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ATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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Case No. 59 Date of filing: 25 Sep 85

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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____

- Date _____
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** SEPARATE OPINION of Howard Holtzmann

- Date 23 Sept 85
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE No. 59
CHAMBER ONE
AWARD No. 191-59-1

QUESTECH, INC.,
Claimant,

and

THE MINISTRY OF NATIONAL DEFENCE
OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

SEPARATE OPINION OF HOWARD M. HOLTZMANN

I agree with the amount of damages awarded in this case, but I disagree quite sharply with a key element of the reasoning by which the Award reaches that result. In particular, I consider that "changed circumstances" resulting from a political policy decision of the Iranian Government cannot be a basis for determining that Government's contractual liability, and that therefore the doctrine of clausula rebus sic stantibus, cited in the Award, is entirely inapplicable. Rather, I think that the measure of compensation to be paid by the Respondent in this case for its actions in unilaterally terminating the Contract should be determined by the terms of the Contract itself.

I join fully in all other aspects of the Award, except that I vote for the unrealistically low amount of costs awarded only because that is necessary in order to form a majority on this question. I also write separately to highlight certain matters in connection with the judgment

obtained by the Respondent in a Tehran court in violation of this Tribunal's Interim Award.

I. The Doctrine of Changed Circumstances Does Not Apply to This Case

This case arises out of the so-called IBEX project, under which a number of United States companies were hired by Iran to modernize its electronic intelligence gathering system. The Contract in this case was part of the training segment of the project. It called for the Claimant, Questech, Inc., to participate in and evaluate the training program conducted by Sylvania Technical Systems, Inc. As the Tribunal correctly has found in the Sylvania case and now finds in this case, after the Islamic Revolution in Iran the Respondent elected to terminate these training contracts while paying no compensation for large amounts of outstanding invoices, or for the costs incurred or profits lost because of the termination.

The Award holds that the Respondent had a right to terminate the Contract under the doctrine of "changed circumstances," i.e., clausula rebus sic stantibus, and that under that doctrine the Respondent is obligated to compensate the Claimant for services rendered and costs incurred under the Contract, but not for profits lost because of the termination. For the reasons set forth below, I consider that the Respondent's right to terminate derived not from changed circumstances but from the particular provisions of this Contract. Under those provisions, the Respondent is likewise obligated to compensate the Claimant for work performed and costs incurred under the Contract, but not for lost profits. I thus disagree not with the result but with the reasoning.

The Award's finding that the doctrine of changed circumstances applies in this case is flawed in two critical respects.

First, the new circumstances cited by the Award as grounds for lessening the Respondent's liability were in fact changes for which the Respondent itself is responsible. As a matter of law, a party cannot avoid contractual obligations because of circumstances that it created or that are within its own control.

Second, the characterization in the Award of the political circumstances in Iran in 1979 is unsupportable as a factual matter. The Award cites no record evidence upon which it bases its finding of supposedly changed circumstances, nor could it, because the file contains no such evidence. The changed circumstances argument was raised for the first time in brief remarks by the Respondent at the Hearing in this case. It was not raised at all in the Sylvania case, which involved the same project. Moreover, public documents, and awards and filings in other cases, in fact show that at the time the Respondent terminated this Contract there was nothing in the post-revolutionary environment that made it unreasonable to continue this Contract, and that the Government of Iran in 1979 continued numerous similar military contracts with Americans when it found them militarily or strategically justified.

It must be noted at the outset that the Award carefully limits the application of the rebus sic stantibus doctrine to what it calls the "exceptional circumstances" of this case. See Award at 23, n. 5. It emphasizes that this Contract was part of a "highly secret" intelligence gathering project that touched on "especially sensitive" aspects of Iran's defense interests. Id. at 20. The Award expressly distinguishes this case from cases involving "ordinary commercial relations" or those relating to "the

sale of less sensitive military equipment or services," such as the military contracts involved in the Pomeroy cases. See id. at 20, 23 n. 5. It also notes that different considerations might prevail where the terminated contract contains a stabilization clause. Id. at 24. But, in my view, even in the limited sphere defined by the Award, the doctrine of changed circumstances cannot properly be applied to determine contractual liability in this case.

The precedential value of the statements in the Award concerning the doctrine of changed circumstances is not only circumscribed by the narrow sphere and exceptional circumstances to which the Award makes it applicable, but also by the somewhat curious vote of this Chamber with respect to it.[1] This much is clear: there is one whole-hearted vote -- Judge Böckstiegel's -- for applying the doctrine of changed circumstances in this case; and there is one whole-hearted vote -- mine -- against that. As to the third vote, our respected colleague Judge Mostafavi states that he votes for applying the doctrine of clausula rebus sic stantibus "in order to form a majority." The extent of this apparent reluctance to join fully may perhaps be discerned from the fact that while he votes for the doctrine of changed circumstances he simultaneously dissents from the award of monetary damages that Judge Böckstiegel predicates on that theory. Judge Mostafavi thus appears to vote for a theory, but to dissent from applying it to award damages. Also, he dissents from the finding that the Respondent terminated the Contract, and yet joins in the view that the doctrine of changed circumstances justifies Iran's termination. It will be for others who consider the value of the Award as precedent to decide whether it can, in these circumstances, be accepted as constituting a clear

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[1] See the statements under the signatures of the Award.

majority pronouncement of this Tribunal on the validity of applying the doctrine of clausula rebus sic stantibus.

Concepts by which parties are excused from contractual obligations by certain changed circumstances are found in many legal systems and are known by various names. In common law systems they are embraced within doctrines of "frustration" and "impossibility"; in the civil law they are often known as clausula rebus sic stantibus. All of these doctrines excuse parties in case of supervening circumstances caused by outside events beyond their control that have made continued performance of a contract unreasonable. All of these doctrines are seen as exceptions to the paramount rule of pacta sunt servanda ("agreements are to be observed"). Because they are exceptions to the contractual obligation to perform they must be proven and applied with care. As this Tribunal held in Sylvania in applying the analogous principle of force majeure,

> [A] party that invokes it has the burden of proving that [such] conditions . . . existed with regard to its various obligations . . . . [T]he question . . . has to be seen, and may well be answered differently, in relation to every specific obligation.

Award No. 180-64-1, at 20.

All systems of law that recognize changed circumstances as an excuse to contractual performance require that the changed circumstances shall not have been caused by the party who invokes them. That is a rule of fairness so obvious as to require no extensive elaboration. The rule typically speaks of changed circumstances beyond the "control" of a party, or due to "outside" causes.[2] This

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[2] See, e.g., C.M. Schmitthoff, Export Trade: The Law & Practice of International Trade 119 (7th ed. 1980); A.G.

(Footnote Continued)

Tribunal has recognized that the same principle is found in Iranian law, the law the parties have agreed governs their Contract in this case. Thus, in the Sylvania case the Tribunal stated that a

> generally recognized requirement is also spelled out in Article 227 of the Iranian Civil Code, which reads: "The party who fails to carry out the undertaking will only be sentenced to pay damages when he is unable to prove that his failure was due to some outside cause for which he could not be held responsible." (English translation by Musa Sabi, 1973). [Emphasis added.]

Award No. 180-64-1, at 20, n.3

The Award describes three "changed circumstances" that it says gave the Respondent "a right to terminate the Contract." Award at 22. Analysis of those supposedly changed circumstances shows, however, that none of them was beyond the control of the Respondent or due to outside causes for which it was not responsible. Rather, these

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(Footnote Continued)
Guest, Anson's Law of Contract 440 (26th ed. 1984); E.A. Farnsworth, Contracts 678, 679 (1982) (terming this a "rather obvious requirement" and noting that "a party is expected to exert reasonable efforts to eliminate the impediment to his performance"); K. Rodhe, Adjustment of Contracts on Account of Changed Conditions, 3 Scandinavian Studies in Law 151, 160, 163-164 (1959) (the causes must be "extraneous"; a judge would be unlikely to release a party unless the performance fails "from no fault of his own"). Christou, A comparison between the doctrines of force majeure and frustration, 3 Int'l Contract L. & Fin. Rev. 75, 78-79 (1982) (both French and German law provide that the doctrine can be invoked only if the event was "outside the control or fault of the party invoking" it).

Article 119 of the Swiss Law of Obligations, which codifies the doctrine of impossibility, requires that the obligor's performance became impossible "because of circumstances for which he is not responsible." The Swiss Bundesgericht has invoked this clause as authority to apply the doctrine of rebus sic stantibus. See H. Smit, Frustration of Contracts: A Comparative Attempt at Consolidation, 58 Colum. L. Rev. 287, 291 (1958), citing cases.

"circumstances" were due to policy decisions voluntarily made by the Respondent itself, and therefore, none of them can excuse it from performance of its contract.

The first "changed circumstance" relied upon in the Award is described as "[t]he fundamental changes in the political conditions as a consequence of the Revolution in Iran." That is not an excuse because it is a recognized principle of law that a State cannot avoid its obligations by a change in government or "political conditions."[3] Otherwise, in a democratic republic a country could simply vote to repudiate its contracts.[4]

The second circumstance on which the Award relies is "the different attitude of the new Government and the new foreign policy especially towards the United States which had considerable support in large sections of the people." That, too, does not excuse the Respondent from its contractual obligations because every government is responsible for its "attitudes" and policy choices; the fact that a government's chosen policy is supported by the populace cannot possibly be invoked to suggest that the

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[3]In international law, a change in the type or nature of the government of a State leaves statehood unaffected and does not alter the binding effect of international obligations, including debts, assumed by the previous regime. See Restatement of the Foreign Relations Law of the United States § 161 (1965); Restatement of the Foreign Relations Law of the United States (Revised) § 208, Reporters' Note 2 (Tent. Final Draft 15 July 1985) (citing sources). Similarly, in cases of state succession, involving the emergence of a new international legal entity, the fact of state successsion does not cancel or alter private contract rights; rather, the relevant contractual obligations pass to the successor state. See I. Brownlie, Principles of Public International Law 657 (3d ed. 1979); Restatement (Revised) § 209(2).

[4]The contrary view is analogous to permitting a corporation to avoid a contract because the shareholders have voted out the directors who signed it.

government is not in control. Indeed, in a republic it would be unusual if substantial segments of the electorate did not support long-term government policy.

The third circumstance relied upon in the Award is "the drastically changed significance of highly sensitive military contracts as the present one, especially those to which United States companies were parties." But any perception that military contracts were of "changed significance" is a matter of political and strategic judgment. Here the Respondent simply changed its view of its military requirements.[5]

Even on its own view of the facts, therefore, the Award is wrong in its conclusion that the changed circumstances that it cites may provide a basis for terminating this Contract. Moreover, the view taken in the Award of events before the hostage-taking in Iran disregards historical

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[5]The inappropriateness of applying doctrines of changed circumstances in the circumstances contemplated by the Award can be illustrated by considering the case of Taylor v. Caldwell, 3 B. & S. 826, 122 Eng. Rep. 309 (K. B. 1863), an English case that has been described as "the fountainhead of modern law" in this area, E.A. Farnsworth, Contracts 673 (1982). Caldwell rented a music hall to Taylor who wanted to use it to present four concerts. The music hall burned down and the concerts could not be held. Taylor sued Caldwell for damages for breach of the rental contract, and the court found that Caldwell was excused from performance by changed circumstances. The court considered the fire to have been an outside event beyond Caldwell's control; certainly it would have held differently if Caldwell had himself set the hall afire.

For a Canadian case in which the Privy Council held that the doctrine of frustration could not be invoked because the changed circumstances were attributable to the election of the party seeking to invoke it, see Maritime National Fish Ltd. v. Ocean Trawlers Ltd., [1953] A.C. 524; The Eugenia, [1964] 2 Q.B. 226, discussed in C.M. Schmitthoff, Schmitthoff's Export Trade: The Law and Practice of International Trade 119 (7th ed. 1980).

facts. The available evidence indicates that at the time Iran elected to terminate the Contract in this case, it found no political or ideological impediment to acquiring other sophisticated and sensitive military equipment from the United States that it considered to be strategically and economically desirable.

It is important first to note the period of time that is relevant. The Parties agree, and the Award finds, that this Contract came to an end no later than the 15 September 1979 meeting between Questech and the Respondent. In fact, the Award concludes that the Contract was terminated prior to 16 July 1979. These dates are substantially before the Shah arrived in the United States on 22 October 1979 and the hostage crisis began on 4 November 1979. Thus it is essential to recall that at the time the Contract was terminated -- the summer of 1979 -- relations between the United States and Iran had not reached the stage that began with the hostage-taking.

There is considerable evidence that during the nine months between the Revolution and the hostage-taking Iran still desired to purchase sophisticated military equipment from United States sellers. In fact, the value of deliveries of military equipment bought from United States contractors declined only slightly in 1979, from $1.67 billion in 1978 to $1.41 billion in 1979.[6] It was only in 1980, after the hostages were taken, that deliveries ceased. Moreover, it is reported that shortly after the Revolution the new Armed Forces Chief of Staff, General Muhammad Vali Qarani, announced that Iran would honor its agreements not to transfer American weapons elsewhere and stated that

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[6] R.K. Ramazani, The United States and Iran: The Patterns of Influence 48 (1982), quoting U.S. Department of Defense, Security Assistance Agency, Foreign Military Sales and Military Assistance Facts, December 1980.

American military personnel might still be allowed into Iran to maintain equipment already purchased, although third-country experts would be preferred.[7] Similarly, a recent account of the early years of the Islamic Republic of Iran confirms that the government that was in power from the Revolution to 6 November 1979 was not impelled by political conditions to sever contacts and cooperation with the United States even in the sensitive area of military intelligence. To the contrary,

> [the Prime Minister] desired an early normalization of relations with the United States, the Iranian army needed delivery of military spare parts, and, moreover, [he] was suspicious of Russian intentions toward Iran. He also feared that the Soviet Union and Iraq were assisting the rebel Kurds in Iran. He hoped the American government might be able to assist Iran with intelligence information on Soviet involvement. Beginning in the early summer, Amir-Entezam [an aide to the Prime Minister] on several occasions asked embassy officials if Washington would share with Tehran data on activities both within Iran and in neighboring countries of importance to Iran's security.

S. Bakhash, The Reign of the Ayatollahs: Iran and the Islamic Revolution 70 (1985). It was in these circumstances that Ayatollah Khomeini approved a program to purchase military spare parts from United States contractors. See id.[8]

The Iranian desire to continue military purchases from the United States is further documented in the filings before this Tribunal in Claim No. B1, which concerns the

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[7] B. Rubin, Paved With Good Intentions: The American Experience in Iran 283 (1980). The statement that the new Government would give a "preference" to third-country nationals surely cannot be the kind of fundamentally changed attitude upon which the Award is based.

[8] The chart of U.S. military sales to Iran reprinted by R.K. Ramazani, supra n. 6, shows that Iran concluded $35.9 million worth of new agreements in 1979.

U.S. Foreign Military Sales program with Iran. In that case, Iran seeks refunds of payments made under some contracts and specific performance of others. In addition, filings by both Iran and the United States confirm that Iran chose not to pull out of the program entirely, but to continue participation on a somewhat smaller scale, and negotiations were conducted on that basis during the months following the Revolution. See Rejoinder of the United States to Iran's Replication at 31, 38, 40 (filed 15 April 1983); Replication Reply of Iran to U.S. Statement of Defense at 15 (filed 29 November 1982). Moreover, the Government of Iran does not allege that purchases were reduced because relations with the United States had deteriorated or because the contracts were no longer politically feasible; rather, it states that the purchase program was "overly grandiose." Id. (Iran's position in that case, like its primary position in this one, is that it desired to continue with the contracts, but that the American parties breached them.)

It is readily apparent that Iran was picking and choosing which military projects with United States contractors it desired to pursue and which it preferred to terminate. When it desired to pursue a project it did so, and did not consider that changed circumstances made that unreasonable or impossible; when it decided otherwise, it terminated the Contract. This was no less true with respect to IBEX than as to the other military programs referred to above. For example, there is documentary evidence in another IBEX case before the Tribunal that appears to indicate that as late as August 1979 Iranian military authorities and another United States contractor that had been involved in the project were considering proposals for

future services in view of the possibility of reinstituting IBEX, albeit on a scaled-down basis.[9]

Other recent cases before the Tribunal further illustrate Iran's continued willingness to make purchases of sensitive equipment from American companies. In its Partial Award in Case No. 302, International Technical Products Corp. et al. and The Government of the Islamic Republic of Iran et al., Award No. 186-302-3 (19 August 1985), the Tribunal considered a contract between the Claimant and the Iranian Air Force to install a radar tracking, ground-to-air and air-to-ground communications system at military bases in Iran. The Tribunal noted that the Air Force in a counterclaim sought specific performance of the contract, that it sent a letter on 30 October 1979 requesting that the Claimants return to Iran for negotiations concerning resumption of the project, and that the Contract came to an end only after the hostage crisis began. Id. at 22-25; see Respondents' submission filed 2 January 1985 in Case No. 302, exh. 36. Similarly, in Case No. 359, the Tribunal has issued an Award on Agreed Terms that calls for General Electric Company to aid the Iranian Plan and Budget Ministry in completing installation of a satellite tracking station in Iran. General Electric Co. and The Islamic Republic of Iran et al., Award No. 185-350-3 (13 August 1985). Clearly

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[9]The evidence referred to was submitted in Touche Ross & Co. and The Islamic Republic of Iran, Case No. 480. The circumstances referred to above do not appear to be contested, although their significance, if any, is disputed. The evidence in the Touche Ross case to which I refer consists of (i) minutes prepared by Iranian military authorities of a meeting on 27 August 1979, and (ii) a letter, dated 17 September 1979, from Touche Ross to Iranian military authorities, submitted by the Government of Iran as an exhibit to its Statement of Defence. See also Statement of Defence at 10-11. It is to be noted that because of the common factual and legal issues in various IBEX cases, all have been assigned to Chamber One, and there is essentially the same Respondent in each of those cases.

if Iran was in the Fall of 1979, and is still, willing to allow installation of sophisticated military intelligence and other equipment purchased from Americans, there were no changed circumstances that made continued performance of this Contract unreasonable.

Rather, while there is no direct evidence of Iran's motivations for cancelling the IBEX contracts, it would appear that the new Government may have ultimately come to the view that, like some of the FMS contracts, the IBEX project was "overly grandiose." The Award in fact explicitly finds that the Iranian Government made "a deliberate policy decision" to cancel this Contract and that the decision was probably "governed" by the stated desire to repudiate contracts "which the new Government considered against the best interests of Iran." Award at 18. Thus, this was plainly not a decision forced on the Government by changed political circumstances in 1979.

Finally, I must comment briefly on the invocation in the Award of the words "changed circumstances" in Article V of the Claims Settlement Declaration. That Article mandates the Tribunal to

> decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

Thus the Tribunal's first duty is to apply relevant principles of law. In doing so it is to take into account both contract provisions and changed circumstances. This does not mean that "changed circumstances" somehow become determinative in a situation in which they are not applicable under the relevant principles of commercial and international law. Rather, as the Award itself recognizes, the wording of the Claims Settlement Declaration mentions both "changed circumstances" and "contract provisions."

Award at 22. The interplay of these two elements is then to be determined "on the basis of law." As shown above, under the relevant principles of law, changed circumstances cannot in this case excuse the Respondent from its contractual obligations. The reference to changed circumstances in Article V therefore adds little to the argument in the Award. The Claims Settlement Agreement does not admit changed circumstances as an excuse in a case where they are barred by the governing law.

II. The Contract Itself Determines the Compensation to be Paid in this Case

I agree with the Award that the Respondent is obligated to pay the Claimant for services rendered and costs incurred under the Contract, but is not obligated to compensate the Claimant for profits lost due to termination of the Contract. Where I differ from the Award is that it does not consider that the Contract gives the Respondent a unilateral right of termination and therefore finds such a right in the doctrine of changed circumstances. I find that the Contract permits the Respondent to terminate and establishes the amount of compensation it is to receive. Therefore recourse to the doctrine of changed circumstances is both unnecessary and, for the reasons discussed above, inappropriate.

The Award incorrectly states that "the Contract does not contain a clause authorizing the Respondent to terminate the Contract for its convenience." Award at 23. It is true that the Contract contains no article providing in so many words that the Respondent could "terminate for its convenience." The Award ignores the fact that this Contract in its basic structure and by its wording provided the Respondent with complete control over the amount of work to be done by the Claimant. This necessarily includes a power to cancel the Contract in its entirety.

In essence, the Contract calls for the Claimant to provide man-hours of effort as directed by the Respondent, at a certain price per man-hour. While the Contract defines the work to be performed at the outset, and estimates the total amount of effort and money to be expended, it permits the Respondent to order more or less work and thereby adjust the total amount paid. The Respondent's right to control the amount and, within reasonable limits, the nature of the services provided is embodied in Article 2.8, which provides:

> "The Employer, at any time, will have the right to change the required services up to a reasonable and suitable amount and omit or add some services."

It is important to note that Article 2.8 places no limit on the Respondent's right to "omit" services to be provided, at least once the Claimant had performed some work under the Contract. Furthermore, under Article 14.7, the Claimant would "only be paid for work actually performed under this Contract." Article 14.5 confirms that "[i]f the level of effort or other expenses actually required to perform the work are more or less than [the estimated maximum price of the Contract], the contract price will be adjusted accordingly." Thus, when the Respondent exercised its right to "omit" services, the amount it was due to pay would decrease as well.

It was entirely logical for the Parties to set up their Contract in this way. As noted, the Contract here was closely linked to the one in the Sylvania case, which was signed at about the same time: the Claimant's sole responsibility was to participate in and evaluate a training program conducted by Sylvania. As the Tribunal found in the Sylvania case, Sylvania had the right to terminate the Contract in whole or in part for its own convenience. Award No. 180-64-1, at 21-22. It would make no sense for the Respondent to preserve its right to discontinue the services

provided by Sylvania and not to ensure that it had a parallel right to reduce the services provided by Questech.

Moreover, the Parties clearly envisioned that the Questech contract might be terminated completely, for as noted in the Award Article 7.4 provided for the release of all bank guarantees of good performance if "the Contract is cancelled due to Force Majeure or the Employer cancels the Contract for any reason except the Contractor's negligence."

The Claimant noted at the Hearing that a prior contract between it and the Imperial Iranian Air Force ("IIAF") contained a clause permitting termination whenever the IIAF determined it was in the best interests of the IIAF. The Claimant suggested that the absence of such clause in the contract under review meant that the Parties no longer intended the Respondent to be able to cancel the Contract. The two contracts are in very different form, however, and it appears unlikely that the first was used as a negotiating basis for the second. In any case, Article 2.8 in the present Contract merely draws together two sets of powers that were contained in different places in the prior contract. The prior contract provided that the IIAF could "at any time make changes to this . . . Contract within the general scope of work on this . . . Contract." Art. XXV. That power corresponds to the clause in Article 2.8 of the present Contract allowing the Respondent "to change the required services up to a reasonable and suitable amount." The prior contract elsewhere contained a clause permitting the IIAF to terminate the contract for its own convenience "in whole, or from time to time in part." Art. XXIII. This power is encapsulated in the present Contract's provision enabling the Respondent "at any time" to "omit" services.

Thus, the legal consequences of the termination of this Contract are governed by the Contract itself. The Respondent is obligated to compensate the Claimant at the

contractual rates for work performed and for other costs incurred under the Contract. It is not required to compensate the Claimant for future profits that the Claimant might have earned had the Contract continued, because upon termination of services payment is to be adjusted to reflect only "work actually performed," and because the Claimant could have no reasonable expectation of continuing its performance and earning all of its hoped-for profit. Moreover, any award of future profits would in any event be entirely speculative inasmuch as Article 2.8 permits the Respondent "at any time" to "omit some services"; thus neither the Claimant nor the Tribunal could ever know the amount of future profit that would ultimately be earned under the Contract -- that was within the sole discretion of the Respondent.

There is an additional reason why, under the Contract, lost profits would not be available in this case. Even if there were no termination of the Contract under Article 2.8 earlier in 1979, there was a termination for force majeure no later than 15 September 1979. In a letter dated 1 May 1979, the Claimant notified the Respondent that it had suspended performance because of force majeure, and requested negotiations. The Respondent by letter dated 16 July 1979 invited the Claimant to come to Tehran for "contractual negotiations." That meeting took place on 15 September 1979. The Claimant's contemporaneous notes and a subsequent letter to the Respondent record that at the meeting the Respondent announced that the Contract had been terminated for reason of force majeure under Article 6. The Respondent has not rebutted this evidence.

The force majeure clause of the Contract provides the same consequences for a termination as are provided by Articles 2.8 and 14. Article 6.2 provides that in case of force majeure either party may request negotiations. Then

> "if within three (3) months from the date of requesting for negotiations by either party, a

III. Costs

In its Award in Sylvania, the Tribunal noted that the Tribunal Rules provide a different treatment for costs of legal representation and assistance than for other costs of the arbitration. The latter costs "shall as a rule be borne by the unsuccessful party," while the costs of legal representation and assistance are to be awarded only to the extent they are reasonable. Award No. 180-64-1, at 36-37. Unfortunately, the Award in this case does not explicitly follow this two-tiered approach but rather awards a composite sum of $30,000 in costs of the arbitration. In view of the Tribunal's efforts to clarify this area in Sylvania, it is unfortunate that it failed to pursue the course suggested there in providing reasons for its award of costs in this case. In addition, I believe the total award of costs is far too low in light of the evidence in this case of costs incurred and of their reasonableness.

This case, moreover, presents evidence of general interest concerning the reasonableness of legal fees sought by claimants before the Tribunal. The judgment of the Public Court of Tehran issued against the Claimant on 21 September 1983 provided for payment of a total of approximately $30,000[11] to lawyers of the successful Iranian party, which is the Respondent here. That case raised some but not all of the same claims and issues as are involved in the claims and counterclaims in this case. The Respondent can hardly question the reasonableness of the amount of legal fees awarded. The work of plaintiff's counsel there, however, may be presumed to have been considerably less extensive than that here because unlike the Claimant's

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[11] Rls. 2,592,737 converted at a rate of 86 rials per U.S. dollar, the approximate exchange rate in September 1983.

lawyers here they did not have to analyze and respond to submissions by the opposing side, the proceedings having been concluded in the absence of any opposition. In addition, the Claimant in this case was required to make additional submissions to stay the proceedings in the Public Court of Tehran -- which lacked jurisdiction -- and to seek a stay of execution of the judgment issued by the Court in violation of this Tribunal's Orders. This evidence alone makes amply clear that the Tribunal's Award of costs is far below the standard of reasonableness prescribed by the Tribunal Rules.

IV. The Tehran Court Judgment

With respect to the default judgment issued against the Claimant by the Public Court of Tehran, I write to highlight certain factual points that are implicit in the discussion in the Award. The Tehran court's judgment deals with two questions: (1) whether Questech breached the Contract by failing to perform its contractual obligations properly, and (2) whether it owes social security premiums to Iran. This Tribunal's Award holds that the Tehran court had no jurisdiction to make the former ruling. In addition, it recounts the history of the litigation in that court and thereby makes clear that the entire court judgment -- including the portion covering social security -- was obtained in a proceeding conducted in violation of the Tribunal's direction that the Tehran proceedings be stayed pending the Tribunal's ruling on its jurisdiction. Thus, the rendering of the Tehran Court's decision was contrary to Iran's obligations under international law.[12] Moreover, the

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[12] See International Law Commission Report on Arbitral Procedure, UN Doc. A/CN.4/18, at 76 (1950) (Scelle, rapporteur), reprinted in (1950) 2 Y.B. Int'l L. Comm'n 76, 143; Martini Case (Italy v. Ven.), 2 R. Int'l Arb. Awards

(Footnote Continued)

Claimant suffered real prejudice from this violation. The Claimant sought and obtained from this Tribunal protection from the Tehran proceedings during the pendency of the present arbitration. Claimant had a clear right to rely on the Respondent to obey its international obligations and a legitimate expectation that a default judgment would not be entered against it in violation of the Tribunal's Award. In these circumstances, in which the Claimant had no genuine opportunity to defend itself in the Tehran action, it appears that justice precludes enforcement of any part of the judgment so obtained.[13]

Howard M. Holtzmann

The Hague
23 September 1985

(Footnote Continued)
975, 995-96 (1930); J.L. Simpson & H. Fox, International Arbitration 266, 262 (1959); Eagleton, The Responsibility of States in International Law 69 (1928).

[13] See, e.g., Hague Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Art. 5(1), reprinted in 15 Am. J. Comp. L. 362, 363 (1967); W. Reese & M. Rosenberg, Cases and Materials on Conflict of Laws 278 (1978).

Moreover, decisions determining questions of tax or social security are generally unenforceable in foreign jurisdictions. 1 Dicey & Morris on The Conflict of Laws 92-93 (10th ed. 1980); see also Hague Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Art. 1; F.A. Mann, Conflict of Laws and Public Law, 132 Recueil des Cours 107, 166-81 (1971).