IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 48
CHAMBER THREE
Award No. 255-48-3

AMERICAN BELL INTERNATIONAL INC.,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN,
THE MINISTRY OF POST, TELEGRAPH and TELEPHONE OF THE ISLAMIC REPUBLIC OF IRAN, and THE TELECOMMUNICATIONS COMPANY OF IRAN,
Respondents.

AWARD

Appearances

For the Claimant:

Mr. Lee R. Marks
Counsel for Claimant,
Mr. Alan S. Weitz
Counsel for Claimant,
Mr. Hamid Sabi
Counsel for Claimant,
Mr. Peter J. Lumia
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Counsel for Claimant,
Mr. Ira T. Kasdan
Counsel for Claimant,
Mr. Robert D. Dalziel
President of Claimant.

For the Respondents:

Mr. J. Niaki
Representative of the Agent of the Government of the Islamic Republic of Iran,
Mr. M.T. Naderi
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Representative of the Telecommunications Company of Iran,
Mr. M.B. Moeeni
Contract Expert of the Telecommunications Company of Iran,
Mr. S. Rabii
Assistant to the Legal Adviser,
Mr. H. Sheikholeslami
Representative of Social Security Organisation,
Mr. F. Afrasiabi
Representative of Social Security Organisation.

Also Present:

Mr. John R. Crook
Agent of the United States of America,
Mr. Michael Glanz
Assistant to the Agent.

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I. PROCEDURAL HISTORY

1. Claimant, AMERICAN BELL INTERNATIONAL ("ABII") submitted its Statement of Claim against Respondents, THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF POST, TELEGRAPH AND TELEPHONE OF THE ISLAMIC REPUBLIC OF IRAN, and THE TELECOMMUNICATIONS COMPANY OF IRAN ("TCI"), on 16 November 1981. The Claim arose in connection with a ten-year plan to modernize the civilian and military telecommunications system of Iran ("Seek Switch Program"). In its claim, as later modified, Claimant seeks $64,103,333.17, plus interest and costs, based on Respondents' alleged failure to make payments due under two contracts and the alleged expropriation of certain funds belonging to Claimant.

2. On 14 May 1982, TCI submitted a Statement of Defence and a Statement of Counterclaim. The Ministry of Defense filed a brief Statement of Defence, but all the major submissions from Respondents' side have been filed by TCI ("Iran" and "Respondents" as used later in this Award refer collectively to all the Respondents represented by TCI). Respondents deny Claimant's allegations and plead several counterclaims on the basis of alleged contract breaches committed by Claimant. The position of Respondents is also that the contracts in question are unenforceable due to improper payments allegedly made or facilitated by Claimant.

3. After a Prehearing Conference was held on 15 February 1983 the Tribunal separated certain specific legal issues to be decided prior to the Final Hearing. On 18 October 1983 a Hearing was held on these issues. By Interlocutory Award No. ITL 41-48-3 filed on 11 June 1984, reprinted at 6 Iran-U.S. C.T.R. 75 ("Interlocutory Award"),

the Tribunal decided several jurisdictional and other preliminary legal issues.

4. The Final Hearing was held on 9 and 10 October 1985. On 8 November 1985 Respondents submitted a Post-Hearing Memorial. This had been authorized by the Tribunal in view of the submission by Claimant on 30 September 1985 of its Counter-Memorial with extensive supporting documents the Farsi version of which, moreover, was not timely submitted.

II. BACKGROUND TO THE CLAIMS AND COUNTERCLAIMS

5. In 1975 the Government of Iran selected American Telephone and Telegraph Company ("AT&T") to assist Iran in the overall coordination of the Seek Switch Program for the modernization of Iran's military and civilian telecommunications system. Claimant ABII was formed by AT&T for this program, which originally was part of the Foreign Military Sales ("FMS") Program between Iran and the United States. Therefore ABII's first direct contractual relationship (an FMS Contract) concerning the Seek Switch Program was with the United States Air Force. This contract covered the period between 28 May 1975 through 31 March 1977. Afterwards, in 1977 ABII and the Government of Iran entered into a direct contractual relationship by agreeing on Contract No. 112, which was in force from 1 April to 15 July 1977. It was followed by two contracts concluded for one year each: Contract No. 118, valid from 16 July 1977 to 15 July 1978, and Contract No. 138 which was to expire on 15 July 1979.

6. The contracts also incorporated by reference a comprehensive Statement of Work ("SOW") which presented the work to be carried out during the planned ten-year lifetime of the project. This Statement of Work was subject to

modification and review by the parties and it was to be updated as each successive contract was negotiated by the parties. Thus the "SOW IR-104", which both covered the whole ten-year period and detailed the services to be performed during the first one-year contract (Contract 118), was supplemented by Annex 1 specifying the works to be done under Contract 138 when that contract entered into force.

7. In the SOW ABII is referred to as "Integration Contractor". Its basic tasks were to "manage implementation of both the civilian and the military elements of the program", to select and supervise "capable and reliable technical personnel from the Bell System", (i.e., AT&T and its affiliated telecommunications companies), and "to establish necessary elements of infrastructure in concert with hardware programs" associated with the Seek Switch Program. In this role, ABII performed three major types of services: 1) preparation of engineering analyses, reports, specifications, and other technical documents referred to generally as "deliverables"; 2) supervision of contractors participating in the Seek Switch Program; and 3) training of TCI personnel eventually to assume full responsibility for the upgraded telecommunications network. ABII was entitled to be paid for these services on the basis of "man/months" (see infra paragraphs 92-93) worked by its technical personnel. To some extent ABII was also to act as the procurement agent for the Government of Iran to secure material and equipment necessary for the performance of the contracts. ABII, however, was not directly responsible for the actual construction work contemplated by the Seek Switch Program.

8. The SOW provided that the Government of Iran was to be "responsible for providing the necessary resources, supervision, manpower, timely decisions, approvals or disapprovals, acceptances or non-acceptances, etc., and, in general, for exercising its total authority and effective control over the Seek Switch Program in a manner which

enables and facilitates implementation of the Seek Switch Program and of the implementation tasks of this Statement of Work." The Iranian Government agencies principally involved were the Communications and Electronics Organization of the Ministry of War ("CEO") and TCI. The former had overall project supervision and control, whereas TCI was responsible for the technical management and review. TCI's role is illustrated by the fact that much of its organizational structure was parallel to that of ABII.

9. ABII commenced performance under the Seek Switch Program in late 1975. Work proceeded under various contracts from 1975 to the second half of 1978 without any major disputes or interruptions. In the fall of 1978 and early 1979, however, political and social conditions in Iran deteriorated drastically. Starting in November 1978 very substantial invoices submitted by ABII went unpaid, and at the end of December the latter stopped its technical work. ABII's work force of over 800 persons was removed quickly, so that by 16 February 1979 all ABII employees had departed Iran.

III. PRELIMINARY ISSUES

A. Jurisdiction

10. Most of the jurisdictional issues were decided by Interlocutory Award No. ITL 41-48-3 of 11 June 1984, the legal authority of which as res judicata is to be respected by the Chamber in its present composition as well as by the parties. The Interlocutory Award held that ABII's claims are those of a United States national within the meaning of Article VII, paragraph 2 of the Claims Settlement Declaration, and that none of the contracts at issue contains a forum selection clause of the type that would deprive the

Tribunal of jurisdiction under Article II, paragraph 1 of the same Declaration.

11. ABII's claims are based on Contract Nos. 118 and 138 between ABII and the Government of Iran, on alleged expropriation, or other actions allegedly taken by Respondents and affecting ABII's property rights. There is no dispute that all the named Respondents fall under the definition of Iran as contained in Article VII, paragraph 3 of the Claims Settlement Declaration. Thus the Tribunal has jurisdiction over the claims.

12. With respect to the counterclaims, it was decided in the Interlocutory Award that there is no jurisdiction over counterclaims asserted against AT&T, and that Contract Nos. 112, 118 and 138 form a "transaction" so as to give jurisdiction over counterclaims based on Contract No. 112 even though no claim by ABII is based on it. It was further held that counterclaims alleging violations of Iranian penal laws and tortious conduct by ABII are outside the Tribunal's jurisdiction. The question of jurisdiction over counterclaims for social security premiums and taxes was joined to the merits. See infra paragraphs 192 - 193.

B. Enforceability of the Contracts

13. Two of the preliminary legal issues reserved for the Interlocutory Award were formulated as follows:

> e. Are Respondents estopped from asserting that the Contracts in issue are invalid, and, if not, are rights under the contracts enforceable?
>
> f. In the event that rights under the contracts are not enforceable for any reason, may Claimant recover under its alternative theories?

14. In the Interlocutory Award the Tribunal stated that "[h]aving in its earlier pleadings contested the enforceability of Contract Nos. 118 and 138, TCI subsequently modified its position so that it now concedes that these contracts were valid and enforceable. Consequently, issues e and f above are moot." Interlocutory Award, supra paragraph 3 at 8-9.

15. However, in both its Hearing Memorial submitted on 15 August 1985 and the Counterclaim Memorial submitted on 30 August 1985 Respondents argue that Contracts 118 and 138 are not enforceable. This position has not been abandoned in the Post-Hearing Memorial of 8 November 1985, although in this document Respondents primarily focus on their alternative theory, according to which the events allegedly causing the unenforceability in any case were contract breaches, including breach of Contract 112. The grounds for the unenforceability, according to Respondents, are various alleged improper rental payments made or arranged by ABII which assertedly amounted to bribery. "Where a contract has been obtained by bribes, it shall not be enforced", TCI contends, stressing that because of the strong public policy reasons behind this rule it can be invoked by the aggrieved party at any stage of the proceedings at which it may become aware of the facts rendering the contract unenforceable.

16. It is a general principle of law that a party which at some stage of judicial or arbitral proceedings admits that certain legal conclusions can be drawn from some facts or circumstances is thereafter estopped from arguing otherwise in the same proceedings.

17. In the present case essentially no new grounds in support of the unenforceability of the contracts have been

presented since the question of validity and enforceability was found by the Tribunal to be moot. The main reasons allegedly supporting the unenforceability of the contracts were raised by Iran as early as in TCI's Statement of Counterclaim of 14 May 1982, to which Respondents explicitly referred when admitting the enforceability of the contracts on 14 June 1983 in their submission on the preliminary legal issues. In view of the admission contained in the latter document, Respondents' argument, put forward in the Post-Hearing Memorial, to the effect that TCI's admission of enforceability concerned only the question whether procedural requirements such as authority to sign were met, cannot be accepted. Considering, moreover, that this concession was not affirmatively reversed at the Hearing on 18 October 1983 which was convened to examine and decide, inter alia, these very questions, the Tribunal does not find any reason why Respondents should not continue to be bound by their concession.

18. Respondents' alternative theory that the allegedly improper rental payments amounted to contract breaches will be addressed infra in paragraphs 153 - 159.

IV. CLAIMS

19. ABII asserts five main categories of claims. Four of them are based on Contracts 118 and/or 138 and pertain to the following subject matters: (a) termination costs; (b) professional services rendered during November and December 1978; (c) procurement services; and (d) office space costs. The remaining claim arises out of the alleged expropriation of certain funds held by ABII in a bank account.

A. Termination Costs

1. Introduction

20. ABII's termination costs claim is not only the biggest individual component of Claimant's claims, but also an issue the decision of which may have an impact on the disposition of certain other claims. It is therefore proper to deal with it first. ABII claims $35,199,351 for various costs associated with the termination of Contract 138. ABII alleges that TCI and CEO effectively terminated the contract by unjustifiably refusing to pay invoices, by unilaterally demanding that ABII reduce its technical force to a small fraction of that contemplated in the SOW and by conducting a general campaign of harassment that prevented ABII from fulfilling its obligations. ABII admits that by its terms Contract 138 accorded Iran a right to terminate it since ABII served "at the pleasure" of Iran. ABII claims, however, that the contract entitles ABII to reimbursement for its costs of terminating the contractual arrangement.

21. Respondents contend that civil unrest and the events of the Revolution, not the actions of TCI and CEO, forced ABII to remove its personnel from Iran. Iran also disputes that such force reductions as were ordered were unilateral or unreasonable. Rather, Respondents argue that those orders were justified in view of ABII's declining productivity, and were also agreed to by ABII.

22. Iran disputes that the terms of the contract provide for payment of termination costs in the circumstances of the case. It argues that the contract never was formally terminated but merely "expired by its own terms". Additionally, Iran argues that the bulk of ABII's costs were incurred prior to termination and thus fall outside the scope of "post-termination" costs contemplated by the contract. Finally, Iran challenges the proof as to many categories of termination costs asserted by ABII.

2. Developments Preceding the End of Contract 138

23. After the first months of Contract 138, during which it was performed without serious disagreements between the parties, the situation started changing rapidly in the fall of 1978. The disputes and discussions between the parties principally focused on three separate though inter-related issues: a) the question of coordination of vacations and absences of ABII technical personnel; b) the question of the number of ABII personnel needed for the project, and c) the payment of invoices. The last-mentioned question is discussed at length in connection with the invoice claims (see infra pargraphs 92-120), whereas the two other issues are addressed in the following sections.

a) Coordination of Vacations and Absences

24. Services of ABII technical personnel were billable on the basis of man/months, and absences such as authorized vacations and business trips were included in the calculation of man/month rates. Paragraph E of Appendix 6 to Contract 138 provided that:

> The time of vacation should be co-ordinated with TCI to prevent any harm to the progress of the project.

25. The first sign of a dispute concerning absences or related questions appeared 20 August 1978 when TCI wrote to ABII complaining that certain ABII personnel had taken business trips on TCI's behalf without the latter's consent. After that the issue of absences apparently was not taken up until 10 October 1978 when TCI wrote to ABII stating that in

its view the provision quoted above and the contract should be interpreted so as to require TCI's advance authorization for any anticipated vacation by ABII personnel, as well as for other absences such as business travel. In the ensuing discussion between the parties TCI's standpoint was strongly supported by CEO. Thus on 5 November 1978 General Tavakoli, the Deputy Vice Minister of War and director of CEO who had day to day responsibility for the administration of the contract, wrote to ABII confirming this position as a necessary requisite "[f]or the purpose of review and verification of . . . invoices and also for avoiding any probable delay in the Seek Switch Programme . . . ." Without such advance approval, the letter went on to say, "the absence of each personnel in its original work-site shall be considered as an absence and Article 3.4. of the Contract shall be applied." Respondents contend that this was a warning that failure to coordinate absences in this manner would lead to suspension of invoice payments.

26. ABII's initial reaction to the demand for advance approval was abrupt rejection. On 24 October 1978 ABII commented by stating that approval was neither required by the contract nor compatible with the goal of effective operation of the Seek Switch Program; it was enough that "ABII knows where [its employees] are at all times and we depend on our Directors to administer their directorates . . . ." However, ABII's position was not inflexible, so that after Mr. Tavakoli's letter it suggested, on 12 November 1978, negotiations on the subject. In a letter dated 29 November 1978 TCI replied that the matter is "to be taken up on the occasion of forthcoming discussions on revision of the Contract No. 138."

27. No such revision ever came about, and the question of coordination of absences remained unresolved.

b) Reduction of ABII's Work Force

28. During the fall of 1978 the parties undertook various discussions concerning the level of ABII's work force required in Iran. According to Contract 138, ABII's work force was to increase significantly in order to meet the designated objectives of the Seek Switch Program outlined in the SOW for the July 1978 - July 1979 period. Contract 138 contemplated that 13,000 man/months of services would be rendered during this period, as compared to the 7,400 man/months rendered under Contract 118 during the previous period. Thus whereas by October 1978 ABII had some 800 technical specialists in Iran, this figure was expected to grow up to as many as 1,145 by July 1979.

29. This growth, however, came to a halt. Contract 138 authorized TCI to review all employees ABII proposed to add to its work force and to veto any employees whom TCI considered unqualified. On 4 October 1978 TCI notified ABII that all 86 new individuals proposed by the latter were "rejected for the positions for which they have been proposed until certain administrative matters between ABII and TCI are clarified." In this proceeding Respondents have contended that these unspecified "administrative matters" concerned disagreements over vacations and absences, a question discussed above.

30. ABII protested against this rejection, calling it "arbitrary" and "a violation of the intent of the contract". At the same time, however, it showed a certain understanding for some of the underlying reasons insofar as it stated that "out of respect for the situation in the country . . . we are voluntarily reviewing the S.O.W. for possible reductions." The "situation" in Iran at that time, 27 October 1985, was characterized by increasing social and political unrest which also affected the Seek Switch Program and the safety of ABII's Iran-based employees. In

mid-November 1978 ABII's internal "Iran Update" report stated that about 15 of such employees "had initiated voluntary return home."

31. By that time ABII had, despite its objections, clearly accepted the idea that its role in the Seek Switch Program would be somewhat more limited. Thus on 1 November 1978 it wrote to CEO emphasizing the need to amend the contract accordingly. While under Articles 2.12 and 3.10 of Contract 138 Iran had the right to change the required services to some extent and to reduce the number of ABII's personnel, such changes were to be made by mutual agreement. The contract (paragraph 2 of Appendix 3) provided that in connection with such amendments the man/month rates should be adjusted to compensate ABII for losses incurred due to reductions.

32. Before any amendments were made, the pressure towards reducing ABII's work force accelerated. On 26 November 1978 CEO, referring to "in person" negotiations and to a request "to cut down [the] number of that company's staff in Iran", asked ABII to eliminate its personnel at four TCI departments and to reduce the number of ABII persons working at the office of two Deputy Managing Directors of TCI. The letter also ordered deletion of nine separate items from the SOW. On the following day, 27 November 1978, another CEO letter "in continuation of the program of [ABII's] staff cut down" ordered further staff reductions.

33. The parties disagree on the scope and nature of the 26 and 27 November force reduction orders. Claimant has alleged that these "drastic" measures reduced the workforce by 83%. Respondents contend that the orders amounted to termination of all but 400 (i.e. 50%) of ABII employees, a reduction which, they argue, in view of the employer's right under articles 2.12 and 3.10 to change the requested services and the number of personnel, was quite

justified considering ABII's allegedly collapsing productivity in October and November 1978. Whatever the relative size of the reductions, an ABII letter to AT&T dated 21 December 1978 (distributed at the Hearing without objection from Claimant) indicates that by that time ABII had been ordered to reduce its work force to approximately 400.

34. In any case, ABII started reducing its work force and expressed its readiness to "cooperate fully with IGOI to help resolve the problems brought on by the present situation." ABII, however, in several letters in late November and early December 1978 emphasized its wish to have the reductions executed by mutual agreement as provided in Article 3.10 of the contract. While repeating this position, ABII, for the first time, in identical letters to TCI and CEO dated 13 December 1978, also called the reductions a "partial termination" of the contract and asserted therefore that it was entitled to termination costs as provided in Contract 138. CEO on 17 December 1978 rejected this contention. In fact, the parties by that time had engaged in negotiations concerning contract modifications envisaged in the contract.

35. After that, however, the situation worsened drastically, and the negotiations just referred to could not be finished. Riots, demonstrations and civil disturbances, including threats directed to ABII employees and their families, escalated, and the whole of Tehran was paralysed by a general strike on 30 December 1978 through 1 January 1979. Under these circumstances ABII suspended its technical performance on 31 December 1978, and, on 2 January 1979, announced to its employees that "[t]he company has recommended all dependents of ABII employees leave Iran, principally because of a continuing shortage of fuel for electricity and transportation."

36. Contemporaneous ABII reports indicate that by 9 January 1979 its personnel in Iran had fallen to some 500 employees and dependents from the mid-November figure of some 2,100 people. The number of Iran-based employees, when it was approximately highest (in late November and early December 1978), was 846. This figure can be derived from ABII's on-roll report (cf. infra paragraph 98) of 30 November 1978. On 12 January 1979 Iran Update reported that the number of ABII employees and dependents would diminish in a few days to less than 250, or below the level envisaged by the November 1978 reduction orders. These latest departures, however, had been preceded by discussions between ABII and TCI on 9 January in which TCI apparently continued to press demands for force reductions. The record indicates that on 14 January 1979 ABII was instructed by CEO to reduce its work force further, leaving ABII with no more than 100 technical specialists to be retained in Iran. Respondents admit that "between January 14 and January 20 ABII and CEO agreed that ABII should maintain approximately 100 technical personnel in the country."

37. In a letter dated 20 January 1979 ABII informed CEO that "[b]ased on your instructions we are reducing our forces in Iran to 100 technical people." On the following day, 21 January 1979, ABII decided to evacuate all remaining personnel except for a staff of volunteers. Shortly after that, in a letter dated 23 January 1979, CEO wrote to ABII stating that "[n]ow that ABII Company has practically indicated its disability (or reluctancy) in keeping all the personnel, this organization [CEO] reduces its demands for the [ABII] staff to 58 persons . . . ." At about this time ABII started, as required by CEO, cancelling its leases and making other preparations for withdrawal from its office buildings.

38. No further instructions to reduce ABII staff ensued. The record indicates that when the remaining 58

persons left, which happened by 16 February 1979, they did so because of the culmination of the revolutionary situation in the country. Their departure thus was caused by the civil unrest rather than by the various force reduction orders discussed above. The balance of those departing, on the other hand, were included in the reduction decisions. These employees were terminated by CEO and ordered to return to the United States; consequently their departure must be attributed to reduction orders. This conclusion can be drawn notwithstanding the fact that many (if not all) of those ordered to leave would eventually have been forced to depart because of the civil disturbances in Iran. Indeed, after the November 1978 reduction orders (allowing 400 employees to remain), ABII contemplated removal to Athens of some employees only temporarily (clearly because of the situation in Iran) to await improvement in the situation. However, the force reduction order of 14 January 1979 (envisaging a work force of no more than 100 specialists) followed before the planned "temporary" removal was executed; its scope encompassed those employees that ABII planned to stage in Athens, as well as those whose status was undetermined in light of the contract negotiations. Similarly, between the 14 January 1979 order and 23 January 1979 request reducing the number of employees to 58, ABII had, on 21 January 1979, decided to remove temporarily all of its remaining employees from Iran. Since CEO, however, clearly acquiesced in this action, it can also be concluded that the departure of those 42 (out of 100) employees who were not among the 58 allowed to stay were included in force reductions within the meaning of Article 3.10 of the contract.

39. Consequently, the Tribunal concludes that 58 out of the 846 ABII employees who departed Iran between November 1978 and February 1979 only did so as a consequence of the revolutionary situation in Iran, whereas the departure of the rest can be said to have been as a result of the force reductions.

3. The Question of Termination of Contract 138

40. After 16 February 1979, when the last ABII employees left Iran, ABII appointed and authorized the accounting firm of Price Waterhouse and the law firm of John A. Westberg and Associates Inc. to wind up ABII's remaining affairs in Iran. On 23 March 1979 the President of ABII wrote to the new Minister of Post, Telegraph and Telephone, Dr. Islami, requesting the opportunity to meet to resolve all outstanding differences and to resume work. No response was received, and work under Contract 138 did not recommence before its expiry date of 15 July 1979.

a) Formal Termination

41. The core of Claimant's argument is that Iran terminated Contract 138 prematurely, thus entitling Claimant to its termination costs. Appendix 3, paragraph 1.4 of Contract 138 contains the following provision regarding such entitlement.

> Payment for termination or cancellation costs as mentioned in Para. 7 below if the contract is terminated or cancelled on any date in accordance with Article 18. Price based on actual cost. Not to exceed U.S.$80,000,000.

42. Thus recoverability of termination costs, which are defined in paragraph 7 of Appendix 3, presupposes that the contract is terminated or cancelled in accordance with Article 18 of the contract. Article 18 in turn provides that "[t]his Contract may be terminated or cancelled or phase[d]-out" by the employer or the contractor or both on various grounds enumerated in that provision. According to Article 18.6, "[t]he termination or cancellation shall be effective upon the date specified in the written notice except para. 5 above." Paragraph 5 deals with a one year

period of takeover from the contractor to the employer in a situation where Iran cancels the contract or the contract expires without the parties having reached agreement on a new contract. Since in the present case the performance had ceased long before the expiry date and there thus was no takeover, this provision is inapplicable. Therefore the Tribunal concludes that ABII's entitlement to termination costs on the basis of the contract provisions is dependent on the fulfillment of two conditions: 1) that a ground for termination existed as provided for in Article 18, and 2) that one of the parties actually terminated the contract.

43. Discussion of the first condition is unnecessary, since it is apparent that the second condition is not fulfilled. None of the parties issued a "written notice" of termination in the sense of Article 18.6, although Claimant -- relying on a letter from CEO to ABII on 11 August 1979 and on a newspaper article published in Kayhan -- argues that Iran did so. The report in Kayhan in April 1979, however, based the news of cancellation on an interview of the Minister of Post, Telegraph and Telephone, who was quoted as saying that "to the extent that I am informed this contract has been cancelled by the Army"; this statement does not amount to such a notice. The same is the case with CEO's 11 August 1979 letter stating that Contract 138 "is considered terminated as of the date of the Islamic Revolution of Iran, that is to say . . . (10 February 1979)." Apart from the fact that it was submitted after the expiry date of Contract 138 and after ABII had, on 25 July 1979, submitted its first termination costs invoice, the letter designated a termination date which had no particular relationship to the events which might have served as a basis for termination. This letter cannot be regarded as more than a political statement.

44. Thus none of the parties formally terminated or cancelled Contract 138 in accordance with Article 18.

b) Force Reductions as Termination

45. Claimant contends, however, that performance ceased because of Iran's force reduction orders and campaign of harassment against ABII and that these measures in effect, even without a formal notice, terminated the contract. According to Claimant the reduction orders alone amounted at least to "partial termination" of the contract. Iran has disagreed with this interpretation from the beginning maintaining that what was involved was neither partial nor total termination of the contract but "only reduction of force . . . according to Article 2.12 and 3.10 . . . ."

46. The Tribunal agrees with Respondents insofar as these articles rather than those on "termination" were intended to deal with force reduction situations. The very concept of "partial termination" seems to be unknown in the contract itself which, when dealing with "termination or cancellation", always uses these phrases without any qualification. Moreover, entitlement to termination costs (paragraph 1.4 of Appendix 3) is conditioned on unqualified termination in accordance with Article 18. Paragraph 7 of Appendix 3 defining the termination costs does mention, inter alia, "all other costs associated with the Contractor's total or partial shut down of operation" (emphasis added), but in the Tribunal's view "partial shut down" cannot be interpreted to mean the same as "partial termination".

47. As discussed supra in paragraph 31, the Articles 2.12 and 3.10 of Contract 138 entitled Iran to change required services and reduce personnel, but as compensation for such reductions ABII was entitled to increased man/month rates. The parties were in the process of negotiating on the financial consequences of the reductions when intervening events prevented them from completing the negotiations.

As the Tribunal has recognized in several cases, "[b]y December 1978 . . . civil strife in the course of the Islamic Revolution had created classic force majeure conditions at least in Iran's major cities. By 'force majeure' we mean social and economic forces beyond the power of the state to control through the exercise of due diligence." Gould Marketing Inc. and Ministry of National Defense of Iran, Interlocutory Award No. ITL 24-49-2, p. 11 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R 147, 152-153. See also International Technical Products Corp. and The Government of the Islamic Republic of Iran, Award No. 186-302-3 at 20-21 (19 August 1985); Sylvania Technical Systems Inc. and Government of the Islamic Republic of Iran, Award No 180-64-1 at 50 (27 June 1985). In this case there can be no doubt that there was also force majeure within the meaning of Article 6.4 of Contract 138.

48. Thus force majeure intervened at the time when the parties in more normal conditions presumably would have negotiated an agreement on reductions. Even if the situation of force majeure ceased before the expiry of Contract 138, by such time the work under the contract was over and immediate resumption as a practical matter unthinkable. Therefore changes to be agreed on ABII's workforce level were outside of the parties' contemplation.

49. In such circumstances the parties would have been justified in terminating the contract, but none of them did so. Termination of a contract is a matter of election. Although ABII may have had sufficient reason to terminate the contract, it chose not to do so. Cf. Kimberly-Clark Corp. and Bank Markazi Iran, Award No. 46-57-2 at 15 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334, 341-342. Moreover, although Iranian law, which according to Article 10 is the governing law of Contract 138, would appear to recognize the possibility of inferring cancellation from the conduct of the parties (Art. 284 of the Civil Code of Iran

states: "cancellation can be made by any oral declaration or by any act which indicates such cancellation."), Article 18.6 of Contract 138 makes it clear that in this particular contract an explicit "written notice" of termination or cancellation is required. As discussed in the previous subsection, no such notice of termination was submitted by any of the parties before the expiry date of the contract pursuant to its terms.

50. Contract 138 thus was not formally terminated or cancelled by any of the parties in accordance with Article 18. Nor did the force reductions mean termination within the meaning of that provision. Therefore there is no entitlement to termination costs on the basis of Article 18 and paragraph 1.4 of Appendix 3. On the other hand, according to the contract ABII would in normal conditions have been entitled to be compensated for the reductions in the form of increased man/month rates. Such compensation never materialized due to extraordinary circumstances amounting to force majeure and not foreseen in the contract. This leads to the question of whether the contract provisions on force majeure provide a basis for ABII's termination costs claims.

4. The Effect of Force Majeure

51. Respondents contend that since the work under Contract 138 ceased because of civil unrest and revolution, not due to termination or other acts of TCI or CEO, the contract does not provide for the payment of the termination costs to Claimant. ABII argues that it is entitled to its termination costs, even if the contract was terminated by force majeure.

52. Since Article 18, which recognizes force majeure as a ground of termination, is not applicable (none of the

parties invoked force majeure as such a ground), attention must turn to other contract provisions which deal with force majeure. A possible alternative basis for termination costs caused by force majeure can be found in paragraph 10 of Appendix 3. It provides that reimbursement of

> Any costs incurred by the Contractor as a result of conditions or events described in the following articles will be paid by the Employer to the Contractor.

53. "Article 6.7. Force Majeure", which is one of the provisions listed under paragraph 10, provides that "[i]n case of Force Majeure which does not result in cancellation of the Contract, additional costs incurred by the Contractor for extra work requested by the Employer will be paid to the Contractor." In this case, however, there was no extra work involved, so that prima facie this provision on force majeure also is inapplicable.

54. That does not mean that force majeure was of no consequence to the question of termination costs. The Tribunal has decided that a portion of the departure was attributable to force majeure, and that force majeure prevented the negotiations relating to the financial consequences of the force reductions from being concluded. Thus force majeure, although not the ultimate cause to which Claimant's termination costs can be attributed, created conditions which made it impossible for Claimant to recover what it was entitled to under the contract. Unlike those situations in which costs are directly attributable to force majeure, this does not reflect the allocation of risks as contemplated by Contract 138, but rather is a consequence of a situation unforeseen in the contract. In such circumstances the determination of the rights and liabilities of the parties is subject "to the Tribunal's equitable discretion, using the contract as a framework and reference point." Queens Office Tower Associates and Iran National Airlines Corp., Award No. 37-172-1 at 14 (15 April 1983),

reprinted in 2 Iran-U.S. C.T.R 247, 254; International School Services Inc. and National Iranian Copper Industries Co., Award No. 194-111-1 at 14 (10 Oct. 1985). In exercising its equitable discretion, the Tribunal must determine what the parties, in the light of their intentions as reflected in the contract, would have agreed upon as to the financial consequences of the force reductions, and what consequently is the reasonable compensation for the costs incurred.[1]

5. Conclusions on ABII's Entitlement to its Termination Costs Claim

55. Contract 138 contains provisions on force majeure, but they do not provide for all the possible consequences of a force majeure situation. At present the Tribunal is faced with a situation of force majeure from which flow two kinds of consequences and to which the express contract provisions do not directly apply: 1) Some ABII employees left Iran because of force majeure, and 2) force majeure interfered with the negotiations on the financial consequences of the force reductions. Although both events fall outside the framework of the contract, they are different. In the

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[1] The Tribunal notes that its task in the present respect is very similar to that faced by the arbitration tribunal in Kuwait v. The American Independent Oil Company (Aminoil), Award of 24 March 1982, (Reuter, Sultan, Fitzmaurice, arbs.), reprinted in 21 Int'l Legal Mat'ls 976 (1982), where the parties had conducted negotiations on the application of a new price formula without being able to complete these negotiations. The tribunal stated that "it thinks that it is not really a question of modifying or completing the contract . . . . The Tribunal is not expected to devise new provisions that will govern the contractual relations of the Parties for the future, but to liquidate the various consequences of their past conduct, and of the contractual clauses that once bound them but are now at an end." Id. at paragraph 75

former case certain costs incurred by ABII are directly attributable to force majeure, whereas in the latter the force majeure situation "indirectly" caused ABII costs by preventing the parties from settling, in accordance with the contract, the financial consequences attributable to other events.

56. Where, as here, the contract does not provide otherwise, the guiding rule concerning costs attributable to force majeure situations is that "the loss must 'lie where it falls'." Queens Office Tower Associates, supra, id; International School Services, supra, id. Therefore, with respect to the 58 persons whose departure was, as a legal matter, attributable to force majeure, no compensation for termination costs is due. Contract 138, as interpreted supra in paragraphs 41 to 50, left it to ABII either to terminate the contract or to bear the risk of the costs in question, and Claimant chose the latter course. Since Claimant has recorded and substantiated all termination costs by item of expense rather than by the individual related to expense (cf. section 6 infra), the Tribunal finds it reasonable to assume that the costs pertaining to the 58 individuals can, as a point of departure, be determined by deducting from the total costs the percentage corresponding to the 58 persons. As 58 out of 846 departing persons (see supra paragraph 39) is 6.9 per cent, termination costs pertaining to this percentage of employees, in addition to claimed costs which for other reasons may be attributable to force majeure rather than to force reduction orders (see infra paragraphs 74 - 80) are not recoverable. The actual amount which therefore is not recoverable is determined in connection with the discussion concerning specific cost items.

57. As to the costs attributable to force reductions, the Tribunal first notes that the contract contemplated that, except for force majeure not resulting in termination,

in virtually every conceivable situation ABII was entitled to recover the costs "associated with" the termination of the involvement of part or all of its work force. These situations even included termination by one party due to breaches by the other. Thus if Iran had cancelled the contract because of ABII's faulty performance, ABII still would have been entitled to its termination costs.

58. The contract also clearly contemplated that the financial consequences of force reductions should be compensated. Therefore in the negotiations ABII had a reasonable expectation of regaining the costs either as a global compensation or, in case the work had continued, in the form of correspondingly increased man/month rates. ABII had available the alternative of terminating the contract (at least on the ground of force majeure), and in that way to recover the costs incurred because of the extensive reductions. Thus the Tribunal concludes that according to the general intent and spirit of Contract 138 ABII is entitled to reimbursement of its costs attributable to the force reduction orders.

59. It is the Tribunal's task to reach a result which as closely as possible corresponds to the contractual scheme. Therefore, in determing the amount of the costs caused by the force reductions the Tribunal finds it in the circumstances proper to proceed from the definition of termination costs in Contract 138. The costs in question allegedly were incurred due to sending ABII personnel home and terminating the company's activities in the Seek Switch Program; in substance they were "termination costs". Thus if the concept of "partial termination" had been accepted, the result would not have been very different from the one reached now. The extent to which these costs are properly attributable to force reduction orders must be determined by consideration of each specific element of termination costs.

6. The Amount and Allowability of Specific Cost Items

a) General

60. ABII's claim consists of various costs incurred as a result of the events described earlier in this Award. The process through which the alleged termination costs were documented is described in an affidavit of H.J. Poorten, Vice-President and Comptoller of ABII at the time relevant to this claim, submitted together with extensive exhibits on 25 October 1984. According to Claimant the documentation is derived from "contemporaneous accounting records kept by the company in the ordinary course of business", but since ABII's "complete records of termination charges fill hundreds of file boxes" they have not been submitted to the Tribunal. Termination costs originally were billed to Iran with three invoices allegedly prepared on the basis of the contemporary accounting records referred to above: Invoices 301 ($24,410,690), 302 ($13,817,980) and 303 ($2,742,950), dated, respectively, 25 June 1979, 1 October 1979 and 1 November 1979. According to Claimant the last invoice (covering costs incurred in September and October 1979) reflected certain estimated costs and therefore the total amount involved (originally $40,971,620) has been adjusted to $35,199,351.

61. Respondents contend that these invoices were not substantiated in accordance with paragraph 5 of Appendix 3, which should be applied also to termination costs invoices. The Tribunal agrees insofar as the costs in question must be sufficiently substantiated so as to show that they were actually incurred.[2] Based on ABII's explanations of its

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[2] Paragraph 5 of Contract 138, which is discussed (Footnote Continued)

accounting procedures, as well as cost summaries and other contemporaneous records submitted to illustrate these procedures and to prove the costs, the Tribunal is satisfied that ABII incurred the costs.

62. Respondents' primary objection is not that ABII did not incur the claimed costs. Rather Respondents contend that the documents submitted by Claimant in this proceeding "are not adequate to substantiate ABII's claim . . . because they only relate to the question of whether costs have been incurred, but not whether they have been properly charged . . . as termination costs." Guidance for the solution of this latter problem must be sought in the contract's definition of termination costs. According to paragraph 7 of Appendix 3:

> Termination or cancellation costs and end of phase out termination cost shall include salary and all costs necessary to return Contractor's employees to another assignment in the U.S. (maximum 3 months for specialists and 5 months for support personnel or the end of their tour whichever is sooner) after cancellation, termination or end of phase out, and all other costs associated with the Contractor's total or partial shut down of operation in Iran and elsewhere.

63. ABII has divided its costs into six major categories: 1) salary costs of employees until the date of their return to other AT&T companies; 2) the costs of relocating employees and dependants to other AT&T companies; 3) losses incurred on the disposition of ABII's assets in Iran; 4) the costs of terminating apartment leases in Iran; 5) the costs of operating the U.S. office in winding down ABII operations, and 6) other costs. In addition, ABII

(Footnote Continued)
in more detail at paragraphs 94 - 95 infra, by its terms is directly relevant only to monthly invoices submitted for services and costs incurred during the performance of the contract.

claims that Contract 138 entitled it to a fee amounting to 12 per cent of these costs. Each of these categories is discussed separately below.

b) Salary Costs

64. ABII claims a total of $6,413,013 for its salary costs payable to its employees until they were relocated to new assignments. These costs were computed on the basis of the standard ABII compensation package, which included the same benefits paid to all employees in the "Bell System". As the SOW required ABII to draw its employees for the Seek Switch Program from the Bell System, the contract must be deemed to have contemplated the application of this salary package. The standard package included base salary, overtime, foreign service allowance, employee incentive pay, fringe benefits, a savings plan contribution under ABII's pre-existing savings plan, a cost-of-living allowance, and a bonus for extended tours.

65. Respondents have raised various objections to these costs. Thus Iran contends that excessive salary costs may be attributable to employees whose tours of duty ended before ABII removed them from the salary roll; that overtime salary is not chargeable; and that the amounts paid for foreign service allowance and the cost-of-living allowance are disproportionately high considering that most employees left Iran during the first weeks of 1979, after which they were not entitled to these allowances.

66. In light of the record before it, the Tribunal concludes that these objections cannot be sustained. On the basis of the affidavit submitted by Mr. Poorten the Tribunal is satisfied that the salary costs do not generally exceed those that would have been paid had the service in Iran not been prematurely terminated. Overtime payments were direct costs attributable to the relevant period, and, as such, are

clearly allowable as a termination expense, since they could not be recovered through the man/month billing rates. Finally, the amounts paid for foreign service and cost of living allowances, although apparently high, are reasonable since many employees found work prior to the end of the three-month period, thus reducing the base salary figure against which the allowances are calculated, and since the evidence suggests these entitlements were paid only during the period when employees were eligible.

67. Consequently, the Tribunal finds that ABII is entitled to reimbursement for the claimed amount of its salary costs less 6.9 per cent of these costs attributable to force majeure. ABII's net entitlement is thus $5,970,515.

c) Costs Attributable to Relocation of Employees and Dependents to Other Assignments

68. ABII claims a total $9,366,869 for the cost of relocating its employees and dependents to other AT&T assignments in the United States. These costs include the cost of travel for employees and dependents; living expenses until the employees and dependents were able permanently to relocate at the site of new jobs; shipping and associated storage of household goods; expenses associated with the sale of homes necessitated by the change of assignment; reimbursement for United States income tax payable by employees as a result of imputed income based on the payment of relocation costs; and a relocation allowance for miscellaneous items that had to be replaced.

69. On the basis of the affidavit of Mr. Poorten and the accompanying exhibits the Tribunal is satisfied that these costs actually were incurred and were consistent with ABII and AT&T policy regarding relocation from foreign service assignments. The Tribunal also has no difficulty in

concluding that for the most part the relocation expenses are to be classified as termination costs. The possibility of a situation in which ABII would abruptly be required to remove its whole work force without an opportunity to amortize the costs through later streams of profits must be assumed to be one of the reasons why the parties set the maximum for termination costs as high as $80,000,000. Thus as a general rule this kind of relocation expense is recoverable as termination costs.

70. This rule, however, is not without reservations. Respondents argue that the man/month rates included the cost of repatriating those employees whose terms were due to expire during the contract period, and that ABII already has been compensated at least partially for the relocation costs pertaining to such individuals through the payment of man/month invoices during the life of Contract 138. According to Respondents ABII's on-roll report of 31 December 1978 shows that employees whose terms were to expire in this way comprised more that 10 per cent of ABII's whole work force in Iran.

71. The Tribunal agrees that to the extent ABII's relocation costs pertain to persons whose term in Iran was to expire before the expiry of Contract 138, ABII would in any case have had to cover the costs thus incurred from the man/month payments due under the Contract. Although Claimant presented testimony at the Hearing that these termination costs had not been previously recorded in man/month rates, its prior written submission stated that man/month rates covered, inter alia, "all overhead and indirect costs of maintaining the work force in Iran and performing the Contract", and thus apparently also costs of repatriating and replacing personnel during the contract period. ABII's on-roll report of 31 November 1978 submitted by Claimant indicates that the assignment of approximately 7 per cent of ABII's work force then in Iran was in any case due to expire

before 15 July 1979. This report rather than that of December 1979 should be used as the basis for calculation, since in the December report the force reductions in several cases may have changed the estimated duration of assignment from what it originally had been. Taking into account the man/month payments (including those for November and December 1978 granted in this award) received for 5½ months of the one-year contract period, the Tribunal concludes that these man/month payments must be deemed to have covered about 45 per cent of the relocating costs attributable to the 7 per cent of the personnel referred to above. As ABII has not contended that a corresponding amount has been deducted from its claim, the Tribunal reduces the award accordingly.

72. Respondents also contend that many of the returning individuals were classified by ABII as "voluntary" rather than "involuntary" returns, thus excluding them from ABII policy on payment of relocation expenses. As held supra, however, the departures of all but 6.9 per cent of the personnel are attributable to the force reduction orders, so the returns cannot be considered truly voluntary.

73. In conclusion, the Tribunal awards Claimant for its relocation expenses the claimed amount of $9,366,869 less 6.9 per cent attributable to force majeure, less 3.15 per cent corresponding to the relocation expenses recovered through man/month payments[3] of the remainder, or $8,720,555. This leaves ABII with the net entitlement of $8,445,858.

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[3] The Tribunal has made the assumption that the 7 per cent of those whose term was due to expire before 15 July 1985 formed 7 per cent of both those who departed because of force majeure and those who did so as a consequence of the force reductions.

d) Losses on Assets in Iran

74. The record indicates that during the course of its work on the Seek Switch Program ABII acquired more than $10 million worth of assets used in the performance of its contractual duties. These assets included office equipment and fixtures for ABII's six office buildings; complete furnishings and appliances for its employees' apartments; cars, trucks and other vehicles used for testing, field inspections, and similar purposes; private branch exchange systems for office communications; and other items of equipment. ABII contends that it was neither possible nor economically feasible to return any of the assets to the United States.

75. ABII tried to sell all the property prior to leaving, and charged Price Waterhouse with the task of disposing of the balance of the assets. The record indicates that Claimant faced many difficulties, but eventually succeeded in disposing of virtually all of its assets in Iran. After depreciating the value of the equipment to its net book value as of the date of disposition ABII registered a loss of $5,528,766. It seeks these costs as reimbursable termination expenses under Contract 138.

76. The Tribunal is satisfied that these costs were actually incurred. A more serious argument against their reimbursement is Iran's contention that these costs were caused by the Revolution and civil disturbances. In light of the Tribunal's conclusions drawn supra at paragraphs 55 - 59, ABII is not entitled to reimbursement of these costs if they are attributable to the situation of force majeure rather than to the force reduction orders. Unlike the other cost items at issue, the dividing line cannot be drawn here on the basis of the percentage of personnel who departed on the two respective grounds, since the present costs do not pertain directly to ABII's departing personnel in particular but to its activities in the Seek Switch Program in general.

77. That ABII had to dispose of its equipment was a consequence of the force reduction orders in the sense that without these orders it would not have been necessary for ABII to sell the assets. The losses forming the basis of the claim, however, were not something that inherently followed from those orders. Rather it seems that both ABII's alleged impossibility (which is disputed by Respondents) to export the equipment to the United States, as well as the specific difficulties, described in Mr. Poorten's affidavit, which ABII faced in winding up its affairs during the spring of 1979 were closely connected with the force majeure conditions in Iran. Consequently, the losses at issue now must be deemed attributable to the force majeure situation rather than to the force reduction orders. Therefore, the Tribunal dismisses the present portion of the claim.

e. Costs of Terminating Apartment Leases in Iran

78. As another cost allegedly caused by the shutdown of operations in Iran ABII claims $1,334,329 for the termination of apartment leases that had been entered into by ABII for its employees in the country.

79. Beginning in January 1979 ABII attempted to terminate these leases as quickly as possible. According to Claimant "[t]his was difficult because of the chaotic conditions at the time; some landlords had left the country; many of those remaining were afraid to accept money from, or have anything to do with, an American company." Nevertheless, the company was able to terminate approximately one-third of the apartment leases before leaving Iran. After it left, ABII made arrangements with the international accounting firm of Price Waterhouse to assist in completing

the terminations. Approximately half of the claimed costs were incurred through Price Waterhouse.

80. On the basis of the record the Tribunal is satisfied that the costs in question were actually incurred and that they qualify as termination costs under Contract 138. However, as indicated by Claimant's references to the "chaotic" situation in Iran and the specific difficulties caused thereby, it is evident that with regard to this item, too, more than 6.9 per cent of the total costs incurred should be attributed to the force majeure situation. Therefore, taking into account all the circumstances the Tribunal finds it reasonable to award Claimant $650,000 for the present portion of its claim.

f. Costs of Operating United States Office in Winding Down ABII Operations

81. ABII claims $5,617,819 for the costs attributable to the central office in the United States charged with the responsibility of overseeing the wind-down process. According to Claimant, the staff of the office assisted in relocating ABII's work force in the United States, arranged for shipment of employees' personal belongings, processed claims for losses and damaged goods, paid all bills, and completed other tasks necessary to conclude ABII's operations. The claimed costs are derived from such items as salary of personnel (the numbers of which were decreased as the outstanding termination tasks decreased), travel expenses, office supplies, office machine rentals, telephone charges, office leasing and guard services, legal and accounting fees, insurance, depreciation and amortization, computer services, postage, couriers, taxes, medical supplies, and similar items.

82. Respondents object to this portion of the claim on the ground that the costs in question allegedly relate not

to ABII's shutdown of operations in Iran but rather to the dismantling of the whole company. Respondents also contend that some individual components of the costs as claimed are unreasonably high.

83. The Tribunal notes that since ABII's role was limited to the Seek Switch Program, arguably virtually all costs arising out of the activities of ABII's home office after the departure of the work force could be regarded as termination costs and thus recoverable in this proceeding to the extent they do not pertain to the 6.9 per cent of the personnel who left due to force majeure.

84. Respondents' interpretation would restrict the termination costs recoverable under the contract to those expenses which are directly attributable to the reduction and consequential relocation of ABII's workforce, excluding costs which would have been incurred by ABII in any case, such as costs arising from the shutdown of ABII as a company. Claimant appears to adhere to this general interpretation insofar as it contends that "the costs charged . . . were spent on the 'shut down of operation in Iran and elsewhere', not in liquidating ABII." Consequently, ABII does not appear to claim entitlement to whatever other costs, apart from the winding-down costs, it incurred through its home office.

85. In view of this, some elements in Claimant's claim appear disproportionately high. Thus although, according to Claimant, only "a small staff" in the United States Office was involved in the shut down operations -- in Mr. Poorten's words "a small group of employees, including myself and my immediate staff, supervised the wind-down of ABII operations in both Iran and in this country" -- the base salary for ten months claimed as a part of these costs amounts to $1,897,924. This figure indicates that salaries not only for "a small group" but also for most of the

employees (numbering between 152 and 351 who worked in the office between January and October 1979 are included. Also the amount of $235,269 claimed for office rent and guard services cannot be accepted as pertaining in its totality solely to the wind-down caused by force reductions. On the other hand, ABII's insurance costs ($457,447), also objected to by Respondents, have been adequately explained as due to the high cost of insuring the international shipment of its employees' belongings in 1979. The Tribunal is also satisfied that the costs for legal and accounting services and outside services were both reasonable and adequately attributable to the situation which arose from the force reduction orders.

86. Taking into account the above reservations and the fact that a portion of all costs claimed under the present heading are non-recoverable as being attributable to the force majeure situation, the Tribunal still concludes that Claimant is entitled to be reimbursed a substantial part of the costs claimed. Using its equitable discretion the Tribunal awards ABII $3,000,000.

g) All Other Costs

87. ABII's final category of claimed termination costs consists of several items related to employee relocation not included in the claim dealt with under c) supra, as well as to miscellaneous expenditures in Iran. Such other costs include certain "unusual resettlement expenses" such as small, fixed amounts paid to employees to replace limited types of goods such as clothing or bedding, household items, or similar effects, up to a fixed limit; damage to personal effects; necessary educational expenses for dependents associated with interim relocations pending the beginning of a new assignment; supplemental tax assistance based on the ABII compensation plan intended to compensate employees who

were unable to obtain the United States income tax benefits which would have accrued if they had been permitted to complete their anticipated stay in Iran; storage of certain household goods; other costs associated with the administration of leases held by the employees; plus "direct support costs" and other expenses incurred by ABII's agents in Iran. The costs claimed amount to $3,167,196.

88. On the basis of the record the Tribunal is satisfied that ABII incurred these costs and that they all were incurred because of the removal of ABII's employees from Iran. Therefore the Tribunal awards Claimant $3,167,196 less the 6.9 per cent attributable to force majeure, i.e., $2,948,659.

h) 12 Per Cent Fee

89. According to Paragraph 11 of Appendix 3 "12% will be added to the actual costs incurred by the Contractor for accomplishing paragraphs . . . 1.4 . . . above." Paragraph 1.4 of Appendix 3 contains the provision of ABII's entitlement to termination costs. Claimant seeks $3,771,359, corresponding to 12 per cent of the sub-total of $31,427,992 of its termination costs claim.

90. In case of an actual termination ABII would clearly have been entitled to the 12 per cent fee. Unlike the other amounts claimed in connection with termination, this 12 per cent represents a profit element. Although in the determination of ABII's entitlement to the costs caused by the force reductions termination costs as defined in Contract 138 give guidance in the search for an equitable solution, such a solution does not necessarily include the 12 per cent fee. On the contrary, the Tribunal recognizes that while ABII had a legitimate expectation of recouping

through an increased man/month rate its costs incurred because of the force reductions, ABII could not reasonably count on gaining profits as a consequence of the reductions. Therefore the Tribunal rejects ABII's claim for the 12 per cent fee.

i) Conclusion

91. In view of the above the Tribunal, dismissing the rest of this portion of the claim, awards Claimant the total amount of $21,015,032 for its termination costs claim.

B. Professional Services Rendered During November and December 1978

1. Introduction

92. According to Article 3.4 of Contract 138:

> . . . the payable amount to the contractor will be calculated with regard to the number of personnel and period of their work based on appendices 3,5 and 6.

93. As its predecessors, Contract 138 thus provided that ABII was to be paid monthly for its professional services based on the amount of time devoted to the project by ABII's technical personnel (see infra paragraph 163). Details were set out in Appendix 5, titled "Basis for calculation of man/month price in accordance with their levels and the number of man months." Thus the time on which payments were based was expressed as the number of "man/months" worked: one specialist working for four weeks entitled ABII to payment for one man/month. The contractual man/month rate varied between $12,345 and $19,251 according to the technical expertise of the personnel rendering the

services. Services of administrative and clerical personnel were not billable.

94. "Terms of Payment" were regulated in Appendix 3. Its paragraph 5 reads as follows:

> All payments to the Contractor shall be against monthly qualified invoices substantiated by the Contractor which are approved by the Employer. If they are not approved by the Employer within 30 days after presentation to the Employer and there is not any objection in writing then they should also be paid. Should the Employer object in writing to a part of an invoice the Contractor is authorized to prepare a new invoice covering the parts which should be approved and submit it to the Employer. Then the 2 parties will discuss the disapproved item(s) in accordance with paragraph 12 below.

95. Thus, if Iran raised no objection within 30 days after the presentation of a monthly invoice, it was required to pay the invoice. If it did not pay the invoice, or if it disapproved it, such differences were to be settled within 30 days of the disapproval. If agreement was not reached within the stipulated period, paragraph 12 of Appendix 3 provided for ABII's right to terminate the Contract in accordance with Article 18 (cf. supra paragraph 42).

96. If Iran, however, paid the invoice, the payment was subject to the following further proceedings, as provided in paragraph 13 of Appendix 3:

> The Employer's auditors which will be an internationally accepted firm will be permitted access to Contractor records necessary to verify: (1) the number, duration of work, levels of man/months and prices set forth in Contractor's invoices to determine that such costs are accurate and in accordance with AT&T approved practices and (2) suppliers' invoices for items billed to the Employer. The Employer representative in Iran will verify the number, duration of work, levels of man months and supplyer [sic] invoices for items billed under paragraphs 1.2. [equipment procurement] and 1.3. [office rentals] above.

> Access shall be permitted to the Employer's representatives/auditors at all reasonable times at the place where the records are kept. The verification or nonverification will be made within 6 months after payment of each Contractor's invoice if such man/months and costs are not disapproved within that time, related invoices are finally accepted. The Employer shall have the right to disallow or suspend or reduce payment of the invoices if the Employer representatives/ auditors disapproved any of paid or unpaid invoices.

97. Although paragraph 13 provides for verification "within 6 months after payment of each Contractor's invoice" (emphasis added) it cannot, despite Respondents' contentions, be interpreted to mean that the invoice does not become final until after possible litigation if Iran simply fails to pay it. To hold otherwise would mean that an unjustified nonpayment of a properly substantiated invoice could indefinitely postpone the finality of the invoice. In the Tribunal's view a more reasonable interpretation is that where the invoice has been "substantiated" in accordance with paragraph 5 of Appendix 3, or where no objections have been raised within 30 days there is a duty to make the conditional payment. The six month verification period starts running from the day on which such a duty arises; if the Employer does not resort to the verification procedure, the invoice has been "finally accepted".

98. Contract 138 does not define what is necessary to "substantiate" an invoice. The affidavit of ABII's Vice-President and Comptroller, Mr. Poorten, however, suggests that during the early stages of Contract 118 officials of CEO and ABII met to establish specific procedures for the submission, verification and payment of invoices. According to Mr. Poorten, submission of several reports as back-up documentation for the invoices was agreed upon by the parties at this time. These documents included:

1) The monthly "On Roll Report" listing information on all ABII employees whose work was

chargeable under the contract during the billing period;

2) Time sheets, i.e., "Semi Monthly Attendance and Assignment Records for Regular ABII Employees" completed by the individual employees twice a month, listing all the time spent by ABII employees on the contract;
3) The "Personnel and Absence Information Report" summarizing the number of ABII employees in Iran and the total number of days they were absent;
4) The "Assistance from Other Bell Systems Companies Report" giving information on other Bell System personnel performing under the contract during the billing period;
5) The "Report of Transfer to or from other Projects" listing the time spent by ABII technical personnel on non-billable activities during the relevant period;
6) The "Case Number Report" giving information on the specific task indicated by the employees on the time sheets; and
7) "Current Return Reports" listing the effective "off roll" dates for employees who returned to the United States during the billing month.

99. Respondents deny the existence of any agreement that submittal of these documents would constitute substantiation of invoices under Contract 138. Respondents' position is supported by the affidavit of General Tavakoli, who had responsibility for administration of Contract 138, stating that he does not "recall" any "agreements or understandings" apart from the contract provisions.

100. Notwithstanding this testimony, it is undisputed that CEO paid regularly through October 1978 ABII's monthly invoices on the basis of substantiation which at least did not go beyond that alleged by Claimant to have been agreed upon. This course of conduct strongly indicates that at least through October 1978 there was a mutual understanding on the sufficiency of such a documentation. Moreover, although such an understanding may not necessarily have prevented the employer from demanding such further substantiation as reasonably could be required as a consequence of changing circumstances, Contract 138 nevertheless set

certain limits to any demands of that kind. First, paragraph 13 of Appendix 3 presupposed that ABII's invoices were to be "accurate and in accordance with AT&T approved practices". It is not disputed that the billing documents in question were consistent with ABII procedures, and derived from AT&T standard practices. Secondly, since ABII was entitled to be paid on the basis of man/months of its services, and since ABII was to provide consulting services (see infra paragraph 163) it could not, contrary to Respondents' argument, be required to submit reports recording concrete progress of the Seek Switch Program as a condition for payment of monthly invoices. It was enough for ABII to substantiate that the man/months billed were actually devoted to the consulting services during the relevant period. Whether ABII satisfied this burden with respect to the consulting services provided in November and December 1978 is discussed in the following two sections.

2. Invoice No. 220 For November 1978

101. On 16 December 1978 ABII submitted "Invoice 220" for November 1978 services. This invoice requested payment in the net amount of $10,496,227 for 875.3 man/months of services provided during November. Four days later, on 20 December 1978, ABII delivered the November on-roll report, time sheets and other documents previously used by the parties for the substantiation and verification of the invoices.

102. Iran argues that it is not required to pay for services rendered in November 1978. Its primary contention is that it raised valid objections to the adequacy of ABII's substantiation of the invoice.

103. The record shows that Iran, on 20 December 1978, did raise objections to the November 1978 invoice within the

30 day time period as required by the contract. Two specific objections (1) and 4) below) were given in a meeting held on that date between General Tavakoli of CEO and Mr. H. L. Jordan, the Contract Representative of ABII; two further objections (2) and 3) below) were specified in a memorandum from General Tavakoli, also dated 20 December 1978. The objections were as follows:

1) Names of those on temporary leave had not been submitted;
2) documents requested by TCI concerning the attendance, assignments, travel and leave of personnel had not been supplied;
3) although a number of technical employees departed Iran during November, the total bill was 8 man/months higher than that for October;
4) personnel on vacation during the month had not obtained prior written approval from TCI and thus such vacations were not properly coordinated under the contract.

104. As to the first two arguments, on the same day on which CEO's objections were registered, ABII submitted necessary information. It delivered seven categories of documents described in the previous section listing, inter alia, the name of each employee billed under the contract, the date at which that employee's services began being billed to Iran, the case number (i.e., the SOW task) to which the employee was assigned during the billing period, the number of days of absence or vacation taken by each individual employee during the contract period, the pay rate at which each employee was to be billed, a report of employee transfers to non-billable projects and a summary of the amount of time to be adjusted for employees who went on-roll or off-roll during the billing period. This information is adequate to verify absences and substantiate the amount billed to ABII on the November invoice. In Mr. Poorten's affidavit ABII has also presented detailed calculations concerning the amounts listed on the November invoice. Thus the objections in question were not sufficient to refuse the payment.

105. Also with respect to the objection concerning the apparent eight man/month discrepancy Claimant has provided sufficient explanations. The increase in man/months was due to three factors: 1) seven additional employees came, with the prior approval of CEO, "on roll" during November, 2) accumulated vacation time earned by employees who departed in November was billed in that month in accordance with Appendix 6 of Contract 138, and 3) billable services of other Bell System employees exceeded in November 1978 the corresponding figure of October. Information sufficient to verify these changes was submitted to Iran, and therefore the present argument is not enough to justify nonpayment.

106. What is left is the objection concerning allegedly "uncoordinated" vacations. According to paragraph E of Appendix 6 of Contract 138:

> The time of vacation should be co-ordinated with TCI to prevent any harm to the progress of the project.

107. As was seen in paragraphs 24 - 27 supra, during the autumn of 1978 there was continuous disagreement between the parties on the interpretation of this provision. ABII rejected TCI's request for its prior approval for any anticipated absence as going beyond the contract requirements. Although it is apparent that during the Contract 118 period and at the beginning of Contract 138 such prior approvals were not required, TCI's demand was not necessarily unjustified. Depending on the developing needs of the project, "coordination" could have meant anything between after-the-fact notice and advance approval, and the experience gained during the work and changing circumstances might arguably also have legitimized a change in the interpretation of the coordination provision. Thus one cannot exclude TCI's interpretation outright as incompatible with paragraph E of Appendix 6.

108. Yet, even if "coordination" could entail advance approval, the failure to coordinate in accordance with that provision cannot be regarded as sufficient justification for nonpayment. According to Appendix 6, vacation time up to pre-established limits was includable to the man/months of time billable under the contract.[4] As noted in the previous section, "substantiation" within the meaning of paragraph 5 of Appendix 3 means substantiation of the number of man/months of services provided. Advance approval of vacations is not necessary for substantiation in this respect or for the avoidance of overpayment. Iran was provided with the time sheets of all employees for the relevant billing month. If it were concerned that unbillable absences were included in man/months, it could have checked the numbers of absences taken by each employee as noted on his time sheets, and verified the amount billed. Whatever other consequences lack of coordination of such vacations might have, it was not a basis for nonpayment, as Iran had available the documentation necessary to verify whether the invoices reflected "the number of personnel and period of their work based on appendices 3,5 and 6", as required by Article 3.4.

109. Thus the four objections contemporaneously raised by Iran for nonpayment of the invoice were unjustified. Respondents now seem to admit this since they assert that CEO was prepared in December 1978 to pay for services billed by ABII's personnel which ABII could demonstrate "had genuinely been at and performing work in November . . . ." This contention is based on CEO's instruction to ABII on 20 December 1978 "to restudy the matter and make out an invoice on the basis of the number of personnel actively engaged in work in Iran, and send it to TCI together with TCI-requested

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[4] On counterclaims based on allegedly unauthorized absences, see infra paragraphs 188-191.

documents for their study and confirmation, subsequent to which necessary action will be taken for their payment."

110. The record indicates that ABII in fact complied with this request. Following the rejection of the November invoice, ABII's representatives conducted several meetings with TCI officials on the matter. An ABII letter to CEO dated 13 January 1979 noted that the requested information had been provided but stated that the submission of a new invoice was unnecessary, since the original invoice was correct. On 14 January 1979 CEO acknowledged receipt of this letter and instructed TCI to recommend whether or not payment should be made. On 17 January 1979 General Tavakoli wrote to TCI with specific reference to the November invoice and TCI was again instructed to identify that portion of the invoice which was the subject of any remaining discrepancy and should not be approved. This same letter directed TCI to give notice of any discrepancy to ABII. No further notification or objection was ever received by ABII.

111. The Tribunal concludes that ABII both substantiated the invoices as required and adequately responded to Iran's objections. As no further objections were raised, Respondents are prevented from asserting new objections in this proceeding. In the Interlocutory Award (supra paragraph 3 at 27, 28) the Tribunal ruled that:

> Unless there is evidence of circumstances constituting a valid, legal excuse for not complying with the 30 days time limit set forth in Appendix 3, paragraph 5, of Contract Nos. 118 and 138, Respondents are precluded under that provision from asserting objections with regard to invoices submitted to TCI by ABII but not objected to within 30 days; but that provision does not preclude Respondents from their right to allege defects in ABII's performance by way of counterclaim.

112. ABII's substantiation of the invoice and the lack of further objections made the invoices first payable and

then, after Iran had not utilized the verification process of paragraph 13 of Appendix 3, final and irrevocable. It is not necessary to determine the precise time at which this occurred, as the Tribunal has no difficulty in concluding that it happened before 15 August 1979, i.e., the day from which ABII seeks interest on the present claim.

113. On the basis of the above, the Tribunal finds that Claimant is entitled to be paid for its November 1978 services charged by Invoice No. 220. The net amount of $10,496,227 reflected a 20 per cent reduction for a down payment which Iran had made pursuant to the terms of Contract 138. In July 1979 Iran called the bank guarantee and corresponding letter of credit arranged by ABII to secure return of any unearned portion of the downpayment, thus recovering the down payment for November (and December) 1978. Since there is no justification for nonpayment, ABII is entitled to the full amount including the portion originally deducted because of the down payment. Thus ABII is entitled to the unreduced amount of the invoice, or $13,120,284.

3. Invoice No. 221 For December 1985

114. On 14 January 1979 ABII submitted its Invoice 221 for the professional services rendered during December 1978. The invoice requested payment for a total of 860.7 man/months of services in the net amount of $10,319,643, as reduced by the 20 per cent down payment. For reasons noted at paragraph 113 supra ABII seeks the full amount invoiced, and therefore claims in this proceeding the total amount of $12,899,554.

115. Respondents attempt to justify the nonpayment based on objections allegedly raised against the invoice shortly after its presentation. Iran further contends that in any case the invoice was not properly substantiated, and

thus it was not necessary to raise any objections at all to render the invoice nonpayable.

116. In the Tribunal's view it is doubtful whether the correspondence referred to by Respondents actually amounted to contemporaneous "objections" to the December invoice. Unlike the objections raised to Invoice 220, the alleged objections against Invoice 221 did not specifically refer to the invoice in question but rather contained allegations or criticism of a more general nature. Resolution of this question, however, is not important, since the Tribunal finds that Respondents' alternative argument has some merit.

117. Claimant admits that the customary backup documents were not submitted within a few days as had been the practice previously. As an explanation for this omission Claimant has referred to the difficulties of arranging for the transportation and delivery of the documents caused by the civil disturbances that prevailed in Iran. The back-up documentation finally was provided in this proceeding in connection with Claimant's Hearing memorial submitted on 25 October 1984.

118. As discussed supra at paragraphs 98 - 100, a basic condition for the payability of the monthly invoices was their prior substantiation as provided in paragraph 5 of Appendix 3. The Tribunal has held that there was agreement between the parties that as a minimum the documents described in paragraph 98 supra were necessary for such substantiation. The Tribunal does admit that the force majeure situation in Iran gave ABII an excuse not to submit the documentation in the normal manner in January 1979. However, the force majeure situation did not excuse ABII indefinitely, nor did it have the effect of making the invoice payable without the customary substantiation. Moreover, Iran's failure to pay the November invoice -- which perhaps indicated that the December payment would not

be forthcoming either -- could not relieve ABII from its contractual duty to substantiate the invoice. Finally, Iran's failure to object to the lack of substantiation within 30 days after the submission of Invoice 221 could not have the effect of validating the invoice. Although it is clear that, as a general rule, Iran should have objected to what it regarded as a defectively substantiated invoice, in the Tribunal's view there can be no such duty with respect to an invoice which, as Claimant also clearly admits, had not been substantiated at all in the way which had been customary in the parties' dealings. Thus, while the underlying obligation was outstanding, Invoice No. 221 did not become payable fully until in late 1984 when the documentation substantiating the invoice was finally submitted.

119. The Tribunal is satisfied that this documentation, together with Claimant's explanations and affidavits, establishes that Invoice 221 was in fact prepared in the standard manner applied throughout the contract and thus constitutes the substantiation required by paragraph 5 of Appendix 3. It may be debatable in which way the contract provisions on objections and verification (paragraphs 5 and 13 of Appendix 5) should be applied to an invoice which is not substantiated until the stage of litigation or arbitration. As, however, the Tribunal finds that there is no reason for genuine objections and as no verification process envisaged in paragraph 13 of Appendix 3 was requested within the limit prescribed in that provision[5], the invoice has become final and payable.

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[5] Respondents have requested an audit under paragraph 13 in TCI's Answer to Claimant's Hearing Memorial filed on 15 August 1985, i.e., at least more than 8 months after Invoice 221 became payable. This request is further discussed infra at paragraphs 194 - 196.

120. The Tribunal holds that ABII is entitled to the payment for the services invoiced for December 1978. Since, as discussed in the previous section, Iran recovered its downpayment originally deducted from the invoice, the full amount of $12,899,554 is awarded. This amount is considered to have become payable in accordance with paragraph 5 of Appendix 3 of Contract 138 on 25 November 1984, i.e., 30 days after the invoice was substantiated.

C. Procurement Invoices

1. The Procurement Procedure

121. According to paragraph 25 of Article 2 of both Contract 118 and Contract 138:

> The purchase of all vehicles and any other equipment and materials which the Contractor agrees to purchase for the Employer for the performance of this Contract should be referred to the Employer. In case the Employer desire[s] he will purchase them and the price for these items will not be paid to the Contractor.
>
> The Contractor shall submit the procurement schedule for these items to the Employer at least three (3) months prior to the required date. Exception[s] to this policy must be justified to the Employer.

122. Thus one of ABII's responsibilities under Contracts 118 and 138 was to act as Iran's agent for the purchase of equipment, materials, and specialized engineering services necessary for the performance of the contracts. Compensation for ABII's procurement services was to be recovered independently of the man/month rate. According to Appendix 3 of Contracts 118 and 138, ABII was entitled to be reimbursed for "costs for transportation in U.S. to storing area, export packing, storing, filing and licence fees, transportation to Iran, order processing and expediting and

delivery charges in Iran . . . ." In addition ABII was entitled to a fee of 12 per cent.

123. The contracts entitled ABII to reimbursement only for authorized procurements. Paragraph 5 of Appendix 3 generally required presentation of "substantiated" invoices which Iran was required initially to review and, if necessary, protest. These provisions applied to procurement invoices, as well as to invoices for professional services. As in the case of invoices for monthly services, the substantiation requirement was not defined in the contracts; nor do the contracts specify the procurement process envisaged in Article 2.25 except by providing (in paragraph 3 of Appendix 3) that "[a]uthorization for the Contractor to provide . . . [the procured] items . . . will be based on approvals by the Employer of the Contractor's recommendations." Despite these contractual ambiguities, however, in practice the parties followed an established pattern the principal contents of which are not in dispute. This process was based on standard Bell Systems procurement practices, and its main features can readily be outlined.

124. The procurement process commenced with the preparation by ABII of a form known as an Authorization to Order ("ATO"). It described the item to be purchased and gave the estimated costs of shipping, delivery and other necessary expenses associated with the acquisition. After the ATO was prepared ABII first determined whether or not the item could be procured from an Iranian source. Regardless of the source of the procured item, however, an approval for the procurement by both TCI and CEO was necessary. TCI approval constituted a certification that the proposed item was necessary for the particular contract purpose. After this approval the ATO was sent to CEO for its budgetary approval of the acquisition.

125. After the item had been so approved, ABII would purchase and deliver the item to TCI. If the actual cost exceeded by an agreed-upon margin the cost listed on the approved ATO, ABII was required to submit an amended ATO to approval before consummating the purchase. After delivery to TCI, the supplier billed ABII and ABII initiated the invoice reimbursement process. The procurement invoices were accompanied by supporting information, including the ATO number, description of the items purchased, number of the check used in the payment, the payee of the check and the amount.

2. The Procurement Invoices at Issue

126. In this proceeding ABII claims the total amount of $1,662,535.46 based on 28 allegedly unpaid procurement invoices. Twenty three of these invoices pertain to items purchased under Contract 118; five were billed under Contract 138. The reason for the "late" billing was ABII's practice of not invoicing Iran until ABII had received and paid the suppliers' invoices. The dates ABII's invoices range from 9 November 1978 to 30 January 1979. Under both Contract 118 and Contract 138 procurement invoices were payable in U.S. dollars.

127. Respondents have not denied that the items in question were actually purchased by ABII. They argue, however, that the invoices are nonpayable on two main grounds: 1) as the invoices never fulfilled the "substantiation" requirement of paragraph 5 of Appendix 3, the payment obligation was never triggered; and 2) the proper procurement procedures, as described in the previous section, were not always followed. Alternatively, if the invoices are found to fulfill the contractual requirements, Respondents argue that they should be entitled to conduct an audit in accordance with paragraph 13 of Appendix 3, and that any approvals of the invoices should be regarded as

invalid on the ground of improper payments allegedly received by persons entitled to give such authorizations.

128. As to the first contention, the evidence shows that the invoices concerning procurement of equipment were contemporaneously accompanied by attachments which prima facie substantiated the costs incurred. Four invoices (604, 605, 606 and 607) on specialized engineering services were also prima facie substantiated by reference to CEO's prior agreement to the services in question and to a subcontract concluded by ABII with the provider of those services. Although such substantiation does not necessarily prove the final payability of the invoices, it did (unlike Invoice No. 221, for professional services, where no customary substantiation at all was provided) oblige Iran to object to the invoices within 30 days in case it rejected their payability. If Iran did not object, it is now precluded from asserting objections, "[u]nless there is evidence of circumstances constituting valid legal excuse for not complying with the 30 days limit set forth in Appendix 3, paragraph 5 . . . ." Interlocutory Award, supra paragraph 3 at 27-28.

129. ABII alleges that no objection was ever raised to any of the procurement invoices upon which it bases its claim. There is, however, evidence that CEO objected to payment of four of these invoices. A memorandum from CEO to ABII dated 26 December 1978 rejected payment of Invoices No. 524, 526, 527, and 529:

> Since invoices No. 524, 526, 527 and 529 were prepared without care, and were not based upon Letter No. 1141-27-28 dated 13/8/1357 [4 November 1978] and the amount was larger than stated in "Authorization of Order"; therefore, the above invoices are not payable.
>
> Please instruct to inform us if there is any explanation regarding to this matter.

130. The referenced letter of 4 November 1978 was a prior memorandum to ABII setting forth CEO's policy on

payment of procurement invoices. This prior memorandum stated, inter alia, that "only the amount estimated on the Authorization to Order will be payable."

131. ABII has not presented any evidence indicating that it ever responded to the objections of 26 December 1978. Each of the protested invoices was dated 1 December 1978; therefore CEO's objection was within the thirty day period required by Contract 138. In order to resolve the question of whether payment is justified on these four invoices, the Tribunal must examine the record before it to determine whether or not the objections raised by CEO were well founded.

132. Iran's first objection was against Invoice No. 524 in the amount of $3,314.42, which allegedly exceeded the authorized amount listed on the ATO. The record does not contain the ATO upon which this invoice was based, so that it is not possible to verify Iran's objection. However, the contemporaneous objection of CEO shifted to ABII the burden of responding to the objection. As no specific response against the objection has been made, the Tribunal concludes that ABII is not entitled to payment for this invoice.

133. Invoice 526 sought payment of $4,614.21 for various components needed as "critical repair parts" for a telecommunications installation. According to the relevant ATO, however, the estimated cost was only $3,051.00, or $1,563.21 less than the amount invoiced to Iran. Consequently, the Tribunal finds that ABII is not entitled to the full amount for the procurement invoice. Based on the policy of CEO, as set forth in the above-quoted memorandum of 4 November 1978, the Tribunal finds that ABII is entitled only to the amount of the cost estimated on the ATO, i.e., $3,051.00.

134. In Invoice 527 a payment request for similar repair parts was presented in the amount of $5,756.07, whereas the revised ATO only authorized the payment of $550. The Tribunal concludes that ABII is only entitled to this authorized amount of $550.

135. The final invoice in question is Invoice 529 in the amount of $171,693.78. No ATO has been provided by either party for this invoice. Therefore it is not possible for the Tribunal to verify whether the invoice price in fact exceeded the authorized price. In view of the contemporaneous objection by CEO and in the absence of any evidence of a specific response by ABII to this objection, the Tribunal cannot grant the amount claimed under Invoice 529.

136. As to the other invoices, the evidence submitted by ABII establishes the payment of each at the procurement cost, as well as the contractual basis for reimbursement of these payments. Iran has presented no proof of timely objections. The question remains, however, whether Iran was legally excused for not making objections. A possible excuse could be provided by the force majeure situation which prevailed during the time of the submission of at least most of the invoices. The existence of force majeure does not automatically excuse Iran from objecting to the invoices, since the nature of the specific obligations in question always has to be taken into account in the assessment of the effect of force majeure in this respect. Cf. Sylvania, supra, at 15-16. Indeed, the very fact that on 26 December 1978 CEO did object to four invoices can be taken as sufficient indication that by that date the situation in Iran had not prevented it from proceeding in the manner envisaged in paragraph 5 of Appendix 3 of the contracts. However since the revolutionary developments reached their peak only after that, the force majeure situation can also be assumed to have reached new dimensions after the end of December 1978. Although it was, strictly speaking, not

impossible for Iran to object to the procurement invoices within 30 days[6], the Tribunal nevertheless recognizes that after the 26 December objections the worsening situation gave Respondents legitimate reasons to reconsider their most important priorities in conducting their business, and that this constituted a "valid, legal excuse for not complying with the 30 days time limit . . .." Interlocutory Award, supra paragraph 3 at 27.

137. Nevertheless, just as the force majeure situation could not indefinitely excuse ABII's failure to substantiate the man/month Invoice 221 after the obstacle had subsided (cf. supra paragraph 118), so the turmoil of early 1979 could not indefinitely excuse Iran's noncompliance with the objection requirement. Although the relations between the parties never returned to normal, the situation in Iran stabilized enough during the spring of 1979 to make it inexcusable for Iran to withhold such objections as it may have had. It is not necessary to decide the exact date by which the state of affairs had changed in this way, since in any case it can be assumed to have happened several months before 15 August 1979, the date from which ABII seeks interest on the present claim.

138. The Tribunal concludes that all invoices, other than the portions of those four to which Iran objected, are payable. ABII is thus entitled to the amount of $1,480,758.

D. Office Space Invoices

139. Cost for office space was another item reimbursable to ABII outside the man/month rates. Both Contract 118

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[6] As is noted infra at paragraph 145, in January 1979 Iran objected to one invoice for office space.

and Contract 138 provided, under paragraph 1.3 of Appendix 3, that Iran would pay ABII for the cost of office space, maintenance, and utilities, including gas, fuel, electricity, and water. Contrary to Contract 118, Contract 138 provided that these costs were payable in Iranian rials.

140. Pursuant to these provisions, ABII leased six office buildings necessary to house its staff. ABII directly paid the landlords, utility companies, and other vendors providing services associated with the rentals. It billed these costs to Iran in monthly invoices quoting the Iranian rial amount as well as the same amount converted into U.S. dollars at 70.35 rials per dollar. The present claim is for payment of the dollar value (converted at 70.35 rials /U.S. dollar) of three such invoices totalling 65,963,305 Iranian rials, i.e., $937,644.71.

141. Invoice No. 826 under Contract 138 is for rent, utility, and maintenance costs for the six buildings incurred in December 1978. The invoice was submitted on 17 January 1978, and it was in the amount of 26,711,643 rials or $379,696.42. The parties agree that it was approved for payment and a check was issued to ABII for the full U.S. dollar amount of the invoice on 29 January 1979, but that the invoice remains unpaid. This is due to the fact that the Government accounts on which the check was drawn were frozen at that time. Respondents now assert that the invoice is not due, since it allegedly was not substantiated in accordance with paragraph 5 of Appendix 3. In view of the contemporaneous approval by Iran both as to the invoiced amount and currency, however, there is no justification for nonpayment. Consequently, the Tribunal awards ABII the full amount of Invoice 826 and in the currency as claimed.

142. Invoice No. 827 under Contract 138 covered the rental charges for the office buildings incurred in January and February 1979. This invoice was in the amount of

39,198,000 rials or $557,185.50 and it was submitted to Iran on or about 25 July 1979. Respondents now object to this invoice on the grounds that it was neither "substantiated" nor "approved".

143. As to the contractual provision on substantiation, the Tribunal notes that this requirement -- the contents of which have not been specified in the contract -- must be construed to have a differing meaning depending on the nature of the invoices in question. The previous practice of the parties is important in determining the level of substantiation necessary (cf. supra paragraph 100). This practice indicates that office space costs were reimbursed on the basis of mere invoices specifying the costs, without any supplementary documentation of the kind needed in connection with certain other invoices. Such an invoice was approved by Iran as late as January 1979. A more limited substantiation can also be regarded as adequate under paragraph 5 of Appendix 3, considering that the bulk of the office space costs, i.e., the rental payments, remained basically unchanged and were necessarily incurred from month to month. Thus there can be no doubt that Invoice 827 was substantiated at least so as to make it necessary for Iran to object to it within 30 days (cf. Appendix 3, paragraph 5 and the Interlocutory Award, supra paragraph 3 at 26 - 27). As no timely objection was raised, the invoice became payable on 25 August 1979. No objection was then raised as to the claim for payment in U.S. dollars. The present invoice relates to reimbursement for similar costs as Invoice No. 826, which was approved for payment in U.S. dollars. Consequently, the Tribunal awards to ABII the full amount of Invoice No. 827 and in the currency as claimed.

144. The final invoice for office costs on which ABII bases a claim is one arising under Contract 118. Invoice No. 818R, submitted on 8 January 1979, is for 53,662 rials attributable to elevator maintenance costs in two ABII

office buildings during the latter half of the contract period (i.e., December 1977-July 1978). The amount claimed is $762.79 based on an exchange rate of 70.35 rials per dollar. According to ABII, the amount was not billed earlier, because the provider of the services had delayed billing ABII.

145. On 28 January 1979 CEO refused to pay this invoice on the ground that it arose under Contract 118, which had previously expired. This, however, is not a valid reason for nonpayment in the light of the contracts or the previous practice of the parties. Because ABII generally waited until it had actually incurred the costs and disbursed the funds, it was not possible to complete all billing within the twelve month contract period. Thus, despite the relatively specific objections raised in December 1978 against four procurement invoices (see supra paragraph 129) Iran did not object on the ground that the invoices pertained to Contract 118. The contract provision clearly took into account the possibility that costs finally incurred by ABII only after the expiry of the contract would at that stage be passed on to Iran for reimbursement. Thus Contract 118 provided at paragraph 4 of Appendix 3 that the letters of credit were to be kept open for six months after the formal expiration of the contract. As Invoice 818R was submitted within six months after the expiration of Contract 118, and as the covering letter following it substantiated the invoice in a sufficient manner, ABII clearly is entitled to the payment of the full amount of Invoice No. 818R. Because Contract 118 authorized all payments to be made in U.S. dollars, ABII is entitled to $762.79 as claimed.

146. In case Invoices 826, 827 and 818R are found payable, Respondents have requested an audit of the invoices in accordance with paragraph 13 of Appendix 3 of Contracts 118 and 138. Since the audit was not requested within six months from the date when each invoice became payable, such

a request cannot be granted now (cf. supra paragraph 97). Respondents' other alternative argument, based on the purported invalidity of one of the leases due to alleged improper payments, does not provide a direct defense against the claim, but is discussed in connection with the counter-claims. Consequently, the Tribunal awards ABII the total amount of $937,644.71 due under the three office space invoices.

E. Expropriation of Bank Account

147. ABII's final claim is for $283,964, the value of funds held in a bank account in Iran which were allegedly expropriated by the Government of Iran. The ABII funds in question were held in a joint ABII/TCI account established at Bank Melli by virtue of an arrangement of 19 March 1979 to which ABII apparently only reluctantly agreed. The funds in this account, originally 61,000,000 rials, were used to satisfy ABII's outstanding affairs with creditors subsequent to its departure. Transactions on the account were to be made subject to the joint signature of TCI and ABII's representatives at Price Waterhouse. Proceeds of sales of ABII's assets were to be deposited into this account and then reapplied to the satisfaction of any outstanding obligations.

148. It appears that by June 1979 a substantial amount of the outstanding obligations of ABII had been settled. In that month ABII's representative telexed the Minister of Post, Telephone and Telegraph, Dr. Islami, objecting to the fact that, despite contrary assurances, the balance of the funds, about 20,000,000 rials had not been released to ABII. This request for the release was subsequently repeated at least in letters addressed to Dr. Islami in October and November 1979, when almost all of the obligations had been satisfied. These requests were not complied with. Instead,

on 10 August 1980 the Minister, in a letter personally forwarded by a TCI representative to ABII's Iranian representative at Price Waterhouse with the authority to sign on behalf of ABII, requested that Price Waterhouse transfer the funds to a TCI account at Bank Melli. In a letter dated 19 August 1980 to ABII the representative reported that he was informed that "non-compliance with the payment request would have serious personal consequences for [him] and would in any case not stop TCI obtaining access to ABII's funds." The representative then authorized the transfer of the 19,976,850 rials which was effected on 11 August 1980. Since then ABII has not had any access to the funds.

149. Claimant contends that the above actions constitute expropriation under international law for which Iran is responsible. Respondents do not deny the appropriation of the funds, but contend that the acts in question do not amount to expropriation or usurpation under Iranian law, the governing law of the contracts.

150. The Tribunal notes that in the circumstances of the present case there is no need to discuss the applicable law at length. Where, as here, both the purpose and effect of the acts are totally to deprive one of funds without one's voluntarily given consent, the finding of a compensable taking or appropriation under any applicable law -- international or domestic -- is inevitable, unless there is clear justification for the seizure. The only conceivable justification for the taking of the funds would have been the settlement of outstanding accounts with landlords and creditors of ABII. Although ABII's letters from as late as October and November 1979 indicate that at that time some minor portion of such accounts remained unsettled, there is no evidence provided by Respondents that any outstanding obligation remained unsettled in the following August.

151. In view of the above, the Tribunal concludes that Claimant was wrongfully deprived of its bank account of 19,976,850 Rials. Therefore ABII is entitled to an award of U.S.$283,964, i.e, the value of the property as of the date of the taking.

V. COUNTERCLAIMS

A. General

152. Respondents have presented several counterclaims. They seek an award of damages based on: 1) alleged improper payments in relation to Contracts 112, 118 and 138; 2) alleged overpayment due to ABII's nonperformance of contractually assigned responsibilities; 3) losses allegedly caused by ABII's faulty performance under Contracts 118 and 138; 4) return of tax costs for which ABII allegedly received payment but which it never incurred; 5) recovery of the value of TCI property allegedly not returned to TCI by ABII after its departure; 6) alleged excess vacations and absences of ABII personnel; 7) taxes and social security premiums; 8) excess profits, and 9) "miscellaneous violations" by ABII. Each of these counterclaims is discussed separately in the following sections.

B. Improper Payments

153. This counterclaim relates to the rental payments which Iran sought to have declared unenforceable. This request was denied supra at paragraph 17, but Respondents alternatively allege that the rentals constituted improper payments amounting to contract breaches giving rise to a counterclaim. The contract provision principally relied on

by Iran is Article 20 of Contract 138 (and the corresponding articles in the two other contracts[7]), which reads as follows:

> The Seller is not entitled to give any money or property to anybody and/or contemplate rebate or profit for him directly or indirectly, inside or outside Iran for the works which he undertakes for the Buyer's Contracts, by himself or by any other legal person for the purpose of obtaining Contract privilege or improper influence on works, whether that purpose be executed or not or it's [sic] execution be plausible or not. Besides, the Seller is not entitled to receive any money or property as commission or rebate etc. on materials and or services procured for the Buyer. An affidavit to these effects will be submitted by the Buyer to be signed by the Seller and his subcontractors. For failure of the Seller from any of the above items, the Buyer has the right to collect the bank guarantees of the Seller and to pursue the Seller according to the laws of Iran and in addition perform on his opinion one or all of the following points.
>
> a. Collect as damages three times the sum of the unauthorized amount paid or received as mentioned above.
>
> b. Cancellation of the Contract without paying any compensation to the Seller for the reason of his failure and fault.
>
> c. Assessment of occurred damages and receiving this amount from the Seller.
>
> This Article will be incorporated in all subcontractors [sic] entered into in connection with this Contract.

154. Respondents argue that the payments made in connection with the lease arrangements in question amounted to illicit payments made for the purpose of obtaining contract privileges. They also contend that at least one of the required affidavits, executed in 1977 by ABII's

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[7] I.e., Article 17 of Contract 112 and Article 20 of Contract 118, both of which are essentially similar to the quoted Article 20 of Contract 138.

president, was false, since the improper arrangements concerning the Niavaran apartments (see infra) had been concluded before but were not revealed in the affidavit. The actions of ABII officials allegedly also violated the Iranian Penal Code and the United States Foreign Corrupt Practices Act, and thereby at the same time Article 21 of Contract 138 ("Certification of Legality"). Iran seeks cancellation of Contracts 112, 118 and 138, or alternative damages to be determined after an audit of ABII's books and records, as well as punitive damages, based on the "willfully false affidavit". Claimant denies any liability.

155. The first of the challenged lease arrangements concerns eight apartments in the Niavaran district owned by a relative of the ex-Shah. It is clear, however, that ABII never in fact rented these apartments. ABII was approached by TCI staff about the feasibility of renting the apartments, but ABII initially found them unsuitable and too expensive. Only after the owner's representative offered to make substantial repairs and to provide access to some recreational facilities did ABII agree to enter into a "Pre-Lease Agreement" summarizing the conditions which any eventual lease should include. The Pre-Lease Agreement itself, however, was not an agreement to lease the apartments and thereby did not independently create any such obligations for the parties. ABII never executed any lease on these apartments. Instead, ABII was advised subsequently that TCI had directly rented the apartments and would provide them to ABII in exchange for a reduced man/month rate, corresponding to ABII's reduced costs.

156. The evidence indicates that the arrangements whereby the apartments described in the Pre-Lease Agreement were rented by CEO and then provided to ABII did take place at a time when ABII was resuming negotiations which eventually led to the conclusion of the first direct contract between ABII and Iran. Nevertheless, the evidence is not

sufficient to show that the payments received by the landlord from CEO or TCI were either payments made by ABII or payments "for the purpose of obtaining Contract privilege". Rather, the arrangements prima facie served ABII's legitimate business purposes. Even assuming that ABII indirectly can be regarded as the payor, the rental payments received by the owner were not strikingly high or incompatible with ABII guidelines. Indeed, had ABII's intention been to gain improper benefits, one would assume that it should have accepted the terms originally presented by the owner's representative rather than enter into bargaining, as it evidently did. The record establishes that sworn affidavit of ABII's president executed after the Pre-Lease Agreement cannot be regarded as incorrect.

157. Similarly, there is no showing of impropriety regarding ABII's rental of an office building at 1717 Pahlavi. The building apparently was owned by the wife of the head of CEO. Nevertheless, the record does not support a contention that the agreement was concluded and the rental payments made for the purpose of improperly influencing anyone involved in the Seek Switch Program. The lease was entered into several months after Contract 118, the first one-year contract, was negotiated and signed. The arrangement was openly disclosed; the lease conditions were standard; and the rate apparently was negotiated downwards from that proposed by the representative of the landlord. ABII prima facie used the building for legitimate business purposes, and there is no evidence that some "extra" consideration for the lease was ever sought or received by anyone.

158. Respondents have further alleged that two rentals from TCI employees were made with the intention of improperly, and in violation of the contracts, influencing the receivers of the rental payments, who were responsible for accepting certain invoices of ABII. Respondents, however, have failed to submit any proof of such motives as would make the arrangements contract breaches. Mr. Dalziel, the

signer of one of the two leases in question, has testified in an affidavit that he never knew that the landlord was employed by TCI. In addition, the rental rates were consistent with ABII guidelines and its practice concerning the leasing of literally hundreds of apartments in Iran.

159. In conclusion, Respondents have failed to show that the conditions for the application of any of the remedies provided for in Article 20 of Contract 138 are satisfied. The arrangements in question admittedly served ABII's legitimate business needs, and do not show features decisively different from many other similar arrangements made by ABII at the relevant period. Moreover, far from indicating any systematic effort of covering up the arrangements in question the evidence rather shows that all the transactions were openly documented. Thus the Tribunal concludes that there is no showing of any violations of Article 20 of Contract 138 quoted above, or its equivalents in the other contracts. On this basis it is also apparent that the contention according to which ABII's conduct violated the Iranian Penal Code and the United States Foreign Corrupt Practices Act lacks substantiation, quite apart from the fact that the Tribunal lacks jurisdiction over counterclaims alleging violation of Iranian penal laws. Interlocutory Award, supra paragraph 3 at 35. Iran's counterclaim is thus denied.

C. Overpayment due to Non-Performance Under Contract 138

160. Respondents argue that ABII's final entitlement to the contract price was contingent upon its performance of the specific tasks defined in the SOW. Not only the down payment, Respondents assert, but also monthly payments were made on a "provisional basis" subject to refund if the

projects were not finally completed according to the schedule. Thus, according to Iran, the provisions of Contract 138 must be interpreted as an obligation de résultat entitling ABII to final payment only upon completion of the supervisory, training, and "deliverable" tasks assigned in the SOW.

161. On this assumption, Respondents submitted a table analysing the performance of ABII. This analysis allegedly suggests that only 12.3 per cent of total deliverables required under Contract 138 was produced; that no greater percentage of supervisory responsibilities was accomplished; and that documents submitted by ABII show that only 7.8 per cent of total training tasks due under Contract 138 was completed. Estimating that 70 per cent of the total contract price was allocable to deliverables, 20 per cent to supervision, and 10 per cent to training, Respondents conclude that they are entitled to a refund of "at least" $20,005,783 out of the payments received by ABII.

162. Claimant denies the merits of this counterclaim, disagreeing with Respondents on both the nature of the contract and the accuracy of the supporting calculations.

163. The Tribunal cannot share TCI's view that Contract 138 involved an obligation de résultat. Payment for professional services rendered under the contract was not directly based on the submission of deliverables or on the completion of identifiable tasks. Article 3.4 stated that "the payable amount to the contractor [ABII] will be calculated with regard to the number of personnel and period of their work . . . ." (Emphasis added.) Although Contract 138 recognized (in Appendix 3) that the contract price was based on the "services" to be rendered, Contract 138 does not stipulate prices for specific tasks; rather it established a rate schedule in which the level of fees payable per man/month varied with the level of experience of the employees whose services were billed to Iran. Thus the contract provisions

did not form an obligation de résultat presupposing payment only upon the fulfillment of concrete tasks. Rather the measure of the services on which the billing was based is that typical of consulting contracts, i.e., the amount of professional time devoted to accomplish the designated objectives. This conclusion is also confirmed by paragraph 13 of Appendix 3 (see supra paragraph 96) according to which Iran was to verify the "number, duration of work, [and] levels of man/months and prices" underlying invoices, but not the number of concrete tasks accomplished during the billing period.

164. The SOW did establish a time table for the performance of ABII's services to be billed according to the man/months. In case of noncompliance, Article 6.1 provided that if "the Contractor does not accomplish any of his duties and obligations according to this Contract properly and in accordance with time table of Seek Switch Program . . ., the Employer will inform the Contractor, in writing, . . . and will stipulate a date for correction . . . ." If no correction ensued, Iran was, according to the same article, "entitled to cancel the Contract in accordance with Article 18." Iran never recorded any objections in accordance with Article 6, nor did it finally disapprove any invoices submitted for man/month services either within the six month verification period or at any time before the submission of its counterclaim at the Tribunal. ABII's entitlement to the two last -- and most controversial -- man/month invoices was positively confirmed by the Tribunal in paragraphs 92 - 120 supra. As there is even less proof of ABII's non-entitlement to be paid for the previous invoices, the counterclaim alleging overpayment must be dismissed.

D. Faulty Performance

1. Introduction

165. Under this counterclaim Respondents claim damages in the amount of at least $10,619,906 allegedly caused by ABII's substandard performance of its obligations under Contracts 118 and 138. Whereas, roughly speaking, the previous counterclaim dealt with quantitative aspects of ABII's performance, this counterclaim focuses on the quality of this performance. According to Respondents, ABII's personnel generally did not live up to the high professional standards required of them, thereby causing damages to Iran. In addition to such broad complaints TCI has put forward specific examples of ABII's allegedly faulty performance. They concern both specified deliverables and ABII's supervision tasks.

166. Claimant denies the merits of these allegations and also argues that the present counterclaim is barred by the Tribunal's rulings in the Interlocutory Award. This latter argument must be dealt with first in relation to the various portions of this counterclaim.

2. Qualifications of ABII Personnel

167. As to the allegations concerning the qualifications of ABII personnel, in the Interlocutory Award (supra paragraph 3 at 25) the Tribunal held that:

> Articles 3.6 and 3.3 of both contracts gave Iran a 10 day period for disapproval of ABII employees before they were sent to Iran and the right to dismiss, without cause, ABII employees in Iran. If Respondents failed to avail themselves of the remedies provided by Articles 3.3 and 3.6, they are now precluded from asserting counterclaims in such matters, unless there is evidence of circumstances constituting a valid, legal excuse for not availing themselves of such remedies.

168. There is evidence that TCI occasionally expressed its dissatisfaction with certain ABII employees, asking them

to be dismissed. The record contains, however, no evidence or even allegations that ABII failed to remove the persons in question from the Seek Switch Program. Aside from these apparently few instances, there is no evidence that Respondents ever used the contractual remedies with respect to persons with purportedly unsatisfactory professional skills, or that Respondents are sufficiently excused for this failure. Consequently, pursuant to the Interlocutory Award, supra paragraph 3 at 28, "Respondents are . . . precluded from asserting objections or counterclaims with regard to the qualifications and performance of ABII personnel."

3. Specific Deliverables

169. Respondents have specified some twenty deliverables allegedly showing ABII's faulty performance. Thirteen of them relate to "Military Seek Switch Requirements". The balance concern the "Subscriber Trunk Dialing Network", "National Network Homing Maps and Lists", "Engineering Packages for EAX Exchanges", "Determination of Power Requirements", "Preparation of Tender for Stored Program Control Switching Equipment", "Cable Tender TDP-083", and "Zohreh Satellite System".

170. The contracts as interpreted in the Interlocutory Award are relevant also in this connection. The Tribunal held that by virtue of Articles 2.15 and 2.16 "Respondents are precluded from asserting any objections and counterclaims with regard to actions proposed by ABII and the content of tasks performed by ABII", save where they had disapproved such tasks within 45 days or had a legal excuse for failing to do so. Interlocutory Award, supra paragraph 3 at 22. As regards tasks completed by ABII, Article 2.16 provided as follows:

> If [work] acceptance certificates are disapproved the Employer will notify the Contractor in writing of the specific reasons for disapproval within 45 days of submission.

171. For later-discovered negligence, however, which is "solely attributable to ABII", the "approval of ABII's work by the Government of Iran does not relieve ABII from responsibility and liability for the deficiencies and errors . . . as long as such deficiencies and errors are observed within two years after a project is placed in service." Id. at 23. The requirement of negligence solely attributable to ABII applies also in connection with responsibility for works disapproved in accordance with Article 2.16.

172. The Interlocutory Award left open "any possible limiting effect of Article 6.1 and other provisions of the contracts . . . ." Article 6.1 of Contracts 118 and 138 required Iran to "inform [ABII] in writing about [ABII's] faults and failures and [to] stipulate a date for correction of such objection"; if ABII failed "to rectify the defined objection", Iran was entitled to invoke Article 18 and cancel the contract. Article 6.1 was thus (in addition to situations discussed in the previous section) also relevant to situations in which a material breach, such as production of a defective deliverable, occurred. In this respect Article 6.1 supplemented the above-quoted provision of Article 2.16. By virtue of Article 2.16, Iran, at least initially, could properly disapprove acceptance certificates concerning deliverables, without setting any exact period for rectification. Thereupon it was ABII's duty to react, either to correct the document or to explain why it did not need correction. If Iran, however, was dissatisfied with the explanations or with what emerged from the revision process, Article 6.1. entitled ABII to be informed that a default had occurred and to be granted a period within which to "rectify the objection". Such a rectification period was required also with respect to alleged material breaches other than those to which Article 2.16 applies. If not given such an opportunity, ABII would be deprived of the contemporaneous opportunity to show that a breach had not occurred, or if it had occurred, to correct it quickly.

173. When these principles are applied to the present case, it appears that with regard to an overwhelming majority of the deliverables at issue Iran has failed to comply with the procedures envisaged in the contract. As regards two specific deliverables concerning Military Seek Switch Requirements, however, the situation must be judged differently.

174. The first of the deliverables is Document No. 234 ("Output Reports Indicating Status and Necessary Action for Program Control, Tehran Iran"). The work acceptance certificate for this document was submitted by ABII to TCI on 8 November 1977. On 18 December 1977 the governmental unit involved ("J-6") sent a report to TCI's Managing Director stating that the document "was inadequate" and that "a complete revision was called for." ABII has contended that there is no evidence that the report was "ever transmitted to ABII by TCI", but the latter has produced minutes of a meeting between CEO and ABII, held on the same day (18 December 1977), at which the deliverable was discussed. According to the minutes "General Tavakoli indicated that he was not satisfied with" Document 234 and certain other deliverables, whereafter "ABII responded that these were not final products but were the most complete that could be done at this time." The minutes record an agreement that the deliverables be updated.

175. The other deliverable in question is Document No. 287-2 ("Military and Civilian Customer Servicing Progress Reports"), for which the work acceptance certificate was submitted by ABII on 8 October 1978. On 13 November 1978 the involved governmental unit in a memorandum to TCI's managing director, criticized the document, stating in summary that it "does not know what to do with it." ABII has admitted the receipt of this document by stating that "[o]n November 13, 1978, J-6 submitted two pages of constructive comments . . . which were accepted by ABII."

176. The Tribunal concludes that in both cases Iran conveyed to ABII clearly enough its disapproval within 45 days from the submission of the work acceptance certificate, as required by Article 2.16 of the contract. In both cases there is indication that ABII admitted that the documents in question needed revision. There is, however, no evidence or even allegation (apart from the statement made in this proceeding that ABII "accepted" TCI's comments on Document 287-2) that the deliverables were corrected or revised in accordance with the comments by Iran. Therefore ABII is, by virtue of Article 2.18, "responsible for all cost of alteration, replacement or modifications" concerning these disapproved deliverables. Cf. also Interlocutory Award, supra paragraph 3 at 26-27. Noting the lack of evidence concerning such costs and the difficulties of assessing them, the Tribunal finds it reasonable to award Iran U.S.$50,000.

177. With respect to the rest of the deliverables in question, Respondents have failed to show any entitlement in light of the procedures and standards set by Contract 138 and the Interlocutory Award. Either Iran has failed to issue an explicit disapproval within 45 days or, even if such a disapproval can be discerned, the record also indicates that problems were solved in an ensuing revision process, or that at least the process did not lead to a definite notification of breach and ordering of a correction period in accordance with Article 6.1. Apart from the lack of such notification, in some instances (e.g. deliverables associated with engineering packages for "EAX" exchanges, and the determination of power requirements) there is strong indication that any defects which may have existed were partly if not entirely attributable to other contracting entities involved, and not "solely attributable to ABII" as required by the contracts and the Interlocutory Award. Where such attributability concerning alleged defects might be established, as in connection with the tender programs and the satellite system program referred to above, the

preponderance of the evidence nevertheless fails to show any negligence on the part of ABII.

4. Supervision

178. The third main category of claims of faulty performance relates to ABII's allegedly defective supervision of various contractors in the Seek Switch Program. The contracts in question are "Contract No. CEO-128-3 (TDP-049) for the Supply and Installation of Diesel Alternator Power Plants", " Contract No. TDP-035 for the Installation of Cable-Tehran", and "Contract No. TDP-038 for the Installation of Cable-Provinces," as well as others associated with "STD Exchange Building Designs". In this respect Contract 138, as interpreted in the Interlocutory Award, provides, inter alia, that "ABII is liable only for its errors, i.e., negligence". According to the Interlocutory Award, supra paragraph 3 at 24, furthermore:

> . . . Article 2.18 provides that in connection with any ABII errors, i.e. negligence, in its "other functions of supervision and installation, test, acceptance", ABII is responsible for going back and seeing that responsible sellers and consultants correct these deficiencies without any cost to the Government of Iran.

179. Respondents' allegations concerning the substandard performance are rebutted by ABII in detailed explanations and affidavits. On the balance, the Tribunal concludes that Iran has not fulfilled its burden of proof. Even where the criticism and remarks by TCI may not have led to corrections -- and corrections often ensued -- evidence is lacking to the effect that any remaining deficiencies were due to negligence attributable to ABII. Thus these portions of the counterclaim are denied.

180. Consequently, ABII is liable to Respondents under the present counterclaim for $50,000. In view of this amount it is not necessary to discuss the quantitative limitations

of ABII's liability set by Article 2.21 of the contracts, or any possible exceptions to those limitations. Cf. Interlocutory Award, supra paragraph 3 at 28-30.

E. Repayment of Tax Costs

181. One of the cost components of the man/month rates of Contract 138 was an amount intended to recoup ABII's cost of reimbursing its employees for additional tax liabilities the employees were to suffer under an anticipated change in United States income tax laws. This change, however, never came into effect. Respondents contend that ABII had taken upon itself the obligation of returning the funds received because of the planned tax law, in case the law did not become operative. On this basis Respondents claim $3,716,165.

182. This counterclaim, as admitted by Respondents, was not raised until TCI's Counterclaim Memorial submitted on 30 August 1985. Therefore it raises questions under Article 19, paragraph 3 of the Tribunal Rules which requires a counterclaim to 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." In the assessment of the circumstances, among other things, the possible prejudice caused to Claimant by the late presentation of the counterclaim has to be taken into account as an important factor.

183. The Tribunal notes that the counterclaim was presented about five weeks before the Hearing, and four weeks before ABII was due to submit its rebuttal. As to the factual issues involved, this counterclaim belongs to one of the least complicated parts of the whole case. Thus the preparation of a defence would not have caused to ABII such hardship as would amount to undue prejudice, and such prejudice is not even alleged by Claimant. In view of this,

and accepting that Respondents may not, at the time of the presentation of the Statement of Defense, have detected the evidence (mainly letters of ABII) supporting this counterclaim among voluminous documentary materials relating to the Seek Switch Program, the Tribunal decides that the late presentation of the counterclaim was acceptable under the circumstances.

184. As to the merits of the counterclaim, Respondents have submitted as evidence relevant correspondence between ABII, CEO and AT&T, as well as two memoranda touching upon the subject. According to these documents ABII contemporaneously informed AT&T that the former "would be obliged to refund [the amounts corresponding to the costs of the anticipated tax reform] to our customer" in case the law never became operative. With a view to the same eventuality ABII wrote to CEO that "ABII will of course refund to IGOI the applicable credit" and, when it had become clear that the anticipated costs were not incurred, in a meeting between ABII's president and General Toufanian ABII acknowledged that "therefore we owe you a couple of million dollars which we will pay you." Although normally changes in the costs included in the man/month rates must be regarded as a risk to be borne by the parties, the above evidence shows that in this particular instance the parties clearly regarded the cost element in question as contingent and subject to ABII's refunding obligation in case of non-existence of the conditions upon which the inclusion of the costs in the man/month rates was based. As there is no evidence or allegation of an actual refund, this counterclaim is meritorious.

185. As to the amount, an ABII letter dated 12 June 1978 indicates that Claimant admitted the refundable costs amount to "approximately $3,500,000". Since the exact amount is difficult to determine, the Tribunal accepts this figure, and therefore awards Iran $3,500,000.

F. Recovery of the Value of the Missing Property

186. Respondents contend that when leaving Iran ABII failed, in breach of the contracts, to return property of TCI worth $1,266,256 and 1,108,255 rials. According to Claimant, in the absence of showing of willful or negligent behaviour on the part of ABII, Iran bears any responsibility for the property regarding the loss of which, moreover, Respondents have not produced sufficient evidence.

187. The Tribunal need not resolve the issues of responsibility for the property and the effect of the force majeure situation under which ABII's last employees departed, as Respondents have failed to prove the alleged losses. Only a tabular summary merely indicating the invoice numbers and the amount allegedly expended for the equipment in question has been provided. No underlying invoices or other evidence attesting to the loss of the equipment has been tendered. The counterclaim is denied for lack of proof.

G. Excess Vacations and Unauthorized Absences

188. Respondents contend that ABII documents concerning its personnel in Iran together with "other information available to TCI" show excess vacations and unauthorized absences. Based on their computations presented in an "Excess Vacation Table" Respondents claim to be entitled to $763,971 on the basis of overcharging due to excess vacations under Contracts 118 and 138. The corresponding amount claimed for "unauthorized absences" is $49,154, thus making the total claim $813,125.

189. Claimant has responded to the allegations of excess vacations by providing the actual attendance records of the employees at issue, which indicate the number of the vacation days taken. These documents together with the

accompanying explanations show that Respondents' calculations are based on incorrect premises. Thus they fail to recognize that, according to Appendix 6 of the contracts, the employees were entitled to the vacation based on the length of their entire service in the Bell System (rather than their service in Iran only), and that the employees could carry over unused vacation time from the previous year. Having studied the calculations presented by both parties the Tribunal concludes that Respondents have failed to show any entitlement on the basis of excess vacations.

190. As to other allegedly unauthorized absences, it is provided in Clause C of Appendix 6 of Contract 138 (Contract 118 has an essentially similar provision) that:

> The Contractor will be paid for other authorized absences up to a maximum of 24 days per year per employee . . . [d]uring the Contract year for all the following (not for each one):
>
> Paid elective absence for religious and other personal reasons up to 3 days, illness, travel to and from Iran except for business purposes, family death, trips home, jury and military reserve duty for personnel working in the U.S. and other approved personal reasons. Travel for business trips is not considered an absence.

191. Respondents allege that two ABII employees were absent in excess of a net total of 77 days. As evidence Respondents refer to ABII document "Personnel in Iran", effective as of 12 December 1979, produced by TCI, which indicates in the case of both persons an absence on the basis of "emergency" in 1979. In one case the absence lasted 68 days, in the other 57 days. As this kind of absence clearly falls under the field of application of the above-quoted Clause C, it means that both absences exceeded the 24 days for which ABII was entitled to bill in its man/month invoices. The total excess amounts to 77 days, as alleged by Respondents. Since ABII has not even alleged

that amounts corresponding to these days had been deducted from the relevant man/month invoices, the Tribunal concludes that Iran is now entitled to a corresponding refund. Accepting, in the absence of other evidence, the amount claimed, i.e., $49,154, as accurately reflecting the amount overcharged, the Tribunal awards it to Respondents.

H. Taxes and Social Security Premiums

192. Respondents have also raised a counterclaim for allegedly unpaid taxes and social security premiums relating to ABII's Iranian personnel and subcontractors. Claimant denies both the jurisdiction over this counterclaim and the merits of the same.

193. The Tribunal notes that no proof of any outstanding tax and social security obligations has been tendered. Instead Respondents request that ABII be ordered to produce its relevant payment documentation. The Tribunal does not find sufficient reasons to grant this request, and dismisses the counterclaim for lack of proof. In view of this the Tribunal does not have to reach the issue of its jurisdiction over the present counterclaim.

I. Excess Profits and Requests for Audit and Expert

194. Paragraph 14 of Appendix 3 of both Contract 118 and 138 contains the following provision:

> If the profit of the Contractor including U.S. corporate income tax in any calendar year on services of par. 1.1 of app. 3 exceeds %18 of actual cost in accordance with AT&T practices then the Contractor should return the excess to the Employer.

195. Suggesting it to be "likely that ABII overstated its costs under Contracts 118 and 138" and thereby received excess profits, Respondents request an audit for the

determination of whether and to what extent such excess profits were actually received. In addition, Respondents during the proceedings have made other requests for an audit of ABII's financial records. They have also requested appointment of an expert for the assessment of their alleged damages.

196. Iran was contractually entitled to audit ABII's records for a limited time and for limited purposes. As discussed earlier (supra paragraphs 96 - 97), under paragraph 13 of Appendix 3 it was entitled to audit any records necessary to verify invoices for up to seven months after their submission. Respondents' failure to rely on their contractual right precludes them from now asserting it. As to alleged excess profits, the contracts provide no right to an audit for that purpose. Moreover, according to an affidavit by Mr. Poorten no such profits were earned. Sufficient evidence suggesting the likelihood of contractually excessive profits has not been tendered. Therefore the Tribunal rejects the counterclaim concerning alleged excess profits and the request for an audit.

197. With regard to the necessity of experts, the Tribunal notes that the parties have had more than adequate time to prepare their case and engage their own experts. Having studied the case the Tribunal concludes that any possible benefits to be derived from the appointment of an expert are not in proportion to the delays and consequential prejudice to all parties which would ensue. This request is therefore rejected.

J. Miscellaneous Violations

198. In its Counterclaim Memorial of 30 August 1985 TCI stated that "[t]o the extent not otherwise discussed herein or finally settled by the Interlocutory Award TCI repeats

all of the claims set forth in its Statement of Counterclaim of May 14, 1982 . . . ." The Tribunal concludes that, apart from questions disposed of in connection with the claims or the counterclaims already discussed, TCI's Statement of Counterclaim and related evidence do not prove violations for which Respondents would be entitled to damages. Consequently, the counterclaim for miscellaneous violations is rejected.

VI. INTEREST

199. Claimant seeks simple interest at the annual rate of 12 per cent on all components of its claim. With respect to the invoices for professional services, procurement and office space the interest is claimed from 15 August 1979, i.e., the date when Iran received payment from the bank guarantee provided by ABII to secure the downpayment made by Iran. Interest on Claimant's termination costs claim is claimed as from 5 December 1979 which is the date 30 days after the receipt by Iran of the last termination costs invoice. Claimant emphasizes that in selecting this date it relinquishes entitlement to interest "from 30 days after [Iran's] receipt of each invoice." As regards the expropriation claim the interest is claimed from 11 August 1980, "because it was on that date that ABII was denied further use of the funds."

200. Respondents deny that any interest should be due but, in case it is granted, ask that "the same treatment should be afforded to TCI with respect to all its counterclaims."

201. The Tribunal first notes that in a commercial case like the present one Claimant is clearly entitled to interest at a "reasonable" or "fair" rate to compensate for the delays with which the payments due are made. Cf. McCollough Company, Inc. and The Ministry of Post, Telegraph and

Telephone, Award No. 225-89-3 at 37 - 38 (22 April 1986). Noting the absence of any contractually agreed-upon interest rate, and taking into account such considerations as were put forward in McCollough, the Tribunal determines that a fair rate of interest to be awarded on all amounts due and owing Claimant is 10 per cent per annum.

202. Regarding most components of Claimant's claim the determination of the date from which interest is to be computed is relatively simple. This is the case with respect to Invoice No. 220 for professional services (U.S.$13,120,284) for which ABII claims interest as from 15 August 1979. Since the invoice actually had become due and payable even earlier (cf. supra paragraph 112), the Tribunal has no hesitation in awarding interest from the date requested. The same applies to the procurement invoices totalling U.S.$1,480,758, as well as to office space Invoices No. 826 (U.S.$379,696.42) and 818R (U.S.$762.79): the interest shall be computed from 15 August 1979 as claimed by ABII, since this date is subsequent to that on which the amounts became due. Thus on a total amount of $14,981,501.21 the interest is calculated from 15 August 1979.

203. The rest of those components of the claim on which the interest is claimed from 15 August 1979, on the other hand, did not become payable until after that date. Therefore also the interest on the amounts in question shall be calculated from a later date. In case of office space Invoice No. 827 (U.S.$557,185.50) such a date is 25 August 1979 when the invoice became payable (supra paragraph 143). As invoice No. 221 for professional services rendered in December 1978 (U.S.$12,899,554) was not finally substantiated until this proceeding, the Tribunal determines the date of the final payability of the invoice following such substantiation, i.e., 25 November 1984 (supra paragraph 120), as the day from which the interest is calculated.

204. Had ABII been entitled to the costs included in its termination costs claim directly by virtue of the contract provisions on the termination costs, each invoice for such costs would have become payable 30 days after Iran's receipt of the invoice. Since with respect to this portion of the claim "[i]t is the Tribunal's task to reach a result which as closely as possible corresponds to the contractual scheme" (supra paragraph 59), the invoices in question -- to the extent they have been found to be payable -- shall be deemed to have become payable in accordance with the contract terms referred to. As all the invoices submitted for the costs in issue had become payable not later than 5 December 1979, the interest shall be calculated from that date, as requested by Claimant.

205. In case of expropriation or misappropriation of property, interest should be computed from the date of the taking. Since in the present case Claimant was deprived of the funds in its bank account not later than 11 August 1980 (cf. supra paragraph 148), the interest on $283,964 shall be calculated from that date, as requested by Claimant.

206. The 10 per cent interest rate also applies to TCI's counterclaims insofar as they are accepted. The largest of such counterclaims, i.e., that concerning the repayment of tax costs (U.S.$3,500,000), was not raised until 30 August 1985. Therefore interest on that amount is calculated from 30 August 1985. Similarly, it was only as a result of this proceeding that the debts based on the other portions of the counterclaims became payable so as to make TCI entitled to compensation for delayed payment. As, however, both the counterclaim for faulty performance ($50,000) and that for unauthorized absences ($49,154) were raised in the Statement of Defense and Counterclaim submitted on 14 May 1982, the interest on the total amount of U.S.$99,154 shall also be calculated from that date.

VII. COSTS

207. In view of the circumstances of this case, the Tribunal determines it appropriate that each party shall bear its own costs of arbitration.

VIII. AWARD

208. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a. THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF POST, TELEGRAPH and TELEPHONE OF THE ISLAMIC REPUBLIC OF IRAN and THE TELECOMMUNICATIONS COMPANY OF IRAN are jointly obligated to pay to AMERICAN BELL INTERNATIONAL INC.:

i) the sum of fourteen million nine hundred eighty-one thousand five hundred one United States Dollars and twenty-one Cents (U.S.$14,981,501.21) plus simple interest due at the rate of ten per cent (10%) per annum (365 day basis) from 15 August 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

ii) the sum of five hundred fifty-seven thousand one hundred eighty-five United States Dollars and fifty Cents (U.S.$557,185.50) plus simple interest due at the rate of ten per cent (10%) per annum from 25 August 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

iii) the sum of twenty-one million fifteen thousand thirty-two United States Dollars and no Cents (U.S.$21,015,032) plus simple interest due at the rate of ten per cent (10%) per annum (365 day basis) from 5 December 1979 up to an including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

iv) the sum of two hundred eighty-three thousand nine hundred sixty-four United States Dollars and no Cents (U.S.$283,964) plus simple interest due at the rate of ten per cent (10%) per annum (365 day basis) from 11 August 1980 up to an including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; and

v) the sum of twelve million eight hundred ninety-nine thousand five hundred fifty-four United States Dollars and no Cents (U.S.$12,899,554) plus simple interest due at the rate of ten per cent (10%) per annum from 25 November 1984 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

b. The rest of the claims are dismissed.

c. AMERICAN BELL INTERNATIONAL INC. is obligated to pay to the TELECOMMUNICATIONS COMPANY OF IRAN

i) the sum of ninety-nine thousand one hundred fifty-four United States Dollars and no Cents (U.S.$99,154) plus simple interest due at the rate of 10 per cent (10%) per annum (365 day basis) from 14 May 1982 up to and including the date until which the interest on the sums mentioned in paragraph a. above are calculated; and

ii) the sum of three million five hundred thousand United States Dollars and no Cents (U.S.$3,500,000) plus simple interest due at the rate of ten per cent (10%) per annum (365 day basis) from 30 August 1985 up to and including the date until which the interest on the sums mentioned in paragraph a. above are calculated.

d. The rest of the counterclaims are dismissed.

e. The total amounts, including the interest, mentioned above in paragraph c. shall be deducted from the total amounts, including the interest, mentioned in paragraph a., and the net amount due to AMERICAN BELL INTERNATIONAL INC. shall be satisfied by payment out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

f. This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Datad, The Hague
19 September 1986

Michel Virally
Chairman
Chamber Three

In the name of God

Charles N. Brower
Concurring Opinion

Parviz Ansari Moin
Dissenting Opinion
in part, Concurring
Opinion in part.