 7 Iran-U.S. C.T.R. 190; Rexnord, Inc. and Iran, Award No. 21-132-3, Ibid, vol. II, at 12; Lischem Corporation and Atomic Energy Organization, Award No. 140-194-2, reprinted in 7 Iran-U.S. C.T.R. 23; Howard Needles Tammen & Bergendoff and Iran, Award No. 244-68-2, para. 94; Reading & Bates Drilling Company and Iran, Award No. 355-10633-2, para. 16; and Harnischfeger Corporation and Ministry of Roads and Transportation, Award No. 144-180-3, reprinted in 7 Iran-U.S. C.T.R. 101.

Therefore, justice required that in this instance, the Tribunal apply, in favor of the Respondent, that same principle which it adopted in its earlier decisions. According to the Respondent, at least three of the ten individuals who worked on the maintenance team had been declared to be unqualified, and pursuant to Article 1.3

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[7] Such as the Respondent's letters dated 9 July 1978 and 20 September 1978, and the Claimant's telex of 25 October 1978 (para. GGG) and its letter of 4 October 1978.

of the contract, Lockheed was required to replace them. This violation by Lockheed should now result in a deduction of an amount equal to three individuals' salary, over a six-month period, from the total amount sought by Lockheed -- an amount, that is, of approximately $175,000, none of which the majority has deducted.

Understaffing:

25. The Tribunal has agreed -- and indeed Lockheed itself admitted -- that there was some understaffing. We shall now see what effect the calculations relating to this understaffing ought to have upon the amount awarded; ie., whether the majority's "equitable adjustment" has benefitted only the Claimant, or whether the Respondent has also benefitted from it, to the extent of its entitlement under the law.

Under Article 3, as amended, Lockheed was required to provide 16 men for the maintenance team over the full term, while for the flight team, it was initially to provide 11 men for three months, from October to December 1978, and then eight men for six months (January-June 1979). The sum total of all the personnel over the entire term of the contract (12 months) equals 273 man-months. In the first six months, when Lockheed was present at the airbase, it was supposed to provide 16 men for the maintenance group over that whole period, and 11 men for the flight group for only three months, ie. 129 man-months in all [8].

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[8] This figure has been arrived at as follows:

Personnel		months	
16	x	6	= 96
11	x	3	= 33
		Total:	=129

Since 129 equals 47% of 273, Lockheed would have been entitled to receive 47% of the total contract price, viz., $ 1.24 million, if it had not committed any violation of the contract during the first six months. The majority disregarded this clear and simple computation and instead credited the Claimant with 50%, viz. $1.33 million. Up to this point, then, the sum of $90,000 was turned over in favor of, and credited to, Lockheed through an error or oversight on the part of the majority.

26. The Respondent argued, and the majority accepted, that this amount should be adjusted in view of Lockheed's violations of the contract. However, the adjustment for understaffing, which the Tribunal has accepted, raises a point which is even more astonishing than that referred to in paragraph 24 in connection with the unqualified personnel, for whom the Tribunal made no adjustment. According to the Respondent's calculations, Lockheed is entitled to only 70% of the total amount relating to the first six months of the contract. This is because Lockheed actually provided only 70% of the number of personnel contracted [9] (ie., it was 30% understaffed), since the maintenance team was six men short, and the flight team one man short.

Therefore, the total amount of its entitlement should

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[9] In other words, the available personnel consisted of the following:

	personnel		months		
maintenance :	10	x	6	=	60
flight :	10	x	3	=	30
			Total	=	90

90 equals 70% of the 129 man-months which were supposed to be provided during the first six months.

be $872,700 (ie., 70% of $1.24 million), and since it had already received $825,000 in two installments, the Tribunal should have awarded only $47,700, and not $350,000.

27. According to the Claimant's statistics, which diverge slightly from those of the Respondent, the number of personnel provided was higher, viz., 79%. But even in this case, the total amount to which Lockheed is entitled for the first six months is $985,000; and since it had already received $825,000 of that total, the Tribunal should have awarded it $160,000. However, apparently only considerations of "equity" required that the majority award a further $190,000 (ie., for a total of $350,000), to the prejudice of the Respondent and to Lockheed's advantage. It is very disconcerting to see that the majority has, contrary to a legal principle which it has itself accepted (para. 18, supra), disregarded this sum of $825,000 in its calculations, and that it has computed Lockheed's 70% entitlement on the basis of the sum of $510,275 (the balance of one-half of the contract price, after subtracting $825,000). This carelessness on the part of the majority is not compatible with any legal logic whatsoever. What is more, does the logic of "equity" dictate that the adjudicating forum be equitable to the Claimant only?!

- II -

THE TRIBUNAL'S FINDINGS IN THE OTHER CLAIMS

Claim No. Two (B):

28. Lockheed alleged that it had sent certain of its personnel to duties outside of Bandar Abbas for 17 assignments between October 1977 and August 1978. The

majority has awarded it exactly the amount of its claim, ie., $27,709, whereas this claim ought to have been dismissed, pursuant to both the provisions of the contract and the principles of adjudicative procedure relating to probative evidence.

29.(a) The contract made provision only for assignments outside Bandar Abbas but within Iran (Article 8.1), whereas $25,500 of the amount demanded by Lockheed on the claim was for assignments outside Iran. The claim's nonconformity to the contract, in terms of the place where the work was carried out, should be taken as evidence that Lockheed is not entitled to recovery thereon.

30.(b) There has been an extraordinary and unreasonable delay in demanding monies which might even be said to relate to a contract that had, in effect, expired. In another case, Chamber Two ruled that a failure to send an invoice was ipso facto evidence that the services involved were inconsequential, and that any claim for costs relating thereto had been waived. Howard Needles Tammen & Bergendoff and Iran, Award No. 244-68-2, para. 113.

$26,900 of the amount of the claim relates to assignments carried out between October 1977 and May 1978, and we know that the Parties signed an amendment in July 1978, thereby both amending and changing the contract and, in reality, starting anew, with a new contract. The invoices presented by Lockheed to the Tribunal are dated 20 December 1978, but the letter accompanying them is dated 23 June 1979; and even at that, the Respondent denies ever having received it. Moreover, contemporaneously with the said alleged assignments, the Respondent paid Lockheed for six temporary assignments. The Tribunal itself has on a

number of occasions dismissed evidence relied upon by parties, on the rationale that it was implausible and untenable, and in this same Award, the majority has time and again compensated for the flimsiness of Lockheed's evidence by applying the criterion of "reasonableness," and thereby awarded in favor of the Claimant. Wasn't there enough evidence that this claim was unreasonable, to convince the majority that the Claimant had no entitlement therein?

31. (c) Pursuant to Article 8.2 of the contract, Lockheed first had to substantiate its personnel's expenses which it had paid itself during their assignment, in order for it to be entitled to restitution from the Respondent. Lockheed has avoided submitting to the Tribunal any document evidencing that it had incurred such expenses.

32. (d) In one of the assignment request forms, the Respondent had approved an assignment of only about 16 days, but Lockheed's invoice which has now been submitted to the Tribunal seeks expenses for 42 days. In order to justify this 162% increase in time, and to fit it into the framework of the phrase "approximately 16 days", the majority's only recourse was, to rely solely upon a statement by the Claimant's attorney -- an oral statement at that, made at the Hearing -- so as to write that "in this instance, the Claimant has presented a reasonable and unrebutted explanation that the mission was extended because of mechanical problems experienced by the aircraft." (Para. 52 of the Award). Here, first of all, the majority avoided stating explicitly that the evidence on which its Award was based consisted only of an oral statement by the Claimant's attorney at the Hearing. Secondly, it was never made clear to me, the other member of the Chamber, just why this explanation was "reasonable".

Hasn't the Tribunal itself often found against a respondent that had failed, on similar occasions, to make a timely report of defective performance, or that had refrained from taking any measures, even though it could have taken up the matter with the other party? In this same Award, we see that contemporaneous evidence is invoked repeatedly, and that noncontemporaneous evidence has no probative value. If so, in this regard couldn't Lockheed have promptly reported the mechanical problems experienced by the aircraft, and asked the Air Force for an extension of the assignment? Has the verbal statement and allegation of the Claimant's attorney, ten years after the alleged assignment, now acquired the probative value of contemporaneous evidence in the eyes of the majority? Moreover, just what does "unrebutted explanation" mean? When a statement is heard for the first time at the Hearing, what other meaning could a "rebuttal" possibly have, apart from the adverse party's denial?

33.(e)Aside from all this, it is also objectionable that in failing to apply a principle accepted by the Tribunal -- ie., the principle of respect for the Parties' practice -- the majority has in the Award also paved over the last remaining problem with Lockheed's claim.

In mounting its defence, the Respondent relied on its previous practice with Lockheed in connection with assignments; and since the present claim did not coincide with the policy followed in the past, the Respondent held that it was without foundation. Moreover, it would seem that the Claimant was initially convinced, since in one of its pleadings it promised to file its probative evidence with the Tribunal later on, and yet never did so; nor did it ever produce any

evidence in confirmation thereof, beyond an assignment request form and invoices which it had already filed. This being the case, it is astonishing that Lockheed did not face any problems due to having broken its promise; for despite all the objections and ambiguities in its claim, it received the amount claimed, down to the last dollar.

Claim Six

34. The criteria and premises adopted by the majority with respect to this claim, which culminated in an award against the Respondent for over $400,000, are more or less the same as those we encountered in the preceding sections, in connection with "Claim Two". First, the majority quotes the Claimant word for word, and in the Award's section on the "merits" at that, as if those words expressed an established and irrefutable truth and thus ought to be quoted verbatim. Those specific words refer to "daily attendance records... approved by the respective IIAF officials to substantiate the amount invoiced" (para. 95 of the Award). But it is most astonishing that the attendance records were never submitted to the Tribunal, and that instead, only a list containing a summary of attendances and absences, and attached to Mr. Williamson's affidavit, was submitted. Here, the majority accepts this noncontemporaneous evidence; yet in another place in this same Case, the assertion pertaining to the Respondent's graph indicating the percentage of grounded aircraft, which was one of the grounds of the Respondent's counterclaim (in Claim Two (A)), was dismissed since it was not based on contemporaneous evidence. Furthermore, the evidence submitted by the Claimant is all unilateral, and has been prepared by the Claimant itself. Contrary to a reasonable course of work and to the Parties'

practice in the past, and despite the Respondent's denial that the services relating to the claimed installments had been rendered, the Claimant was unable to produce any confirmation of the work. Nor did the majority take any interest in Mr. Bahrami's affidavit stating that he did not recall that the alleged invoices had been approved by the Air Force, and that he had been unable to find any such approval even after referring to the Air Force's records. This constitutes another example of the majority's unequal treatment of the Parties' evidence.

35. Aside from all the foregoing, in para. 97 of the Award the majority expects the Respondent, as it has elsewhere, to prove the existence of a nullity, and writes that:

> "The IAF presents no evidence that these services were not rendered and rests its defense on the assertion that Lockheed has not proved its claim..."

The majority thus expects the Respondent to prove that these services were not rendered. However, just what services does it mean-- the services mentioned on paper and in Lockheed's Statement of Claim, or services which were really rendered? In the case of the former, we are still in the stage of statements and allegations, and how can the Respondent prove today the non-existence of services which were supposedly rendered ten years ago? It is unreasonable to expect proof of the existence of a nullity. In the case of the latter, if it has really been proved that services were rendered, there is no point in proving that they did not exist. Thus, this statement in the Award indicates a still more unreasonable expectation, one expressed by the majority in order to justify its Award. The Respondent does not deserve any criticism whatsoever -- and yet the majority condemns it in the

passage quoted above -- for not having proved the nonexistence of the alleged services; while on the other hand, the majority has not expected the Claimant to prove that these services were rendered. Quite naturally and logically, it is the party making an affirmative allegation that is required to prove it, rather than requiring the party who denies it to prove that the matter in question does not exist.

In addition, the mere fact that the Respondent has not presented evidence in rebuttal does not relieve the Claimant of the duty to produce acceptable evidence of its own. Cheng, referring to a number of cases before the United States-Mexican Claims Commission, writes that:

> "Indeed, the Commission on several occasions held that: - 'The mere fact that evidence produced by the respondent government is meagre, cannot in itself justify an award in the absence of concrete and convincing evidence produced by the claimant government.'" B. Cheng, General Principles of Law, Grotius, 1987, p. 330.

36. The fact that the majority places emphasis upon the phrase "prima facie" in two consecutive paragraphs in order to justify its findings, is further evidence of the weakness of the Claimant's position. What is more, the fact that under the influence of the rules of evidence in the common law, the majority places the burden of proof on the Respondent, is itself due to its incorrect application of those rules. Sandifer, Evidence before International Tribunals, 1975, at 176. For if under Anglo-Saxon law, the bringing of prima facie evidence places the burden of proof of the contrary upon the respondent, this is in cases where, first of all, the prima facie evidence really constitutes "evidence"; and second, the issue should be of a kind where reason and logic admit of the possibility of proving the opposite. Decision of the Arbitral

Commission on Property Rights and Interests in Germany (Treaty of 5 May 1955), cited in Sandifer, op cit, at 171. Also: Encyclopedie Dalloz , Repertoire de droit international Tome II, "Preuve," No. 27.

And yet, no more than this could be expected from an Award wherein we have observed (in respect of Claim Two (A)) that damages have been carelessly calculated (paras. 26 and 27, supra), or which has made no reduction whatsoever in the Claimant's recovery despite its breach of contract and despite the existence of contemporaneous evidence filed by both the Claimant and the Respondent, indicating that certain of Lockheed's personnel were unqualified; or where (in respect of Claim Two (B)) none of the primary and secondary evidence indicating that the Claimant's claim was unreasonable is brought to bear against the Claimant. The sentence used here in favor of the Claimant was never used by the majority in connection with Claim Two (A), in discussing certain personnel's lack of qualifications in order to vindicate the Respondent's rights; thus, the majority did not say that "Lockheed presents no evidence that this lack of qualifications did not exist." For in that connection, Lockheed not only failed to present evidence against the Respondent's assertion, but confirmed it as well. Or in another claim, despite all the circumstantial evidence and other evidence indicating that Lockheed's claim was unfounded (paras. 30-33, supra), the majority did not say that "the Respondent has made a prima facie showing on its assertion denying the validity of Lockheed's claim." For if it had said so, it could not at the same time have proceeded to find against the Respondent. Apart from all this, in Claim Six, which involves a claim for more than $400,000, all sorts of determinations of plausibility and implausibility, and astonishing expectations, are compressed into a very

few words, so as to help and justify the majority in rendering its Award.

Claim Five

37. This claim concerns whether certain parts which had been ordered from GELAC, one of Lockheed's divisions, were ever delivered. The relevant purchase orders were never submitted in evidence. On this claim, the Claimant initially demanded $37,244.00, and subsequently $34,182.00, whereas the majority finally found a way, by means of its own idiosyncratic criteria for weighing evidence, to award it $18,623.00. And yet, as I shall make clear below, this is another spurious claim brought by the Claimant.

The extent of Lockheed's liability in connection with these parts was specified in two documents: one, a contract which Lockheed failed to produce and which is thus not available; and the other, a letter of credit, a copy of which the Respondent made available to the Tribunal. Supposing that the alleged purchase orders did exist, the parts should have been delivered and paid for in accordance with the terms of this letter of credit.

38. (a) If Lockheed had acted in accordance with the conditions of the contract and letter of credit, the bank would have promptly paid the monies due it, if any. However, upon the establishment of this Tribunal, and in the special atmosphere prevailing in the Tribunal with respect to the assessment of probative evidence, Lockheed succeeded in obtaining a major portion of the monies claimed by it, even though it was definitely precluded by its own violations from being paid by the bank.

39. (b) According to the majority, the claim for the parts was justified on the basis of photocopies of some Airway bills. Moreover, although the majority itself acknowledged that this claim appeared to be complicated by the absence of the relevant contract and purchase orders, it nonetheless ruled, in reliance on ten "receipts" attributed to the shipping agent (para. 88 of the Award), that a part of that claim, viz., $18,623, was payable.

These ten receipts in actuality consisted of five airway bills and five forms issued by Lockheed itself, which the Tribunal accepted as constituting circumstantial evidence that the goods had been delivered to the carrier! If the majority had here observed the logic of equity just as applied in the Claimant's favor in Claim Two (A), it could at most have accepted those five airway bills -- in which case the amount awarded would have been reduced to $6,625.

40. (c) On principle, every beneficiary of a letter of credit is required to meet its terms exactly: "In credit operations all parties concerned deal in documents, and not in goods..." (Uniform Customs and Practice for Documentary Credits, Article 8). This point expresses, in another way, the rule of "strict compliance," where no payment is made if the terms provided for in the document are not met; this rule has been laid down for the protection of the buyer. Mark Hoyle, International Commercial Law, 1981, at 99. The question which now arises is, did Lockheed act in accordance with the terms of the letter of credit; and if so, why didn't the bank pay it?

Lockheed has failed to provide the Tribunal with any information in this connection. For its part, however, the Respondent has filed a photocopy of the letter of

credit, whose number is also stated precisely on Lockheed's invoices. This letter of credit includes the following important instructions:

> "As the goods will be shipped by the Imperial Iranian Air Force C-130 plane therefore No.[sic] -AWB is required, however a receipt signed by Col. Mehrabanzad orderers [sic] representative in U.S.A. will be sufficient."

In view of this fact, which was left unsaid in the text of the Award, the truth of the matter becomes clear. That is, Lockheed refused to deliver the goods to the authorities to whom it was required to convey them, and it did not give any of the goods to the Respondent's representative.

41. (d) The Respondent provided the Tribunal with a number of examples of the Claimant's practice in this connection in previous years, and it produced photocopies of Lockheed's requests. In the past, Lockheed always observed the principle that it had to request the Air Force to give written authorization, in order for it to transport goods via commercial air carriers. Doc. 89, Exhibit 7. However, the majority did not take this practice into consideration either. It thus persisted in holding that the present claim was justified, notwithstanding the absence of any such letter of authorization.

42. (e) Only one part of Lockheed's entire claim, amounting to $6,625.00, is supported by evidence -- an airway bill at that and, what is more, without Lockheed's having obtained the Respondent's authorization to ship via a commercial air carrier. Of course, it must be noted that the carriage of the goods will not, of itself, indicate that the sender has no further responsibility. The Award states quite explicitly that Lockheed is entitled to payment, whether or not the

goods were ever received by the Air Force. (Para 89 of the Award). Apart from the fact that in Raygo Wagner Equipment and Iran Express Terminal Corporation (Award No. 30-16-3), the Tribunal found that ipso facto, a bill of lading does not constitute evidence that the respondent received the goods (2 Iran-U.S. C.T.R., p. 145), on principle the delivery of goods to the air carrier does not hinder the consignor from retrieving them:

> "The consignor may withdraw the goods from the airport before they are placed on the aircraft or call for them to be delivered to an alternative consignee. If en route, the goods can be ordered stopped, and held at any point of landing and, if required, returned to the airport of departure." Mark Hoyle, op cit, at 46.

Therefore, even where Lockheed had all these means at its disposal, the majority still relieved it of all liability.

43. (f) Taken alone, an invoice is not regarded as probative evidence, for it constitutes the claim itself. The invoice and packing sheet for the goods, mentioned with such particular emphasis in para. 86 of the Award, do not by themselves prove anything, since they amount to no more than a claim. That is, they merely purport that certain goods have been packed, state the price of those goods, and indicate the contents of the containers. It also very often happens, as in the case of the present claim, that the number of the airway bill is indicated on those forms, etc. Nonetheless, these all constitute claims, which can be proved only by the help of supporting evidence. R.N. Pomeroy and Iran, Award No. 50-40-3, reprinted in 2 Iran-U.S. C.T.R. 385; DIC of Delaware and Teheran Redevelopment Corporation, Award No. 176-255-3, reprinted in 8 Iran-U.S. C.T.R. 172. These are examples of instances where a claim brought by Iranian

respondents was dismissed on the grounds that an invoice does not, ipso facto, establish the existence of a debt. In the preceding paragraph, we found that even the issuance of an airway bill cannot serve as evidence that the goods actually arrived at their destination, because the consignor is legally entitled to halt and retrieve the consignment at any time while it is en route. In this claim, Lockheed has submitted airway bills for only five consignments, out of 20 allegedly made by it. If the goods were properly shipped, Lockheed would be entitled to recover only $6,625, and not the amount now awarded by the Tribunal.

Claim Eleven:

44. Here too, as in Claim Five, the Tribunal has relied upon a "Commercial Invoice & Packing Sheet... and receipts from carriers..." and has thus assumed that six parts purchased by the Respondent were in fact shipped. The flimsiness of the majority's argument has already been discussed in the preceding paragraphs; for this claim has a number of points in common with Claim No. 5. In para. 105 of the Award, the majority concedes that the Claimant did not tell the Tribunal what the terms of the contract were. Yet, in para. 106, it relieves Lockheed of this responsibility, and states that Lockheed met its contractual obligations once it delivered the parts to the carrier. In the absence of the contract itself, the majority must be prescient indeed, for it to have arrived at such an unequivocal conclusion.

In discussing Claim Five, we observed that neither delivery of the goods to the carrier, nor issuance of an airway bill constitutes evidence that the goods were delivered over to the buyer. The text of the purchase order relating to this claim expressly states that the

goods were to be shipped in accordance with certain conditions printed on the reverse side of that form, which was not made available to the Tribunal. Not having even seen those conditions, the Tribunal nonetheless went ahead to render its Award.

45. A communication filed in evidence by Lockheed constitutes further evidence which ought to have convinced the majority of the Claimant's nonentitlement. On 2 July 1979, it sent the Respondent a list of matters which were pending between GELAC and the Respondent; and following this, Lockheed's representative in Tehran sent his superior in the U.S. a telex dated 29 October 1979, wherein he reiterated his pending matters and overdue payments. Neither that letter nor telex, however, mentions the invoices now brought forth under Claim Eleven.

46. Claim Two (C) :

In this claim, Lockheed seeks certain monies for repair of an aircraft; yet, its only evidence indicating that these repairs were carried out is its own internal memo dated December 1978. In that memo, one employee wrote to another that they had started the repair work. This memo, which has been relied upon by the majority as evidence justifying its decision, is a copy of a draft telex which "CALCORD" was supposed to send to "JACK." If this telex was actually sent, why didn't the Claimant file a copy of that telex with the Tribunal? Furthermore, what scope and significance can that brief statement possibly have, such as to convince the majority thereby that the repairs were really carried out? But on the other hand, doesn't the silence surrounding the telex sent by Lockheed on 4 September 1979 (Doc. 99, Exhibit II-11) -- ie., the absence of any mention whatsoever of this claim in the course of

Lockheed's reiteration of its overdue accounts -- indicate that in September 1979 (when, Lockheed alleges, the repairs were completed), Lockheed did not think the Respondent owed it anything in connection with this claim? Without doubt, in comparison with other circumstantial evidence, upon which awards of this arbitral Tribunal are essentially and on the whole based, equal treatment should have been accorded to, and in favor of, the Air Force on the basis of this telex. Indeed, it is precisely with respect to this item of Lockheed's claims, that the Tribunal expressly concedes that it has issued its Award in favor of Lockheed on the basis of "circumstantial evidence" (para. 58 of the Award).

47. Claim Two (D) :

I concur in the Award wherein it rejects this claim for $101,602.60, but at the same time I believe that the Tribunal has stopped somewhat short in making its legal argument. In view of the rules of conflict of laws, the merits of this claim are governed by Iranian law, which the Award neither invokes nor even mentions. See: Mayer, Droit international prive, ed. Montchrestien, 1983, pp. 569-70; Cheshire, Private International Law, 11th ed., 1987, pp. 464 and 492; Rooij & Polak, Private International Law in the Netherlands, Kluwer, 1987, p. 120; Encyclopedie Dalloz, Repertoire du droit international, Tome I, "Enrichissement sans cause," Nos. 12-13.

48. Apart from the foregoing, accepting a claim founded on the theory of unjust enrichment in rem verso does not depend solely upon realization of one of the two conditions set forth in para. 63 of the Award. Furthermore, in this instance, if Lockheed continued as before to provide the services of two of its personnel

in Iran and for the Iranian Air Force after the FMS contract expired, the Air Force's enjoyment of these unrequested services cannot be labelled "unjust enrichment." For the Respondent did not take any illegal steps in order to derive advantage for itself, or to injure another and against his will and consent. See, Katouzian, Civil Law-Delictual obligations, torts, Tehran, 1362/1983, p. 548 (para. 319). What has allegedly occurred in this case is called "lawful gain" and not "unjust enrichment" or in other words, "illegal and unjust gain." In the civil law, lawful gain also gives rise to obligations, but this involves conditions which have been extinguished in respect of Lockheed -- or at least, this is true of the first condition, that the act be "at the order" of the beneficiary (Article 336 of the Civil Code).

> "A requirement to pay quantum meruit arises where the agent has acted upon orders from the person receiving benefit therefrom. Otherwise, voluntary performance of some act does not, on principle, give rise to any obligation on the part of others, even though they have benefitted therefrom." (Katouzian, op cit, p. 508 (para. 293).

This point can also be somehow inferred from the text of the Award, where it states that :

> "By unilaterally deciding to continue the service without first arranging alternative payment arrangements with the IAF, Lockheed accepted the risk that it might encounter difficulty in recovering payment." (Para. 63 of the Award).

In this claim too, Lockheed did not receive any instructions from the Respondent to continue the services. Therefore, the benefits allegedly received by the Air Force owing to Lockheed's voluntary -- or gratuitous -- act did not constitute unjust enrichment or gain and, in the words of the Award, Lockheed cannot now claim that "it was unjust for the IAF to have

received the benefit of the service, which there is no evidence the IAF requested" (Para. 63 of the Award).

- III -

THE COUNTERCLAIMS

49. In the claims under Claim Two (A), by not accepting the theory of breach of contract and in confirming that it was terminated due to hazardous conditions, the majority has resorted to "equity" and in so doing, it leaves no room for the Respondent's claim for damages, even though it has conceded that Lockheed was guilty of certain violations of contract. As a result, the majority has not only awarded monies in Lockheed's favor, but also very considerably increased the amount of its recovery, as a result of faulty computations and its neglect to apply the contractual principle of "payment amounting only to the level of performance of obligations." If, however, the majority had not portrayed a scene of fear and violence and popular disturbances with respect to the secure environment of the guarded, walled and remote Bandar Abbas airbase, it could not have released Lockheed from its obligations on the excuse of "hazardous conditions," and in that event it would indubitably have reached a different conclusion.

50. In the claims involving parts which were purchased or to be repaired, the Respondent was not only required by the majority's Award to pay the cost thereof, but its counterclaims seeking return of those parts or else restitution of their cost were not entertained either. The majority's argument in this connection is very interesting, because by submitting a few airway bills

and a number of documents which it had issued itself, and which purported to show that the goods had been repaired or delivered to the carrier, Lockheed succeeded both in relieving the majority of any need to ask it for evidence that the repairs had been made, and in relieving itself of all responsibility for the failure of the goods to reach the Air Force or even Behring, the Respondent's authorized representative. As a result, the Respondent's counterclaims have been tainted and rejected in the process. Viewed in the light of sound standards of adjudication in assessing evidence, the majority's decision, which has led to such incorrect results, is highly open to dispute (paras. 37-43, supra).

51. In this Case, the counterclaims relating to taxes and social security were also dismissed. The majority, relying on the precedent set by previous Tribunal decisions, writes that :

> "The Tribunal has held consistently that social security premiums become payable by operation of Iranian law and therefore do not arise out of the same 'contract, transaction, or occurrence' as the claim, as required by Article II, paragraph 1 of the Claims Settlement Declaration ... Accordingly, these two counterclaims are dismissed for lack of jurisdiction. For the same reason, the Tribunal also holds that Respondents' counterclaim related to the assessment of taxes on Lockheed's operations in Iran from 1977 through 1979 is not within its jurisdiction." (Para. 24 of the Award).

On principle, not every prior decision can be relied upon as precedent for all subsequent decisions. For example, Mr. Holtzmann holds, with respect even to awards rendered by the Full Tribunal, that those decisions lack precedential value (See: 1 Iran-U.S. C.T.R. 287) -- let alone decisions whose premises are patently weak, as we shall see below.

To the best of my recollection, in its early stages the Tribunal did not take a clear position on tax and social security claims. That is to say, it used to dismiss them on the grounds of lack of evidence or late filing, and it never addressed the jurisdictional issue. See, eg., Ultra-systems, Inc., and Iran (Award No. 27-84-3, reprinted in 2 Iran-U.S. C.T.R. 113); R.N. Pomeroy and Iran (Award No. 50-40-3), Ibid, 385; William L. Pereira Associates, Iran and Iran (Award No. 116-1-3), 5 Iran-U.S. C.T.R., 229. The first time that the Tribunal seriously addressed this issue and set forth arguments in order to find against its jurisdiction over tax debts, was in Computer Sciences Corporation and Iran, Award No. 221-65-1 (16 April 1986), reprinted in 10 Iran-U.S. C.T.R. 306 et seq. In that award, Chamber One went into detail in rejecting the arguments of the Iranian Government. (General Brief of the Islamic Republic of Iran in Support of Claims Based on Unpaid Taxes; Iranian Assets Litigation Reporter, May 10, 1985, pp. 10456-10477). This was the Tribunal's first elaborated argument in which it declared that it lacked jurisdiction over tax claims. Subsequently, in Howard Needles Tammen & Bergendoff and Iran, Chamber Two invoked that award and in so doing, took the same position. Award No. 244-68-2, reprinted in 11 Iran-U.S. C.T.R. 318; see also the Dissenting Opinion of Mr. Bahrami in this same award, reprinted in 11 Iran-U.S. C.T.R. 349-356. It will suffice to examine the legal arguments made by the Iranian Government in the General Brief and Chamber One's arguments side-by-side, so that one may be his own judge in determining to what degree the majority relied upon legal logic in that award in finding against its jurisdiction. For example, one of the Iranian Government's arguments was that if the tax claim could not be brought as a counterclaim, these amounts owed it

should necessarily be deducted from the judgment sum, on the basis of "legal set-off".

52. It is very obvious that Chamber One indulged in sophistry in its award in Computer Sciences Corporation, in finding against its jurisdiction on the basis of set-off, if we consider the nature of the original claims and tax claims brought within the framework of the Algiers Declaration. This Tribunal has found the Government of Iran to be liable with respect to private claims in accordance with the Declaration; and it pays the claims of U.S. companies out of Iran's publicly-owned assets. However, when it comes to the tax liabilities of these same companies, it turns to the Claimant's argument that "public law debts may not be offset against private law claims." (11 Iran-U.S. C.T.R. 309). This argument based on a double standard -- along with Chamber One's other finding whereby it writes in the aforementioned award, and in keeping with the Claimant's position, that "both counterclaims and claims for the purpose of set-off are governed by the same jurisdictional standards" (Ibid, 310) -- constitutes an amazing legal argument, one which has mixed together and argued two such divergent legal concepts.

53. In the major legal systems, a legal set-off is one stage in the defence, and a counterclaim is a claim which must possess all the attributes and qualifications of an independent claim, although of course it is taken up in connection with the original claim. A legal set-off constitutes a "compulsory release of a respondent from his debt" and comes about automatically by force of law, and the claimant -- the obligor in respect of the set-off -- need not necessarily even be aware of its existence. Civil Code of Iran, Article 295; Emami, Civil Law, vol. I, p. 342;

Civil Code of France, Article 1290; Peter Herzog, Civil Procedure in France, Nijhof, 1967, p. 277. Therefore, it is never necessary for a set-off to qualify as a counterclaim -- that is, for it to have arisen from the same transaction or occurrence as that on which the original claim is founded (80 C.J.S., p.44). Indeed, one award by this very Tribunal expressly sets forth the principle that if a claim -- in that case, a patent -- could not be brought as a counterclaim, it must necessarily be deducted from the amount of the award, as a set-off. Owens-Corning Fiberglass Corporation and Iran, Interlocutory Award No. ITL 18-113-2, reprinted in 2 Iran-U.S. C.T.R. 324. The General Brief of the Iranian Government also brought this precedential decision to the attention of the Tribunal, but Chamber One did not consider itself bound by it. Given all the foregoing, one wonders how such a precedent as the instant one -- a precedent brought about by Chamber One in such violation of legal principles and even in blatant violation of its own earlier precedent -- will deserve to be followed in other awards by the other Chambers of this Tribunal.

The Hague, 8 July 1988/17 Tir 1367

S.K. Khalilian