IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL [redacted] 64-159 [redacted] 98-109

Case No. 64 [redacted] ling: 27 June 85

** AWARD - Type of Award FINAL

- Date of Award 27-6-85

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

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- Date _____

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** DISSENTING OPINION of _____

- Date _____

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** OTHER; Nature of document: _____

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- Date _____

_____ pages in English _____ pages in Farsi

R/12

CASE NO. 64
CHAMBER ONE
AWARD NO. 180-64-1

SYLVANIA TECHNICAL SYSTEMS, INC.,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

AWARD

Appearances:

For the Claimant : Mr. H. Richter,
Mr. H. Shalvarjian,
Mr. A. J. van den Berg,
Attorneys,
Mr. E. S. Matthews,
Mr. F. Sullivan,
Counsels,
Mr. F. W. Gailo,
Mr. R. Shepard,
Claimant's Representatives

For the Respondent : Mr. M. K. Eshragh,
Agent of the Islamic Republic of Iran,
Mr. A. Nouri,
Adviser to the Agent of the Islamic Republic of Iran,
Mr. J. Givehchin,
Mr. Mamagani,
Assistants to the Adviser,
Mr. N. Hojati Emami,

Adviser to the Ministry of Defence,
Mr. M. A. Tehrani,
Mr. A. Shamloo,
Mr. A. A. Ostadifar,
Mr. E. Samimi,
Representatives of the Ministry of Defence

Also present : Mr. J. R. Crook,
Agent of the United States of America,
Ms. L. Polk,
Assistant to the Agent of the United States of America

The claim in this case asserts breaches of a contract to train Iranian Air Force personnel to operate and maintain an electronic intelligence gathering system. Under the contract, the Claimant, SYLVANIA TECHNICAL SYSTEMS, INC., ("SYLVANIA"), was to provide training in the United States and in Iran, and eventually establish a training institute in Iran to be operated by the Air Force. Sylvania alleges that the Respondent, THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("THE IRANIAN GOVERNMENT"), breached and repudiated the contract in January and February 1979. The Iranian Government alleges that the Claimant breached and cancelled the Contract, and it has interposed a counterclaim.

I. Procedural Issues

A Pre-hearing Conference in this case was held on 25 April 1983 and a Hearing was held on 18 and 19 February 1985. A number of procedural issues that arose prior to or at the Hearing were taken under advisement and have been considered by the Tribunal in its deliberations after the Hearing.

First, both Parties submitted for filing during the Hearing a number of documents, some of which were merely excerpts from

previously filed documents and some of which had not been filed before. The Tribunal has repeatedly stated that no party shall submit any document for the first time at the Hearing or so shortly before the Hearing that the other party cannot respond to it without prejudice and in an appropriate way. In view of the character and contents of the documents submitted "late" by both Parties in this case, however, the Tribunal determines that their acceptance does not create prejudice to the other Party and therefore accepts these documents for filing. This refers also to the Pre-hearing Memorial, filed by the Iranian Government on 13 February 1985.

Second, requests have been made that the Tribunal disregard certain submissions because they were made in one language only, or, alternatively, that it order the submitting Party to provide translations. Pursuant to Article 17 of the Tribunal Rules, the Tribunal decides to accept all submissions which were made by the Parties in one language only.

Third, the Respondent has objected on grounds of irrelevance and prejudice to the filing by the Claimant of copies of a number of newspaper and magazine articles submitted as Exhibit 1 in the Claimant's Documentary Evidence filed on 3 January 1984. The Tribunal finds no need to exclude this evidence. As with any evidence, the Tribunal is able to assess its bearing on the case as well as its evidentiary value.

Fourth, at the Hearing, the Respondent requested permission to file a Post-hearing Memorial. The Parties fully briefed their case prior to the late filings, and the Tribunal has accepted those late filings as well; the Tribunal does not find it necessary to allow the Respondent to file, in addition, a Post-hearing Memorial.

Fifth, during the Hearing, the Respondent requested a stay of the proceedings in this case until a decision is rendered by the Full Tribunal in Case No. A-20 on the requirements for the proof of the corporate nationality of United States claimants. The Tribunal notes that similar requests have been made in other cases. Such requests, if granted, would halt the proceedings in virtually every claim brought by an alleged United States corporation until the decision in Case No. A-20, and no such request has been granted in any case so far. At any rate, the Tribunal determines that the request in this case has been made too late to be dealt with. The Claimant's United States nationality was disputed by the Respondent as early as in its Statement of Defence, and Case No. A-20 has been pending since 14 June 1983.

Finally, during the Hearing the Claimant requested that the Respondent's counterclaim for social security premiums be dismissed because it was filed too late. The Tribunal notes that the Respondent's Supplementary Statement of Counterclaim, which contains the counterclaim for social security premiums, was accepted by Order of 5 May 1983 as timely filed under Article 20 of the Tribunal Rules; the Tribunal finds no justification for changing that Order.

II. Facts and contentions

Sylvania's claim arises out of a contract that was part of the so-called "IBEX" project. This project consisted of a program of the Iranian Air Force in the mid-1970's to modernize and expand its existing electronic intelligence gathering system with a new high technology system called IBEX. The IBEX project encompassed the provision of electronic equipment, training of personnel to operate and maintain the equipment, construction of facilities for training, collection of data and data anaylsis, and expansion of logistic services. The completed system would collect data using two types of aircraft, fixed ground facilities at

a number of military sites near Iranian borders, and transportable vans. A central complex to house the data analysis computers, a permanent Training Institute, and a central logistics depot would be situated at Dohsen Tappeh Air Force Base in Tehran. The analysis centre would analyze data and produce intelligence reports.

The Imperial Government of Iran contracted with a number of United States companies to furnish the equipment, supply the services, supervise the work under the project and assist the Iranian Government in the implementation of the program. Contract No. 116 ("the Contract") was concluded with the Claimant on 8 June 1977 and amended on 20 November 1977. The Contract, which is the basis of this claim, provided for Sylvania to train Iranian Air Force personnel independently to manage, operate and maintain the IBEX system, as well as to plan and set up a training institute for that purpose.

In view of the number of different contractors involved in the IBEX project, a system of coordination and monitoring of their work was set up. The Claimant's performance of work was to be monitored and evaluated by two United States corporations employed by the Respondent for that purpose. The Respondent gave Harris Corporation responsibility for system integration, and Questech, Inc. the task of evaluating the Claimant's performance and certifying Iranian Air Force personnel upon completion of their training.

The Statement of Work ("SOW"), attached as Appendix One to the Contract, lists six tasks that the Claimant was to perform: training program planning, instructional material development, instructional implementation, facility implementation, training segment management and training coordination. The Contract provided for a period of performance of 40 months, for the training of 667 Iranian Air Force personnel, and for a price of $57,300,000 with a

possible increase to $60,000,000 for additional services and equipment if so authorized by the Respondent.

The Claimant asserts that it fully performed its contractual obligations for a period of 18 months from August 1977 through 14 February 1979. Although it acknowledges that there were some start-up problems, the Claimant asserts that all these problems were subsequently corrected and that as of the end of January 1979 its performance under the Contract was on or ahead of schedule.

The Claimant contends that in January and February 1979 the Respondent breached the Contract through various acts. It asserts that the Respondent's breaches constituted a repudiation of the Contract as of 14 February 1979, which left the Claimant with no other choice but to withdraw its personnel from Iran on 16 February 1979 and to stop performance in Iran. In particular, the Claimant asserts that in February 1979, when the present Iranian Government replaced the Imperial Government, the new Government decided to repudiate the Contract. This allegedly was demonstrated by a number of actions by the Respondent, including its removal of the Program Director, failure to name a replacement, and failure to respond to the Claimant's letters regarding the situation. The Claimant contends that the Leader of the Islamic Revolution publicly declared as early as October 1978 his intention to repudiate such contracts with foreigners that were considered to be against the interests of Iran, especially contracts constituting "command" of the military forces "by foreign advisors".

The Claimant further contends that the Respondent breached the Contract in the following additional ways:

First, the Claimant asserts that on 5 February 1979 the Respondent directed the Iranian students in training in the United States to return to Iran. On 10 February 1979, the

Iranian students left the training facility at Doshen Tappeh Air Force Base in Tehran, and did not return. On the following day, the Program Director told the Claimant's Deputy Project Manager in Iran that the Claimant's employees should not return to the facility until further notice from the Respondent.

Second, according to the Claimant, the Respondent further materially breached the Contract by failing to pay invoices for the months December 1978 through July 1979, and by paying the invoice for November 1978 too late.

Third, the Claimant alleges that the Respondent failed despite the Claimant's requests, to fund adequately letters of credit that the Respondent had opened to ensure payment of the Claimant's invoices.

Fourth, according to the Claimant, the Respondent further breached the Contract when it failed to cooperate, as required under the Contract, by not appointing a replacement for the Program Director who became unavailable after 11 February 1979, by not ensuring that the other IBEX contractors that had to review and approve the Claimant's performance continued to perform, and by not responding to the Claimant's repeated communications regarding the Respondent's alleged breaches of the Contract.

Fifth, the Claimant asserts that the Respondent also breached the Contract by its failure to negotiate payment for extra services as well as to negotiate the Parties' differences following a letter of 16 July 1979, in which the Respondent announced to the Claimant that as of 10 February 1979 "the accomplishment of all the works and expenditures under the Contract No. 116 has been considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran." In the Claimant's view, this letter, which "appears to be a belated attempt to terminate the Contract

unilaterally", constituted a cancellation and repudiation of the Contract as of 10 February 1979.

Finally, the Claimant asserts that the Respondent made wrongful calls on letters of credit securing performance and down payment guarantees provided by the Claimant pursuant to the Contract. Instead of releasing the guarantees and cancelling the letters of credit, as required in the event of breach of the Contract, the Respondent on 1 May 1980 made fraudulent demands on the letters of credit, which constituted another breach of the Contract, the Claimant contends.

The Claimant argues that none of the provisions in the Contract dealing with termination is applicable to the situation brought about by the Respondent's breach and repudiation of the Contract, and that therefore it is entitled under "rules of law generally applicable to breach of contract" to "damages sufficient to place it in the same position as if the Contract had been performed". The "full compensation" that the Claimant demands comprises compensation for work performed and all costs incurred through the date of the alleged repudiation and breach of the Contract by the Respondent, post-breach costs, lost profit, interest and costs including attorneys' fees.

As of 18 February 1985, the date of the Hearing in this case, the Claimant has claimed $4,277,713 for work performed and costs incurred through the breach of the Contract, $3,458,833.60 for post-breach costs, $3,708,082 for lost profit, $6,013,386.20 (as of 31 December 1984) for interest and $830,093.96 for costs, totalling $18,288,108.76.

As further relief, the Claimant seeks the release and cancellation of bank guarantees and related standby letters of credit it obtained pursuant to the Contract as guarantees of performance and as security for the Respondent's down

payment. Should the Tribunal deny such release and cancellation, the Claimant makes a contingent claim of at least $14,740,425 for amounts that it may be liable to pay under these guarantees and letters of credit.

With regard to the Respondent's counterclaim for social security premiums and penalties, the Claimant seeks payment of any amounts awarded to the Respondent in that respect. The Claimant asserts that a provision of the Contract requires such reimbursement. The Claimant also requests a declaratory judgment that it is not liable to the Respondent for any payments to the Iranian Social Security Organization.

The Respondent has raised a number of defences to these claims and has interposed a counterclaim.

At the outset the Respondent raises two objections to the Tribunal's jurisdiction over this claim. It argues that, pursuant to the provision in the Contract dealing with the settlement of differences between the Parties, this claim is within the exclusive jurisdiction of the Iranian courts and thus excluded from the Tribunal's jurisdiction. It further contends that the Claimant has not furnished sufficient proof to establish its United States nationality. The Claimant rejects both objections.

In its defence on the merits the Respondent contends that by letters of 13 and 15 February 1979 the Claimant unilaterally breached and cancelled the Contract. The Respondent asserts that it performed its obligations under the Contract until the Claimant's breach. In this connection it contends that it had made the advance payment, opened the required letters of credit, obtained the necessary Government authorizations in Iran, provided the facilities in Tehran, and paid 11 invoices totalling $16,006,147. It asserts that it appointed the Program Director and other relevant

representatives, and kept the letter of credit sufficiently funded to pay the invoices that it was obliged to pay.

The Respondent denies the Claimant's contention that its letter of 16 July 1979 constituted a unilateral cancellation of the Contract. Rather it asserts that this letter recorded the fact that the Claimant had stopped performance under the Contract and therefore invited the Claimant to a meeting for "contractual negotiations".

When the Claimant invoked the force majeure clause of the Contract in a letter to the Respondent dated 13 February 1979, it had, according to the Respondent, already breached the Contract by not providing required services and material. The Respondent contends that this letter was a unilateral cancellation of the Contract by the Claimant. It further contends that the Claimant was estopped by this letter from basing the cessation of its performance on the Respondent's alleged breach of the Contract, which is the reason the Claimant gave in another letter to the Respondent dated 15 February 1979. The Respondent states that nothing had occurred during these two days that could have justified such a different legal consequence.

The Respondent asserts a counterclaim for damages resulting from the Claimant's alleged breaches and cancellation of the Contract in a total amount of $44,627,215. This amount is composed of payments under the Contract of $24,601,147 (including $8,595,000 in advance payments), interest for the years 1978 through 1980 of $11,526,068, and "[i]ncidental losses arising out of suspension of the contract" of $8,500,000.

In its "Exhibit of Counterclaim", consisting of a "Training Equipment Inventory List" dated 1 March 1979 and a one-page statement, the Respondent asserted that the listed equipment had been acquired under the Contract and was being held by

the Claimant. The Respondent requests that an award be issued ordering the Claimant to deliver the equipment to the Respondents.

The Respondent further requests the Tribunal to require the Claimant to lift injunctions obtained in United States courts that bar collection of the letters of credit securing the Claimant's performance and the Respondent's downpayment. The Respondent asserts that the Contract permits it to call the letters of credit when, as it asserts, the Claimant breaches the Contract.

The Respondent also asserts a counterclaim for social security premiums and penalties in the amount of Rials 248,892,835. The Claimant denies that any such premiums were owed. It states that an authorized representative of the Respondent expressly exempted the Claimant from payment of social security premiums, and that its liability for social security premiums under the law and their amount have in any case not been proven.

Finally, the Respondent requests reimbursement of "all the losses and costs incurred in these proceedings."

III. Reasons for Award

1. Jurisdiction

a) The Forum Selection Clause

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

> "Settlement of Differences
>
> All differences and disputes which may arise between the two parties resulting from interpretation of the Articles of the Contract or the execution of the works

> which can not be settled in a friendly way, must be settled in accordance with the rules and laws of Iran via referring to the competent Iranian Courts."

The Respondent argues that this is a clause that, pursuant to Article II, paragraph 1, of the Claims Settlement Declaration, provides for the exclusive jurisdiction of the Iranian courts over any disputes under the Contract. It finds its main argument in the interpretation of the Farsi expression used for the English word "work", namely "kar". The Respondent asserts that the word "kar" in Farsi, which according to Article 12. of the Contract governs in case of differences between the two languages, has such broad and varied meanings that it is impossible to conceive any dispute that would not be covered by this clause.

In an Order of 18 November 1982, the Tribunal stated that "it would appear that this clause does not bar the jurisdiction of the Tribunal within the terms of Article II, paragraph 1, of the Claims Settlement Declaration." This statement was based on Interlocutory Award No. ITL 6-159-FT of 5 November 1982 in Ford Aerospace & Communications Corporation et al. and The Air Force of the Islamic Republic of Iran et al., in which the Full Tribunal decided that a virtually identical forum selection clause does not exclude the Tribunal's jurisdiction. The Chamber realizes that in its Interlocutory Award No. ITL 6-159-FT the Full Tribunal did not refer explicitly to the interpretation of the Farsi word "kar" and its impact on the scope of the Tribunal's jurisdiction. The fact that the word "kar" has so many different and broad meanings in Farsi does not mean, however, that all these meanings have been agreed between the Parties. The Contract was written and signed in both Farsi and English. Although it provides that the Farsi text is to govern in the event of inconsistency between the two versions, the many different meanings of the Farsi word "kar" lead to an ambiguity in the Farsi text. It is appropriate to refer to the English text to clarify this ambiguity. The best evidence of which of the

Farsi meanings was intended by the Parties is the one found in the English version, namely "work".

This interpretation is supported by the use of the word "kar" in other places of the Farsi text of the Contract. Article 2.13., which uses "kar" in Farsi when it speaks about "[a]ccomplishment of all works" and "works rendered by the contractor", clearly refers only to services to be performed by the contractor. In the Statement of Work, which forms an integral part of the Contract and which deals with the limited issue of the contractor's performance obligations, the same word "kar" is used to describe the "work".

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

b) The Claimant's United States Nationality

Based on the evidence submitted by the Claimant, which fulfills the requirements laid down by the Tribunal in its Order of 20 December 1982 in Case No. 36 (Flexi-Van Leasing, Inc. and The Islamic Republic of Iran) for the proof of corporate nationality, the Tribunal is satisfied that the Claimant is a wholly owned subsidiary of GTE Corporation, which is a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration.

2. Merits

In this section of the Award the Tribunal deals first with the allegations of each Party that the other had breached the Contract by 15 February 1979, the date when the Claimant wrote to the Respondent declaring the Contract cancelled because of alleged breaches. The Award then addresses the question of what other circumstance caused the Contract to come to an end and considers the legal consequences that follow from termination in those particular circumstances. Finally, the Respondent's counterclaims are examined.

a) Alleged Breaches of the Contract by the Respondent

The Claimant alleges that by 15 February 1979 the Respondent had breached the Contract in several respects. The Claimant alleged such breaches in its letter to the Respondent dated 15 February 1979, and the alleged breaches were further described and clarified in the pleadings and at the Hearing. The Tribunal finds that the Respondent had not breached the Contract by 15 February 1979, the date this letter was sent to the Respondent.

One of the breaches alleged by the Claimant is that the Respondent failed to make timely payments. The only two unpaid invoices outstanding on 15 February 1979 were Invoice No. 18, covering performance in November 1978 and Invoice No. 19, which related to December 1978. Under Article 14.6. of the Contract the Respondent was not required to make payment for four weeks after it received an invoice. Invoice No. 18 was submitted on 8 January 1979, so that payment was not due until at least 5 February 1979. Within that four-week period it was necessary to undertake a complex payment certification procedure established by Article 14.9. of the Contract and by the mutually-agreed "Invoice Certification and Processing Procedures, Revision B". The four weeks during which Invoice No. 18 would normally have been going through the

certification procedure and been paid coincided with the height of the Islamic Revolution. The Tribunal notes, for example, that the Leader of the Islamic Revolution returned to Iran on 1 February 1979. As the Tribunal has previously pointed out, "[b]y December 1978, strikes, riots and other 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."[1] The situation created in Iran at least during the time from December 1978 until 15 February 1979 by civil unrest, strikes, riots and a state of general upheaval was such that both the Claimant and the governmental authorities and agencies in this case were not able to perform certain of the contractual obligations that they had previously undertaken.

The Tribunal finds that revolutionary conditions, including a general disruption of banking operations, existed on 15 February 1979 and constituted force majeure, which temporarily delayed the Respondent from paying Invoice No. 18 at that time. It was, however, paid shortly afterwards on 2 March 1979.

The invocation of force majeure as an excuse for failure to perform under a contract must always be analyzed in the context of the circumstances causing the force majeure, taking into account the particular party affected by those circumstances and the specific obligations that party is

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[1] Interlocutory Award No. ITL 24-49-2 of 27 July 1983 in Gould Marketing, Inc. and The Ministry of National Defence of Iran at page 11, reprinted in 3 Iran-U.S.C.T.R. 147, 152-153.

prevented from performing.[2]

With respect to payment of Invoice No. 18, it is clear that revolutionary conditions prevailing around 15 February 1979 resulted in force majeure that prevented processing and payment. Article 6 of the Contract excuses a party's failure to perform when such force majeure exists. Thus, the Respondent's failure to pay Invoice No. 18 before 15 February 1979 was not a breach of contract, but was excused by events beyond its control.

Nor was non-payment of Invoice No. 19 by 15 February 1979 a breach of contract by the Respondent. That invoice was not submitted until 5 February 1979; accordingly, under the contractual procedures already noted the payment was not yet due.

The Claimant also alleges that by 15 February 1979, the Respondent had breached the contract by failing to fund sufficiently the letter of credit under which the Claimant was to receive payment for its services. There is a dispute between the Parties as to whether or not the letter of credit was adequately funded at that time. The Tribunal does not

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[2] See generally Ph. Kahn, Force majeure et contrats internationaux de longue durée, Journal du droit international, Vol. 102, at 467 (1975); M. Fontaine, Les clauses de force majeure dans les contrats internationaux, Droit et pratique du commerce international, Vol. 5, at 469 (1979); B. Nicholas, Force Majeure and Frustration, The American Journal of Comparative Law, Vol. 27, at 231 (1979); Gesang, Force Majeure (1980); B. Khadjavi-Gontard/R. Hausmann, Zurechenbarkeit von Hoheitsakten und subsidiäre Staatshaftung bei Verträgen mit ausländischen Staatsunternehmen, Recht der Internationalen Wirtschaft, Vol. 8, at 533 (1980); P. van Ommeslaghe, Les clauses de force majeure et d'imprévision (hardship) dans les contrats internationaux, Revue de droit international et de droit comparé, Vol. 57, at 7 (1980); W. Melis, Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration, Journal of International Arbitration, Vol. 1, at 213 (1984).

need, however, to decide that contested issue, because even if further funding was required on or about 15 February 1979 any failure by the Respondent to make payments at that time was excused by the same force majeure conditions as are described above.

The disruptions in the banking system appear also to have been related to the Respondent's action on 5 February 1979 ordering Iranian students in training in the United States to return to Iran at a time when payments for their continued support could not be made.

The force majeure circumstances prevailing on 15 February 1979 not only disrupted banking conditions, but also made it impossible at the time to carry on the training activities in Iran contemplated by the Contract. Thus the withdrawal of Iranian students from the training site at the Doshen Tappeh Air Force Base in Tehran on 10 February 1979, at a moment when revolutionary fighting was going on there, is excused by that force majeure situation and does not constitute a breach of contract by the Respondent. Similarly, revolutionary upheavals at that time prevented replacement of the Program Director, a high ranking Air Force officer who disappeared, and other cooperation by the Respondent that the Claimant needed in order to continue its performance under the Contract.

For the foregoing reasons, the Tribunal concludes that the Respondent had not breached the Contract by 15 February 1979, and that therefore the Claimant was not justified in writing to the Respondent on that date stating that because of alleged breaches it had "no choice other than cancellation" of the Contract.

b) Alleged Breaches of Contract by the Claimant

It is also necessary to consider the Respondent's allegations

that the Claimant itself was in breach of contract before it wrote its letter of 15 February 1979 accusing the Respondent of breach.

One central allegation of the Respondent is that the Claimant breached the Contract by failing to provide the required services and materials. The Tribunal cannot find evidence to support that allegation, and, to the contrary, holds that the Claimant fulfilled its contractual obligations. This is confirmed by evaluations of the Respondent's representatives who were responsible, on behalf of the Respondent, for evaluating the Claimant's performance under the Contract. For example a report to the Respondent by Harris Corporation, the System Integration Contractor, covering January 1979, stated that "[p]rogress made by [Sylvania] in January was greater than might have been expected in view of the disruption to this contractor's large-scale training activities in Iran due to unsettled conditions there." Similarly, in a report on the status, problems and future of the IBEX project, which Harris Corporation submitted on 29 September 1979 to the Communications and Electronic Organization of the Iranian Ministry of National Defence at the latter's request, Harris Corporation observed with regard to the Claimant's performance that "[a]t the time of the Islamic Revolution in Iran, the formal training program in the United States was proceeding with only minor problems. Proficiency development training in Iran, heavily criticized in earlier months, had begun to gain substantial momentum." In a Summary Report of Sylvania's Performance as Training Segment Contractor, which Questech, the Training Evaluation Contractor of the IBEX program, submitted on 3 October 1979 to the Communications and Electronic Organization at the latter's request, Questech also confirmed that after experiencing start-up problems the Claimant's performance improved steadily and that by September 1978 these problems were overcome and a viable training program was functioning.

This evidence shows that certain shortcomings, which existed at an early stage of the Claimant's performance of the Contract and which are reflected in so-called "deficiency factors" in the Certifications of Progress of Works rendered for the Respondent by the System Integration Contractor, were later corrected, and thus did not constitute a breach of the Contract by the Claimant.

The Tribunal notes that before filing its Statement of Defence in this case, the Respondent never gave the Claimant any notice of the breaches now alleged. In particular the Respondent did not give to the Claimant the notice and opportunity to correct which Article 6.1. of the Contract requires in the event the Claimant did "not accomplish any of his duties and obligations according to this Contract properly." Even the letter that the Respondent's Communications and Electronic Organization sent to the Claimant on 16 July 1979 announcing that performance under the Contract had been "considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran" made no mention of any alleged breach of the Contract by the Claimant.

Nor did the action of the Claimant in withdrawing its personnel from Iran and stopping activities there on or about 10 February 1979 constitute a breach of contract. That was at a time when, as noted above, there was serious revolutionary upheaval and civil disruption in Tehran, including actual fighting at the Doshen Tappeh Air Force Base where the Claimant's activities in Iran were centered. By 10 February 1979, the safety of the Claimant's personnel in Iran could no longer be assured. These conditions constituted force majeure that justified the Claimant in withdrawing its employees and ceasing contractual performance in Iran for the time being. The Claimant invoked these force majeure conditions in a letter to the Respondent dated 13 February 1979.

c) Termination of the Contract after 15 February 1979

As noted above, both the Claimant and the Respondent had largely ceased performance of the Contract by 15 February 1979. Each was at that time excused from its obligations by the existence of force majeure conditions preventing its performance. The Respondent invokes force majeure for a period extending beyond 15 February 1979, contending that such conditions continued and existed even on 16 July 1979 when the Respondent wrote its letter concerning termination of the Contract. Force majeure being an exception to the obligation to perform, a party that invokes it has the burden of proving that conditions of force majeure existed with regard to its various contractual obligations.[3]

The Tribunal holds that the Respondent has not submitted sufficient evidence to show that force majeure conditions continued to exist until and beyond mid-July 1979 that prevented it from performing its obligations under the Contract. The Tribunal does not need to determine exactly when the force majeure conditions, which undoubtedly existed on 15 February 1979, later ceased so that the Respondent was no longer excused from performing under the Contract. It might even be doubtful whether such a general determination would be possible, because the question of force majeure has to be seen, and may well be answered differently, in relation to every specific contractual obligation. But we do hold that there is insufficient proof in this case to support the

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[3] This 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). See also H. Krüger, Zum Begriff "höhere Gewalt" im iranischen Recht, Recht der Internationalen Wirtschaft, Vol. 10, at 650 (1978).

Respondent's contention that conditions over which it had no control continued to and beyond 16 July 1979 and still prevent it even from making contractual payments and releasing letters of credit.

Rather, the Tribunal concludes that the Iranian Government made a deliberate policy decision not to continue with American contractors in a project that related to secret military intelligence operations. This conclusion finds support in the text of the Respondent's letter of 16 July 1979, which says its purpose is to announce that "the accomplishment of all the works and expenditures under the Contract [...] has been considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran." These words seem designed to inform the Claimant of a decision as to the Contract taken in view of an historic development, and do not convey that performance by the Government of Iran was prevented by events beyond its control. Considering the relations between Iran and the United States before and after the Islamic Revolution, it is reasonable to infer that after February 1979 termination of contracts such as the one in this case was governed by political considerations of the type that the Leader of the Islamic Revolution referred to in interviews published in the months prior to the Revolution, in which he declared that he intended to repudiate contracts with Americans and other foreigners that the new Government considered against the best interests of Iran.

The Contract contains provisions that reserve to the Respondent the right to make such policy decision and to decide to terminate the Contract but imposes on it certain financial obligations if that occurs. Thus, Article 4-a- states:

"1. Where the Employer wants that this Contract be terminated in whole or in part, without any fault of the

Contractor, such termination shall be made by written notification to the Contractor subject to the conditions that the Employer shall pay the Contractor for all direct costs including G and A, overhead and fair profit incurred by the Contractor at the time of receipt by the Contractor of the notice of termination. In addition, costs attributable to the termination shall be paid by the Employer to the Contractor.

2. Contractor's claim for reimbursement under this clause shall be substantiated by accounting records, which may be verified by independent auditors prior to payment. Payment of amounts due to Contractor under this clause shall be made not later than 120 days after receipt by the Employer of Contractor's claim. Failure of the parties to agree upon the amount of reimbursement shall constitute a dispute and be resolved in accordance with the provisions of Article 8 of this Contract.

3. Within thirty (30) days after settlement of the termination claim, or such longer period as may be agreed upon at the time by the parties, Contractor shall deliver F.O.B. Mountain View, California, and pass title to the Buyer of all items produced and/or purchased under the Contract, regardless of their stage of comp[l]etion."

The Contract contains several other provisions governing the amount of compensation to be paid in the event of termination in various circumstances. Of all the termination provisions, Article 4-a- comes closest to what occurred in this case. The Tribunal reaches that conclusion while recognizing that this Article may primarily have been designed for other circumstances of termination and that the Parties did not follow the procedural steps provided for in Article 4-a-. Nevertheless, that Article expresses the mutual intent of the Parties concerning the formula to be applied in determining the amount of compensation to be paid when, as in this case, the Respondent decides to terminate the Contract for its own convenience. It should be applied by analogy to the present case.

d) Application of the Contract Provisions Governing Termination for Convenience

Pursuant to Article 4-a-1. of the Contract, which the

Tribunal applies to the termination in question for purposes of determining the compensation to be awarded, the Respondent "shall pay the [Claimant] for all direct costs including G and A, overhead and fair profit incurred by the [Claimant] at the time of receipt by the [Claimant] of the notice of termination."

aa) Costs incurred by the Claimant until the Respondent's alleged breach and repudiation of the Contract

The Claimant seeks payment of its Invoices Nos. 19, 20 and 21 in a total amount of $4,277,713, representing compensation for work performed and direct costs, general and administrative expenses ("G & A"), overhead and profit through the date of the Respondent's alleged breach of the Contract. Invoice No. 19 covers the month of December 1978, Invoice No. 20 covers January 1979 and Invoice No. 21 covers February 1979.

Invoice No. 19, dated 31 January 1979, for direct costs, G and A, overhead, and profit for December 1978 of $2,314,300 was prepared and submitted by the Claimant according to the invoice certification and processing procedures, the application of which the Parties had agreed upon pursuant to the Contract. Under these procedures Touche Ross & Co., the Respondent's Audit Advisory Contractor, reviewed and recommended for payment Invoice No. 19. Article 4-a- of the Contract, which the Tribunal applies to this case, provides for the reimbursement to the Claimant of all its costs incurred until the termination of the Contract, and it further provides that the Claimant shall substantiate this claim by "accounting records, which may be verified by independent auditors prior to payment." It is not necessary - as it would have been for a claim for the payment of invoices during the life of the Contract - that costs incurred by the Claimant, in order to be payable, must have

been certified and approved by the Respondent according to the contractual invoice certification and processing procedures. Rather, under Article 4-a- the Claimant need only substantiate such costs by accounting records and satisfy the Tribunal that the Claimant incurred the costs for its performance under the Contract.

The Claimant's performance for the period covered by Invoice No. 19 was evaluated and certified by Harris, the Respondent's System Integration Contractor, and Invoice No. 19 was reviewed and recommended for payment by Touche Ross according to the contractually provided procedures. While Touche Ross performed tests on costs only through October 1978, and not through December 1978, which is the period covered by Invoice No. 19, no objection was raised by the Respondent in the course of the contractual invoicing procedures to the figures of Invoice No. 19, nor to Touche Ross' recommendation for payment. In the light of this evidence and procedural posture, the Tribunal is satisfied that the Claimant incurred the costs reflected in Invoice No. 19.

Invoice No. 19 contains a deduction for a so-called "deficiency factor" of completion of the Contract, which was determined by Harris in the course of its progress of works evaluation. The Respondent contends that the "deficiency factor" on each invoice reflects actual deficiencies in the Claimant's performance up to and including the period covered by each invoice. The Claimant, on the other hand, asserts that the "deficiency factor", rather than having been based on actual shortcomings, was used by the Respondent largely as an incentive for further full performance by the Claimant, and did not reflect the value of the asserted deficiency. The Claimant also contends that it had in any case reached a performance level of 100 percent not later than January 1979.

The "deficiency factor" was calculated in relation to the amount of the Contract's "financial plan". Since it does not relate to actual costs incurred by the Claimant, which is what is at issue in a claim based on Article 4-a- of the Contract, these deductions do not have to be applied in calculating compensation under that Article. As discussed more fully below, the Claimant used a 100 percent evaluation of the progress of work in its Invoices Nos. 20 and 21, thus making up for the previous deficiencies, and the Tribunal is satisfied that the Claimant incurred the costs reflected in the amounts of these two invoices. Therefore the "deficiency factor" applied in Invoice No. 19 remains applicable as used in that invoice and it does not require a modification of the amount of costs reflected therein.

Invoice No. 20, dated 9 March 1979, for January 1979 direct costs, G and A, overhead, and profit of $4,016,798 was prepared by the Claimant without evaluation of its performance by the Respondent as provided for under the Contract because the respective American contractors responsible for that task were no longer performing at that time. Invoice No. 20 was submitted by Touche Ross to the Respondent "for further processing for payment" by a letter dated 22 March 1979. Thus, no recommendation as to payment was made, as was the case with Invoice No. 19.

The evidence submitted by the Claimant, while not proving each item in detail, creates a presumption that the Claimant incurred the costs reflected in the invoice. In view of the fact that no particular item of the invoice has been objected to or challenged by the Respondent, a general allegation that those costs have not been incurred in the amount claimed is not sufficient to nullify that presumption. As described above at III.2.b), reports by the Respondent's System Integration Contractor and Training Evaluation Contractor confirmed that in January 1979 the Claimant was performing its obligations under the Contract. The Claimant has

submitted samples of back-up material for the January 1979 invoice, such as portions of worksheets and hourly records, and it offered to present time cards and further supporting records if so requested, which material the Claimant had ready for review at the Hearing. The Claimant has further submitted cover letters and receipts establishing that it provided the services and sent the Respondent the material required to make up for the "deficiency factor" contained in Invoice No. 19 and to reach a level of performance of 100 percent. The Respondent has not challenged the amount for any particular item of Invoice No. 20, nor did it request an opportunity to review the back-up material that the Claimant offered to present and had available at the Hearing. In view of this, the Tribunal is satisfied that the Claimant has incurred the costs, G and A, and overhead, and earned the profit, reflected in its Invoice No. 20.

The same applies to Invoice No. 21, dated 9 March 1979, for the amount of $982,434 covering February 1979.

The face amounts of Invoices Nos. 19, 20 and 21, as stated above, were arrived at by deducting a contractually required performance withhold of five percent from the amounts owed to the Claimant for costs incurred. This was a routine withhold as a security for the Respondent, which was not made for any specific deficiency in the Claimant's performance. Since the Tribunal has found that the Claimant was performing its obligations under the Contract, the Claimant is entitled to recover the amount of the withhold. By the time of Invoice No. 21 the cumulative amount withheld amounted to $1,227,352, which must be added to the aggregate face amount of $7,313,532 of Invoices Nos. 19, 20 and 21, resulting in a total amount of $8,540,884.

Against this total it is uncontested that the Respondent is to be credited for the unamortized portion of its down payment of 15 percent of the contract price, which by Invoice

No. 21 amounted to $4,263,171. The total amount of the Claimant's unpaid direct costs, G and A, overhead and profit until the termination of the Contract is therefore $4,277,713.

bb) Post-breach costs

Expenses in a total amount of $3,458,833.60, claimed by the Claimant as post-breach costs, include costs of performance as well as costs resulting from the Respondent's termination of the Contract. To the extent that they constitute performance costs, they are governed by the first part of Article 4-a-1. of the Contract. As far as they constitute termination costs, they are governed by the last sentence of Article 4-a-1., which states: "In addition, costs attributable to the termination shall be paid by the [Respondent] to the [Claimant]".

The Claimant has submitted extensive documentation and back-up material for each item of the following types of post-breach costs claimed: payments to the suppliers of goods and services including the cost through December 1984 of storing equipment related to the Contract, labor and fringe benefits expense, expenses for personnel assigned to Iran, and offsets. The supporting documents include, inter alia, contracts and correspondence with subcontractors, invoices, journal entries, personal loss claims and expense reports and expense accounts. In addition, the Claimant offered and had ready for review at the Hearing further back-up material for the documents it had submitted.

As with the amounts set out in Invoices Nos. 19, 20 and 21, the Respondent did not specifically challenge any of the documentation or amounts claimed as post-breach costs, and did not request review of the back-up material offered by the Claimant. The Tribunal has reviewed the material filed and, with the one exception discussed below, it is satisfied that the Claimant incurred the amounts claimed.

The exception concerns charges allegedly incurred with respect to the letters of credit the Claimant opened under the Contract as a guarantee of good performance and as security for the Respondent's down payment. The Claimant seeks a total of $519,049 for "payments made to Bank Iranshahr and Bank of America after Respondent's breach and for amounts claimed by those two banks ... as a result of Respondent's refusal to cancel the letters of credit and bank guarantees." The Claimant has submitted calculations and supporting invoices showing that it paid Bank of America and Bank Iranshahr a total of $113,607.98 in quarterly payments covering the period from March 1979 through June 1980.[4]

After that it paid several Bank of America invoices under protest, stating that it believed the amounts were "not due and payable" and that payment was made "without prejudice to rights or obligations to be determined when that issue is resolved." It made one further payment covering the first quarter of 1981, but then it apparently stopped making any payments. Therefore, the rest of its claim is based on amounts that it merely anticipates it might have to pay.

The Claimant has provided no details of its dispute with the banks over these letter-of-credit charges. It is noteworthy, however, that the Claimant began to protest payment, and later ceased paying altogether, shortly after it obtained court injunctions in the United States blocking payment of the letters of credit at issue. The Claimant is proceeding on the theory that the amounts paid under protest will not be returned to it and that it is now entitled to an award for

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[4] The Claimant seeks an additional $6,437.13 for part of a payment it made to Bank Iranshahr in about March 1979. It appears, however, that this charge was incurred in January and February 1979. The Respondent was not required by the Contract to release the letters of credit until after termination of the Contract, which occurred no earlier than mid-February 1979. Thus, this charge would have been incurred in any event.

the amounts the banks have claimed but have not been paid. At the least, however, the Claimant must show that it may reasonably be expected that it will not receive repayment of the protested payments and that it will have to pay the amounts claimed by the banks. This the Claimant has not done. It has given no explanation as to why it is reasonable to expect that the banks will be entitled to such payment in the future, even though the Claimant itself asserts the amounts are not owed and the banks have foregone payment for over four years. Thus, the remainder of the claim on this issue -- $405,441.02 -- must be disallowed as not proven.

The Tribunal is satisfied, however, that after the termination of the Contract the Claimant incurred costs of performance and termination amounting to $3,053,392.58.

cc) Lost profit

The Claimant claims profit on the costs that it incurred for performance of the Contract as well as the profit it would have earned for the remaining life of the Contract had it not been terminated by the Respondent.

The profit on the costs incurred under the Contract has been included in the amounts of Invoices Nos. 19, 20 and 21. These invoices were calculated in accordance with an Invoice Pricing Agreement concluded between the Parties on 27 February 1978, and this Agreement provided for inclusion of profit. Recovery of this part of the profit is allowed by the express provisions of Article 4-a-1. of the Contract, which entitles the Claimant to reimbursement of "all direct costs including G and A, overhead and fair profit incurred by the [Claimant] at the time of receipt by the [Claimant] of the notice of termination".

The Claimant bases its claim for future profit on the assertion that it could expect to perform its obligations

until the end of the predetermined duration of the Contract and thus to earn the remaining profit, and that it should be compensated for the loss of this opportunity. Article 4-a-1. of the Contract, however, which the Tribunal applies to this claim, does not provide for such compensation. The reference to "profit incurred" in the context of a provision that clearly speaks of reimbursement for costs incurred until the termination of the Contract must also be construed as referring only to profit earned until such time, and not to future profit.

Moreover, in determining whether lost profits should be paid in the event of termination of a contract by one party it is necessary to consider whether the other party could have reasonably expected to earn profits if the contract had not been terminated. In this case, the Claimant could not have reasonably anticipated that the Respondent would never exercise its right under Article 4-a- of the Contract to terminate for its own convenience, and therefore the Claimant could not reasonably expect to receive profits for any period after the date of such a termination.

The claim for future profit lost due to the termination must therefore be dismissed.

dd) Interest

The Claimant claims interest on any amount awarded it. It calculates the interest on the basis of the prime rate charged by Citibank for loans on equivalent amounts to substantial borrowers. It applies the average yearly rate to the average amount of the claim each year, thus reaching an interest amount of $6,013,386.20 as of 31 December 1984, based on a total average rate of 14.03 percent for the period 1979 through 1984. For each month thereafter until the date the Award is paid the Claimant seeks an additional $68,880,

which amounts to an annual rate of 10¾ percent. That rate is also based on the prevailing prime rate.

So far the Tribunal's practice in awarding interest does not show a great degree of uniformity. While the Chambers are consistent in generally awarding interest, when claimed, on the basis of compensation for damages suffered due to delay in payment, and while the Tribunal has never awarded compound interest, the rates applied by the Tribunal show little uniformity.

The rates stipulated in a contract and thus agreed to by the Parties are usually accepted by the Tribunal, although it has been stated that unreasonable or usurious rates will not be enforced. Award No. 145-35-3 of 6 August 1984 in R. J. Reynolds Tobacco Co. and The Government of the Islamic Republic of Iran et al., at page 19. In the absence of a contractually stipulated rate, however, the Tribunal has exercised its discretion, applying rates varying from 8.5 percent to 12 percent, which it determined to be "fair rates."

This Chamber finds it in the interest of justice and fairness to develop and apply a consistent approach to the awarding of interest in cases before it. Unless there are special circumstances, the rates stipulated in a contract will be accepted by the Tribunal. In the absence of a contractually stipulated rate of interest, the Tribunal will derive a rate of interest based approximately on the amount that the successful claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in

common use in its own country.[5] Six-month certificates of deposit in the United States are such a form of investment for which average interest rates are available from an authoritative official source.

The Tribunal realizes that there is some precedent in arbitral tribunals that deal with single cases to base interest in their awards on borrowing rates from banks in the Claimant's country, sometimes utilizing the prime rate.[6] In the circumstances of this Tribunal, however, it is desirable to have uniformity of treatment of a large number of parties in many cases, and therefore, a rate of interest based on return of investment during the relevant period is more appropriate. Uniformity can be accomplished by basing interest in Awards on the rate of return on certificates of deposit, which are available to all investors at substantially the same rates. In contrast, borrowing rates vary depending on the credit rating of each particular party, not all of whom are able to borrow at the prime rate, and some of whose credit standings may change during the relevant period. Also, not all parties who suffer from delayed payment actually borrow. For these reasons, basing a general interest rate in all Awards on the prime rate would often

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[5] See D. P. O'Connell, International Law, Vol. 2, at 1123 (2d ed. 1970) ("The standard [to be used in deriving a rate of interest to be applied to international arbitral awards] is indicated by the answer to the question, what could the claimant reasonably have expected had he had the use of the property?").

[6] In the United States, the prime rate is the rate used as a base to determine rates on loans to banks' most creditworthy corporate customers.

not be realistic.[7]

The Tribunal notes that the practice of applying uniform rates of interest in all cases is followed by many courts in the United States, often as a result of statutory requirements. It appears that statutory rates of interest in many jurisdictions in the United States, while adjusted from time to time to reflect changing financial conditions, tend to be somewhat lower than the prime rate, due to various legislative considerations including time lag. In any event, many legislators and judges accept that general application of such rates is just. The fact that all United States claimants before the Tribunal have the benefit of the security provided by the Security Account established by the Algiers Declarations might also be seen as a reason supporting the use of a general rate of interest derived from rates of return on investment, even if in a particular case the claimant may have been borrowing at a higher rate, since such a security is not available to most other international awards or judgments of national courts.[8]

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[7] Judge Holtzmann agrees that the Tribunal should adopt a uniform method for determining the rate of interest in Awards. He believes that using the average rate paid on six-month certificates of deposit in the United States is not unreasonable, but that it would be more appropriate to base the Tribunal's interest rate on the prime rate during the relevant period. In his view, it is reasonable to assume that most businesses habitually borrow while fewer regularly invest in certificates of deposit. Moreover, although the prime rate is not applicable to all businesses, it is generally representative because the difference between it and other lending rates is relatively small. In contrast, the six-month deposit rate is less representative because of the wide range of possible uses that businesses make of their funds and the relatively large differences in the rates of return on such uses.

[8] Judge Holtzmann does not believe that the existence of the Security Account is relevant to the determination of interest rates.

The average rate of interest paid on six-month certificates of deposit in the United States from 1979 through 1984, approximately the relevant period in this case, was 12.12 percent.[9] The Tribunal therefore decides to apply an interest rate of 12 percent to the amount payable to the Claimant. The Claimant is entitled to such interest on $7,331,105.58 from 16 July 1979, a convenient date that corresponds to the date of the Respondent's letter concerning termination of the Contract, until the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

ee) Standby letters of credit and bank guarantees

The Claimant seeks cancellation of the bank guarantees and release of the standby letters of credit provided by it to guarantee its performance under the Contract and the repayment of the Respondent's down payment. Should the Tribunal not grant this relief, then the Claimant raises a contingent claim of $14,740,425, which is the aggregate of the face amounts of the two letters of credit. The Claimant asks the Tribunal to retain jurisdiction to award it any amounts it might then be compelled to reimburse the Bank of America, the bank that issued the letters of credit, on account of those letters of credit.

On 1 May 1980, the Respondent, through Bank Iranshahr, made demands on Bank of America for payment of the amount of both standby letters of credit. On 27 and 30 May 1980 injunctions against payment of the two letters of credit were issued

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9 See Federal Reserve Bulletin, April 1985, at A24; Federal Reserve Bulletin, May 1982, at A27.

against the Respondent and Bank of America by a California state court. These injunctions remain in effect today.

Since the Contract was terminated and therefore performance did not have to be guaranteed thereafter, and since the Respondent has been credited for the remaining balance of its down payment for which therefore no more security is necessary, the bank guarantees issued to this end have no further purpose. Thus the Respondent is obliged to withdraw demands for payment of these guarantees and to refrain from making any further demands thereon. The Respondent is further obliged to cancel these bank guarantees and to release the corresponding letters of credit.

ff) Costs

The Claimant seeks reimbursement for expenses of pursuing its claim against the Respondent before the Tribunal and in the courts in the United States in the amount of $830,093.96.

The Tribunal Rules provide in Article 38, paragraph 1, that "[t]he arbitral tribunal shall fix the costs of arbitration in its award". As to costs other than for legal representation and assistance, the Rules provide that they "shall in principle be borne by the unsuccessful party", subject to apportionment between the parties if the Tribunal "determines that apportionment is reasonable, taking into account the circumstances of the case" (Article 40, paragraph 1).

The Claimant has not indicated the amount of such non-legal costs - such as translation or travel expenses of witnesses - and has not provided evidence as to them. Accordingly, the Tribunal makes no award for the Claimant's non-legal costs. As to costs of legal representation and assistance, Article 38, paragraph 1(c), requires that the Tribunal fix the costs "of the successful party if such costs were claimed during

the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable". The Rules then provide that the Tribunal, "taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable" (Article 40, paragraph 2).

Whereas according to these provisions costs other than for legal representation and assistance shall as a rule be borne by the unsuccessful party, the Rules are not so clear with regard to costs for legal representation and assistance. The above-quoted provision of Article 38, paragraph 1(c), mandating the Tribunal to fix the legal costs of the successful party, seems to indicate an intention that such costs shall also be borne by the unsuccessful party. Article 40, paragraph 2, however, clearly leaves broader discretion to the Tribunal to determine who shall bear such costs. In addition, the seemingly mandatory provision of Article 38, paragraph 1(c), is to a large extent modified by the fact that the Tribunal shall fix such costs "only to the extent" that it deems them reasonable (emphasis added). While this does not create a presumption in favour of the exemption from the stated rule, it indicates that the test of "reasonableness" as required here should be applied in a rather cautious manner.

In this context it is noted that thus far the Tribunal has not awarded costs in all cases, and even when it has, the amounts have generally been less than claimed. Chamber Two has never awarded any costs, Chamber One has awarded relatively small amounts of costs in only a few cases, and Chamber Three has in general awarded costs to the successful party in an amount well below the one claimed, using a range between $5,000 and $25,000 with costs of $70,000 awarded in one case. No distinction has been made between costs for

legal representation and assistance and other costs, where costs were awarded.

In applying the test of "reasonableness", it might be said that, unlike in ordinary litigation and arbitration, the successful party before the Tribunal, rather than having to enforce an Award in its favour, should the losing party not comply, will be paid the amount of the Award out of the Security Account established pursuant to the Algiers Declarations, without any further steps required from its side. The amount awarded as costs shares this additional and unusual security, and Article 38, paragraph 1(c), leaves room to take into account this particular circumstance. Also, it may be noted that in commercial cases in courts in the United States the practice is that each party generally bears the costs of its legal counsel.[10]

In addition to these general considerations the circumstances of each case will have to be taken into account when determining to what extent the amount of costs for legal representation and assistance is reasonable. In the present case the Tribunal determines that the costs incurred by the Claimant "in presenting its claim [...] before courts in the United States" do not come within the application of Article 38. The remaining costs, for which the Claimant was regularly invoiced by its counsel, amount to approximately $265,000. In view of the general considerations outlined above, and taking into account that the present case involves factual and legal issues that are neither of extreme nor of quite ordinary complexity in comparison to other cases before the Tribunal, the Tribunal determines that $50,000 is a

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[10] Judge Holtzmann believes that the existence of the Security Account and practices as to legal fees in courts in the United States are not relevant to the determination of reasonable costs under the Tribunal Rules.

reasonable amount of costs to be paid by the Respondent.[11]

e) The Counterclaims

aa) Balance of the Respondent's down payment

The Respondent seeks to recover the unamortized balance of its advance payment. When calculating the amount of Invoices Nos. 19, 20 and 21, the Claimant credited the Respondent for the unamortized portion of the down payment. This method of calculating the Claimant's invoices has been accepted by the Tribunal, as noted above. Therefore the Respondent cannot recover the balance of its down payment again.

bb) Deliverables

With respect to the equipment the delivery of which the Respondent requests in its "Exhibit of Counterclaim", the Tribunal is in a peculiar posture because it is not clear what relief the Respondent seeks and because the record is scanty on this issue. In its initial Statement of Counterclaim alleging that the Claimant breached the Contract, the Respondent cited as one of the instances of breach the Claimant's failure to deliver equipment it held for the Training Institute. The Claimant responded that the Training Institute equipment was not transferred to Iran because the facilities in Iran for the Institute were never completed by the Respondent. The Claimant acknowledged that it holds property belonging to the Respondent and stated that it had so advised the Respondent. The Claimant stated that the equipment is available to the Respondent whenever the Respondent reimburses the Claimant for its storage charges on the equipment and makes arrangements to transfer it. The

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[11] Judge Holtzmann would have awarded $265,000 as reasonable costs, but joins in the Award in order to form a majority.

Claimant also reports that it has sold some office supplies and furniture for the Respondent's account, and the claim here has been reduced by the amount received. In its Rejoinder, the Respondent again cited the nondelivery as evidence of the Claimant's breach of the Contract.

The Respondent's "Exhibit of Counterclaim", which was filed after the dates set for documentary submissions in this case, requested for the first time an award requiring delivery of the equipment. It did not address the question of storage and shipping charges. Later, in its Pre-hearing Memorial the Respondent again mentioned the Training Institute equipment only in the context of the Claimant's alleged breaches of the contract. The issue was not clarified by either Party at the Hearing.

This history of pleading, and the fact that the Respondent's final pleading restates the relief sought on its counterclaim but does not mention the delivery of the equipment, may give rise to the inference that the Respondent does not actually seek delivery. In any event, the Respondent has never addressed the question of storage and shipping charges.

Even if the request for an award obligating the Claimant to deliver the equipment were still part of the Respondent's request for relief, the Tribunal would have to regard this under Article 20 of the Tribunal Rules as an inappropriate amendment of the Respondent's counterclaim. The request was filed after both Parties had completed all of their requested documentary submissions, and the Claimant has not had an opportunity to submit evidence on whether the list is accurate. As a result, the record contains no clear evidence as to which pieces of equipment the Claimant has in storage in the United States, which were left in Iran, and which have been sold by the Claimant for the Respondent's account. Thus, the prejudice to the Claimant and to the Tribunal's processes would be too great to permit the amendment.

cc) Social security premiums

In its counterclaim for social security premiums the Respondent asserts that the Claimant has not paid premiums to the Social Security Organization on account of the Claimant's employees. The Respondent quotes provisions of the Social Security Act it says are applicable to the Claimant and states that the Claimant "has not fulfilled [its] legal duty, [and] therefore ... is legally bound to make payment of the insurance premium" plus certain penalties. The Respondent has submitted a letter from the Social Security Organization reporting that a total of Rials 248,892,835 is due.

The Claimant denies any liability under the Social Security Act. The Claimant also asserts that the Contract in any case relieves it of any liability for social security premiums. It asserts that the following reimbursement clause, contained in Article 5.6., applies to social security premiums:

> "Payment of all taxes and fees as may be levied on the Contractor or its employees by the Government of Iran, shall be reimbursed by the Buyer. Should Contractor be required to pay any such taxes and fees, they will be repaid by the Buyer to the Contractor."

The Claimant further asserts that subsequent correspondence with representatives of the Respondent specifically reaffirmed that the Claimant was exempted from social security premiums.

Pursuant to Article II, paragraph 1, of the Claims Settlement Declaration, the Tribunal's jurisdiction over counterclaims is limited to those counterclaims "which arise[] out of the same contract, transaction or occurrence that constitutes the subject matter of" the main claim. The asserted obligation to pay social security premiums in this case is imposed not by the Contract that is the subject matter of the claim, but by operation of the applicable Iranian social security law. Any such obligation is, as the Tribunal found in Award No.

114-140-2 of 16 March 1984 in T.C.S.B., Inc. and Iran, at page 24, a "legal relationship[] arising out of the application of the law to a situation in which either party individually finds itself" rather than a "contractual relationship between the parties to the contract inter se".

This situation is different from that in Award No. 141-7-2 of 29 June 1984 in Tippets, Abbett, McCarthy, Stratton and Tams-Affa Consulting Engineers of Iran, et al., in which the Tribunal valued all of the assets and liabilities of an engineering partnership -- including its social security obligations -- in order to calculate the dissolution value of the Claimant's interest in the partnership. In that situation, the right being adjudicated was the Claimant's right under international law to recover the net value of the interest of which it had been deprived. In the present case, as in T.C.S.B., the Claimant is entitled to the value of its contract right, and only liabilities specifically imposed by the Contract can be taken into account.

For these reasons, the Respondent's counterclaim seeking social security premiums is outside the Tribunal's jurisdiction.

dd) Collection of the bank guarantees

The Respondent asserts that, since the Claimant had breached the Contract, the Respondent was entitled under the Contract to make calls on the bank guarantees and the Claimant had no right to seek the injunctions it obtained in the United States court. The Respondent requests an award obligating "Claimant to lift restrictions on the collection of the amount of the bank guarantees." The Tribunal has found no breach of the Contract by the Claimant. The Respondent is therefore not entitled to the collection of the performance guarantee. As stated above, the unamortized balance of the down payment has been taken into account when establishing

the Claimant's claim for costs incurred. Thus the Respondent is not entitled to the collection of the down payment guarantee. The counterclaim "to lift [the] restrictions on the collection of the amount of the bank guarantees" is therefore dismissed.

IV. Award

For the foregoing reasons,

THE TRIBUNAL DETERMINES AS FOLLOWS:

Guarantees Nos. 77/6, 77/7, 77/8, 77/9, 77/10, 77/11 and 77/12 issued by Bank Iranshahr have no further purpose, and the Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is hereby ordered to withdraw any and all demands for payment in connection with the above guarantees and to refrain from making any further demand thereon.

The Tribunal hereby orders the Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN to take any and all actions that are necessary to assure that Bank Iranshahr cancels the above guarantees, releases Letters of Credit Nos. 013490 and 013491 issued by the Bank of America, withdraws any and all demands for payment made in connection with the mentioned letters of credit and refrains from making any further demand thereon. The Tribunal retains jurisdiction in this case to take any further action in the event that this order is not complied with within ninety days after the date of this Award.

The Counterclaims of the Government of the Islamic Republic of Iran against Sylvania Technical Systems, Inc. are dismissed.

The Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay the Claimant SYLVANIA TECHNICAL SYSTEMS, INC. the sum of Seven Million Three Hundred Thirty One

Thousand One Hundred and Five Dollars and 58 cents (U.S. $7,331,105.58) plus interest at the rate of 12 percent per year from 16 July 1979 to the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; plus costs of arbitration in the amount of $50,000.

This obligation 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.

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

Dated, The Hague,
27June 1985

Karl-Heinz Böckstiegel
Chairman
Chamber One

In the name of God

Mohsen Mostafavi
Dissenting Opinion

Howard M. Holtzmann
Concurring. Separate Opinion on costs.