IRAN-UNITED STATES CLAIMS TRIBUNAL

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** CONCURRING OPINION of _____

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** DISSENTING OPINION of Mr. Bahrami

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IN HIS EXALTED NAME

Case No. 285
Chamber Two
Award No. 192-285-2

GENERAL DYNAMICS TELEPHONE SYSTEMS CENTER, INC. (formerly known as Stromberg-Carlson Corporation) and GENERAL DYNAMICS INTERNATIONAL CORPORATION,

Claimants,

- and-

THE ISLAMIC REPUBLIC OF IRAN, THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE TELECOMMUNICATIONS COMPANY OF IRAN and BANK MELLI IRAN,

Respondents.

DISSENTING OPINION OF HAMID BAHRAMI

In the claim of General Dynamics v. The Government of the Islamic Republic of Iran,[1] the Telecommunications Company of Iran and Bank Melli Iran, on 4th October 1985 the majority issued an award of no great importance so far

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(1) The Hearing conference in this case was attended by Dr. Shafeiei, a former Iran-appointed arbitrator. Pursuant to the Chamber's majority decision, I took part in the deliberative session therein.

as the amount of the judgment debt is concerned, but wherein it disregarded certain legal principles and set certain precedents, so that I am compelled to set forth my reasons for dissenting thereto. Of course the Chambers of the Tribunal will not hold themselves to be legally bound in the future by these incorrect precedents, but I believe that the appropriate grounds now exist, whereby the Tribunal should proceed in the future to issue awards within the limits of the law and on the basis of Article V of the Claims Settlement Declaration, to which the High Contracting Parties have subscribed and which constitutes the basis of the Tribunal's jurisdiction. This requires that wherever the Tribunal finds that its prior practice and precedent fail to conform exactly to the rules of law, it shall either implicitly or explicitly abandon its previous policy.

The claim has been set forth in the introductory portion of the majority's award, and so I shall refrain from repeating it, except where discussion of the substantive issues has a bearing upon the legal opinions of the present writer.

I. In its award, the majority has disregarded one of the most explicit instances where the competence of the Iranian courts has been agreed to, and it has by and large resorted to other, incorrect precedents established in this connection by the Tribunal. To the degree that the majority's award is based upon the past practice of the Tribunal itself, I am compelled to state, for the same reason set forth above by way of introduction, that if those precedents are illegal they cannot be invoked; nor can they have so much as a "persuasive" weight.

In justification of its finding in favor of jurisdiction, the majority invokes a portion of the award in Itel International Corporation v. The Social Security Organi-

zation of Iran [Case No. 476], wherein it was held that in taking up the issue of its jurisdiction and in interpreting the clause providing for the jurisdiction of the Iranian courts, the Tribunal concerned itself only with "the wording of the [relevant] clause," and not with the intention of the parties or with the connection between performance of the contract and a particular judicial venue. Of course, if the Tribunal had considered only the wording of the contract in interpreting the clauses providing for the jurisdiction of the Iranian courts in the nine model cases such as Ford Aerospace [Case No. 159] as well, the majority's finding that the forum clauses at issue in this case and in the Ford Aerospace case are similar might possibly be applicable. However, contrary to what was set forth in the award in the Itel Corporation case [Case No. 476], in interpreting the forum clauses in the nine model cases, the Tribunal did not content itself only with interpreting the wording of the said clauses; in every instance, it also took up the issues on the merits relating to the contracts containing such forum clauses, entertaining the parties' comments and submissions thereon. Therefore:

(a) Even supposing that the forum clause in the instant case is similar to that involved in the Ford Aerospace case, the Tribunal did not reach its earlier decision [in the latter case] solely on the basis of the interpretation of the wording of the clause, and for this reason it has only a persuasive force and is not binding;

(b) Because the rule of stare decisis is not binding upon this Tribunal, invoking legally unjustifiable precedents causes the Tribunal to deviate from enforcing the law, and it prevents the Tribunal from developing procedures intended to give effect to the principle of proper execution of the Declarations;

(c) At any event, the majority's interpretation in this case should be based upon the wording of the contract and a determination of whether or not the forum clause has expressly provided that the claim lies within the jurisdiction of the Iranian courts. Moreover, the Tribunal itself stated in Case No. A/2 that it would refrain from making a broad interpretation of its jurisdictional ambit. Therefore, how can it so extend its jurisdiction, through a broad interpretation exceeding the limits provided for in the Declaration, as to trample underfoot the express condition requiring submission to the jurisdiction of the Iranian courts (cognovit) as a result? In its decision, the majority insists that the wording,

> "All disputes and differences between the two parties arising out of interpretation of the Contract items of the execution of the Works..."

is not sufficiently explicit as to whether the jurisdiction of the Iranian courts has been accepted with respect to all issues arising out of the contract; and it goes on to hold that disputes relating to other aspects of the contract, such as the works which were to be executed outside Iran and the method of payment, were left outside the jurisdiction of the Iranian courts. I had not expected the majority to resort to such far-fetched pretexts in rendering the award. Can it possibly be supposed that the obligations relating to execution of those works which were perhaps to have been performed outside Iran constituted obligations lying outside the terms of the said contract? A cursory perusal of the terms of the contract reveals that they relate on the whole to the works, some of which were to be executed within Iran and others perhaps outside Iran. Can the majority point to any contract in which express provision has been made for two kinds of forum clauses? Or, on principle, is it reasonable to attribute such an intention to the parties to the transaction? Furthermore, in this contract, disputes

over execution of the works have been expressly placed within the jurisdiction of the Iranian courts, and it is obvious that the sole purpose of the contract is the "execution of the works".

The only raison d'etre of contracts of this sort is, the reciprocal commitments of the parties to the transaction. One party to the transaction undertakes and agrees to execute certain works, and by way of a consideration therefor, the other party obligates himself to compensate him. How, then, can it be imagined that the payment of the compensation lies outside the terms of the contract? In the instant contract, the compensation and payment mechanism have been specified in every article providing for execution of works. Can it possibly be supposed, then, that the parties to the transaction have stipulated that disputes arising out of execution of the works shall be adjudicated by the Iranian courts, but that some other court shall render judgments relating to the payments?! In my opinion, the majority is attempting to do away with the forum exclusion clause as provided for in the Declaration, and is concealing its actual purpose by means of this wording. Therefore, its finding in favor of jurisdiction is without legal justification.

II. The majority in this award has made an unjustified attempt to establish that the Claimant was faced with force majeure conditions in Iran from late 1978 through mid-1980, and that it was for this reason relieved of any obligation to continue carrying out its contractual commitments. In my opinion, this broad conclusion is devoid of any legal basis and contrary to the meaning of "force majeure" as intended under Iranian law and in commercial practice, and contrary to the provisions of the contract out of which the claim has

arisen; furthermore, it affects the other claims brought before the Tribunal and, in particular, it is inconsistent with the requirement that the Claimant bear the burden of proof and with the duty that both parties be accorded equal treatment before the Tribunal.

In the first place, the party asserting the existence of force majeure conditions must not only establish force majeure in its special signification, which includes natural disasters, war, strikes, and acts of God, but also prove that those conditions make it impossible for him to carry out his commitments. The majority in this case has violated this general principle; it explicitly opines that upon an examination of the evidence as a whole (just what "evidence" is intended here is unclear), the Tribunal is convinced that the Claimant is justified in invoking force majeure. Having made an effort to examine this evidence, I note that apparently the basic document underlying the majority's conclusion is the Claimant's letter dated 12 February 1979 to the Telecommunications Company and the Iranian Ministry of War, wherein the Claimant stated that all of the works at Chahbahar would be stopped on 28 February 1979 as a result of force majeure. The Claimant itself states that "the continuing civil unrest in Iran requires us (by recommendation of the U.S. State Department) to withdraw all American personnel" from the site (apparently Chahbahar). As for Omedieh, force majeure conditions were invoked as from 31 October 1978. Yet the majority is well aware of the fact that no civil unrest or disturbances have been reported-- at least during the period when the Claimant was executing the works-- in such remote places as Omedieh and, especially, Chahbahar. For this very reason, the Claimant has stated that it abandoned the works by reason of the recommendation (or more correctly, the order) of the U.S. State Department. But the fact of the matter is that in complying with the general order by the U.S. Government, the Claimant evaded

its obligation to execute its commitments, and abandoned the works. Naturally, the Claimant could find no better pretext for abandoning the works than force majeure (and at that, not as to an existing state of affairs but in connection with circumstances which it merely predicted would come about). However, the Claimant never attempted to prove the existence of force majeure conditions in Omedieh and Chahbahar, and it produced no evidence of any threats to the safety of the foreign experts. Previously, in Award No. ITL 24-49-2(Gould Marketing, Inc. v. The Ministry of National Defense), the Tribunal agreed that force majeure conditions had occurred in major Iranian cities, without contending the basic point that, assuming the occurrence of force majeure conditions, the Claimant must also prove that the said force majeure conditions brought about the stoppage of its work. Now, the majority holds, as a fact requiring no proof and doubtless as a matter of "judicial notice," that force majeure conditions had occurred in the most remote parts of Iran, and it countenances the work stoppage on this pretext. The majority has ignored the basic point that, although in the aforementioned award the Tribunal summarily agreed that force majeure conditions had occurred in the major cities, in finding the obligor exempt from its duty to carry out its obligations the Tribunal nevertheless invoked certain evidence in the case which, in its opinion, justified the argument that force majeure conditions had affected the obligor's ability to continue working. In the Gould Marketing case [Case No. 49], the Tribunal earlier at least kept this important legal point in mind, and it found that sufficient evidence had been submitted in demonstration that [Gould's] experts and employees were endangered, and that this evidence made their departure appear to be justifiable. In this award, however, the majority did not deem it necessary to direct the Claimant to produce evidence as to the occurrence of force majeure conditions in the remote regions of Iran, or to examine any evidence and secondary evidence

indicating a threat to the lives and security of the Claimant's staff. On the contrary, it came to the assistance of the Claimant; on page 12 of the Award, it opines that

> "... the evidence as a whole clearly establishes that Stromberg-Carlson's apprehension for the personal safety of its employees was real and understandable."

I have no idea what the majority meant by "the evidence as a whole." On principle, has the Claimant been able to adduce any evidence at all indicating that its employees feared for their lives or that they were in danger, even though no unusual occurrences had taken place at Omedieh and Chahbahar? In my opinion, the Claimant has been unable to prove the existence of force majeure conditions in the areas where it was working, and it has been unsuccessful in demonstrating that any events of force majeure affected its ability to continue working. Furthermore, it made no effort to demonstrate its good faith by responding to the Respondent's invitation to engage in negotiations and to continue working. Therefore, the Claimant's letters dated 12 February and 7 November 1978 constituted an announcement of its willful abandonment of the works, and such a declaration of anticipatory breach entails certain legal consequences. In inviting the Claimant to engage in negotiations intended to keep the work in progress, the Respondent demonstrated its good faith intention to remove all obstacles in the way of the Claimant's continuation of work; however, the Respondent has never agreed with the assertion that force majeure conditions had occurred. Therefore, the Respondent did whatever was required of it for the sake of saving the contract, and it is now entitled to make claim for recovery of the legal damages arising out of the [Claimant's] breach of contract.

III. In part "B" of the Award, the majority invokes Article 7.8 of the Contract, pursuant to which:

> "In case performance of the contract is delayed for causes attributable to the Buyer or other Iranian authorities the Buyer with the agreement of the Seller will extend the specified term in order to allow the works to be completed and in the case of the Seller [sic] request, the Buyer will pay the Seller for any extra expenses resulting from such delays according to those invoices which are approved by the Buyer."

Relying on this provision, the majority proceeded to assess the costs arising from delays, and it awarded accordingly. In my opinion, this part of the Award fails to conform to Article 7 of the contract, and it cannot be justified by the agreement entered into by the Claimant itself on 30 October 1977. On principle, the Claimant was precluded from making demand on 15 November 1979, for expenses incurred prior to October 1977 as a result of delays due to changes in the work schedule-- that is, one year after it had officially notified the Respondent that it intended to stop work (ie., to breach the contract). This part of the award by the majority displays its unjustified effort to render an award in favor of the Claimant, without regard for the substance of the case, because:

(1) Pursuant to Article 7.8, it was the Buyer who, with the agreement of the Seller (the Claimant), would extend the term for executing the works. That is, on principle it was the Claimant who was supposed to request an extension; otherwise, what possible advantage or benefit could the Respondent (the Buyer) have realized from requiring the Claimant to extend the schedule for executing the project? Moreover, it is not clear why the parties failed to take into consideration the possible claims by the Seller at the time that they agreed to extend the term of the contract.

(2) The Seller should have demanded the costs arising from delays at the same time that it agreed to the extension. On principle, according to the clear terms of the

contract, accrual of costs resulting from delays was contingent upon a request by the Seller, and since the Seller failed to make any such request when it agreed to the extension of the term of the contract, on principle its right to make such a demand [at this time] has lapsed. Perhaps the parties would not have come to an agreement on extending the term of the contract if the Seller had demanded its costs arising from delays. In actuality, the Buyer's agreement to extend the term worked to the benefit of the Seller, and the only possible consideration therefor would have been for the Seller to waive any demands which it might have for costs arising from delays.

(3) Article 7.8 of the contract expressly provided not only that the Buyer must agree to requests for payment of costs arising from delays, but also that to be payable, such costs must be based upon invoices approved by the Buyer. Now, then -- a year after the date on which the Claimant unilaterally breached the contract (or, as even the Claimant states, stopped working in invocation of force majeure conditions)-- how can it possibly submit invoices for costs arising from delays in executing the works, works which were to have been completed in a timely manner several years before, let alone the fact that the parties had legally terminated any such disputes by virtue of having agreed to an extension of the term of the contract?

(4) The intention underlying the provision in the Claims Settlement Declaration that claims be "outstanding" was not, that every unfounded claim brought before this Tribunal was to be adjudicated. The cause of action, and its legal basis, were also to be well-founded. It is true that prior to the date on which the Declarations were signed (but a year after it breached the contract), the Claimant wrote to demand costs arising from delays. However, if this claim has been brought on the basis of Article 7.8 of the

contract, the said contract has expressly stipulated the time within which such a demand was to be made. In accordance with that Article, the Claimant should have submitted such a demand when it entered into negotiations with the Respondent for the purpose of securing its agreement to a change in the work schedule, and not long after it abandoned the works. Therefore, this claim should be regarded as moot, because it does not arise out of the contract at issue in the dispute and is devoid of other legal grounds; indeed, it was not outstanding up to the time of signing of the Declarations.

(5) One of the fundamental requirements for bringing a claim is that it be timely. Pursuant to the aforementioned Article 7.8, costs arising from delays were to be requested at the same time that the Buyer and Seller agreed to change the term of the contract. Therefore, if the Tribunal intends to consider itself as bound by the usages of the trade and by general principles of law, it must take note of the point that he who asserts a right must not be unconscionably remiss in pursuing his demand. Otherwise, such a claim shall be deemed to have been waived by reason of laches, and it shall lapse. Of course, it is for the Tribunal to determine whether the Claimant is subject to laches, but the majority cannot deny the fact that the Claimant failed, at the time (1977) that agreement was reached on changing the term of the contract, to submit any demand for costs arising from delays in execution of the works relating to 1976. Nor can it deny the fact that the Claimant continued to execute the works, apparently pursuant to the revised term, for a further year and that it then brought this unfounded claim a year after abandoning the works, thereby leaving the project uncompleted and causing the other party to the contract to derive no benefit at all from this incomplete performance of the contract. Under

these conditions, how can one possibly deny that the Claimant has been remiss in demanding its rights?

(6) The majority cannot award payment of costs arising from delays even if it relies upon its finding that the contract was cancelled by reason of force majeure. Article 7.6 of the contract expressly provides that in the event of cancellation of the contract by reason of force majeure, the parties shall take action to clear their accounts within three months. Obviously, clearing the account entailed, at the very least, that the Respondent be notified of the amount and nature of the claims; yet the Claimant, whom the majority found to have fulfilled all of its obligations after the occurrence of the force majeure conditions, failed to notify the Respondent, within the three months provided for in the contract, that it had claims or demands relating to costs arising from delays prior to the year 1977. Therefore, there was no basis for bringing this claim in 1979, when it had already lapsed; nor could it serve as the basis for an award. Although the amount awarded for payment of the said costs is small, I deem it to be illegal and am unable to concur in such an award.

IV. Relying primarily on the argument that deduction of accrued taxes from the amount of the judgment sum would, with the exception of the 5.5% withholding tax, have no contractual basis, in its award the majority held that this portion of the counterclaim was outside the jurisdiction of the Tribunal. As a result, it has adopted a position leading to unjust enrichment of the Claimant.

(1) The argument that the Tribunal entertains only those counterclaims arising out of the contract is founded upon the assumption that claims for taxes are invariably counterclaims. However, even if it be presumed that claims for taxes have been brought in the form of counterclaims,

the Tribunal must endeavor, by means of judicial notice, to ascertain their legal category. I very much doubt that any contractor, when setting his contract price, would ignore the taxes accruing by virtue of Iranian law. Therefore, [the obligation to] pay taxes arises out of the execution of the contract along with all the other obligations of the contractor, and all firms take this into account as constituting one of their ongoing costs. Just as the Tribunal has no right to disregard debts (such as to the Iranian banking system) of the Claimant (or of the corporation on whose behalf it has brought claim) at the time that it renders its award in favor of the Claimant, so too one would not expect the Tribunal to take refuge in legal suppositions unrelated to the claim, so as not to reduce the accrued taxes payable by the Claimant from the amount of the judgment sum.

(2) Even assuming that the classic theory that the courts will not enforce foreign tax laws still holds, this Tribunal is nonetheless not a foreign court. Rather, it is an international arbitral tribunal established by the Governments of Iran and the United States; and pursuant to Article V of the Claims Settlement Declaration, it must enforce the laws of Iran in those instances where contracts have acknowledged the applicability of Iranian law -- and we know that Article 11 of the contract expressly and "in every respect" provides that the contract shall be subject to the laws of Iran. In addition, the Tribunal can even enforce Iranian law with the assistance of conflict of law rules. Iranian law must be enforced in the matter of payment of taxes resulting from execution of a contract. Moreover, even without express provisions to that effect, execution of the contract in accordance with the aim and intention of the transacting parties necessarily entails that accrued taxes be deducted. Perhaps the Tribunal would not be readily able to determine the amount to those taxes deductible under Iranian law without referring the matter to an accountant

specializing in taxation, in which case the issue should be referred to an expert opinion, just as are other issues of a specialized nature.

(3) I have no idea how the majority has arrived at the 5.5% rate mentioned in the award, if it really intended to take into account the taxes accruing under the terms of the contract. In justification, the majority cites the 5.5% deduction [regularly] made from the invoices, but it is not clear why the majority does not treat as binding those obligations which the Claimant explicitly undertook under Article 15.3 of the contract, when instead it confuses the issue with such weak analogies and takes into account the withholding tax rather than the accrued taxes. In this case, the Claimant has also undertaken in the contract to pay the accrued taxes in full. Moreover, this undertaking was based upon the Claimant's precise and informed calculation of the exact amount of the taxes accruing, because Article 15.5 of the contract provided that:

> "If any of the above mentioned taxes and fees are increased or new taxes and fees are imposed after the signature of the Contract the increased amount or newly imposed amount will be paid by the Buyer to the Seller and if any of the above mentioned taxes and fees are decreased, the Seller will pay the decreased amount to the Buyer." [emphasis added]

In this way, the Claimant has made provision in this contract for a clause corresponding to a "stabilization clause" in the law, and on principle the cause of the debt in this claim has been changed from legal to contractual. The majority's refusal to deduct the taxes from the amount of the judgment sum is not justifiable, even according to its own line of reasoning, and there can be no doubt that by its award, the majority has sanctioned the unjust enrichment of the Claimant.

Furthermore, this manifest error in the majority's award, wherein it has assumed that the 5.5% withholding tax deducted on account is equivalent to the rate for the taxes accruing under the contract, constitutes an alteration of Iran's tax laws by this Tribunal. This judicial error has cast in doubt the legal standing of awards by this Tribunal, which has encountered and been familiarized with the clear language of Article 76 of the Direct Taxation Act of Iran on many occasions, at least in connection with the procedure for deducting withholding taxes. I must also state that awards of this caliber unfortunately turn the Tribunal into a means by which real and juridical persons can evade their tax obligations.

V. In part "E" of its decision, the majority has also awarded against the Respondent for payment of $72,506, representing the value of the equipment and spare parts of which the Claimant was allegedly deprived. It is not clear just what constitutes the legal basis for this part of the award. The majority's only argument is that, since the Claimant left the equipment in Iran, the Respondent is obligated to compensate it for the costs thereof. The case file -- and that even includes the Claimant's claim-- indicates that the Claimant stopped work by reason of force majeure, and that when it abandoned its work it also abandoned its equipment in Iran (definitely because that equipment was of no value to it), even though no official of the Iranian Government barred its removal. Astonishingly, it has not even been properly ascertained whether the Claimant left the said equipment in the Air Force warehouse, or with Iranian Customs. Notwithstanding, the majority has found the Respondent liable for payment of the cost of the said equipment and spare parts on the basis of such ambiguous statements. It is worth noting that the same figure adduced by the Claimant has also served as the basis for [the majority's] calculation of the cost of the said equipment

and spare parts. However, apart from the amount awarded, I should like to note that this Tribunal's jurisdiction arises either from contractual claims, or on the basis of a claim of expropriation. There can be no doubt that the present claim has no contractual basis; nor has the Claimant brought a claim of expropriation, whether direct or indirect. Therefore, apart from the objections on the merits to which it is susceptible, this portion of the award is outside the Tribunal's jurisdiction. Moreover, the majority has made no effort to provide any legal justification for its finding in this part of the award, merely stating that the Claimant alleges that following cancellation of the contract, the Government of Iran either took or caused to be lost certain of the Claimant's property which had been left in Chahbahar, Omedieh or Tehran. The Claimant has not produced any documentary evidence in proof of its allegation that the property was taken by the Government of Iran -- since in actuality, the Government has not taken any of the Claimant's property. As a result, since the Claimant itself knew that this allegation was contrary to fact, after making this statement it obscured the issue by adding that perhaps the Government had "caused" its property to be lost, an assertion whose absurdity needs no comment. How can it be alleged that a government has caused someone's property to be lost?! And can a Tribunal established on the basis of an agreement by two sovereign Governments attribute the furnishing of means whereby persons' property is lost, to one of the two Governments signatory to that agreement, without any evidence to that effect having been produced and solely on the assertion of the Claimant? My aim here is not, of course, to accuse the majority to having deviated from the bounds of judicial impartiality. At the same time, however, one would not have expected the majority to render such unsupported awards.

I would hope that such an award which is, as set forth above in this Opinion, devoid of legal reasoning and legal justification, will not be held up as a precedent in the Tribunal's future proceedings.

VI. In part "F" of its award, the majority has totally dismissed Iran's counterclaims arising out of the Claimant's breach of contract and its abandonment of the works. I have already stated my views in connection with the failure to establish that force majeure conditions existed at Chahbahar and Omedieh (the places where the obligations were to be performed). Therefore, since the majority's award in dismissal of Iran's counterclaims is founded solely upon a finding of force majeure, something which has not been established, the Respondent's counterclaims, which on the whole arise from actual and liquidated damages owing to the Claimant's abandonment of the works and its unilateral breach of the contract, ought to have been taken up in the award. The majority cannot, on the other hand, make a prima facie finding that the Claimant's unsubstantiated allegations are true, yet on the other simply dismiss all of the Respondent's counterclaims without even examining them. I do, of course, agree that the majority's finding of force majeure entails dismissal of the counterclaims arising from breach of contract. However, an arbitral Tribunal which intends to issue final and binding awards must take into account the consequences of applying a legal theory before embracing it. Moreover, the majority has not considered the point that even if force majeure conditions did occur-- for which Article 7.7 of the contract has made provision (and in any case, the Claimant's claim is not covered by any of those instances set forth in the said Article)-- according to Article 7.6, the parties were to take action to clear their accounts within three months after the date of cancellation. Furthermore, Article 7.1 of the contract contains specific provisions as to the procedure for indemnifying the

Buyer, in the event that the Seller did "not accomplish any of his duties and obligations." Obviously, "clearing the accounts" does not entail only that the Seller's claims be paid; rather, the Buyer's claims and demands under the contract should also have been taken into account at the time that the accounts were cleared. Now, when the Tribunal has taken action to clear the accounts by accepting force majeure, it is not at all clear just what evidence it can adduce, on whose basis it dismisses even those [counter] claims relating to defective work or goods, without so much as examining those claims. In a further effort to dismiss the Respondent's counterclaims, the majority has even dismissed the counterclaims relating to the Social Security Organization, on the pretext that they were filed late; whereas legally, they are inherently different from taxes, and the Seller had agreed in the contract to pay them. Moreover, the Seller's employees were covered by those benefits (during the time that they were employed in Iran).

I do not deny that under its Rules, the Tribunal has the authority to dismiss counterclaims that are filed late. However, it must not be forgotten that this Tribunal is an arbitral tribunal mutually agreed to by the [High Contracting] Parties, or that it has itself drawn up its rules of procedure. Therefore, it cannot act arbitrarily in exercising those powers which it has arrogated to itself. The Tribunal's decision to dismiss counterclaims which are filed late is not merely an exercise of ministerial authority; rather, it is a judicial decision in the special sense of that term. The majority ought to have taken into account that, unlike ministerial decisions rendered by executive officers as the need arises and without any indication of the reasons therefor, in order to have any legal weight, judicial decisions must state the reasons on which they are based; otherwise, they will not conform to the principle of good faith. In my opinion, the Tribunal can dismiss

counterclaims by virtue of their having been filed late only where the Claimant can prove that he has incurred damages as a result of such late filing, or where he can produce evidence or witnesses to attest that as a result of such late filing, evidence and documents have become unavailable to him and he has no access thereto. In actual fact, it is the Respondent who might ultimately have sustained damage through late filing of its claim in connection with demands arising out of social security contributions. Of course, the majority's decision to dismiss the counterclaim relating to social security contributions owing to its having been filed late, at least signifies that the majority deems such claims to be admissible. However, it is a warning to the Iranian Respondents to prepare their documentary evidence relating to claims for social security, and to submit such evidence in accordance with the Tribunal Rules. However, because the dismissal of claim was made without any mention of the legal reasons therefor, it lacks the standing of a res judicata.

In the final portion of its grounds for the decision, the majority states that "in order to compensate the Claimants for the damages they have suffered due to delayed payments, the Tribunal considers it fair to award the Claimants simple interest at the rate of 12 percent per annum..." I regard the majority's finding on interest -- before the Full Tribunal has heard the request for an interpretation, brought by the Government of the Islamic Republic of Iran (Case No. A/19)-- as constituting a pre-judgment by the majority as to this issue before the Full Tribunal, and I believe that arbitrators in the Tribunal's various Chambers who have awarded payment of interest prior to the Full Tribunal's having heard the said request in Case No. A/19 will, under the criteria adhered to in international arbitrations, be required to abstain when the Full Tribunal takes its decision. The majority could at least

have refrained from making any award with respect to interest, pending the decision of the Full Tribunal. I am aware that the other Chambers of the Tribunal currently apply the majority's approach as well, but it does not seem justifiable for a judicial forum which is not bound by precedent, to adhere to a policy that violates judicial principles and the law.

In addition to the problems relating to judicial procedure as set forth above, I can find no legal justification for the majority's decision to apply a 12% interest rate in this case in particular, where the contract was subject to Iranian law alone. It is not clear just what reasons the majority had for setting aside the laws agreed to as binding by the parties in this particular case. And I in no way infer from Article V of the Claims Settlement Declaration, which empowers the Tribunal to determine the applicable laws on the basis of choice of law rules and usages of the trade, that the Tribunal is entitled to set aside those laws agreed to by the parties in this case as applicable (as expressly provided in Article 11 of the contract) without advancing any justifiable reason; and then, instead of rendering an award on the basis of law in accordance with the requirements of Article V [of the Claims Settlement Declaration], to arrogate to itself the right to settle the case on the basis of equity; then, to fix the interest at a rate of 12% in order to compensate for damages with respect to a judgment sum for which there exists no legal basis at all, as set forth in the present Opinion; and finally, to apply the term "equitable" to its decision as well.

I shall state my opinion on the substantive issues relating to the issue of interest only in the Full Tribunal, when Case No. A/19 is taken up. Since the majority's award in connection with interest in this case is not founded upon

any binding rule or law, and because by its own admission the majority has rendered its decision solely on the basis of equity (ie. an act of ultra vires), I shall make no further comment thereon, other than to state that it is invalid.

Based on the foregoing reasons, I dissent from the Award in this case.

Dated, The Hague
27 November, 1985

H. Bahrami