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L/:IMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 409
CHAMBER NO. 1
AWARD NO.323-409-1

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HARRIS INTERNATIONAL TELECOMMUNICATIONS, INC.,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE MINISTRY OF DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN,
BANK MARKAZI,
BANK MELLI IRAN,
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date 2 NOV 1987 تاریخ
۱۳۶۶ /۸/ ۱۱
No. 409 شماره

PARTIAL AWARD

Appearances:

For the Claimant :
Mr. L. Lustenberger, Attorney,
Ms. A. Barrett, Legal Assistant,
Mr. J. Creighton, Counsel,
Mr. J. Scott,
Mr. P. Stitt,
Representatives.

For the Respondents :
Mr. M.K. Eshragh, Agent of the Islamic Republic of Iran,
Mr. A.A. Riyazi, Legal Adviser to the Agent,
Mr. H. Gholami, Assistant to the Agent,

Mr. A.A. Ostadifar,
Mr. E.S. Mofakham,
Representatives of the Ministry of Defence of the Islamic Republic of Iran,
Mr. H.A. Farzad,
Representative of Bank Markazi,
Mr. M.H. Mobayen,
Representative of Bank Melli.

Also Present : Mr. J.R. Crook,
Agent of the United States of America.

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1. This Claim arises out of a contract forming part of the so-called "IBEX" project, which sought to modernize and expand Iran's military electronic intelligence gathering system. See Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985); Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1 (25 Sept. 1985); Touche Ross & Company and Islamic Republic of Iran, Award No. 197-480-1 (30 Oct. 1985); Ford Aerospace & Communications Corp. and Government of the Islamic Republic of Iran, et al., Partial Award No. 289-93-1 (29 Jan. 1987). Under the Contract in this Case, the Claimant HARRIS INTERNATIONAL TELECOMMUNICATIONS, INC. ("Harris") was to provide system supervision and integration services for the IBEX project and to act as a program coordinator and manager for the procurement, installation, and operation of electronic equipment. The Claimant alleges that the MINISTRY OF DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN ("Ministry of Defence") breached and repudiated the Contract in 1979 and made wrongful attempts to draw on bank guarantees and letters of credit which had been issued in connection with the Contract. The Respondent Ministry of Defence contends that the Claimant failed to perform and breached the Contract. It interposes a counterclaim. BANK MARKAZI and BANK MELLI IRAN, against which the Claimant also seeks to proceed, deny that they are proper Respondents. The GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF DEFENCE, and BANK MELLI IRAN have submitted a counterclaim against the Claimant and CHASE MANHATTAN BANK concerning bank guarantees related to Contract No. 121. A Pre-hearing Conference was held on 23 November 1983 and a Hearing on 12 and 13 September 1986.

I. FACTS AND CONTENTIONS

2. As noted, the Contract involved in this Case, No. 121, was part of the IBEX project, an Iranian Air Force program in the mid-1970s to modernize and to expand the existing electronic intelligence gathering system with new high technology. The various IBEX contractors were to provide electronic equipment, to train personnel to operate and to maintain the equipment, to construct facilities for training, data collection and data analysis, and to expand logistic services. The completed system would collect data by means of aircraft, fixed ground facilities at a number of military sites near Iranian borders, and transportable vans. A central complex to house the data analysis computers, a permanent Training Institute, and a logistics depot would be situated at Doshen Tappeh Air Force Base in Tehran. The analysis center would analyze data and produce intelligence reports.

3. The Claimant entered into Contract No. 121 with the Ministry of Defence on 10 September 1977. As specified in the Statement of Work attached as Appendix 1 to the Contract, the Claimant, as the "Systems Integration Contractor," was responsible for the integration of the hardware, software, facilities, and other program assets acquired by Iran from other United States contractors for the IBEX project. The Claimant was not required to produce any equipment or to build any facilities itself. It had to deliver reports concerning system integration and planning, scheduling, and the control of program activities. The Claimant also had to provide certain services such as program communication and maintenance of a data library holding all documents relating to the IBEX project.

4. The Ministry of Defence contends that the Claimant was the prime contractor and responsible to Iran for the performance of other IBEX contractors. The Claimant denies this. It emphasizes that its role was limited to monitoring the efforts of other companies, the preparation of reports

on the project, the transmission to Iran of documents submitted by the other contractors, and providing advice to the IBEX Program Director appointed by Iran, while Iran retained direct control over and final approval of all work performed for the IBEX project.

5. The estimated price, including 12% profit, for the Claimant's performance was $65,072,933, consisting of $63,648,106 for services and $1,424,827 for material. The Ministry of Defence made a down payment in the amount of $10,000,000 toward the total contract price. The Contract provided for three types of letters of credit. The Claimant obtained a series of bank guarantees with respect to the down payment it received from Iran ("the down payment guarantees") and also a bank guarantee of $6,507,293 equal to 10% of the Contract price as security for its performance of the Contract ("the performance guarantee"). Iran, for its part, provided irrevocable letters of credit to secure payment of the Contract price. The down payment guarantees consisted of seven guarantees of $1,305,000 each (Nos. 29934/D-29940/D) and one of $865,000 (No. 29941/D). They were issued by Bank Melli and backed by eight letters of credit (Nos. P-302242 - P-302245 and P-302246 - P-302249) issued by Chase Manhattan Bank in favor of Bank Melli. The down payment guarantees had expiration dates designed to correspond with the gradual amortization of the down payment as the work proceeded. The performance guarantee (No. 29942/D) was also obtained from Bank Melli and backed by a letter of credit (No. P-302280) issued in its favor by Chase Manhattan Bank. Iran's letters of credit securing payment of the Contract consisted of two irrevocable letters of credit issued by Bank Markazi to Bank of America, one for $23,648,106 and the other for $1,424,827.

6. Pursuant to the Contract, invoices submitted by the Claimant were first certified by Touche Ross & Company, the Ministry of Defence's auditor, then signed by the IBEX Program Director appointed by the Ministry of Defence and, finally, presented by the Claimant to Bank of America which charged Bank Markazi for the payment and reduced the amounts of the letters of credit accordingly. In accordance with this procedure, the Ministry of Defence paid 21 invoices in the total amount of $13,326,866. These invoices were paid in compliance with the Contract by applying a portion of the advance payment to the amounts due for approximately 15% of the work covered by the invoice and collecting the balance against the letter of credit issued by Bank Markazi. The Ministry of Defence's last payment occurred on 4 or 5 February 1979 on Invoice No. 021 for work performed through the end of November 1978. Altogether $2,047,934 of these invoices were paid by reducing the down payment leaving an unamortized balance of the down payment of $7,952,066.

7. The Claimant asserts that it fully performed its contractual obligations both in Iran and in the United States until 10 February 1979. It alleges that by the end of 1978 more than 20% of the entire IBEX Project and approximately 35% of the work required under Contract No. 121, which had reached the end of the initial planning and reporting phase, was completed. The Claimant contends that, following an attack on 10 February 1979 on the Doshen Tappeh Air Force Base where most of its personnel were located, Iran's IBEX Program Director instructed Harris' employees to leave the Air Base and not to return until further notice. It alleges that the Program Director disappeared without being replaced by Iran and that its personnel were forced to leave Iran on 16 February 1979. It asserts that it continued to perform to the maximum extent possible in the United States where most of its work at this stage was scheduled to take place anyway.

8. In mid-February Bank of America received a telex from the Revolutionary Supervisory Council of Iran purporting to suspend its authority to charge Bank Markazi's account under the irrevocable letters of credit it had issued for payment of the Claimant's invoices. The Claimant submitted invoices for work after 30 November 1978 but received no payment for them.

9. In identical letters dated 2 and 5 March 1979, the Claimant, citing Article 6.3. of the Contract, gave notice of force majeure and informed Iran that it had to reduce its performance due to events in Iran beyond its control and that it had been forced to withdraw all personnel from Iran on or about 16 February 1979.

10. In a letter dated 20 March 1979, Iran's IBEX representative in Washington requested the Claimant to discontinue temporarily the distribution of all program data deliverables, not to forward any documents unless requested, and to store them in its central program library.

11. Having reduced its staff from approximately 220 to 35 by March 1979, the Claimant sent a letter dated 6 April 1979 to the Ministry of Defence stating that after notifying Iran of the existence of a force majeure condition it had made numerous unsuccessful attempts to contact Iranian authorities to discuss the problem and the future of the Contract and the Program. It declared that these unsuccessful attempts, together with reductions of other contractors' activities, required the Claimant to reduce its own performance further. Harris requested "that both parties meet so that a mutually agreeable solution can be negotiated as contemplated by Subparagraph 6.3. of Article 6 of our Contract concerning force majeure." There was no response.

12. On 10 April 1979, the letters of credit issued by Bank Markazi to Bank of America securing payment of the

Claimant's invoices expired after several requests for their extension had been made to Iran without success.

13. On 25 June 1979, the Claimant sent a letter to the Ministry of Defence requesting assistance in communicating to "the appropriate authorities of the Islamic Republic of Iran" the contents of copies of four identical letters, all dated 14 June 1979, which were attached. They were addressed to the Minister of National Defence, the Iranian Vice Minister of War, the Deputy Vice Minister of War and the IBEX Program Director in Tehran. In these letters the Claimant noted that the Contract "requires that when an event constituting Force Majeure occurs, the parties must consult and exchange views to find ways to deal with the event." Referring to its previous futile attempts to contact Iran, the Claimant also noted that if a mutually agreeable solution was not found within three months the Contract provided that either party could terminate it. It further stated that in the absence of any contact with Iranian authorities and a mutually agreeable solution, "Harris Corporation regrets to advise that it considers Contract 121 cancelled pursuant to Subparagraph 6.3. of Article 6 of the Contract." Finally, it announced that a termination proposal would be forwarded in the near future.

14. On 1 August 1979, the Claimant sent a "Settlement Claim Proposal" to the Ministry of Defence stating that it had "provided notice that it considered Contract 121 cancelled pursuant to subparagraphs 6.3., 6.4., and 6.8. of Article 6 of the Contract" and that its termination proposal was setting forth "its claim for a financial settlement of its accounts with the Government of Iran" as required by the force majeure provisions of the Contract upon contract cancellation.

15. On 8 August 1979, the Claimant received a letter dated 16 July 1979 from the Iranian Communication &

Electronic Organization (ICEO) declaring that as of 10 February 1979 "the accomplishment of all the works and expenditures under the Contract No. 121 has been considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran." The letter requested that the Claimant send a representative to Tehran "for contractual negotiations."

16. A meeting between the Parties took place on 18 August 1979 at which the Claimant submitted a copy of the Settlement Claim Proposal, dated 1 August 1979, to Iran. The Respondent requested that the Claimant prepare a status report on Contract No. 121 and the IBEX program as of the date of the Revolution including proposals for a scaled-down new system. This report was completed on 29 September 1979 and delivered to the ICEO in November 1979. The Claimant did not receive a response.

17. In 1979 Bank Melli made several requests for extension of the letters of credit issued by Chase Manhattan Bank stating that the extension requests should be considered as a demand for payment if the Claimant refused to grant the extensions. The Claimant commenced legal proceedings in the United States courts in order to obtain injunctive relief requiring Chase to notify the Claimant and to allow the Claimant several days to object to any calls made on the letters of credit. However, the Claimant agreed to extend the letters of credit during 1979 until it, finally, refused to submit to a further extension request in January 1980. On 8 January 1980, Bank Melli called one of the letters of credit still outstanding under the Contract. The Claimant obtained injunctive relief in the United States courts restraining Chase Manhattan Bank from paying that letter of credit. On 26 February 1980, Bank Melli attempted to call three more of the outstanding letters of credit and again the Claimant prevented the payment by obtaining injunctive relief barring payment on <u>all</u> the outstanding

letters of credit. Following an instruction of 12 March 1980 by the Ministry of Defence, on 6 April 1980, Bank Melli, ignoring the restraining order issued by a U.S. court, made a call on the letters of credit it had not previously attempted to draw upon. Again, the Claimant obtained injunctive relief in the United States. The injunction proceedings were stayed on 30 September 1983, at the request of the Government of the United States, pending action by this Tribunal on the relief sought by the Claimant.

18. A further meeting took place on 25 September 1981 in Vienna at which the Claimant presented another termination claim. The Claimant alleges that at this meeting Iran stated that it would not accept any claim for termination costs, but that it wanted to continue the Contract, provided that only Iranian employees would work in Iran. The Claimant also contends that it invited Iran to inspect the documents held in the library in Florida. No such inspection occurred. There was also no reaction to the Claimant's later inquiries into the status of affairs.

19. The Claimant asserts that Iran breached the Contract by instructing its personnel to leave Iran, by failing to appoint a new Program Director, by failing to provide the Claimant with work facilities and access to the other contractors working on the project, by failing to reply to its force majeure notices and refusing to consult, by not paying invoices submitted to it, by not extending the letters of credit securing payment, and by making wrongful attempts in 1979 and early 1980 to call the letters of credit provided by the Claimant to secure the performance guarantee and the down payment guarantees. It alleges that Iran repudiated the Contract and that the Contract was terminated either by force majeure or Iran's unilateral cancellation.

20. The Claimant requests an amount of $8,320,000 as payment for work allegedly performed from 1 December 1978 through 25 June 1979. Furthermore, as amended before and modified at the Hearing, it seeks a total amount of $1,642,123.22 for "termination expenses" and a total amount of $6,357,225.71 for "damages and losses," including $5,059,000 for lost profit on Contract No. 121. In addition, the Claimant asks for interest and costs of arbitration. From the monetary relief sought it has deducted $7,952,066 as the unamortized portion of Iran's down payment.

21. In the Statement of Claim, the Claimant further requested the release and cancellation of the bank guarantees and related letters of credit it provided pursuant to the Contract as guarantees of its performance and as security for Iran's down payment. In its submission filed on 14 July 1986, the Claimant requests that the Tribunal should not merely cancel the guarantees and letters of credit but declare them null and void because they have all expired.

22. The Respondents raise two objections to the Tribunal's jurisdiction over this Claim. They argue that, pursuant to the provision in the Contract dealing with the settlement of differences between the Parties, this Claim is within the exclusive jurisdiction of the Iranian courts and thus is excluded from the Tribunal's jurisdiction. They further contend that the Claimant has not furnished sufficient proof to establish its United States nationality.

23. As to the merits, the Ministry of Defence denies that Iran breached or terminated the Contract. It alleges that the Claimant failed to perform as required by the Contract and that it abandoned its contractual responsibilities under the pretext of force majeure by evacuating its personnel from Iran without prior notice to the Respondent. It further contends that the Claimant failed to deliver any

items, breached the Contract by refusing to transfer to Iran the documents concerning the IBEX Project held at the library in Florida, and failed to obtain a renewal of the necessary export licence. It alleges that the Claimant cancelled the Contract by its letter of 25 June 1979 and denies that the Claimant is entitled to any termination costs or damages. It also argues that the bank guarantees and related letters of credit cannot be cancelled because the Claimant did not complete its work and clear its accounts with Iran.

24. In its Statement of Defence filed 27 December 1982, the Government of the Islamic Republic of Iran submitted that Contract No. 121 was concluded between the Claimant and the Ministry of Defence. It "confirmed" the defence as well as the Counterclaim filed by the Ministry of Defence "in its entirety" and requested the Tribunal to dismiss the Claim. It has filed no further submission.

25. Contending that it was not a Party to Contract No. 121, Bank Markazi denies that it is a proper Respondent in this Case. It refuses to accept any liability for claims against the Ministry of Defence under the Contract and payment thereof in foreign currency. It further contends that, according to the letters of credit, the Claimant's invoices were payable only upon the employer's approval and that those which were not paid were lacking the authorized signature by the Ministry of Defence. Accordingly, Bank of America had refused to pay and sent them to Iran. It further denies its liability with regard to invoices presented after the dates on which the letters of credit had expired. It also alleges that as the guarantees and letters of credit were unconditional, Bank Melli was authorized to call them without being liable.

26. Bank Melli also denies that it is a proper Respondent in this Case and that any claims arising under Contract

No. 121 are attributable to it. It argues that it was not involved in Contract No. 121 and that the guarantees and letters of credit were separate and independent contracts. It further alleges that it was obliged to respect the calls of the beneficiary and that only the beneficiary was entitled to request the cancellation of the guarantees.

27. The Claimant contends that Bank Markazi is a proper Respondent because it issued irrevocable letters of credit pursuant to the Contract to secure the payment of the Claimant for its performance. Any issues with respect to these letters of credit would arise from and form part of the Contract. It alleges that Iran failed to appoint new authorities empowered to approve invoices after the Revolution and that the invoices submitted were in the proper form and properly documented. It further contends that Bank Markazi's refusal to pay constitutes its participation in the alleged breach of contract by the Ministry of Defence.

28. As to Bank Melli, the Claimant asserts that an account party under letters of credit and bank guarantees is allowed to proceed directly against the issuing bank to restrain any wrongful draw on such guarantees or letters of credit. It further contends that Bank Melli attempted to draw on the letters of credit issued by Chase Manhattan Bank although payment was never actually made to the Ministry of Defence on the performance guarantees. The Claimant finally alleges that the Respondents have been acting in concert to prevent payment to the Claimant and, at the same time, seeking recovery under the letters of credit. Because of this concerted action, the Claimant contends, Bank Markazi and Bank Melli are proper Respondents in this Case.

29. In its Statement of Counterclaim filed 27 December 1982, the Ministry of Defence originally asserted a Counterclaim for damages resulting from the Claimant's alleged

failure to perform the Contract in the total amount of $120,000,000. According to a more specific request in its submission filed 14 March 1985 it seeks relief in the amounts of $7,952,066 for the balance of the down payment, $13,326,866 for paid invoices, $3,000,000 for delayed performance damages under Article 6.2 of the Contract, $60,000,000 for other damages, and, if the Tribunal accepts the Claimant's force majeure defence, the reimbursement of amounts the Claimant allegedly received in excess of work actually performed.

30. Moreover, the Ministry of Defence asserts a Counterclaim for Rials 211,868,616 allegedly outstanding as social security premiums and penalties. The Claimant denies that it owes any such premiums or penalties, and contends that this Counterclaim is in any case outside the Tribunal's jurisdiction because it does not arise out of the same Contract on which the Claim is based.

31. The Ministry of Defence further requests that the Tribunal order the Claimant to deliver all documents it received from other IBEX contractors and which are held in the data library in Florida.

32. The Government of the Islamic Republic of Iran, the Ministry of Defence, and Bank Melli Iran have submitted a Counterclaim against the Claimant and Chase Manhattan Bank. The Respondents seek an order from this Tribunal that the Claimant and Chase Manhattan Bank pay the sums of the bank guarantees related to Contract No. 121, together with interest and compensation for Bank Melli Iran for harm allegedly done to its prestige and goodwill as a result of a bank claim brought by Chase Manhattan Bank concerning these guarantees. The Claimant objects to this Counterclaim, arguing that Chase Manhattan Bank is not a Party in this Case and that the Counterclaim was in any case filed too late. Bank Markazi did not submit a Counterclaim.

33. Finally, the Respondents request reimbursement of their costs and expenses incurred in connection with their defence and Counterclaims.

III. REASONS FOR AWARD

1. Procedural Issues

34. The Tribunal first addresses the procedural issues presented by this Case. The relief sought and the submissions concerning the court proceedings in Tehran are dealt with separately in the discussion of the Merits. See infra Section 3c.

a) Procedural History

35. An unusually large number of disputes on procedural issues arose between the Parties in this Case. As background for the Tribunal's decisions on those questions, it is necessary to review the history of the proceedings in considerable detail.

36. The Statement of Claim (Doc. 1) was filed on 18 January 1982. On 27 December 1982, the Islamic Republic of Iran (Doc. 10), the Ministry of National Defence (Doc. 11), Bank Markazi Iran (Doc. 12), and Bank Melli Iran (Doc. 13) submitted their Statements of Defence. The Ministry of Defence included a Counterclaim for social insurance premiums in its Statement of Defence. On 30 March 1983, the Claimant filed its Reply to the Statements of Defence and to the Counterclaim, (Doc. 28) together with an Appendix containing exhibits, (Doc. 29) the Farsi version of which was submitted on 3 July 1984 (Doc. 87). Bank Markazi (Doc. 51) and Bank Melli (Doc. 52) responded to the Claimant's Reply on 1 September 1983, the Ministry of Defence filed its Rejoinder on 31 October 1983 (Doc. 64).

37. Following a Pre-Hearing Conference on 23 November 1983, the Tribunal, by Order filed 19 December 1983, requested that the Claimant file a summary of evidence together with all documentary evidence and any written brief by 15 March 1984. The time limit for the Respondents to file such documents was set for 15 June 1984. The same Order also extended the time for both Parties to file their evidence in rebuttal and any further written briefs to 15 August 1984. This Order remained in force when the Case was transferred from Chamber Two to Chamber One on 29 February 1984.

38. The Claimant submitted a Pre-Hearing Memorial (Doc. 78) with an Appendix (Doc. 79) on 15 March 1984. The Respondent made several requests for extensions of time to file documentary evidence and written briefs, which were granted. In an Order filed 20 December 1984, the Tribunal finally set the time limit for the Respondents at 15 March 1985 and noted that no further extensions would be granted "without specific and compelling reasons." The Order further invited the Claimant to file any evidence in rebuttal within 60 days after the date of filing of the Respondents' briefs and evidence. Bank Markazi (Doc. 114) and Bank Melli (Doc. 115) filed their Memorials on 13 March 1985, and the Ministry of Defence filed its Response (Doc. 120) a day later. On 14 May 1985, the Claimant presented a "Reply to the Respondents' Pre-Hearing Memoranda" (Doc. 123) with an Appendix (Doc. 124).

39. By Order filed 6 March 1986, the Tribunal scheduled a Hearing to take place on 10 and 11 September 1986 and drew the attention of the Parties to the following:

> "1. No new documents may be introduced in evidence prior to the Hearing unless the Tribunal so permits and unless the request for their introduction is filed at least two months before the Hearing.
>
> 2. At the Hearing, any Party is free to make any arguments it wishes, but new documents may not be

introduced in evidence unless the Tribunal so permits which permission will normally not be granted except for evidence in rebuttal of evidence introduced at the Hearing.

3. With respect to witnesses, the Tribunal reminds the Parties of the requirements of Article 25 of the Tribunal Rules."

40. On 3 April 1986, the Ministry of Defence filed a "Statement of Counterclaim Arising Out of Bank Guarantee" (Doc. 139) on behalf of itself, the Government of the Islamic Republic of Iran, and Bank Melli Iran, against Harris Company and Chase Manhattan Bank. On the same day, the Ministry of Defence also submitted a Response (Doc. 140) to the Reply and Appendix (Docs. 123 & 124) which the Claimant had filed on 14 May 1985, accompanied by an Appendix with documentary evidence (Doc. 141).

41. In addition, in support of its Counterclaim for allegedly unpaid social security contributions, the Ministry of Defence on 11 June 1986 presented a "Supplementary Brief on Social Insurance Premiums" (Doc. 142) and a copy of a "Memorial of the Government of the Islamic Republic of Iran in Support of the Tribunal's Jurisdiction over the Claims Arising Out of Non-Payment of Social Security Premia" (Doc. 143).

42. On 14 July 1986, four days after the deadline set in the Order of 6 March 1986, the Claimant, referring to the Response and evidence submitted by the Respondents on 3 April 1986 (Docs. 139-41), filed a letter (Doc. 144) requesting permission to file "Harris' Comments On Iran's Unauthorized Submission" and a "Pre-Hearing Summary Of Evidence" (Doc. 145) together with an Appendix (Doc. 146) containing a large amount of documentary evidence. Furthermore, the Claimant sought permission to file comments "at a time prior to the Hearing" on the Memoranda submitted by the Ministry of Defence in support of its social security Counterclaim (Docs. 142 & 143).

43. On 15 July 1986, the Agent of the Government of the Islamic Republic of Iran, referring to paragraph 1 of the Order filed 6 March 1986 and to an application received from the Ministry of Defence, requested that the Tribunal permit the Respondent to file some new documents (Doc. 149). The Agent explained that the request "is filed 4 days later" than the two months deadline set by the Order because the telex and telephone communications between Iran and abroad had been disrupted during those past few days.

44. On 18 July 1986, the Agent of the Government of the Islamic Republic of Iran, contending that the Claimant's Pre-hearing Summary of Evidence and Appendix (Docs. 145 & 146) filed on 14 July 1986, see para. 42 above, contained new elements and that the requests seeking permission to file them was submitted late with no valid excuse, and asked to be allowed to file a memorial and evidence in rebuttal in the event that the Tribunal decided to admit them (Doc. 150).

45. By Order of 25 July 1986, the Tribunal invited the Respondents to reply to the Claimant's Pre-hearing Summary of Evidence and Appendix (Docs. 145 & 146), which the Claimant had sought to file on 14 July 1986. Any such reply, the Tribunal noted, must be filed by 2 September 1986. Moreover, the Tribunal continued, any other submissions, such as that requested by Iran on 15 July 1986, would have to be filed by 15 August 1986. It invited the Claimant to respond to such submission and to comment on the Memorials submitted by the Ministry of Defence in support of its social security Counterclaim by 2 September 1986 (Docs. 142 & 143). Finally, the Tribunal explicitly reserved its decision on the admissibility of all of the aforementioned submissions by either Party until after the Hearing.

46. On 11 August 1986, the Registry received the English text of the Claimant's witness list. A submission

of the witness list in both English and Farsi, following a request by the Registry, was filed on 20 August 1986.

47. On 15 August 1986, the Claimant also submitted five affidavits (Docs. 157-61), three with exhibits attached, of certain witnesses on the list whose presence at the Hearing was not assured. The Claimant noted that their testimony was presented pursuant to Article 25, paragraph 5, of the Tribunal Rules. It explained that it had been impossible to collect this evidence earlier because many of the witnesses were on foreign assignment or were no longer employed by the Claimant.

48. On 15 August 1986, the Agent of the Government of the Islamic Republic of Iran filed one copy of three volumes, each containing lists of documents allegedly belonging to Iran which were delivered by other IBEX contractors to the Claimant, together with 20 copies of the cover page of those volumes (Doc. 164). In an Explanatory Note the Ministry of Defence reiterated previous requests to order the Claimant to deliver all documents and equipment belonging to Iran and to submit the latest inventory of items (Doc. 163).

49. On 29 August 1986, the Claimant filed a "Reply to Respondents' Memorial Regarding the Tribunal's Purported Jurisdiction over Counterclaims for Social Security Premia" (Doc. 166).

50. The Agent of the Government of the Islamic Republic of Iran filed a letter on 2 September 1986 informing the Tribunal that the time allowed for filing the Respondents' submissions had been insufficient (Doc. 167). He noted that should the Tribunal not wish to postpone the Hearing due to the Claimant's late filing, the Respondent would have no alternative but to comment at the Hearing and, if necessary, would request permission to submit a Post-hearing Memorial.

51. On 3 September 1986, the Ministry of Defence formally objected to the admission of the Claimant's submissions of 14 July 1986 and informed the Tribunal that it was impossible to submit a Reply by 2 September 1986 (Doc. 168). It requested that the Tribunal extend the time-limit to submit a reply to the Claimant's Documents 144-48 to three months after the Hearing and to reject any other documents introduced by the Claimant prior to or at the Hearing.

52. On 8 September 1986, the Claimant filed corrected versions of two of the affidavits it had submitted on 15 August 1986 (Doc. 170).

53. Following a Request filed 8 September 1986 for a postponement of the Hearing, due to a sudden illness of the legal counsel of the Ministry of Defence, (Doc. 171), by Order of 9 September 1986, the Tribunal delayed the Hearing until 12 and 13 September (Doc. 172).

54. On 10 September 1986, Chase Manhattan Bank submitted a Statement concerning the "Lack of Jurisdiction for Certain Counterclaims" (Doc. 175).

55. On 10 September 1986, the Agent of the Government of the Islamic Republic of Iran objected to the filing of the affidavits submitted by the Claimant on 15 August 1986 as being unauthorized (Doc. 174). On 12 September 1986, the Agent also objected to the filing on 8 September of a document (Doc. 170) containing the corrected versions of two of the affidavits (Doc. 176).

56. Finally, on 18 September 1986, the Agent of the Government of the Islamic Republic of Iran raised objections to the late filing of the Memorial by Chase Manhattan Bank (Doc. 177).

b) Late-Filed Documents

57. As noted in the discussion of the procedural history of this case, both Parties have submitted documents after the expiration of the filing deadlines established by the Tribunal's Order of 6 March 1986. At the Hearing, the Tribunal reserved its decision on the admissibility of these documents. The Tribunal now turns to an examination of this issue.

58. The starting point of the analysis must be the Tribunal Rules themselves. There are four rules relevant to this determination. First, Articles 22 and 23 of the Rules provide authority for the Tribunal to establish deadlines for the submission of written submissions. In establishing such deadlines, however, the Tribunal must be mindful of Article 15, which requires that both Parties be treated with equality.

59. Article 22 provides:

> "The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements."

Moreover, Article 28, paragraph 3, states:

> "If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it."

60. Taken together, these rules provide authority for the Tribunal to make and to enforce deadlines for the filing of written submissions, provided that the Parties are

treated with equality. This limitation is important. Equality, a "fundamental principle of justice," implies that the Parties must have equal opportunity to make written submissions and to respond to each other's submissions. See Foremost Tehran, Inc. and Islamic Republic of Iran, Case Nos. 37, 231 (Chamber One) (Order of 15 Sept. 1983). The Tribunal "has repeatedly stated that no party shall submit any document only at the Hearing or so shortly before the Hearing that the other Party cannot respond to it without prejudice and in an appropriate way," Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1, p. 3 (27 June 1985); Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1, p. 4 (25 Sept. 1985).

61. In determining whether to admit a late submission, the Tribunal has frequently referred to these fundamental requirements of equality between, and fairness to, the Parties,[1] and the possible prejudice to either Party.[2]

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[1] See, e.g., Logos Development Corp. and Information Systems Iran of the Islamic Republic of Iran, Award No. 228-487-3, para. 3 (30 Apr. 1986); McCollough & Company, Inc. and Ministry of Post, Telegraph and Telephone, Award No. 225-89-3, para. 6 (22 Apr. 1986); Ford Aerospace & Communications Corp. and Air Force of the Islamic Republic of Iran, Award No. 236-159-3, para. 12 (17 June 1986); Futura Trading Inc. and National Iranian Oil Co., Award No. 263-324-3, para. 6 (30 Oct. 1986); Anaconda-Iran, Inc. and Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 65-167-3, para. 7 (10 Dec. 1986).

[2] See, e.g., Rexnord Inc. and Islamic Republic of Iran, Award No. 21-132-3, p. 6 (10 Jan. 1983); John Carl Warnecke & Associates and Bank Mellat, Award No. 72-124-3, para. 3 (2 Sept. 1983); Alan Craig and Ministry of Energy of Iran, Award No. 71-346-3, p. 3 (2 Sept. 1983); Dames & Moore and Islamic Republic of Iran, Award No. 97-54-3, p. 4 (20 Dec. 1983); William L. Pereira Associates, Iran and Islamic Republic of Iran, Award No. 116-1-3, pp. 3-4 (19 Mar. 1984); Middle East Management and Construction Corp. and Government of the Islamic Republic of Iran, Award No. 202-292-2, para. (Footnote Continued)

Further, the orderly conduct of the proceedings also requires that time limits be established and enforced. See Middle East Management and Construction Corp. and The Islamic Republic of Iran, Award No. 202-292-2, pp. 3-4 (25 Nov. 1985).

62. In applying these principles to the specific facts of a case, however, the Tribunal considers the character and contents of late-filed documents and the length and cause of the delay. See, e.g., Trustees of Columbia University and Islamic Republic of Iran, Award No. 222-10517-1, para. 23 (16 Apr. 1986); Ronald Stuart Koehler and Islamic Republic of Iran, Award No. 223-11713-1, paras. 7, 27 (16 Apr. 1986); Sola Tiles, Inc. and Government of the Islamic Republic of Iran, Award No. 298-317-1, para. 8 (22 Apr. 1987). These factors affect the probability of prejudice, the equality of treatment of the Parties, and the disruption of the arbitral process by the delay.

63. Filings containing facts and evidence are the most likely to cause prejudice to the other Party and to disrupt the arbitral process if filed late. Each Party has the burden of setting out the facts upon which it wishes to base its case, and the heavier "burden of proving the facts relied on in support of his claim or defence," as provided by Article 24, paragraph 1, of the Tribunal Rules, if the allegations are contested. Facts and evidence, however, must be introduced in time, as specified by Orders of the Tribunal, to allow for a response by the other side. As the Tribunal stated in Oil Field of Texas, Inc. and Government of the Islamic Republic of Iran, Award No. 258-43-1, para. 7

(Footnote Continued)
8 (25 Nov. 1985); Bechtel, Inc., et al. and Government of the Islamic Republic of Iran, Award No. 294-181-1, para. 20 (4 Mar. 1987); Starrett Housing Corp. and The Government of the Islamic Republic of Iran, Award No. 314-24-1, para. 251 (14 Aug. 1987).

(8 Oct. 1986), "[e]vidence that could have been submitted during these time periods will normally not be accepted at the hearing without adequate justification."[3]

64. Furthermore, the Tribunal has accepted documents submitted as "rebuttal evidence" only if their contents really "fall within the definition of 'rebuttal' as being material submitted in response to specific evidence previously filed."[4] Henry F. Teichmann, Inc. and Hamadan Glass Co., Award No. 264-264-1, para. 23 (12 Nov. 1986). For example, in Teichmann the Tribunal decided not to admit a document consisting of largely new material as "[t]he admission of such a document so close to the hearing date

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[3] For example, in Bechtel, Inc., supra, para. 20, one of the Respondents submitted a document entitled "Hearing Statement" at the Hearing which the attorney described as being a "verbatim" transcript of the oral statements he intended to make. The Claimants objected to the admission of this document at such a late stage of the proceedings. The Tribunal permitted the distribution of the document, but did not accept it for filing, reserving its decision until after the Hearing. Upon examination of the document after the Hearing, the Tribunal discovered that the "Hearing Statement constituted in fact the Respondent's Hearing Memorial which had been due by 15 December 1985 and had not been submitted before the Hearing, which was held on 13 and 14 February 1986. The Tribunal found that this "Hearing Statement" contained a detailed and partly new outline of factual allegations and legal arguments, "the acceptance of which for filing would prejudice the Claimants, who did not have sufficient opportunity to comment on the document as a whole." It refused to admit the document but stated that it "takes note of arguments contained therein to the extent they were contained in and could be followed during the oral presentation" of the Respondent's attorney at the Hearing. The Claimant had the opportunity to respond orally to the Respondent's oral arguments.

[4] In Otis Elevator Company and Islamic Republic of Iran, Award No. 304-284-2, para. 22 (29 Apr. 1987), the Tribunal accepted several late-filed documents considering them "to be within the scope of rebuttal evidence previously

(Footnote Continued)

would effectively deprive the opposing party of an opportunity to examine and rebut a large body of new material." Id. See also Starrett Housing Corp. and The Government of the Islamic Republic of Iran, Award No. 314-24-1, para. 251 (14 Aug. 1987) (excluding late-filed new evidence "ensures that the other Party will not be unfairly prejudiced . . . .").

65. On the other hand, when the late submission contains no additional evidence and merely adds identifying tabs to previous timely-filed documents in order to facilitate identification of exhibits, the Tribunal has found no difficulty in admitting the submission. Ian L. McHarg and Islamic Republic of Iran, Award No. 282-10853/10854/10855/10856-1, para. 48 (17 Dec. 1986); Training Systems Corp. and Bank Tejarat, Award No. 283-448-1, para. 18 (19 Dec. 1986). Moreover, it has accepted the filing ten days late of the Farsi version of documentary evidence by one Party because the filing did not occasion any prejudice to the other Party which had been granted an equivalent extension to file its own documentary evidence and brief. Ian L. McHarg, supra, para. 46. In both instances the Tribunal accepted the late-filed documents because there was little likelihood of prejudice.[5]

(Footnote Continued)
authorized by the Tribunal" and noting the Claimant's failure to object to their late filing.

[5] Similarly, in Islamic Republic of Iran and United States of America, Interlocutory Award No. ITL 60-B1-FT, pp. 5-6 (4 Apr. 1986), the Tribunal admitted late-filed documents from both sides. In doing so, however, the Tribunal specifically noted that the submissions were brief enough to allow the parties to comment upon them at the Hearing, which both parties did. Thus, because both parties had been treated equally and the nature of the submissions made prejudice unlikely, the Tribunal admitted the documents.

66. In addition to examining the content of late-filed submissions, the Tribunal examines the reasons given which explain or excuse the late filing of documents. See, e.g., Futura Trading Inc., supra, para. 6; Ian L. McHarg, supra, para. 46; Trustees of Columbia University, supra, para. 23; Questech, supra, pp. 3-5; Otis Elevator Company, supra, para. 22; Bechtel, Inc., supra, para. 21; Starrett Housing Corp., supra, para. 251. Even when no or little prejudice would result, the orderly conduct of the arbitral proceedings require that deadlines be enforced, absent some explanation for the delay.

67. These same considerations of equality of treatment, prejudice, and disruption of the arbitral process have led the Tribunal to refuse to admit unauthorized post-hearing submissions.[6] Although the Tribunal has, on occasion, authorized a Party to file a post-hearing submission in response to new evidence introduced by the other

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[6] See, e.g., Rexnord Inc., supra, p. 6; John Carl Warnecke & Associates and Bank Mellat, Award No. 72-124-3, pp. 2-3 (2 Sept. 1983); William L. Pereira Associates, Iran, and Islamic Republic of Iran, Award No. 116-1-3, pp. 3-4 (19 Mar. 1984); Dames & Moore and Islamic Republic of Iran, Decision No. DEC 36-54-3, pp. 11-12 (23 Apr. 1985); Computer Sciences Corp. and Government of the Islamic Republic of Iran, Award No. 221-65-1, pp. 4-6 (16 Apr. 1986); McCollough & Company, Inc., supra, p. 4; Cosmos Engineering, Inc. and Ministry of Roads and Transportation, Award No. 271-334-2, para. 29 (24 Nov. 1986); Ian L. McHarg, supra, p. 4.

In one case, Touche Ross & Co. and The Islamic Republic of Iran, Award No. 197-480-1, p. 21 (30 Oct. 1985), the Tribunal admitted but refused to rely on an unauthorized post-hearing submission. Because it had not relied on the unauthorized post-hearing submission in making the Award, no prejudice occurred and consequently the Tribunal did not dismiss the submission. Although to some extent this holding is in conflict with the Tribunal's holdings in other cases, the Tribunal's practice has made it unmistakably clear that when such unauthorized post-hearing submissions might cause prejudice to the other Party, the Tribunal will not admit them.

Party shortly before or at the Hearing,[7] it has emphasized that "exceptional circumstances" are required to justify the "unusual step of permitting post-hearing submissions." Ian L. McHarg, supra, para. 46 (citing Computer Sciences Corp. and Government of the Islamic Republic of Iran, Award No. 221-65-1, pp. 4-6 (16 Apr. 1986)).

68. New legal arguments are less likely to cause prejudice and are accordingly treated somewhat more liberally. Nonetheless, the Tribunal will examine whether the other party has had an opportunity to respond to the document, whether it is likely to cause prejudice, and the length and cause of the delay. Thus, for example, in Cal-Maine Foods, Inc., supra, p. 12, the Claimant altered its theory for recovery of its investment interest in a document filed three months before the Hearing. Noting that the Respondents had been given and had used the opportunity to file post-hearing memorials, the Tribunal found no prejudice and admitted the documents.

69. Moreover, such new legal theories have not been considered untimely "new claims" so long as the factual basis for the argument appears in the record, Shannon and Wilson, Inc., and Atomic Energy Organization of Iran, Award No. 207-217-2, p. 6 (5 Dec. 1985), since the Tribunal, in any case, is not limited to the legal theories offered by the parties. Futura Trading, Inc. and Khuzestan Water and Power Authority, Award No. 187-325-3, p. 15 (19 Aug. 1985); Futura Trading, Inc. and National Iranian Oil Co., Award No. 263-324-3, para. 7 (30 Oct. 1986); Islamic Republic of Iran and United States of America, Interlocutory Award No. ITL 60-B1-FT, p. 6 (4 Apr. 1986).

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[7] See, e.g., Blount Brothers Corp. and Ministry of Housing and Urban Development, Award No. 74-62-3, p. 3 (2 Sept. 1983); John Carl Warnecke, supra, pp. 2-3; Cal-Maine (Footnote Continued)

70. Finally, submissions concerning costs of arbitration and claims for interest belong to a special category. In Ian L. McHarg, supra, paras. 9, 49, in commenting on a "Notification of Costs" submitted by the claimant eight days prior to the Hearing, the Tribunal noted that "[b]y its nature, a notification of costs cannot be complete until the Parties have completed their preparations for the Hearing. As a general matter, therefore, this particular category of filing cannot be expected until shortly before the Hearing." Similarly, updates of legal costs and attorney's fees have frequently been accepted at the Hearing, see, e.g., Litton Systems, Inc. and Islamic Republic of Iran, Award No. 249-769-1, p. 8 (25 Aug. 1986), or even up to a year after the Hearing, when such documents contain only information regarding legal fees and interest. Anaconda-Iran, Inc. and Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 65-167-3, p. 6 (10 Dec. 1986). See also Amoco International Finance Corporation and Government of the Islamic Republic of Iran et al., Award No. 310-56-3, p. 11 (14 July 1987) (Claimant's "Supplemental Affidavit Relating to Costs" accepted, even though filed five months after the Hearing).

71. The Tribunal now must turn to an application of these principles to the documents at issue in this Case.

72. The Tribunal finds that the Ministry of Defence's Response to the Claimant's Reply to the Respondents' Prehearing Memoranda filed on 3 April 1986 (Docs. 140 and 141) is admissible because it was filed within the period specified in the Order of 6 March 1986. It contains a Memorial and documentary evidence responding to the Claimant's

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(Footnote Continued)
Foods, Inc. and Government of the Islamic Republic of Iran, Award No. 133-340-3, pp. 2-3 (11 June 1984).

Documents 123 and 124, including documentary evidence, filed on 14 May 1985.

73. Documents submitted after 10 July 1986, the deadline set by the Order of 6 March 1986, are inadmissible because of the likelihood of prejudice. The Claimant's Pre-hearing Summary of Evidence and Appendix (Docs. 145 & 146), submitted on 14 July 1986, (see para. 42), were filed late with no explanation. Although the Summary of Evidence (Doc. 145) partly repeats and summarizes previous pleadings, it also substantiates for the first time the facts upon which the claims for termination expenses, damages, and losses are based. The accompanying Appendix (Doc. 146), to a large extent, contains new documentary evidence. The admission of either of these documents, each containing new facts and evidence, is likely to cause prejudice to the other Party. Consequently, in accord with the practice noted above, the Tribunal rejects these documents. It admits, however, the Affidavit of Mr. Lustenberger in the Appendix (Doc. 146), as it is concerned solely with legal fees and the documentation of costs which the Tribunal normally accepts at a later stage. To the extent that this documentation includes expenses incurred in U.S. litigation which the Tribunal now accepts as damages, see paras. 153-157 below, the Tribunal notes that the Respondents had an opportunity to respond at the Hearing.

74. Similar reasoning leads the Tribunal also to reject the Affidavits of Mr. Palmer (Doc. 157 with Exhibits), Mrs. Howard (Doc. 158), Mr. Stitt (Doc. 159), Mr. Dowling (Doc. 160 with Exhibits), and Mr. Zentek (Doc. 161 with Exhibits) filed on 15 August 1986 by the Claimant. See para. 47. With the exception of the part of the Affidavit of Mrs. Howard addressing legal costs related to these proceedings, these submissions introduce new documentary evidence which was filed late with no justification. Their

admission so close to the Hearing would cause prejudice to the Respondents.

75. With respect to these Affidavits, the Tribunal cannot accept as an excuse that the Claimant may have been misled by Article 25, paragraph 5, of the Tribunal Rules stating that "[e]vidence of witnesses may also be presented in the form of written statements signed by them." Affidavits constitute documentary evidence which must be submitted in accordance with the time-limits set in the Tribunal's orders so that the other Party is able to respond. Article 25, paragraph 5, merely clarifies the admissibility of affidavits of witnesses, since not all national legal systems admit such written evidence.

c) Bank Markazi and Bank Melli as proper Respondents

76. The Claimant has asserted claims against the Respondents Bank Markazi and Bank Melli relating to the letters of credit and bank guarantees. As noted above, both of these Respondents have objected to this Claim, arguing that they are not proper Respondents to this Claim.

77. The Tribunal recognizes that letters of credit and bank guarantees are independent obligations, distinct from related underlying obligations. As the Tribunal noted in International Technical Products Corp. and Government of the Islamic Republic of Iran, Award No. 186-302-3, p. 39 (19 Aug. 1985):

> "Letters of credit and bank guarantees are autonomous obligations independent of the underlying obligations to which they are ancillary. See Harza Engineering Co. and Islamic Republic of Iran, Award No. 19-98-2 at 14 (30 Dec. 1982). Thus the obligations of the banks vis-a-vis one another are distinct and independent from the obligations of the parties to the underlying transactions vis-a-vis one another."

Accord Howard Needles Tammen & Bergendoff and Government of the Islamic Republic of Iran, Award No. 244-68-2, para. 47 (8 Aug. 1986).

78. The Tribunal finds, however, that Bank Markazi and Bank Melli are proper Respondents in this Case at least as to the claims concerning cancellation and release of the bank guarantees and letters of credit. Even if the contractual claims and the claims based on the bank guarantees and letters of credit were separate claims, they may be combined in this Case. The Tribunal's decision on this point, of course, is without prejudice to the issue whether or not the Claimant is entitled to receive compensation from Bank Markazi or Bank Melli for alleged wrongful calls on the guarantees and letters of credit.

d) Amendments to the Claim

79. The Claimant has introduced a number of amendments to the Claim. In the Statement of Claim the Claimant requested as "termination expenses" $64,244 for "termination administration," $166,500 for "facilities and occupancy costs," $22,500 for "security," $2,570 for "closeout of Iran operations," $82,329 for "legal support" (March - June 1979 only), $597,675 for "lost profit on delayed payments" (December 1978 - June 1979 only), and an amount of $876,913 for finding alternative employment for IBEX personnel," consisting of $247,039 for "management expense," $231,302 for "marketing expense" and $398,572 for "engineering expense." After deducting $196,417 for "equipment salvage," the value of a computer that it had purchased for the Contract, and which, although not a deliverable item, would have been delivered to Iran upon completion of the Contract, the Claimant arrived at a total amount of $1,616,314.

80. At the Hearing, the Claimant increased the amount claimed for "facilities and occupancy costs" to $290,164.91,

including $123,615.41 for telephone costs omitted in the Statement of Claim. It also raised the amounts claimed for "security" to $23,552 and "for legal support" to $193,000. Furthermore, instead of the specific amount of $597,675 for "lost profit on delayed payments" (December 1978 - June 1979 only) it requested the Tribunal to award interest as in Sylvania, supra. As to the sums claimed for "alternative employment for IBEX personnel," the Claimant reduced the amount claimed for "management expense" to $158,291 and increased the amounts for "marketing expense" to $266,084 and for "engineering expense" to $614,913. Finally, the Claimant introduced a Claim for the costs of storing records in the amount of $29,304.31.

81. In its submission filed on 14 July 1986 (Doc. 145), and at the Hearing, the Claimant no longer made an offset for the computer in the amount of $196,417. Rather, it argued that the computer had lost its value due to the progress of computer and data processing technology. The Tribunal notes that at the Hearing the Claimant stated that it had used the computer until 30 July 1980. The Claimant further contends that, starting in June 1979, it had asked Digital Corporation, the producer, to repurchase the computer or to find another customer. The Claimant maintains that Digital was not interested because it did not consider such a search to be reasonable as the equipment had become out-of-date and potential buyers would not want it. At the Hearing the Claimant stated that it was prepared to put the computer, which it contends is still usable although no longer state of the art, in storage with the warehouse receipt in escrow and to do everything in its power to enable it to be delivered to Iran. The total amount of "termination expenses", sought by the Claimant, as modified at the Hearing, is now $1,642,123.22.

82. The Claimant also modified the relief sought for other damages and losses. In the Statement of Claim Harris

sought a total amount of $6,619,500 for damages and losses. This represented the sum of $660,000 for "lost profit [interest] on delayed payments (July 1979 - January 1982)," $20,000 for "extra letter of credit fees," $64,500 for "settlement negotiation costs," $541,000 for "legal expenses," $5,059,000 for "profit loss on Contract," $150,000 for "damage to banking relations," $50,000 for "damage to contractors relations," and, finally, $75,000 for "damages for failure to negotiate in good faith." At the Hearing the Claimant no longer claimed the specific amount of $660,000 for "lost profit on delayed payments" but instead requested the Tribunal to award interest as in Sylvania, supra. Furthermore, the Claimant increased the amount sought for "extra letter of credit fees" to $26,045.93 and, in addition, requested $312,500 for "extra commission on letters of credit" and $249,239.65 for "fees for deficient compensatory balances." The Claimant also reduced the amount claimed for "legal expenses" to $510,550.13 and withdrew the claims for "settlement negotiation costs" in the amount of $64,500 and for "damage caused by Iran's failure to negotiate in good faith" in the amount of $75,000 as duplicative of the claim for "legal support" in the amount of $193,000 claimed under "termination expenses." It further indicated at the Hearing that it had doubts whether $5,059,000 was due for lost profit, but it did not formally withdraw the claim. The total amount now claimed for "damages and losses" is $6,357,225.71.

83. Finally, as noted above, the Claimant amended the Claim for interest. The Claim for termination expenses originally included a request for $597,675 as "lost profit on delayed payments", for interest, calculated at the then-prevailing rates, on $5,450,871 allegedly owed to the Claimant for its performance from 1 December 1978 through 10 February 1979, and for $2,869,129 allegedly owed to it for performance from 10 February 1979 through 25 June 1979. Furthermore, the Claim for damages and losses also included

a request for $660,000 for "lost profit [interest] on delayed payments" for the period from July 1979 until January 1982 when the Claim was filed with this Tribunal. In its submission filed 14 July 1986, the Claimant noted that, as a result of the passage of time since 1982, the amount of interest now due was far greater. It alleged that at least by March or April 1979 payments could have been made for the work performed prior to the Revolution. Contending non-payment of these amounts was a breach of contract as of the spring of 1979, it argued that interest should be calculated from that time, particularly as to the amount of $5,450,871 which was allegedly due as of 10 February 1979. At the Hearing the Claimant stated that instead of seeking interest in the aforementioned amounts, with reference to Sylvania, supra, it now requests 11.89% interest on the amounts owed for services, for termination costs, and for damages and losses.

84. In determining the admissibility of the amendments, the Tribunal again begins its analysis by examining the Tribunal Rules. The Tribunal notes that Article 20 provides in part that

> "[d]uring the course of the arbitral proceedings either party may amend or supplement his claim . . . unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances" (emphasis added).

85. As noted in International Schools Services, Inc. and Islamic Republic of Iran, Interlocutory Award No. ITL 57-123-1, p. 10 (30 Jan. 1986), "[t]his provision affords wide latitude to a party who seeks to amend a claim, and the Tribunal's practice is in accord with this liberal approach." The Tribunal permits amendments unless delay, prejudice, or other "concrete circumstances," see

International Schools Services, supra[8]; Ford Aerospace & Communications Corp. and Government of the Islamic Republic of Iran, Award No. 289-93-1 (29 Jan. 1987), make amendment inappropriate, or unless "loss of jurisdiction would result," see Fedders Corporation and Lorristan Refrigeration Industries, Decision No. DEC 51-250-3, p. 2 (28 Oct. 1986).[9] The same considerations of prejudice, equality of treatment, and delay of the arbitral proceedings are applicable here. Thus, the Tribunal must consider whether the other Party would be prejudiced by the proposed amendment, whether the other Party has had an opportunity to respond to the newly-added or amended claim, and whether the proposed amendment would needlessly disrupt or delay the arbitral process. See Thomas Earl Payne and Government of the Islamic Republic of Iran, Award No. 245-335-2, para. 9 (8 Aug. 1986); Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1, p. 28 (25 Sept. 1985); Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1, p. 39 (27 June 1985).[10]

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[8] See also International Schools Services, Inc. and Islamic Republic of Iran, Award No. 290-123-1, paras. 2-13 and 17-18 (29 Jan. 1987) (final Award).

[9] The Tribunal's practice concerning proposed amendments to add or to substitute a party has been examined in St. Regis Paper Company and Islamic Republic of Iran, Award No. 291-10706-1 (29 Jan. 1987), and in Judge Holtzmann's Dissenting Opinion in that Case. That analysis need not be repeated here.

[10] In Sylvania the Tribunal refused to permit an amendment requesting an award obligating the Claimant to deliver equipment in storage in the United States because it was filed after both Parties had completed all of their documentary submissions "and the Claimant has not had an opportunity to submit evidence on whether the list is accurate." Consequently, the Tribunal noted, "the record contains no clear evidence as to which pieces of equipment the Claimant has in storage in the United States, which were left in Iran, and which have been sold by the Claimant for the Respondent's account." Id. at 39.

86. In the present Case the Tribunal holds that, except for the amendment withdrawing the set-off for the value of the computer, all of the proposed amendments are admitted. It is the practice of the Tribunal to admit requests to increase the rate of interest initially sought as well as to update the amount of costs claimed, since, as stated in Pepsico, Inc. and Government of the Islamic Republic of Iran, Award No. 260-18-1, p. 20 (13 Oct. 1986), such amendments "affect only the amounts of calculations and as such do not prejudice the defence by the Respondents." As to the other amendments the Tribunal finds that their admission causes neither delay to the arbitral process nor prejudice to the Respondent, and there are no other "concrete circumstances" which would make amendment inappropriate. There have also been no allegations by the Respondents to that effect.

87. The withdrawal of the offset of the value of the computer at the Hearing, however, is a different matter. Such a withdrawal significantly alters the relief sought by the Claimant and raises new factual and legal issues to which the Respondents have not had a sufficient opportunity to respond. Allowing this amendment, at this stage of the proceedings, would likely prejudice the Respondents. Moreover, no explanation has been offered for the delay in seeking this alteration of the Claim. Therefore, the Tribunal rejects this proposed amendment to the Claim. Accordingly, $196,417 must be deducted from any amount awarded to the Claimant.

e) Late Counterclaim

88. The Tribunal now turns to an examination of the counterclaim filed by the Ministry of Defence on 3 April 1986 on behalf of itself, the Islamic Republic of Iran, and

Bank Melli, naming Harris and Chase Manhattan Bank as Respondents.

89. The Claimant and Chase Manhattan Bank contend that this counterclaim should be dismissed because it is untimely, because no reason has been offered for the delay in its filing, and because Chase Manhattan Bank is not a party to this Case.

90. Again, the principles guiding the Tribunal's determination of this issue are to be found in the Tribunal Rules. Article 19, paragraph 3, of the Rules require that a counterclaim be made

> "[i]n the Statement of Defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances."

91. In the normal course of events, then, a counterclaim must be contained in the Statement of Defence. When counterclaims are filed late, the Respondent has the burden of justifying the delay. Again, considerations of equality in treatment, prejudice to the other party, and delay of the proceedings underlie this requirement that delays be justified.

92. Consequently, the Tribunal has uniformly rejected late-filed counterclaims when it concludes that the delay was not justified under the circumstances,[11] although it has

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[11] See, e.g., Richard D. Harza and Islamic Republic of Iran, Interlocutory Award No. ITL 14-97-2, pp. 3, 5 (23 Feb. 1983) (counterclaims for damages rejected when late-filed under Article 19(3) and a previous scheduling order and when damages sought were uncertain and speculative); Intrend International, Inc. and Imperial Iranian Air Force,

(Footnote Continued)

occasionally rejected late-filed counterclaims without entering into such an analysis.[12]

93. The Tribunal has been particularly reluctant to accept late-filed counterclaims which are filed shortly before the Hearing,[13] during the Hearing, or after the

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(Footnote Continued)
Award No. 59-220-2, p. 12 (27 July 1983) (counterclaim rejected when filed six months after the Statement of Defence); Ultrasystems Inc. and Islamic Republic of Iran, Partial Award No. 27-84-3, p. 21 (4 Mar. 1983) (no explanation for delay offered); General Dynamics Corp. and Islamic Republic of Iran, Award No. 123-283-3, pp. 2, 26 (16 Apr. 1984); General Dynamics Telephone Systems Center, Inc. and Islamic Republic of Iran, Award No. 192-285-2, pp. 25-26 (4 Oct. 1985); Motorola, Inc. and Iran National Airlines Corp., Case No. 481, Chamber Three (Order of 16 June 1986) (counterclaim rejected when filed five weeks before Hearing and Tribunal found no justification for the delay); Austin Co. and Machine Sazi Arak, Award No. 257-295-2, paras. 7-9 (30 Sept. 1986) (counterclaim rejected when late-filed and no specific justification offered); FMC Corporation and Ministry of National Defence, et al., Award No. 292-353-2, p. 4 (12 Feb. 1987) (no justification found for the delay in filing the counterclaim).

12 See, e.g., Cosmos Engineering, Inc. and Ministry of Roads and Transportation, Award No. 271-334-2, para. 12 (24 Nov. 1986); International Technical Products Corp. and Government of the Islamic Republic of Iran, Award No. 186-302-3, p. 41 (19 Aug. 1985); Ford Aerospace & Communications Corp. and Air Force of the Islamic Republic of Iran, Award No. 236-159-3, para. 94 (17 June 1986).

13 Dames & Moore and Islamic Republic of Iran, Award No. 97-54-3, p. 30 (20 Dec. 1983) (counterclaim rejected when filed three days before Hearing and no explanation for the delay offered); International Technical Products Corp. and Government of the Islamic Republic of Iran, Award No. 196-302-3, pp. 29-30 (28 Oct. 1985) (several counterclaims rejected when filed 22 days before Hearing); Cosmos Engineering, Inc. and Ministry of Roads and Transportation, Award No. 271-334-2, para. 12 (24 Nov. 1986) (counterclaim rejected before the Hearing).

In International Schools Services, Inc., and Islamic Republic of Iran, et al., Decision No. DEC 61-123-1, p. 4
(Footnote Continued)

Hearing.[14] Amman & Whitney and Ministry of Housing and Urban Development, Award No. 248-198-1, pp. 8-9 (25 Aug. 1986), is a good example of the Tribunal's practice in this area. In that Case, one day after the Hearing, the Respondent filed a "counterclaim arising out of letter of guarantee" on behalf of itself and Bank Melli against the Claimant and Citibank of New York concerning a failure to make payment under a letter of guarantee securing an advance payment made to the Claimant under the contract in question. Neither Bank Melli nor Citibank was a party to the Case. The Tribunal rejected the Counterclaim, stating that

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(Footnote Continued)
(28 Apr. 1987), for example, a Respondent raised the issue of retained profits for the first time three weeks before the Hearing. The Tribunal, noting that no counterclaim on that issue had actually been presented, declared that such a counterclaim could not be added at that very late stage of the proceedings in any case without the Tribunal's permission under Article 19, paragraph 3, of the Tribunal Rules.

[14] Woodward-Clyde Consultants and Government of the Islamic Republic of Iran, Award No. 73-67-3, pp. 22-23 (2 Sept. 1983) (three counterclaims rejected when filed on the day of the Hearing and no explanation offered to justify the delay); Blount Brothers Corp. and Ministry of Housing and Urban Development, Award No. 74-62-3, p. 3 (2 Sept. 1983); R.J. Reynolds Tobacco Co. and Iranian Tobacco Co., Case No. 35, Chamber Three (Order of 22 Nov. 1982) (counterclaim presented at the Hearing and filed the next day rejected; Tribunal noted that there had been an "insufficient showing" that the delay had been justified); White Westinghouse International Co. and Bank Sepah - Iran, New York Agency, Award No. 7-14-3, pp. 3, 4-5 (25 June 1982); Dames & Moore, supra, p. 4 (counterclaim filed after the Hearing rejected on the grounds of "[f]airness, orderliness, and possible prejudice to the other party"); Morrison-Knudsen Pacific Limited and Ministry of Roads and Transportation, Award No. 143-127-3, pp. 61-62 (13 July 1984) (tax counterclaim rejected when not elaborated, as required by Article 19(4) and Article 18(1), until a post-Hearing Memorial and there was no justification for the delay in filing the supporting evidence); Harnischfeger Corp. and Ministry of Roads and Transportation, Award No. 144-180-3, p. 47 (13 July 1984) (counterclaim contained in a post-hearing memorial dismissed
(Footnote Continued)

> "[A]side from any questions as to the Tribunal's jurisdiction over a counterclaim thus formulated and the parties named in it, the Tribunal is bound to reject a pleading filed not only considerably later than the Statement of Defence (see Articles 19 and 20 of the Tribunal Rules), but, indeed, after the Hearing itself - the more so since no explanation has been advanced as to why such a delay may be justified."

94. Indeed, cases are rare in which the Tribunal accepted late counterclaims. In Starrett Housing Corp. and Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 32-24-1, p. 35 (19 Dec. 1983), the Tribunal, without further explanation, admitted four counterclaims "[i]n accordance with Article 19, paragraph 3, of the Tribunal Rules . . . although they were not included in the Statement of Defence" and not filed until approximately six weeks before the Hearing. But see Concurring Opinion of Howard M. Holtzmann, Starrett Housing Corp., supra, at pp. 45-46 (arguing that the late-filed counterclaims should not have been admitted). Starrett, however, is a unique case in many respects. Given the drawn-out nature of the proceedings in that case, the Tribunal may have concluded that prejudice to the Claimant was unlikely. In any event, Starrett represents the exception rather than the rule. The predominant practice of the Tribunal is that when it accepts a late-filed counterclaim it bases such a determination on an examination of the possible prejudice to the other party and the explanation, if any, for the delay.

95. A more representative example of this practice is American Bell International, Inc. and Islamic Republic of Iran, Award No. 255-48-3, pp. 78-79 (19 Sept. 1986), in which the Tribunal accepted a late-filed counterclaim. In that Case the Counterclaim was filed five weeks before the

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(Footnote Continued)
as untimely when no justification for the delayed filing was offered).

Hearing and four weeks before the Claimant's rebuttal was due. The Tribunal examined the possible prejudice to the Claimant that might result from the counterclaim, but concluded that there was little likelihood of prejudice because the counterclaim related to one of the least complicated portions of the case and because the Claimant had not alleged prejudice. Further, the Tribunal noted that the Respondent may not have been able to find the evidence supporting the counterclaim earlier. Consequently, the Tribunal accepted the counterclaim.

96. The Tribunal has been less hesitant to accept counterclaims which clarify or provide detail for previous timely-filed counterclaims,[15] or amend previous timely-filed counterclaims.[16]

97. In applying these principles to the Case at hand, the Tribunal notes that this Counterclaim was filed for the first time more than 39 months after the Statement of Defence. Thus, it is apparent that this Counterclaim does

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15 Behring International, Inc. and Islamic Republic Iranian Air Force, Interim and Interlocutory Award No. ITM/ITL 52-382-3, pp. 43-44 (21 June 1985) ("supplemental" counterclaim permitted when it constituted a "specific counterclaim" within a more general and timely-filed counterclaim which it merely clarified); Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Case No. 64, Chamber One (Order of 10 May 1983) (Supplementary Statement of Counterclaim admitted where there was no objection submitted by the Respondent).

16 R.J. Reynolds Tobacco Co. and Iranian Tobacco Co., Case No. 35, Chamber Three (Order of 22 Nov. 1982); Ford Aerospace & Communications Corp. and Air Force of the Islamic Republic of Iran, Award No. 236-159-3, para. 95 (17 June 1986); Anaconda-Iran, Inc. and Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 65-167-3, paras. 115-16 (10 Dec. 1986) (amendment to counterclaim allowed when made a year before the Hearing; the Tribunal noted that the Claimant had "ample opportunity to respond" and "has not suffered any prejudice").

not comply with Article 19, paragraph 3, unless the delay can be justified by Iran.

98. The Tribunal notes, however, that this Counterclaim may be distinguished from other late-filed counterclaims as it was originally filed as several direct claims by Bank Melli against Chase Manhattan Bank in Cases Nos. 510, 534, 540, 541, 543, 548, and 556. These direct claims were later determined to be outside of the Tribunal's jurisdiction in Award No. 108-A-16/582/591-FT, p. 21 (25 Jan. 1984). The Tribunal, however, expressly left open the possibility that the claims might be filed as counterclaims. It stated that

> "Whether an Iranian bank claim on a standby letter of credit can be joined as a counterclaim against the relevant United States contractor is a matter that each Chamber will have to deal with in accordance with Tribunal Rules concerning jurisdiction over counterclaims. It is up to the Chambers to take the necessary steps in each case, in accordance with the Tribunal Rules and this decision."

Id. at 21.

99. By Orders filed on 2 July 1985, Chamber One terminated Cases Nos. 510, 534, 536, 540, 541, 543, 548, and 556, among a series of other bank claims, in accordance with Article 34 of the Tribunal Rules. In those Orders the Tribunal drew the Parties' attention again to a paragraph of its Order filed on 24 April 1985 providing: "[i]f a letter of credit involved in the present claim relates to any other claim pending before the Tribunal, then the consequences of that letter of credit should be decided as part of the decision on that other claim, and any request to submit a counterclaim with respect thereto should be made in the case where that other claim is pending." It further announced that it would consider as soon as possible what guidance could be given for the submission of such requests.

100. The Ministry of Defence alleges that the Tribunal failed to issue any clear guidelines concerning the filing of such counterclaims. This is incorrect, at least as far as the Cases in question are concerned. On 16 August 1985, following the Termination Orders and in response to a request of the Agent of the Islamic Republic of Iran for further guidance, the Tribunal, again drawing the Parties' attention to the above-quoted paragraph, stated that the request to submit a counterclaim must be made by a Party to the Case in which the underlying, related claim is pending, and filed in that Case while such Case is still pending. The Tribunal did not specify the precise form in which the request should be made but left this to the discretion of the Parties. It noted, however, that such requests "must be timely filed, not later than six months from the date of this communication."

101. As far as the Case at issue are concerned, this period expired on 16 February 1986. The Counterclaim filed on 3 April 1986 was therefore submitted late with no justification for the delay offered by the Respondent. In such a case the Tribunal's practice is clear. To permit such late counterclaims might prejudice the Claimant and would in any event run directly contrary to the plain meaning of Article 19, paragraph 3, of the Tribunal Rules. Accordingly, the Counterclaim is dismissed as untimely.

f) Witnesses

102. The Tribunal next addresses an objection raised by the Respondents to the Claimant's witness list. The Tribunal received an English version of the witness list on 11 August 1986. The Registry notified the Claimant that, absent agreement of the arbitrating Parties, Article 17, Note 3, of the Tribunal Rules requires that witness lists be submitted in both Farsi and English. The witness list was submitted in both languages on 20 August 1986 (Doc. 165).

This was only 20 days before the Hearing as originally scheduled.[17] Because this was less than 30 days before the Hearing, the Respondents objected to the witness list.

103. The general rule regarding witness lists is stated by Article 25, paragraph 2, which provides that

> "If witnesses are to be heard, at least [thirty days] before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony."[18]

104. There are special provisions in the Tribunal Rules, however, with respect to rebuttal witnesses. Article 25, Note 2, provides that

> "The information concerning witnesses which an arbitrating party must communicate pursuant to paragraph 2 of Article 25 of the [Tribunal] Rules is not required with respect to any witnesses which an arbitrating party may later decide to present to rebut evidence presented by the other arbitrating party. However, such information concerning any rebuttal witness shall be communicated to the arbitral tribunal and the other arbitrating parties as far in advance of hearing the witness as is reasonably possible."

105. As noted in William J. Levitt and Government of the Islamic Republic of Iran, Award No. 297-209-1, pp. 9-10 (22 Apr. 1987), Note 2 contains a limited derogation from

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[17] The Hearing was postponed 2 days at the Respondents' request. Even taking this delay into account, however, the witness list was untimely filed.

[18] The original text of the UNCITRAL Rules provided for a fifteen day period. The Tribunal extended this period to thirty days when it adopted the rules.

the general notice requirement of Article 25 paragraph 2, in favor of rebuttal witnesses called upon to rebut evidence presented at the Hearing or so soon before it that it is impossible to observe the normal period of notice. It cannot be construed to encompass witnesses addressing matters raised earlier in the proceedings. Indeed, such a construction would create an exception so large as to swallow the rule.[19]

106. Because the witnesses offered by the Claimant in the present Case were not rebuttal witnesses, the witness list filed on 20 August 1986 was clearly late-filed. Any relaxation of this standard is likely to prejudice the Respondents and thus cannot be condoned. Consequently, the Tribunal held at the Hearing, and confirms in this Award, that it cannot accept the proffered witnesses.

107. Although refusing to admit the persons named by the Claimant in its late filing as witnesses, the Tribunal noted at the Hearing that any Party is free to choose the persons it wishes to present its case, including those not accepted by the Tribunal as witnesses and may receive information from them. See Economy Forms Corp. and Government of the Islamic Republic of Iran, Award No. 55-165-1 (14 June 1983). Such persons do not make the declaration that witnesses are required to make in accordance with Note 6(a) to Article 25 of the Tribunal Rules. The Tribunal, of course, may attach a different "weight" (Article 25,

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[19] However, it should be noted that in Otis Elevator Company and Islamic Republic of Iran et al., Award No. 304-284-2, para. 21 (29 Apr. 1987), the Tribunal permitted two witnesses, both officers of the Claimant at the relevant times, to give evidence although the notification was filed only eighteen days before the Hearing. It did not accept the presentation of a third witness who had prepared a valuation report "except to the extent, if any, justified in rebuttal to the presentations made by the Respondents at the Hearing."

paragraph 6) to information provided by such persons as compared to the testimony of witnesses.

108. For the foregoing reasons, in assessing the evidence before it, the Tribunal does not consider the statements made at the Hearing on behalf of the Claimant by Mr. Stitt and Mr. Scott, who were both on the witness list, as those of witnesses, but does consider them as part of the presentation of the Case by the Claimant in the Hearing.

2. Jurisdiction

a) The Forum Selection Clause

109. Article 8 of the Contract contains the following dispute settlement clause:

> "All differences and disputes which may arise between the two parties resulting from interpretation of the Articles of the Contract or the execution of the works which can not be settled in a friendly way, must be settled in accordance with the rules and laws of Iran via referring to the competent Iranian courts."

110. The Respondents argue that this clause provides for the exclusive jurisdiction of the Iranian courts over any disputes under the Contract so as to oust the Tribunal's jurisdiction pursuant to Article II, paragraph 1, of the Claims Settlement Declaration. This clause, however, employs language identical in all material respects to that already examined by the Tribunal in Ford Aerospace and Communications Corp. and Air Force of the Islamic Republic of Iran, Interlocutory Award No. ITL 6-159-FT (5 Nov. 1982). There the Tribunal decided that the express limitation of the provision to disputes arising from the interpretation of the Contract and execution of the works removed it from the scope of the exclusion. The Tribunal reaffirmed this reasoning after examining virtually identical dispute

settlement clauses in Sylvania Technical Systems, supra, pp. 11-13; Questech, supra, pp. 11-13; Touche Ross, supra, pp. 7-8, 12; and Ford Aerospace & Communications Corp., supra, pp. 3-4.

111. There is no reason for this Chamber to interpret the forum selection clause in this Case differently from the interpretation provided by the Full Tribunal in Interlocutory Award No. ITL 6-159-FT. There, as here, "[i]mportant aspects of the contract . . . have been left outside the jurisdiction of the selected courts" and "[s]uch limitation of the jurisdiction places [this forum selection clause] outside the requirement that the Iranian courts must be solely competent for any disputes arising under the contract."

b) The Claimant's United States Nationality

112. The Claimant has submitted evidence which fulfills the requirements established by the Order of 20 December 1982 in Case No. 36, Flexi-Van Leasing, Inc. and Islamic Republic of Iran, reprinted in 1 Iran-U.S. C.T.R. 455, and in the 18 January 1983 Order in Case No. 94, General Motors Corp. and Government of the Islamic Republic of Iran, reprinted in 3 Iran-U.S. C.T.R. 1, for proof of corporate nationality. Consequently, the Tribunal is satisfied that the Claimant is a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration.

3. Merits

113. In this section of the Award the Tribunal will consider first the initial issue of how the Contract came to an end. The Tribunal will then examine the legal consequences that follow from termination in those particular

circumstances. Finally, it will consider the various Counterclaims.

a) Termination of the Contract

114. The Parties disagree on what brought the Contract to an end. Article 6.3. and Article 6.8. are the two Contract provisions which must be considered in this context.

115. Article 6.3. deals with force majeure and the right of either Party to terminate the Contract under certain conditions. It provides that:

> "In the event of Force Majeure when the performance of this Contract becomes impossible the afflicted party must inform in writing the other party of the occurrence of the said event or events, and also mention in his letter the estimated duration of time during which these circumstances will continue.
>
> Then, both parties of this Contract must consult and exchange views with each other to find ways to deal with such events.
>
> However, if within three (3) months from the date of requesting for negotiations [sic] by either party, a mutually agreeable solution is not found, each party can, on his opinion, cancel the Contract by giving a written notice to the other party.
>
> In this case, both parties must take action to clear their account within three (3) months after the cancellation date of the Contract and the price of services rendered by the Contractor up to this date be paid according to the latest monthly progress report accepted by the Employer."

116. Article 6.8. concerns termination for convenience by the Employer. It states:

> "Whenever the Employer terminates the Contract without the fault of the Contractor, the Employer will pay to the Contractor approved actual costs up to the time of termination and related fee plus

approved actual cost of termination of the Contract."

117. In the Statement of Claim the Claimant argued that the Contract was terminated either by force majeure and/or by breach of contract by Iran. In its subsequent briefs the Claimant contended that because it received no reply to its force majeure notices dated 5 March 1979 and 6 April 1979, pursuant to Article 6.3. of the Contract, it notified Iran by its 25 June 1979 letter that the Contract was terminated due to force majeure. On the other hand, in its submission filed 14 July 1986, the Claimant, referring to Article 6.8., alleged that Iran terminated the Contract by its letter dated 16 July 1979 declaring all work "stopped" as of 10 February 1979. In the same submission the Claimant asserted that this letter, however, could not operate retroactively, but was effective on 16 July 1979. It also cited Sylvania, supra, pp. 20-22 and Questech, supra, p. 18 for the proposition that identical letters dated 16 July 1979 which were sent to other IBEX contractors were unilateral acts by Iran ending the respective contracts or a step in its termination of the entire IBEX project.

118. At the Hearing the Claimant argued that the force majeure condition which arose in February 1979 did not end but merely suspended the Contract for both Parties and disappeared at least by 1 April 1979, if not earlier. The Claimant now relies on the argument that Iran breached the Contract by failing to respond to the Claimant's communications and terminated the Contract unilaterally by rejecting the Claimant's notice of force majeure. The Claimant contends that its notice was defective because it depended on the condition that negotiations actually take place before the Contract could be cancelled. It further maintains that Iran's 16 July 1979 letter was a clear rejection of the Claimant's 25 June 1979 letter which implied that Iran regarded the Contract as only suspended until Iran chose to terminate it unilaterally by its 16 July 1979

communication. The Claimant suggests, therefore, that the Contract was terminated by Iran under Article 6.8., which it argues is applicable to force majuere, "without the fault of the Contractor."

119. The Ministry of Defence alleges that the Contract was effectively brought to an end by the Claimant's notice of force majeure letter of 25 June 1979. It denies, therefore, that Iran's 16 July letter could play any further role in ending the Contract.

120. The Tribunal notes that Article 6.5. of Contract No. 121 defines the "case of Force Majeure" as including: "Flood, epidemics, earthquake, War, cases which are generally accepted by international practice as Force Majeure and if U.S. Government cancel the export licence." The Tribunal has recognized in Sylvania, supra, pp. 16, 17, in very similar circumstances that "it is clear that revolutionary conditions prevailing around [the Revolution] resulted in force majeure that prevented processing and payment" of the Claimant's invoices, as well as the cooperation "the Claimant needed in order to continue its performance under the Contract." See also Questech, supra, p. 16; Touche Ross, supra, p. 14 (circumstances in Iran at the time of the Revolution amounted to "classic force majeure conditions at least in Iran's major cities" that prevented parties from substantially performing contractual obligations) (citing Gould Marketing, Inc. and Ministry of National Defence of Iran, Interlocutory Award No. ITL 24-49-2, p. 11 (27 July 1983)).

121. Because of these revolutionary conditions, the Tribunal does not agree that the Claimant breached the Contract by leaving the sites in Iran in February 1979. As in Questech, supra, pp. 16-17, the Tribunal finds that, at a time when there was serious revolutionary upheaval and civil strife in Tehran, including actual fighting at Doshen Tappeh

Air Force Base, the Claimant, if not forced to withdraw its personnel from Iran on 16 February 1979, was at least justified in doing so because their safety in Iran could no longer be guaranteed.

122. It seems clear that the Claimant abided by the correct procedure prescribed by Article 6.3. of the Contract. It gave notice of force majeure and of its withdrawal of all personnel from Iran in the letters dated 2 and 5 March 1979 and, in the letter dated 6 April 1979, it expressly requested negotiations as envisaged by Article 6.3., paragraph 3. There is no record of any communication between the Parties during the next three months, after which the Claimant sent its letter of cancellation dated 25 June 1979.

123. The Tribunal holds that the Contract was terminated under Article 6.3 by the Claimant's letter of 25 June 1979. This provision requires that a request for negotiations be made. It does not require, as the Claimant contends, that such negotiations actually take place. Nor does the Contract require that a termination proposal be accepted before it becomes effective. The Contract plainly gives either party the unilateral right to cancel the Contract due to force majeure. The exercise of the right does not depend on the consent of the other Party. This follows from Article 6.3., paragraph 3, which clearly states that if after three months a mutually agreeable solution is not found, "each party can, on his own opinion, cancel the Contract by giving a written notice to the other party." The wording of the Claimant's letters dated 14 July 1979 and the preparation of the 1 August 1979 Settlement Claim Proposal leave no room for doubt that the Claimant was actually exercising its right to cancel the Contract due to force majeure and that it also perceived this as a unilateral action.

124. The Tribunal is also unable to accept the contention that the 16 July 1979 letter in which ICEO declared all work "stopped" as of 10 February 1979 was a rejection of the Claimant's notice of force majeure. As noted in Ford Aerospace, supra, para. 51, this letter is virtually identical to the letters of the same date sent by Iran to the other IBEX contractors in other Cases. It did not address or in any other way refer to the previous individual communications by the IBEX contractors to Iran. Moreover, as distinct from the circumstances in Sylvania, supra, and Questech, supra, in this Case the 16 July 1979 letter could not have had any legal effect on the Contract because no contract existed after it had been terminated by the Claimant's 25 June 1979 letter. The Settlement Claim Proposal dated 1 August 1979 which the Claimant sent to the Ministry of Defence, pursuant to the force majeure provisions of the Contract requiring clearance of accounts upon contract cancellation, cannot be construed as a reaction to the 16 July 1979 letter. Indeed, the Claimant did not receive the 16 July 1979 letter until 8 August 1979 - - seven days after it had delivered its Settlement Claim Proposal.

125. Considering the time that elapsed before the Claimant's letter of 25 June 1979 could reach the Respondent, the Tribunal finds that the Contract was effectively terminated on 29 June 1979.

b) Legal Consequences of Termination

126. The various Claims presented by the Claimant will be examined in the light of Article 6.3., paragraph 4, of the Contract which establishes the legal consequences following from the termination of the Contract by the Claimant due to force majeure.

aa) Claims for Performance

127. The Claimant seeks payment of an amount of $8,320,000, consisting of $5,450,871 for work allegedly performed before 10 February 1979, and $2,869,129 for work allegedly performed between 10 February 1979 and 25 June 1979. The amounts claimed encompass alleged costs for services and materials as well as 12% profit.

128. Under Article 6.3., paragraph 4, the Claimant is entitled to the "price of services rendered" until the date of cancellation of the Contract. This includes both the cost of services and the cost of material acquired to provide those services. The Tribunal first examines whether the Claimant, having the burden of proof, has demonstrated to the Tribunal's satisfaction that it actually rendered the services for which payment is claimed. Then the Tribunal will examine whether the Claims for performance are sufficiently substantiated and correctly calculated. See Foremost Tehran, Inc., et al. and Government of the Islamic Republic of Iran, Award No. 220-37/231-1, p. 37 (11 Apr. 1986).

129. The alleged services are contained in the Claimant's Invoices Nos. 22 to 35. With respect to these invoices, the Tribunal must determine whether the work to which they refer was actually performed and whether it was performed at the contractual price. The Ministry of Defence has raised the objection that the invoices should not be paid because they were not processed according to the invoice certification and processing procedures agreed upon by the Parties. Those procedures required that Touche Ross & Co., Iran's Audit Advisory Contractor, examine invoices submitted and issue a recommendation that they should be paid. Only the two invoices for December 1978 were reviewed and recommended for payment by Touche Ross and forwarded to Iran. Later invoices were reviewed, if at all, only by

Iran. Taking into consideration that the invoice certification procedures ceased to function around the time of the Revolution, the Tribunal holds that invoices that record costs incurred need not have been submitted under the procedure the Parties had originally established. It is true that Article 6.3., paragraph 4, implicitly referring to this procedure, requires that services rendered by the Claimant to be paid "according to the latest monthly progress report accepted by the Employer." When, as in this Case, the preparation and submission of such reports is impossible due to the lack of necessary communication between the Parties and the absence of cooperation of the other contractors, this requirement cannot prevent a final settlement of claims for services actually rendered. The Tribunal concludes that it suffices that the Claimant substantiates such costs to a reasonable extent and satisfies the Tribunal that it incurred the costs for its performance under the Contract.

130. First, the Claimant seeks $5,450,871 for its alleged performance from 1 December 1978 until 10 February 1979. The Claimant starts from a cumulative amount of $17,580,576 for services from the beginning of its performance through 26 January 1979 as indicated in Invoice No. 24 and from a cumulative amount of $680,114 for materials through 26 January 1979 as stated in Invoice No. 25, thus arriving at a total of $18,260,690. For the month of February 1979, Invoices No. 26 and No. 27 show amounts of $1,019,728 for services and $14,366 for materials, totalling $1,034,094. In order to calculate the amount due for services and materials up to 10 February 1979, the Claimant divides the total of $1,034,094 for February by 2 and arrives at $517,047, which it adds to the cumulative total costs of its performance through 26 January 1979. From this sum of $18,777,737 it deducts the payments it received through 30 November 1978 in the total amount of $13,326,866 and arrives at the figure of $5,450,871. In calculating the

relief sought the Claimant has taken into account that the Respondent's down payment of $10,000,000 was to be amortized by deducting approximately 15% of the price that was invoiced monthly to the Respondent.

131. With respect to the claim for $5,450,871 for the period from 1 December 1978 through 10 February 1979, the Tribunal is satisfied that the Claimant incurred the costs reflected in the invoices. The supporting records utilized in the preparation of the invoices have been audited by the Claimant's auditor, Ernst & Whinney, a firm of independent public accountants, which certified that the amount of $5,450,871 "present(s) fairly" the unpaid costs incurred through 10 February 1979.

132. In addition, the Claimant seeks $2,869,129 for its alleged performance from 10 February 1979 through 25 June 1979. For this period, the Claimant, referring to Invoices No. 34 and No. 35, contends that the cumulative costs through 29 June 1979 were $20,269,814 for services and $774,150 for materials, totalling $21,043,964, as stated in the Settlement Claim Proposal dated 1 August 1979. After subtracting the amount of $18,777,737 for cumulative costs calculated through 10 February 1979, the costs for the period from 10 February 1979 until 25 June 1979 amount to $2,266,227. This is $602,902 less than the amount claimed for this period. The Claimant explained at the Hearing that not all the expenses, including those relating to work after 29 June 1979 in preparation of the September report, were known when the 1 August 1979 termination proposal was drawn up. The Claimant contends that the total amount of $2,869,129 requested in the Statement of Claim covers such unanticipated costs.

133. With regard to the claim for $2,869,129 for its performance from 10 February 1979 through 25 June 1979, the Tribunal, first of all, finds that the Claimant has failed

to prove that it is entitled to the additional $602,902. Therefore, the Tribunal dismisses this portion of the Claim. As to the remaining portion of the Claim for this period the Tribunal finds for the reasons given hereafter that the Claimant has sufficiently substantiated a claim of only $1,438,529.

134. The Tribunal notes that there are several methods of calculating the Claim for performance. After careful consideration of the various options, the Tribunal adopts the following approach: In order to determine the amount due to the Claimant for its performance between 10 February 1979 and 25 June 1979, the Tribunal must subtract the cumulative costs through 10 February 1979 from the cumulative costs through 25 June 1979. The resulting figure will yield the costs to be compensated during this period. The Tribunal notes that, in support of its Claim, the Claimant has submitted as evidence monthly cost summaries which were utilized in the preparation of monthly invoices rendered and examined by Ernst & Whinney.

135. The Claimant contends that its cumulative costs through 10 February 1979 amount to $18,777,737. The Tribunal notes that, based on the monthly costs summaries, the audit by Ernst & Whinney proves the claim for $5,450,871 in unpaid costs through 10 February 1979. Furthermore, the Claimant has admitted receiving $13,326,866 in payment for its cumulative performance. The Respondent has not challenged this amount; indeed it is one of the bases for its Counterclaims. By adding these two figures, the Tribunal finds that the cumulative costs through 10 February 1979 (unpaid costs plus paid costs) were $18,777,737.

136. As to the alleged cumulative costs through 25 June 1979 of $21,043,964, the Tribunal notes that the Claimant has not submitted an independent verification of this amount. The evidence presented in support of this amount

consists of Invoices Nos. 34 and 35 which were prepared on the basis of the costs summaries. An analysis of the monthly costs summaries yields an amount of $19,605,435 as cumulative costs of performance through 10 February 1979,[20] which exceeds $18,777,737, the amount accepted by the Tribunal as cumulative costs through 10 February 1979, by $827,698. In these circumstances, the Tribunal concludes that the discrepancy of $827,698, which apparently was not accepted by Ernst & Whinney, does not represent costs of performance "pursuant to contract No. 121." Indeed, the Claimant has stated in its 1 August 1979 report that "[e]xpenses incurred through June 29, 1979 ($21,043,964) include such costs as phasedown of the project, costs for legal expenses, replacement of business costs and profit lost due to non-payment of invoices." As explained infra, the Tribunal holds that the Claimant is not entitled to such termination costs. The Tribunal concludes, therefore, that Invoices Nos. 34 and 35 include $827,698 to which Claimant is not entitled. Allowing for this discrepancy, the Tribunal finds that the correct cumulative cost of performance through 25 June 1979 is $20,216,266.

137. By subtracting the cumulative costs through 10 February 1979, $18,777,737, from this adjusted amount, the Tribunal finds that the Claimant is entitled to an award of $1,438,529 for its costs from 10 February 1979 until 25 June 1979.

138. There is an alternative way of arriving at the same amount. At the Hearing in response to the question how

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20 The monthly cost summaries show an amount of $17,966,502 for "costs of sales" as of 23 February 1979. Adding the contractual 12% profit to this amount gives a total of $20,122,482 which represents costs through 23 February 1979. It is necessary to subtract $517,047 from this figure to arrive at the alleged costs through 10 February 1979 which amounts to $19,605,435.

to reconcile the Claim of $2,869,129 with the costs summaries, the Claimant produced a "Cost Statement through 2/23/79" indicating that the amount of costs through 23 February 1979 is $20,122,482. By subtracting this amount from the cumulative costs through 25 June 1979 in the amount of $21,043,964, as stated in Invoices Nos. 34 and 35, the Tribunal arrives at $921,482 representing cost of performance from March through June 1979. To calculate costs of performance from 10 February 1979 to 25 June 1979, one half of the total costs for the month of February, $517,047, as calculated by the Claimant, should be added. This also leads to the amount of $1,438,529. The Claimant did not clarify the difference between $1,438,529 and $2,869,129 to the Tribunal's satisfaction.

139. The Tribunal also notes that the cost summary of 23 February 1979 states the total labor cost as $1,253,545 and the total materials cost as $11,521,754. This statement appears to contradict the fact that under the Contract the cost of labor and services usually ran about ten times higher than the cost of material. A closer examination, however, reveals that the figure $11,527,754 for "material cost", includes $10,219,833 for "PUR FR HESD" which represents costs of services rendered by "Harris Electronic Systems Division" (HESD), a company apparently affiliated to the Claimant. There is evidence in the record indicating that HESD was to perform a substantial portion of the service required under the Contract. It shows, for example, that the projected travel costs of HESD "Conus Personnel", which were part of the Financial Plan upon which the Contract price of $65,072,933 was based, was estimated to be four times higher than the the respective costs for Harris International Telecommunication (HIT) (Doc. 141, Exhibit 6, p. 26).

140. Finally, the Tribunal notes that the sum of $1,438,529 for costs of performance from 10 February 1979 to

25 June 1979 is consistent with the evidence in the record which shows that by March 1979 the Claimant had considerably reduced the workforce on the Contract and restricted its contractual activities basically to the maintenance of program records.

141. The Tribunal is satisfied by the evidence before it that the Claimant performed the Contract fully until 10 February 1979 and then continued to fulfill its contractual obligations in the United States as much as could reasonably be expected under the particular circumstances of this Case, until it finally exercised its right to terminate the Contract under Article 6.3. The evidence which establishes that the Claimant actually performed includes the summaries and descriptions of delivered items in the Claimant's Exhibits as well as the 29 September 1979 report describing its complete performance.

142. As to the Ministry of Defence's allegation that the Claimant breached and failed to perform the Contract prior to 1 December 1979, the Tribunal notes that the Claimant was fully paid by Iran during this period and no contemporaneous complaints concerning the Claimant's performance were made. Furthermore, the Tribunal notes that, at the Hearing, Iran accepted that there was dispute only as to the invoices concerning performance after the end of November 1978.

143. The Tribunal notes that Iran did not raise any specific objections to the invoices until this proceeding. Under the Contract Iran was obliged to raise any objections to invoices submitted within four weeks. Even if this four-week rule did not apply when the contractually required cooperation between the Parties ceased, the Tribunal finds, as in Touche Ross, supra, p. 18, and in Ford Aerospace, supra, p. 27, that Iran's failure to respond to the invoices within a reasonable period raises the presumption that they

were, or at least should have been, accepted. The Tribunal holds that the Claimant should have been placed on notice of any objections within a reasonable time after receiving the 29 September 1979 report with the accompanying invoices in November 1979. Under the circumstances, the date 31 December 1979 appears to be a reasonable limit to set on the Respondent's review of the invoices. Since neither approval nor objections were communicated to the Claimant, the Tribunal holds that as of 1 January 1980 Iran became liable to pay the invoices as far as the Claimant was able to show in this proceeding that they are properly calculated and reflect actual costs.

144. The Claimant is therefore entitled to $5,450,871 for its performance from 1 December through 10 February 1979 and to $1,438,529 for its services from 10 February through 25 June 1979, totalling $6,889,400. The rest of the Claim for performance is dismissed.

bb) Claims for Termination Costs

145. The Claimant contends that it is entitled to termination costs in the total amount of $1,642,123.22 under Article 6.8. of the Contract. The Tribunal disagrees. It is true that when the Employer terminates the Contract for convenience under Article 6.8. it is obliged to pay not only "approved actual costs" the Claimant incurred up to the time of termination and "related fee," but also the "approved actual cost of termination of the Contract." However, the Tribunal has found that in this Case the Contract was terminated by the Claimant's invocation of the force majeure provisions of Article 6.3. Article 6.8., therefore, is not applicable.

146. Alternatively, the Claimant argues that it may claim termination expenses under Article 6.3. of the Contract. Again, the Tribunal cannot agree. In contrast to

Article 6.8., this provision does not mention termination expenses. It only states that the "price of services rendered by the Contractor" up to the date of cancellation must be paid. If the Parties had wanted termination costs to be paid under Article 6.3., they could have included them expressly when drafting the provision as they did in Article 6.8. Nor is the Tribunal convinced that the obligation imposed by Article 6.3. on the Parties to "take action to clear their account within three (3) months after the cancellation date of the Contract" is a separate duty which implies that the Claimant is entitled to termination costs. The obligation to clear the account has the purpose of establishing the price of services rendered until cancellation of the Contract. It cannot be invoked as an additional basis for termination charges. Under Article 6.3. such costs lie where they fall.

147. The Tribunal holds, therefore, that the Claimant is not entitled to costs arising from its termination of the Contract. Nonetheless, it is necessary to examine whether any of the costs claimed as "termination costs" may be covered by Article 6.3. of the Contract because they are in fact part of the "price of service" rendered by the Claimant. Costs which the Claimant reasonably incurred to keep the Contract alive may be considered as "service" in the sense of Article 6.3. Costs which arose after the cancellation date of the Contract, however, are not covered by this provision. Rather, they were incurred as speculation by the Claimant because it hoped to be able to conclude a new contract with Iran in the future. No such contract emerged from later negotiations with Iran. This was a risk that the Claimant took.

148. The only cost claimed as "termination expenses" that the Tribunal accepts as recoverable as "services" under Article 6.3. of the Contract is the $60,000 that the Claimant, as explained at the Hearing, spent for security and the

lease of the building that it used for its performance until the end of June 1979. Like the claims accepted by the Tribunal relating to the Claimant's performance, this amount was due on 1 January 1980 at the latest. The other claims for termination costs are dismissed.

cc) Claims for Damages and Losses

149. The total amount claimed for "damages and losses" is $6,357,225.71. The Tribunal will consider each component of this claim separately: (i) the claim for "damage to contractors' relations," (ii) the claim for lost profit, and (iii) the rest of the claims for damages and losses which are all due to Iran's alleged wrongful attempts to draw on the letters of credit provided by the Claimant pursuant to the Contract.

Claim for "Damage to Contractors' Relations"

150. The Claim for "damages to contractors' relations in the amount of $50,000 is based upon the allegation that the Claimant suffered losses in its relations with other IBEX contractors because Iran breached its contractual duties by failing to give the Claimant any instructions and putting it into an adversary position with those other companies. The Tribunal has found that both Parties were excused from performing their obligations under the Contract due to force majeure. Neither Party was in breach of contract. The Respondents, therefore, cannot be held liable for any damages or losses the Claimant incurred as result of the force majeure situation. Moreover, even if the Claimant had established that the Respondents had breached the Contract, it has failed to carry its burden of proving these alleged damages. This part of the Claim must be dismissed.

Claim for Lost Profit

151. Contending that Iran breached and repudiated the Contract, the Claimant seeks to recover the profit it would have earned for the remaining life of the Contract had it not been terminated. It calculates its future lost profits by adjusting the total amount of profit provided for in Appendix 5 to the Contract, which was approximately 12%, or $6,972,100, to $5,059,000. The Claimant bases this claim on the contention that Iranian law and general principles of international law provide that a nonbreaching party is entitled to recover such lost profit.

152. As the Tribunal has found that it was the Claimant which cancelled the Contract pursuant to Article 6.3 due to force majeure, the claim for lost profits cannot be based on the allegation that the Respondent terminated the Contract prematurely. Moreover, Article 6.3., which applies to this Claim, does not provide for such compensation. It only refers to profit earned until the Claimant's termination by the letter of 25 June 1979. Such profit is clearly included in the term "price" which encompasses both costs and profits on costs incurred. Article 6.3., however, cannot be construed also to cover future profit. Furthermore, in Sylvania, supra, p. 30, the Tribunal noted that in determining whether one party should be entitled to receive lost profits in the event of termination of a contract by the other party it is necessary to take into consideration whether the payment of such profits could have reasonably been expected. In Ford Aerospace supra, para. 83, the Tribunal held that the Claimant could not have reasonably anticipated that the Respondent would refrain from ever exercising its contractual right to terminate the Contracts in that Case for its own convenience. In the present Case in which the Contract was terminated by the Claimant itself and not by the other Party, the Claimant had even less reason to expect to receive profits for any period after the cancellation date. But, even if the Contract had been terminated by Iran for its convenience under Article 6.8.,

as the Claimant contends, no lost profits would be due in this case. This part of the Claim is therefore dismissed.

Claim Due to Calls on Letters of Credit

153. The Tribunal first will consider the claim for $510,550.13 for legal expenses which the Claimant alleges it incurred in defending itself against wrongful attempts to draw upon the letters of credit that it had provided pursuant to the Contract.

154. Although the Tribunal concludes that these attempts by the Ministry of Defence were wrongful, the Claimant did not show to the Tribunal's satisfaction that Bank Markazi was actually involved in these attempts. Moreover, Bank Melli was obliged to act as it did under the terms of its guarantee and was not a Party to the underlying Contract.

155. The Tribunal is satisfied, however, that the Ministry of Defence is liable for damages because it wrongfully caused Bank Melli to attempt to draw on the letters of credit. The attempts in early 1980 to call on the letters of credit, have to be examined in the light of Articles 7.4. and 7.5. of the Contract. Article 7.4. provides:

> "In the event the Contract is cancelled due to Force Majeure or the Employer cancels the Contract for any reason except the Contractor's negligence, all Bank Guarantees of good performance of work will be released."

Article 7.5. continues:

> "In any case, the Bank Guarantees for down payments will be released within 4 weeks after the clearance of down payments amount."

The Tribunal concludes that the Respondent was obliged to release the bank guarantees and letters of credit after the

Claimant cancelled the Contract due to force majeure by its letter of 25 June 1979. Under Article 7.5., the Ministry of Defence should have released the guarantees and letters of credit before the end of 1979, which was at least four weeks after it had received the 29 September 1979 report setting out the Claimant's performance including the amortization of the down payment. The Respondents' failure to do so constitutes a breach of Articles 7.4. and 7.5. of the Contract and gives rise to liability for damages that the Claimant sustained in protecting itself in the United States against wrongful calls on the letters of credit.

156. The Tribunal is satisfied on the basis of the Claimant's presentation at the Hearing that in seeking injunctive relief in the United States courts the Claimant incurred damages in the amount of $50,000 for corporate legal expenses, claimed as part of the $193,000 for "legal support" under the heading "termination expenses," and $510,550.13 for outside legal costs totalling $560,550.13. The Tribunal finds, however, that the legal expenses incurred by the Claimant during 1979 in anticipation of a wrongful call on a letter of credit by the Ministry of Defence are not recoverable. Bank Melli clearly had the right to request extensions under the Contract and in the independent bank guarantees and letters of credit. The Claimant has failed to establish that these requests to which it agreed during 1979 were wrongful. Consequently, the Claimant is not entitled to any legal expenses it claims as damages which were incurred prior to the date on which the Ministry of Defence was obliged to release the guarantees and letters of credit. Considering the Tribunal's findings in paras. 143 and 148, the Tribunal concludes that only legal expenses sustained after 1 January 1980 are recoverable as damages.

157. The evidence shows that the legal expenses incurred by the Claimant until 1 January 1980 were

$195,416.57. Deducting this sum from the total amount of $560,550.13, the Tribunal awards $365,133.56 for these damages.

158. The Claim for extra letter of credit fees in the amount of $26,045.93, as amended at the Hearing, is based upon the assertion that the Claimant had to reimburse Chase Manhattan Bank for commissions due to Bank Melli in connection with the letters of credit. The Claimant failed to submit any documentation or evidence to support this claim other than the Affidavit of Mr. Michael Dowling, (Doc. 160), filed on 15 August 1986. As noted above (see II. 1. b) this document is not admissible because it was filed too late. The Tribunal, therefore, dismisses this part of the Claim for the lack of proof.

159. For the same reason the Tribunal also dismisses the claims for $312,500 for "extra commission on letters of credit," for $249,239.65 for "fees for deficient compensatory balances" and for $150,000 for "damage" to "banking relations." The Claimant alleges that it incurred these costs due to the necessity to discontinue its business relationship with Chase Manhattan Bank in order to protect itself against Bank Melli's calls on the letters of credit. The Claimant offered no evidence to prove the claims other than Mr. Dowling's late-filed Affidavit.

160. The following table summarizes the Tribunal's conclusions:

	Award	Claimant
1.	Unpaid invoices (paras. 127-144)	6,889,400.00
2.	Costs qualifying as "services" (para. 148)	60,000.00
	unpaid invoices	6,949,400.00
	less	
3.	unamortized portion of advance payment	(7,952,066.00)
4	Excess of the advance payment over unpaid invoices	(1,002,666.00)
5.	Computer offset	(196,417.00)
		(1,199,083.00)
	plus	
	Damages for wrongful calls on letter of credit (para. 157)	365,133.56
		(833,949.44)

dd) Interest

161. The Claimant requests 11,89% interest on the amounts owed for services, termination costs and damages and losses. As noted above, however, the Respondent's down payment was sufficient to cover all of the outstanding unpaid invoices. Consequently, the Tribunal dismisses the claim for interest.

ee) Standby Letters of Credit and Bank Guarantees

162. The Tribunal finds that since the Contract was terminated and there is no performance to be guaranteed thereafter, and since the Ministry of Defence has been credited for the remaining balance of its down payments for which no security is necessary, the bank guarantees and letters of credit issued to this end, see para. 5, all of which have meanwhile expired, have no further purpose. Moreover, under Article 7.4. of the Contract the Respondent was obligated to release the underlying bank guarantee of good performance when the Contract was cancelled due to force majeure. As to the down payment guarantees, Article 7.5. of the Contract provides that such guarantees will be released "within 4 weeks after the clearance of downpayments amount." The Ministry of Defence is therefore obliged to withdraw demands for payment of these guarantees and to refrain from making any further demands thereon. It is further obliged to have those bank guarantees cancelled and to ensure the release of the corresponding letters of credit. See Ford Aerospace Communications Corp. and Government of The Islamic Republic of Iran, Partial Award No. 289-93-1, para. 89 (29 Jan. 1987).

c) Proceedings in Iran

163. The Ministry of Defence filed its Counterclaim in this Case on 27 December 1982. In a Request filed 29 November 1985, the Claimant asked the Tribunal to compel a stay of certain proceedings in Tehran of which it had received notice on 12 November 1985 and which it claimed were related to the present Case.

164. In an Order filed 19 December 1985, the Tribunal noted that to grant the requested relief, the Tribunal must be satisfied that the proceedings in Tehran involve the same subject matter as the Claim and/or Counterclaim in this Case. The Tribunal requested that the Claimant file certain

documents and that the Respondent file comments on the Claimant's request by 31 January 1986.

165. In an Order filed 18 February 1986, the Tribunal extended the Respondents' time to file comments until 31 March 1986. At the same time the Tribunal, noting that the Claimant was apparently summoned before the Public Court of Tehran on 1 March 1986 in proceedings commenced by the Iranian Ministry of Defence, requested that the Respondents immediately take all appropriate steps to ensure that no further action is taken in the Tehran court proceedings until the Tribunal decides on the Claimant's request to stay proceedings in Tehran.

166. The Ministry of Defence submitted its comments on the Claimant's request on 20 February 1986, arguing that the Claimant's request was unjustified because the contract vests exclusive jurisdiction in Iranian courts. Furthermore, it contended that the Claim under consideration in Tehran differs from that in this proceedings. The relief sought by the Ministry of Defence amounts to $86,000,000, while the relief sought in Tehran would only amount to $21,278,930.

167. On 14 July 1986 the Claimant notified the Tribunal that on 3 June 1986 it had received a new Summons and Complaint in the proceeding instituted against it in Iran by the Ministry of Defence requiring it to appear in the Public Court of Tehran on 29 October 1986. The Claimant requested the Tribunal to direct the Ministry of Defence to stay the Tehran proceeding pending a Final Award by this Tribunal.

168. According to a copy of a Motion submitted in the Tehran proceeding, the Ministry of Defence claims reimbursement of $13,326,866, evidenced by 21 invoices, alleging that they did not yield any results due to the suspension of the performance of Contract 121 by the Claimant, plus

reimbursement of $7,952,066 as the balance of the down payment. It also reserves the right to claim over $50,000,000 against the Claimant "and other contractors who were signatories to the IBEX project Contract and for which Harris had assumed the coordination."

169. In an Order filed 4 August 1986 the Tribunal invited the Ministry of Defence to comment by 3 September 1986 and deferred decision on the Claimant's renewed request until after the Hearing. In a letter filed 2 September 1986 the Iranian Agent explained that the Respondent had not been able to complete its submission because of insufficient time and that it would respond at the Hearing and, if necessary, would request permission to file a Post-Hearing Memorial.

170. At the Hearing the Claimant alleged that the Respondent's Claim in the Tehran proceedings is the same as the Counterclaim before the Tribunal and requested a ruling corresponding to the one in Questech, supra, p. 41. There were no further comments by the Respondent.

171. The Tribunal is satisfied on the basis of the evidence before it that the Claim filed against the Claimant with the Court in Tehran involves the same subject matter as that of the Counterclaim before it in this Case. By virtue of the Tribunal's assumption of jurisdiction over the Claims and Counterclaims, they are, as of the date of their filing with the Tribunal, excluded from the jurisdiction of any other court. This consequence of Article VII, paragraph 2, of the Claims Settlement Declaration has been confirmed by the consistent practice of the Tribunal since E-Systems, Inc. and Government of the Islamic Republic of Iran, Interim Award No. ITM 13-388-FT (4 Feb. 1983). The effect of the Tribunal's assumption of jurisdiction in the present Case is that as of 27 December 1982, the date of filing of the Respondent's Counterclaims with the Tribunal, the Tehran Court is divested of jurisdiction to consider the subject

matter of the Claim which the Respondent brought before that Court on 6 December 1982.

d) The Counterclaims

aa) Balance of Down Payment and Damages

172. Based upon the premise that the Claimant breached and failed to perform the Contract, the Ministry of Defence seeks recovery of the balance of the down payment in the amount of $7,952,066 plus interest, $13,326,866 it paid for invoices, $3,000,000 for delayed performance damages and $60,000,000 for other damages and, if the Claimant's force majeure defence is accepted, the reimbursement of amounts received in excess of work performed. Since the Tribunal has found that the Claimant did not breach the Contract, but rather fulfilled its contractual obligations as much as possible under the circumstances until it exercised its contractual right to terminate the Contract due to force majeure, the Ministry of Defence is only entitled to the amount of $833,949.44 which, as noted above, is due to Iran for the balance of the down payment and for the offset of the computer purchased by the Claimant for the Contract.

173. The Respondent claims interest on the balance of the down payment. The Tribunal has found that as of 1 January 1980, $6,889,400 for unpaid invoices and $60,000 for costs qualifying as "services" within the meaning of Article 6.3, paragraph 4, of the Contract were due to the Claimant. Deducting the total of $6,949,400 from the unamortized portion of Iran's down payment in the amount of $7,952,066 leaves, as of 1 January 1980, a balance of $1,002,666 in favor of Iran. The Ministry of Defence is entitled to interest on this amount until the date on which the Claimant may set off its claim for damages resulting from the wrongful calls on the letters of credit. The Tribunal has

accepted that $365,133.56 is due to the Claimant for damages for this reason. These expenses were incurred cumulatively over a longer period. It started on 1 January 1980, the date by which Iran should have released the bank guarantees and letters of credit, and ended with the ultimate stay of the proceedings in the United States in the federal court in Florida on 30 September 1983. It appears fair, therefore, to both Parties, for the purpose of determining when the Claimant should be allowed to set off its claim for damages against the Respondent's claim for interest, to accept a date approximately in the middle of the entire period, which is 10 December 1981.

174. Having regard to the general considerations set forth in Atomic Energy Organization of Iran and United States of America, Award No. 246-B7-1, pp. 5-8 (15 Aug. 1986), the Tribunal considers it reasonable to award the Respondent simple interest at the rate of 10 percent per annum on the amount of $1,199,083, consisting of the excess of the down payment over unpaid invoices in the amount of $1,002,666 plus $196,417 for the value of the computer, from 1 January 1980 until 10 December 1981 and on the amount of $833,949.44 from 10 December 1981 until the execution of the Award.

bb) Social Security Premiums and Penalties

175. In its Statement of Counterclaim filed on 27 December 1982, the Ministry of Defence claimed Rials 211,768,616 for "insurance premiums and penalties." In Doc. No. 120 filed on 14 March 1985, the Respondent requested an award ordering the Claimant to pay Rials 211,868,616 for "Social Security contributions" and "delayed payment of fines." There was no further substantiation of this claim until the Ministry of Defence filed a "Supplementary Brief on Social Insurance Premiums" (Doc. 142) on 11 June 1986.

On 29 August 1986, the Claimant filed a reply to this memorial denying that the Tribunal has jurisdiction over the Claim and that it has any factual basis.

176. Previous decisions of the Tribunal interpreting Article II (1) of the Claims Settlement Declaration have clarified that the Tribunal has no jurisdiction over counterclaims for social security premiums that are based on municipal laws rather than on the contract which forms the basis of the claims. Article 2.26 of the Contract in this Case stipulates that the Claimant is responsible for "Payment of all taxes, charges, fees and Government charges relating to this Contract and contractor's personnel and his Contractors outside of Iran" (emphasis added). The Contract does not provide for any obligation of the Claimant to pay social security premiums in Iran. Any such obligation can therefore only stem from an application of Iranian law, which is also the legal basis on which the Respondent itself basis this Counterclaim. Thus, the Counterclaim for social security premiums and related penalties must be dismissed.

cc) Delivery of Documents

177. In its Rejoinder filed 31 October 1983 (Doc. 64), the Ministry of Defence requested that the Tribunal order the Claimant to return documents and papers allegedly belonging to the Ministry of Defence which the Claimant took to the United States and to submit a comprehensive report on the performance of the other IBEX Contractors. In its memorial filed on 14 March 1985 (Doc. 120), the Ministry of Defence again requested that the Tribunal require the Claimant to deliver the documents, papers, and equipment related to the IBEX project. Denying that it had received the last list of deliverable items and project inventories held by the Claimant, the Ministry of Defence repeated this request in its Response filed 3 April 1986 (Doc. 140). On

15 August 1986, the Agent of the Government of the Islamic Republic of Iran filed three volumes containing lists of documents allegedly belonging to Iran which the Claimant received from other IBEX contractors by the end of 1978 (Doc. 164), together with an Explanatory Note (Doc. 163) in which the Ministry of Defence requested that the Tribunal order the Claimant to deliver all documents, correspondence, and equipment it received from other IBEX contractors and to submit the latest inventory of items.

178. The Ministry of Defence alleges that the Claimant failed to honor its contractual obligations to deliver the documents related to the IBEX program to Iran and to set up a library in Iran. It further contends that at the September 1979 meeting in Tehran the Claimant stated that it was unable to deliver the documents and files in its possession due to the lack of an export licence from the United States Government.

179. The Claimant admits that it holds documents concerning the IBEX project in a large library at its headquarters in Florida. It contends that these documents are its own copies of documents previously submitted to Iran and duplicates of those contained in the data library in Iran. In its 29 September 1979 Report (Doc. 29, Ex. 4, p. A-61), the Claimant stated that until the time of the Islamic Revolution it maintained a data library in Iran at Doshen Tappeh which was not as complete as the data library in the United States "inasmuch as the U.S. data library was to be transferred to Iran at a later point in the IBEX program." The Report also maintains that "difficulties in transportation between the United States and Iran which began in January 1979 made impossible the updating of records in Iran with the most current program data." The Claimant alleges that it invited Iran several times to inspect the documents in Florida without receiving a

response. The Claimant also denies that it failed to deliver an inventory of the items in the data library.

180. At the Hearing, the Claimant explained that all documents in Florida are held in a warehouse belonging to a third-party contractor without any security arrangements. It further contends that it would have to obtain an export licence to deliver them to Iran. As the Claimant was unable to assure the Tribunal that the Government of the United States would grant such a licence, it declared that it was prepared to place the documents in a bonded warehouse.

181. Under Article 3.1.5. of the Statement of Work attached to the Contract the Claimant was responsible, inter alia, for:

> "e. General Data Base Libraries
>
> (1) United States - provisions for operation and maintenance of a General Data Base Library in the United States that shall consist of all deliverable documentation, reports, data, and specifications prepared for the Program. Provisions for notifying the Buyer in writing when the General Data Base Library is established in the United States.
>
> This General Data Base Library shall be operated by the Seller for use by the Buyer and the Program participants.
>
> Provisions for establishment and maintenance of historical logs and file copies of all Program correspondence between Program participants.
>
> (2) Iran - provisions for operation and maintenance of a General Data Base Library at the Buyer's facility in Iran that will consist of all deliverable and historical documentation, reports, data, and specifications prepared for the Program. Provisions for notifying the Buyer in writing when the General Data Base Library is established in Iran.
>
> This General Data Base Library shall be operated by the Seller for use by the Buyer and Program participants.

Establish and maintain historical logs and file copies of all Program correspondence between Program participants.

(3) Access - access to the General Data Base data in both the United States and Iran shall be at all reasonable times.

(4) Technical Reference Books and Materials - The Seller shall provide technical reference materials to include engineering, logistics, and Visual Search Microfilm Film reference files; for an amount not to exceed $325,000.00.

(5) Maintenance and Updating - Provisions for removal of obsolete, invalid, and superseded data.

(6) Delivery - Deliver the contents of the United States and Iran General Data Base Libraries to the Buyer at the conclusion of the Contract."

The Tribunal is satisfied that the Claimant fulfilled its obligations as much as possible with regard to the establishment of the data library in Iran and that it delivered the inventory lists as contractually required. As to the claim for delivery of the documents relating to the IBEX program held by the Claimant, the Tribunal concludes that the Claimant is obliged, pursuant to Article 3.1.5 e(6), to deliver the contents of the United States General Data Base Library to Iran. If this requires an export licence issued by the Government of the United States, the Claimant is obligated to take all reasonable steps to obtain such a licence. Furthermore, the Tribunal orders the Claimant to submit to the Tribunal, within a period of six months after the filing of this Award, a specific proposal concerning delivery of the contents of the General Data Base Library to a bonded warehouse in the United States. The proposal should also include a discussion of the allocation of the costs of obtaining the export licence, arranging the delivery of the library, and storage at that warehouse.

182. The Tribunal retains jurisdiction over this part of the Counterclaim.

e) Costs

183. Taking criteria of the kind outlined in Sylvania, supra, pp. 35-38, and the factual and legal issues of this Case into account, especially the amounts of the Claims and Counterclaims and the extent to which both are dismissed, the Tribunal determines that each Party should bear its own costs of arbitration.

III. AWARD

184. For the foregoing reasons,

THE TRIBUNAL DETERMINES AS FOLLOWS:

a) The bank guarantees Nos. D/29934 and D/29936 to D/29942 issued by BANK MELLI IRAN pursuant to the Contract and the Letters of Credit Nos. P-302242 to P-302245, P-302246 to P-302249, and P-302280 issued by Chase Manhattan Bank in connection with this Contract have no further purpose. The Respondent MINISTRY OF DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN shall withdraw all demands for payment in connection with the guarantees and shall refrain from making any further demands thereon. The MINISTRY OF DEFENCE shall take all action necessary to ensure that BANK MELLI cancels the guarantees, that Chase Manhattan Bank releases the Letters of Credit, and that BANK MELLI withdraws all demands for payment made in respect of the Letters of Credit and refrains from making any further demands thereon.

b) With regard to the proceedings commenced by the Respondent THE MINISTRY OF DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN in the Public Court of Tehran, the Tribunal determines that the Claims over which the Tribunal has found in this Award that it has jurisdiction were, as of the date such Claims were filed in the form of Counterclaims in this Tribunal, and continue to be, excluded from the jurisdiction of that Court or any other Court by the terms of the Claims Settlement Declaration.

c) The Claimant HARRIS INTERNATIONAL TELECOMMUNICATIONS, INC. is obligated to pay the Respondent THE MINISTRY OF DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN the sum of Eight hundred thirty three thousand nine hundred forty nine United States Dollars and forty four Cents ($833,949.44) plus simple interest at the rate of 10 percent per annum (365-day basis) on the amount of $1,199,083.00 from 1 January 1980 until 10 December 1981 and on the amount of $833,949.44 from 10 December 1981 until the date of payment of this amount.

d) The Tribunal retains jurisdiction over the Counterclaim for delivery of the documents relating to the IBEX program held by the Claimant in its General Data Base Library in the United States.

e) The remaining Claims and Counterclaims are dismissed.

Dated, The Hague
02 November 1987

Karl-Heinz Böckstiegel
Chairman
Chamber One

In the name of God

Mohsen Mostafavi

Concurring, except with respect to the holdings in connection with paras. 162 and 184 a) concerning the bank guarantees and letters of credit, the award of damages due to the calls on letters of credit, and except with respect to the findings relating to social security premiums, interest and and cost of arbitration with regard to which I have already expressed my opinion in other Cases.

Howard M. Holtzmann

Concurring fully in the Award except dissenting as to the denial of termination costs. See Separate Opinion.