IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL
«نسخه برابر اصل»

CASE NO. 93
CHAMBER ONE
AWARD NO. 289-93-1

FORD AEROSPACE & COMMUNICATIONS CORPORATION,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
BANK MARKAZI IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 29 JAN 1987 تاریخ
No. ۱۳۶۵/۱۱/۹ 93 شماره

PARTIAL AWARD

Appearances:

For the Claimant:

Mr. K. Wolf,
General Counsel,
Mr. M. McCall,
Attorney,
Mr. L. Chan,
Mr. D. McCrary,
Representatives,

For the Respondents:

Mr. M. K. Eshragh,
Agent of the Government
of the Islamic Republic of
Iran,
Mr. A. A. Riyazi,

Legal Adviser to the
Agent,
Mr. A. Fatemi,
Attorney of the Ministry
of Defence,
Mr. A. A. Ostadifar,
Technical Representative of
the Iranian Air Force,
Mr. M. Ekhteraie,
Representative of Bank
Markazi, Iran,

Also present:

Mr. D. M. Price,
Deputy Agent of the
United States of America.

CONTENTS

1. The Claim in this Case arises out of two contracts forming part of the so-called "IBEX" project, the purpose of which was to modernize and expand Iran's military electronic intelligence gathering system. See Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985); Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1 (25 September 1985); Touche Ross & Company and Islamic Republic of Iran, Award No. 197-480-1 (30 October 1985). Under the two Contracts (No. 126 and No. 130) in this Case, Aeronutronic Overseas Services, Inc. ("AOSI"), the Claimant's allegedly wholly owned subsidiary, was to provide equipment, qualified personnel, facilities, data and services for, respectively, an operational "Ground Processing and Analysis Segment" and an operational "Ground Collection Segment" of the IBEX system. The Claimant FORD AEROSPACE & COMMUNICATIONS CORPORATION alleges that the Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN breached and repudiated the Contracts in 1979. The Iranian Government contends that the Claimant failed to perform and breached the Contracts. It interposes a counterclaim. Bank Markazi, against which the Claimant also seeks to proceed, denies that it is a proper Respondent. An Interim Award has been issued in this Case requesting the Government of Iran to seek a stay of proceedings before the General Court of Tehran with respect to claims brought by the Government of Iran that were identical to its Counterclaims before the Tribunal. See Ford Aerospace & Communications Corporation and Government of Iran et al., Interim Award No. ITM 16-93-2 (27 April 1983). A Pre-hearing Conference was held on 26 January 1984 and a Hearing took place on 18 and 19 June 1986.

I. PROCEDURAL ISSUES

1. Bank Markazi as a proper Respondent

2. In its Statement of Claim filed on 18 November 1981, the Claimant named Bank Markazi Iran as a Respondent. Bank Markazi requested to be deleted from the list of Respondents. It also requested to be awarded costs totalling $5750, consisting of $4000 for legal expenses and costs of travelling and residing in The Hague incurred by Bank Markazi's representative, and $1750 in respect of his travelling costs from and back to Iran, including the cost of an exit visa. In a submission filed on 15 March 1984, the Claimant presented an "Offer to Withdraw Claim Against Bank Markazi" in which it, however, opposed Bank Markazi's request for costs.

3. In view of Bank Markazi's request to be deleted as a Respondent and of the Claimant's agreement to withdraw its claim against Bank Markazi, the Tribunal decides that Bank Markazi is stricken as a Respondent. However, as the basis for naming Bank Markazi as a Respondent is not sufficiently established, the Claimant has to pay Bank Markazi's costs in the amount of $5750.

2. Amendment to the Claim

4. In its Statement of Claim filed 18 November 1981, the Claimant originally claimed a total amount of $17,699,065, not including interest. In its Hearing Memorial filed on 19 December 1984, the Claimant amended the Claim. The monetary relief it now seeks totals $17,877,105, again not including interest. The Claimant explained that the increase of $178,040 reflected an adjustment for additional costs subsequent to termination in the amount of $30,400 and an underestimation of the profit to which Ford Aerospace allegedly is entitled in the amount of $147,640.

5. The Tribunal admits the amendment to the Claim, pursuant to Article 20 of the Tribunal Rules of Procedure, as such admission causes neither delay nor prejudice to the Respondent, and there are no other "concrete circumstances" which would make admission inappropriate. See International Schools Services, Inc. and Islamic Republic of Iran et al., Interlocutory Award No. ITL 57-123-1 (30 January 1986).

3. Claimant's rebuttal brief and evidence filed on 20 March 1986

6. As requested by the Tribunal in an Order of 18 September 1984, the Claimant filed its Hearing Memorial and written evidence on 19 December 1984. The Respondent, the Government of Iran, after five extensions, did not file its Hearing Memorial and written evidence, which were first due on 14 January 1985, until 16 October 1985. On 24 February 1986, the Claimant requested permission to file a rebuttal brief and evidence. In an Order filed on 28 February 1986, the Tribunal invited the Claimant to do so by 20 March 1986 and the Respondents to file a brief and evidence in rebuttal of the Claimant's submission by 9 May 1986. The Order also stated that in view of the Hearing scheduled for 18 and 19 June 1986, no extension would be granted. The Claimant filed its rebuttal brief and evidence on 20 March 1986. In a submission filed on 8 May 1986 the Respondent alleged that, as had been predicted in an objection filed on 18 March 1986 by the Agent of the Islamic Republic of Iran to the Order of 28 February 1986, the submission of a response to the Claimant's rebuttal brief and evidence had proved impossible.

7. The Tribunal reiterates the ruling in its Order of 10 April 1986:

> "Had the Claimant's rebuttal brief and evidence, . . . either because of its volume or because of its contents, required considerable time to respond to, the Tribunal might have reconsidered its scheduling leading

to the Hearing on 18 and 19 June 1986. However, having examined the Claimant's rebuttal brief and evidence, the Tribunal notes that the brief itself consists only of 18 pages with relatively few exhibits attached to it, of which a large part deals only with the claim for costs. Therefore, and also since parties should be expected to give priority to cases in which a Hearing has already been scheduled, the Respondents are considered to be in a position to respond to this brief within the time limit set forth in the Order of 28 February 1986."

4. Claimant's back-up documents

8. At the Hearing, the representative of the Ministry of Defence alleged that it had not been able to prepare a proper defence with respect to voluminous back-up documents submitted by the Claimant, because it had received them only a few weeks before the Hearing. With respect to these back-up documents, the Tribunal reiterates the ruling in its Order of 10 April 1986:

"a) On 12 December 1984, the Claimant filed one copy of a number of volumes containing receipts for engineering data. On 20 December 1984 the Chairman of Chamber One instructed that, because of the large amount of material involved, only one copy of these documents need be filed which would be available in the Tribunal's Registry for use by Respondents and the Tribunal. Copies of that instruction were delivered to the Agents of the Islamic Republic of Iran and the United States of America on 24 December 1984. Thus, from that date the Government of the Islamic Republic of Iran, which is the main Respondent in this case, has been on notice of the availability of the back-up documents and has had the opportunity to review them.

b) Although, pursuant to the Chairman's instruction, only one copy of the back-up documents were required to be filed, the Claimant has furnished summaries of the information contained therein, in the full number of copies required by the Tribunal Rules. Summaries of documents filed on 12 December 1984 are provided in Exhibits 47 and 48 to Document 167, filed on 19 December 1984. Summaries of a second category of back-up documents filed by the Claimant on 24 February 1986 are

contained in Exhibits 28 through 31 to Document 167.

c) After the Claimant filed its Hearing Memorial and written evidence on 19 December 1984, including Document No. 167, the Respondent, the Government of the Islamic Republic of Iran did not file its Hearing Memorial and written evidence until 16 October 1985. During that ten-month period, the Respondent had ample time and opportunity to include in its Hearing Memorial an answer to the contents of Document No. 167 and to make specific requests as to the back-up documents to that submission, which were available in the Registry.

d) Moreover, it has been the practice of the Tribunal to accept certain back-up material in one copy only. With respect to the back-up material submitted by the Claimant in this case, the Tribunal does not see why it should deviate from that practice. Therefore, the arrangements with respect to the back-up documents do not require a change in the scheduling of this Case."

5. Respondent's Request for Expert Opinion

9. In its pleadings, the Respondent has repeatedly requested the Tribunal to appoint an expert to evaluate the Claimant's alleged performance of the Contracts, in particular, to assess the scope of the work done and whether it conforms to the contractual requirements. The Respondent reiterated the request at the Hearing. The Claimant objects.

10. The Tribunal finds that in this Case it is able to assess the Claimant's performance on the basis of the evidence submitted and that there is no need to appoint an expert.

II. FACTS AND CONTENTIONS

11. As noted, the Contracts involved in this case were part of the IBEX project, 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. The various IBEX contractors were to provide electronic equipment, train personnel to operate and maintain the equipment, construct facilities for training, data collection, and data analysis, and expand logistic services. The completed system would collect data by means of aircraft, fixed ground facilities at a number of military sites near Iranian borders, and transportable vans. A central complex to house the data analysis computers, a permanent Training Institute, and a central logistics depot would be situated at Doshen Tappeh Air Force Base in Tehran. The analysis centre would analyze data and produce intelligence reports.

12. AOSI, the Claimant's allegedly wholly owned subsidiary, entered into two contracts with the Imperial Government of Iran, Contract No. 126 signed on 14 December 1977 and Contract No. 130 signed on 15 January 1978, which respectively required AOSI to provide the initial phases of the "Ground Processing and Analysis Segment" and the "Ground Collection Segment" of the IBEX system.

13. The Statement of Work ("SOW") attached as Appendix Four to Contract No. 126 lists a series of tasks AOSI was to perform: planning and management of the Ground Processing and Analysis Segment; implementation of the segment program in accordance with applicable Buyer approved plans and schedules; provision of specified segment hardware and software in accordance with Buyer approved specifications, plans and procedures; testing and delivery of the segment for Buyer acceptance; and provision of the required services and material. The SOW attached as Appendix Four to Contract No. 130 enumerates similar tasks with respect to the Ground Collection Segment. Generally speaking, the design phase was to be completed by the spring of 1979, the procurement phase by the end of that year, and installation and testing by early 1981. The maximum estimated price was $23,655,853 for the Ground Processing and Analysis Segment (Contract No.

126) and $48,937,000 for the Ground Collection Segment (Contract No. 130).

14. The Respondent made down payments in the amount of $3,548,377 under Contract No. 126 and $7,340,550 under Contract No. 130. In addition, until the period of difficulties arose, the Respondent paid invoices submitted by the Claimant in the amount of $2,837,710 with respect to Contract No. 126 and the amount of $2,930,504 with respect to Contract No. 130. There is no dispute that the Claimant thus actually received a total amount of $16,657,141 under the Contracts from the Respondent.

15. The Claimant asserts that it fully performed its contractual obligations until work had to be curtailed in February 1979 because Iran failed to provide directions or instructions that were necessary to the performance of the Contracts and because important meetings were cancelled. The Claimant further contends that Iran breached the Contracts by refusing to pay invoices for work performed from October 1978 through February 1979 as well as invoices for work performed thereafter, by not appointing a replacement for the Program Director who became unavailable after 11 February 1979, by failing to provide buyer-furnished materials as contractually required, and by refusing to extend a letter of credit which ensured payment of the Claimant's invoices.

16. By telex and by a letter dated 21 February 1979 the Claimant gave notice to the Respondent that "recent civil disturbances in Iran, still occurring, have created conditions constituting an event of Force Majeure under which, if continued, execution of the contract will be impossible." The Claimant also stated that, pending further direction from Iran, it planned for the time being to limit its work levels pending resolution of the situation in Iran.

It also announced that it was prepared to consult and exchange views on how to deal with the events.

17. The Claimant alleges that it did not immediately consider the project terminated and that it aimed at minimizing costs by not beginning new work, but completing work in process to a point which would permit resumption when Iran so decided.

18. On 24 April 1979, the Claimant submitted a brief report on the status of the Contracts to the Respondent's representative in Washington. In this report the Claimant indicated that a decision would have to be made before the middle of May 1979 to maintain or terminate subcontracts.

19. In a letter dated 18 May 1979 to the Respondent, the Claimant stated that notwithstanding its 21 February letter, it had received no instructions regarding the continuation of the project. It also stated that buyer-furnished equipment necessary to performance had not been delivered, that invoices for October 1978 and subsequent months had not been paid, and that the Respondent had failed to renew the letter of credit under which the Claimant would receive payment. As a result, the Claimant advised Iran that further reductions in the program were necessary until instructions were received.

20. As no response was received from Iran, the Claimant alleges that it took steps in May 1979 to terminate subcontracts or bring their work to completion and to reduce other costs as far as possible.

21. In a letter to AOSI dated 16 July 1979 the Respondent, declared that as of 10 February 1979 "the accomplishment of all the works and expenditures under the Contracts No. 126 and 130 has been considered to be stopped due to the recent transformations arising from the Islamic Revolution

of Iran". The letter requested AOSI to send representatives to Tehran for "contractual negotiations".

22. A meeting between the Parties took place on 18 September 1979. The Claimant contends that at this meeting Iran pointed out that the Contracts were concluded with the former Government, which had ceased to exist on 10 February 1979, and that therefore only invoices for work done before that date, subject to verification by Iran, would be paid. The Respondent asked the Claimant for "Final Status Reports" on the project, which the Claimant submitted on 18 October 1979, but to which Respondent did not respond.

23. The Claimant contends that although the Respondent refused to acknowledge that it was "terminating" the Contracts, it in fact repudiated and effectively cancelled them. After giving notice to Iran, the Claimant terminated the remaining subcontracts and, to mitigate damages, began to sell the equipment it had obtained for the project. The last invoice was submitted for September 1979.

24. The Claimant asserts that in March 1980 Iran made wrongful calls on letters of credit provided by the Claimant pursuant to the Contracts to secure performance and down payment guarantees.

25. As of the Hearing, the amended Claim sought total monetary relief of $17,877,105. At the Hearing the Claimant withdrew a portion of the Claim proper representing legal costs which it now seeks only as costs of this arbitration. Thus, as amended before the Hearing and modified at the Hearing, the Claimant now seeks a total of $17,236,581.07, consisting of $7,681,870 for invoice amounts billed and unpaid; $1,282,001 for amounts withheld from submitted invoices; $491,414 for costs incurred from October 1979 through August 1981, including profit; $307,805.07 for costs

incurred after August 1981; $2,411,726 for unabsorbed overhead costs; and $5,061,765 for lost profits. In addition, the Claimant asks for interest and costs of arbitration.

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

27. Finally, in an amendment to the Statement of Claim accepted by the Tribunal in its Order dated 2 February 1984, the Claimant requests a declaration that Iran shall satisfy the tax liability and related penalties assessed against it in Iran in respect of the Contracts and that it is released from any such liability.

28. The Respondent raises three objections to the Tribunal's jurisdiction over this Claim. It argues that, pursuant to the provision in the Contracts 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. Finally, the Respondent raises an objection to the standing of Ford Aerospace and requests evidence of the Claimant's ownership of the Claim. The Claimant rejects all three objections.

29. On the merits, the Respondent denies that it breached or terminated the Contracts. Rather, it asserts that it at all times contemplated full performance by the Claimant. The Respondent alleges further that the Claimant failed to perform the Contracts and terminated them because it was unable to obtain an export licence as contractually required.

30. In addition, the Respondent contends that the Claimant breached the Contracts by failing to deliver the engineering data specified in the Contracts, by delivering some items late, by not honouring its obligation to establish an office in Tehran and to appoint a local program director, and by denying Iran access to records and files in the United States needed to evaluate the work allegedly performed. The Claimant denies all of these contentions.

31. The Respondent asserts a Counterclaim for the balance of down payments and invoices paid to the Claimant in the total amount of $16,657,141, plus interest through 1980 amounting to $7,804,162.59, plus the interest accrued until the execution of the Award.

32. Furthermore, the Respondent seeks damages allegedly resulting from the Claimant's breach of the Contracts, the amount of which should be determined by an expert.

33. In a supplement to the Counterclaim accepted by the Tribunal in its Order dated 10 April 1986, the Ministry of Defence also asks for Rials 1,175,994,154 which the Claimant allegedly owes as taxes to the Ministry of Economic Affairs and Finance. The Claimant denies this claim, arguing that under the Contracts the Respondent is liable for Iranian taxes.

34. The Respondent also requests the Tribunal to order the Claimant to deliver to the Respondent buyer-furnished electronic equipment and machines allegedly belonging to Iran which is stored in the United States.

35. Finally, the Respondent requests reimbursement of the "cost of proceedings and attorneys' fees in accordance with Article 38 of the Tribunal Rules."

III. REASONS FOR AWARD

1. Jurisdiction

a) The forum selection clause

36. Both Article 10 of Contract No. 126 and Article 10 of Contract No. 130 contain the following dispute settlement clause:

> "Settlement of Differences
>
> All disputes and differences which may arise resulting from interpretation and explanation of the Articles of the Contract or related appendices 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."

37. The Respondent argues that this clause provides for the exclusive jurisdiction of the Iranian courts over any disputes under the Contract so as to oust the Tribunal's jurisdiction pursuant to Article II, paragraph 1, of the Claims Settlement Declaration. However, this clause employs language identical in all material respects to that already examined by the Full Tribunal in Ford Aerospace and Communications Corporation et al. and Air Force of The Islamic Republic of Iran et al., Interlocutory Award No. ITL 6-159-FT (5 November 1982). There the Tribunal decided that the express limitation of the provision to disputes arising from the interpretation of the Contract and the execution of the works removed it from the scope of the exclusion. The Tribunal reaffirmed this reasoning after examining virtually identical dispute settlement clauses in Sylvania, supra, pp. 11-13; Questech, supra, pp. 11-13; and Touche Ross, supra, pp. 7-8, 12.

38. There is no reason for this Chamber to interpret the forum selection clause in this Case differently from the

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

b) The Claimant's United States nationality

39. Based on the evidence submitted by the Claimant, which fulfills the requirements laid down in the Order of 20 December 1982 in Case No. 36, Flexi-Van Leasing, Inc. and Islamic Republic of Iran, reprinted in 1 Iran U.S. C.T.R. 455, and in the 18 January 1983 Order in Case No. 94, General Motors Corporation et al, and Islamic Republic of Iran et al., reprinted in 3 Iran-U.S. C.T.R. 1, for proof of corporate nationality, the Tribunal is satisfied that the Claimant is a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration. Accord Ford Aerospace & Communications Corporation et al. and Air Force of the Islamic Republic of Iran et al., Award No. 236-159-3 (17 June 1986).

c) The Claimant's standing

40. The Respondent objects to the Claimant's locus standi on the ground that it has not proven that the rights and obligations of AOSI under Contracts No. 126 and No. 130 were assigned to Ford Aerospace.

41. On the basis of the Claimant's submission of the copy of the assignment dated 4 August 1978 signed by AOSI, Ford Aerospace, and the Iranian Government's Communications & Electronics Organization, the Tribunal is satisfied that Ford Aerospace owns the Claim.

2. Merits

42. In this section of the Award the Tribunal deals first with the allegations of the Parties concerning the performance of the Contracts prior to and after 15 February 1979, the date when work was curtailed. It then addresses the Parties' arguments as to what brought the Contracts to an end and considers the legal consequences that follow from termination in those particular circumstances. Finally, the Respondent's Counterclaims are examined.

a) Performance under the Contracts

43. One central allegation of the Respondent is that the Claimant breached the Contracts 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 as much as could reasonably be expected under the particular circumstances of this Case, until the Contracts were finally terminated by the Respondent.

44. The evidence which establishes that the Claimant actually performed includes the summaries and descriptions of delivered items in the Claimant's Exhibits as well as the Final Status Reports submitted by the Claimant to the Respondent in October 1979, which list all delivered items and the dates on which Monthly Progress Reports were submitted. This evidence is supported by the voluminous back-up documents the Claimant lodged with the Registry, which include the receipts the Claimant obtained for delivery from the courier designated by the Respondent, as well as executive summaries indicating which item was delivered, when it was delivered and whether a receipt was obtained.

45. As to the period after 15 February 1979, the Tribunal finds that the Claimant was entitled to reduce its

work level for various reasons. Firstly, its invoices for work already performed in the period from October 1978 to February 1979 were not paid. This justified the Claimant's curtailment of work even if the Respondent's failure to pay may have been excused by force majeure. Secondly, the cooperation between the Parties that was necessary to proceed with full performance of the Contracts had ceased. Meetings had been cancelled. Indispensable instructions by the Respondent were not available. There was no communication. At that stage, with design work under both Contracts almost complete, the Claimant's performance was entering the "Critical Design Review" stage scheduled for February 1979, in which all of the completed design work was to be examined in detail by Iran and other IBEX contractors for final approval before continuation. Thirdly, under these circumstances there was perhaps even an obligation on the Claimant to curtail work in order to mitigate damages.

46. The Respondent alleges that the termination of the subcontracts constituted a violation of Article 11.3. of each Contract requiring the Respondent's prior approval to any changes to subcontracts. The Tribunal finds that the Claimant was entitled to terminate the subcontracts. Its failure to obtain the Respondent's approval was, at a minimum, excused by force majeure. Moreover, because the subcontractors' work formed part of the Claimant's own performance, its action in terminating the subcontracts must be assessed in the light of the factors already considered with respect to the Claimant's curtailment of work -- specifically, the absence of instructions from the Respondent and the Respondent's failure to pay outstanding invoices. Thus, the Claimant acted reasonably when it first suspended a number of subcontracts by invoking a provision permitting suspensions up to three months and, after receiving no reply to a request for instructions from the Respondent, by terminating them. Indeed, the Claimant may have even been obliged to reduce work on the subcontractor

level as much as possible to mitigate the Respondent's damages, in the event it decided not to continue the Contracts.

47. Furthermore, the Tribunal is convinced by the evidence before it not only that the Claimant performed its contractual obligations but also that its performance was satisfactory. 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. There were no contemporaneous complaints by the Respondent concerning the Claimant's performance. The Respondent also failed to give the notice and opportunity to correct which Articles 8.1. of the Contracts require 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. Even if the rule in Appendix One to each Contract, according to which objections were to be raised to invoices submitted within a four-week period, was no longer applicable after the Parties' cooperation ceased due to the Revolution, the Claimant should have been placed on notice of any objections to its performance at least within a reasonable period, which in this Case ended at the end of December.

b) Termination of the Contracts

48. The central issue in this Case is how the Contracts came to an end. The Parties agree that neither of them terminated the Contracts according to Articles 8.5. with reference to force majeure. They otherwise differ.

49. The Claimant contends that, as in the other IBEX Cases, Iran terminated the Contracts in this Case on the basis of a "deliberate policy decision" not to continue with American contractors in a project that related to secret military intelligence operations, as indicated in the Respondent's form letter of 16 July 1979 which was sent to all IBEX contractors. The purpose of the letter was to announce that "the accomplishment of all the works and expenditures under the Contracts . . . has been considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran." Alternatively, the Claimant suggests that the Contracts were either terminated by the Claimant because of Iran's default or by Iran's repudiation of the Contracts at the September meeting in Tehran. It asserts that, at any rate, there was no attempt by Iran to terminate the Contracts according to Articles 8.1. because of any default by the Claimant.

50. The Respondent alleges that the Contracts ended because the Claimant breached them before the 16 July 1979 letter. It contends that this letter was merely an invitation to negotiate in response to such request made by the Claimant in its previous communications referring to force majeure and because of the curtailment of work by the Claimant.

51. The Tribunal notes that the 16 July 1979 letter is virtually identical to the letters of the same date sent by Iran to the other IBEX contractors in other Cases. The problems Iran had with its individual contractors were related and therefore necessitated a common solution. Therefore, the previous individual communications by the IBEX contractors to Iran concerning the project were not specifically addressed or in any other way referred to in the 16 July 1979 letter. This was apparent in Sylvania, supra and in Questech, supra. Likewise here, the July 1979

letter addressed neither Ford Aerospace's conduct nor its earlier telexes and letters to the Respondent. Instead, it merely reflects Iran's general approach to the IBEX project.

52. The Respondent emphasizes, in particular, that the Claimant's failure to obtain an export licence as required by the Contracts was the real cause why the Claimant failed to perform and finally abandoned the Contracts. The Tribunal finds that the lack of an export licence in 1979 did not affect the termination of the Contracts. The Claimant fulfilled its obligation to obtain an export licence within 120 days after signing the Contracts as required by Article 8.9. of each Contract. The fact that this licence expired did not block the Claimant's performance, which took place in the United States, because there was no obligation to deliver before the Contracts ended in 1979. The 16 July 1979 letter was not motivated by the lack of a valid export licence. It did not even mention it. Nor did the export licence issue play a prominent role in the discussions between the Parties at the meeting in September 1979 in Tehran, as it was only one of several matters the Claimant undertook to deal with in the future and was not invoked by either party as a reason for not continuing the Contracts. The discussions never reached the stage where the issue of the export licence may have acquired crucial significance.

53. Rather, the Tribunal concludes that by its letter of 16 July 1979, at a time when neither Party was in breach of the Contracts, Iran decided to bring them to an end. It confirmed this termination at the meeting of September 1979 by requesting Final Status Reports and by not responding to the Claimant's notice that it would have to terminate the remaining subcontracts and sell equipment unless it received other instructions.

54. Of all the termination provisions of the Contracts, Articles 4.2., reserving to the Respondent the right

to terminate the Contracts for its own convenience, come closest to what occurred in this Case. These provisions state:

> "The Buyer is entitled at any time to terminate this contract partly or wholly for its own convenience by a 30 days prior notice."

Furthermore, Articles 4.3. stipulate that the Buyer's decision

> "is conclusive and there is no need for mentioning the reason or discussion and negotiation."

Articles 8.3. of the Contracts lay down, inter alia, the legal consequences of such termination for convenience by the Buyer:

> "In case the Buyer decides to cancel the Contract wholly or partly, for any reason not attributable to the Seller's negligence, or to decrease the requirements out of Article 4.1. he will from the official date of Contract cancellation, or the decrease of requirements take over the responsibility of paying the price of all equipment and materials shipped and works performed for the Buyer."

55. The Tribunal recognizes that these Articles may primarily have been designed for other circumstances of termination and that the Respondent did not terminate by giving the notice they require. It nevertheless concludes that they express the mutual intent of the Parties concerning the formula to be applied in determining the amount of compensation to be paid should the Respondent decide to terminate the Contracts for its own convenience. These provisions are therefore applied by analogy to the present Case.

c) Application of the contract provisions governing termination for convenience to the present Case

aa) Unpaid Invoices

56. The Claimant seeks payment of twelve invoices for each Contract in a total amount of $7,681,870, consisting of $687,761 allegedly due under Contract No. 126 and $6,994,109 under Contract No. 130. The amounts claimed include costs incurred for materials delivered and services performed for the period from October 1978 through September 1979 as well as 15% profit on these costs under Contract No. 126 and 12% under Contract 130.

57. In calculating the relief sought the Claimant has taken into account that the Respondent's down payments, $3,548,377 under Contract No. 126 and $7,340,550 under Contract No. 130 were to be amortized by deducting 15% of the price that was invoiced monthly to Iran. From the amounts thus allegedly due for unpaid invoices, i.e. $3,119,215 under Contract No. 126 and $11,608,581 under Contract No. 130, the Claimant deducts the remaining unamortized down payments in the amounts of $2,431,454 under Contract No. 126 and $4,614,472 under Contract No. 130 and arrives at the amounts claimed.

58. Under Articles 8.3. of the Contracts the Respondent has to pay "the price of all equipment and materials shipped and works performed for the Buyer." In applying these provisions to the invoice claims, the Tribunal notes that it is irrelevant that in this Case no equipment and materials were actually shipped to Iran. Firstly, the wording of Articles 8.3. clearly implies that works performed for the Buyer must be paid irrespective of whether equipment or materials were shipped or not. Secondly, under the Contracts there was no obligation on the Claimant to deliver anything in 1979 to Iran. At the time when the Respondent terminated the Contracts the Claimant's performance was in the phase of the "Critical Design Review" which, as noted above, was not implemented at least in part

because the Respondent failed to appoint a Program Director for the IBEX project. The Claimant was only obliged to ship completed equipment, and that stage of the Contracts was never reached.

59. With respect to the invoices, the Tribunal finds that the sole questions are whether the work to which they refer was actually performed and whether it was performed for the contractual price. The Respondent has raised the objection that the invoices should not be paid because they were not processed according to the invoice certification and processing procedures agreed upon by the Parties. Those procedures required that Touche Ross & Co., the Respondent's Audit Advisory Contractor, examine invoices submitted and issue a recommendation that they should be paid. Only the invoice for October 1978 was reviewed and recommended for payment by Touche Ross, whereas the invoices for November and December 1978 were forwarded to Iran by Touche Ross in February 1979 without recommendation for payment because the required Monthly Progress Reports were lacking. Later invoices were reviewed, if at all, only by Iran.

60. As in Questech, supra, p. 25, the Tribunal holds that, in awarding compensation because of a termination by the Respondent, invoices that record costs incurred need not have been submitted under the procedure the Parties had originally established. Taking into consideration that the invoice certification procedures ceased to function around the time of the Revolution, the Tribunal concludes that it suffices that the Claimant substantiates such costs to a reasonable extent and satisfies the Tribunal that it incurred the costs for its performance under the Contracts. The opposite conclusion would thwart the goal of compensation through no fault of the Claimant.

61. The Tribunal is satisfied by the evidence before it that the Claimant incurred the costs reflected in the

invoices. The supporting records utilized in the preparation of the invoices have been audited by the Claimant's auditor, Coopers & Lybrand, a firm of independent public accountants, which certified that the amount for costs incurred as alleged by the Claimant "presents fairly" the cost incurred through 31 August 1981, which includes those costs incurred through September 1979. Having also reviewed the Final Status Reports, the back-up material, and the invoices, the Tribunal is satisfied that the invoice amounts have been properly calculated and reflect the Claimant's actual performance. This also applies to the discrepancy between the deduction made in Invoice No. 0021 for "progress adjustment" of 24% and the respective deduction of 0% in Invoice No. 0022 under Contract No. 126, and the corresponding difference between Invoice No. 0024 with a deduction of 26% for "progress adjustment" and Invoice No. 0025 with 0% deduction under Contract 130. These differences have been explained at the Hearing to the Tribunal's satisfaction as attributable to the difficulties of the invoice certification procedure at the time. Moreover, the Tribunal notes, as in Sylvania, supra, p. 25, that such deductions made as a "deficiency factor" were calculated in relation to the Contracts' "financial plan" and did not relate to actual costs incurred by the Claimant. Such deductions are immaterial when actual costs are at issue as is the case here when calculating compensation under Articles 8.3. of the Contracts.

62. Furthermore, the Tribunal notes that until this proceeding the Respondent did not raise any specific objections to the invoices, which it received from the Claimant at the latest at the September 1979 meeting in Tehran, except for the general and in this context therefore negligible statement at that meeting that no invoices for work done after 10 February 1979 would be acknowledged. Under the Contracts the Respondent was obliged to raise any objections to invoices submitted within four weeks. Even if

this four-week rule may have no longer applied under the circumstances when the contractually required cooperation between the Parties ceased, the Tribunal finds, as in Touche Ross, supra, p. 18, that the Respondent's failure to respond to the invoices within a reasonable period raises the presumption that they were, or at least should have been, accepted. The Tribunal finds that the Claimant should have been placed on notice of any objections within a reasonable time after the meeting in September 1979 at which the Respondent confirmed its obligation to review invoices for work up to and including the date of the Revolution. Considering that the Respondent received the Final Status Reports on 18 October 1979, the date of 31 December 1979 appears, in the circumstances, to be a reasonable limit to set on the Respondent's review. Since neither approval nor objections were communicated to the Claimant, the Tribunal considers that from 1 January 1980 the Respondent became liable to pay the invoices.

bb) Amounts withheld from invoices

63. The face amounts of the invoices submitted by the Claimant under both Contracts were arrived at by deducting a contractually required performance withhold of five percent from the total price invoiced. This was a routine withhold as a security for the Respondent, which was not made for any specific deficiency in the Claimant's performance. The amounts finally withheld totalled $372,308 with respect to Contract No. 126 and $908,693 with respect to Contract No. 130, which adds up to $1,281,001.

64. According to Appendix 1 to each Contract, amounts withheld were to be paid "after termination of the warrantee period and receiving final acceptance certificate from the Buyer." The "guarantee period" for material and equipment pursuant to Article 2.41. of Contract No. 126 and, for

equipment only, pursuant to Article 2.26 of Contract No. 130 was 12 months.

65. The Tribunal finds that the five percent withhold is part of the price for work performed and therefore has to be paid under Articles 8.3. of the Contracts. There may be a question whether the Respondent, following a termination for its own convenience, may rely on a warranty period in the context of Articles 8.3. The amounts withheld, at any rate, became due at the latest when the warranty period expired. As the last date on which the Claimant delivered design and engineering materials to the Respondent, namely in the Final Status Reports, was 18 October 1979, this occurred on 18 October 1980. The Claimant is therefore entitled to recover the withhold under both Contracts in the cumulative amount of $1,281,001.

cc) Termination costs

66. The Claimant distinguishes between three types of termination costs in respect of which it seeks reimbursement: a) costs incurred "prior to the filing of the Statement of Claim, i.e. from October 1979 to September 1981" in the amount of $547,414; b) costs incurred since August 1981 in the amount of $307,805.07; and c) unabsorbed overhead costs in the amount of $2,411,726.

67. The Tribunal notes that, in contrast to the pertinent clause of the contract in Sylvania, supra, p. 21 et seq., in this Case, Articles 8.3. to each Contract do not provide for any compensation for termination costs. The Claimant, therefore, is generally not entitled to costs arising from the Respondent's termination of the Contracts. However, it is necessary to examine whether any of the costs claimed as "termination costs" may nevertheless be covered by Article 8.3 of each Contract because they are in fact

part of the "price" for "work performed" either by the Claimant itself or by subcontractors.

- Costs from October 1979 - August 1981

68. Noting that the Respondent did not specifically challenge any of the documentation or amounts claimed as termination costs, the Tribunal, having reviewed the material filed, is satisfied on the basis of the evidence before it, including the cost evaluation report by Coopers & Lybrand, that the Claimant incurred costs totalling $2,794,606, namely $337,165 under Contract No. 126 and $2,457,441 under Contract No. 130, arising from the settlement of subcontracts and from the procedure of selling the material and equipment that had been purchased for the project. These are costs which the Claimant can recover as the price for work performed under Articles 8.3.

69. Furthermore, the Claimant is also entitled to contractual profits on these costs, as the term "price" in these provisions includes costs and profits. The total amount of profit on these costs is $348,594, calculated on the basis of 15% under Contract No. 126 ($50,473) and 12% under Contract No. 130 ($298,121).

70. From the total amount of $3,143,200 for costs and profits, the Claimant has deducted $2,595,786, the proceeds of the 1980 salvage sales of equipment and materials it had purchased for the two Contracts.

71. The Respondent alleges that the Claimant breached the Contracts when it sold the equipment. The Claimant contends that the equipment would have become obsolete otherwise. It notified the Respondent of its intention to dispose of the equipment in order to mitigate damages in a letter dated 18 September 1979, a further letter dated 10

October 1979 and in the Final Status Reports, without receiving any objection. In the salvage sales, the Claimant acquired a large part of the equipment itself at a price equal to or higher than that offered by third parties. The sales were audited by Coopers & Lybrand, which has confirmed that the highest bid was accepted with respect to sales in excess of $50,000, and that with respect to "Internal Ford Aerospace Transfers" third-party bids were less than or equal to the transfer price and that the transfer price appeared reasonable.

72. The Tribunal finds that the Claimant, having notified the Respondent several times of the planned sale without receiving any objection, was entitled to sell the equipment to mitigate damages.

73. In its Hearing Memorial, after setting off the proceeds of the salvage sales, the Claimant arrives at $547,414 claimed for costs from October 1979 through August 1981. This amount should be reduced by $56,000 which, as notified by the Claimant at the Hearing, is attributable to attorneys' fees in connection with the dispute concerning the letters of credit and not to the price of work performed within the meaning of Articles 8.3. of the Contracts.

74. The Claimant is therefore entitled to $491,414 for its performance during the period from October 1979 until August 1981.

- Costs after August 1981

75. Originally, the Claimant sought a total amount of $893,329 for costs incurred after August 1981. In this claim it had included $551,704 for "Legal fees", $24,529 for "Auditor fee" and $79,596 for "Other costs". At the Hearing, the Claimant withdrew the amounts requested under "Legal fees" and under "Auditor fee" and reduced the amount

requested under "Other costs" by $9,290.93, an amount representing travel and other witness expenses in connection with this arbitration. These items are sought as costs of arbitration, as amended and supported with evidence in its submission filed 20 March 1986.

76. As costs incurred after August 1981, the Claimant now seeks $237,500 for expenses related to the settlement of the subcontract with Argo Systems, plus an amount of $70,305.07 for "Other costs" for which it does not offer a specific breakdown.

77. The Tribunal accepts the claim for $237,500 because the costs of the settlement of subcontracts form part of the price for work performed in the sense of Articles 8.3. of the Contracts. As to the principal amount claimed, it is immaterial that the settlement of the subcontract with Agro Systems occurred after August 1981, namely on 11 October 1982. However, with regard to the calculation of interest on this amount, the Tribunal notes that, in the ordinary course of business, the Respondent would have been expected to pay on 1 January 1983 at the latest.

78. The Claimant, however, has not shown to the Tribunal's satisfaction that the claimed amount of $70,305.07 is also covered by the price of the work performed as required by the aforementioned provisions. This part of the Claim is, therefore, dismissed.

- Overhead Costs

79. The Claimant seeks overhead costs it allegedly incurred from 1979 through 1981 that were not recovered, as anticipated, through contractual payments by Iran. The total amount of unabsorbed overhead costs claimed for both Contracts is $2,411,726.

80. The Tribunal finds that under Article 8.3. of the Contracts the Claimant is not entitled to receive payment for overhead costs. Such costs were covered by the price of the contract as a whole. They were thus related to work which had not been completed when the contract was terminated. Articles 8.3., however, only provide for the payment of the price of the work actually performed until termination. By accepting this provision when concluding the Contracts, the Claimant took the risk of not recovering its overhead costs in case the Contracts ended prematurely. This part of the Claim is therefore dismissed.

dd) Lost Profits

81. The Claimant claims not only profit on the costs that it actually incurred for performance of the Contracts but also the profit it would have earned for the remaining life of the Contracts had they not been terminated by the Respondent. It calculates its future lost profits by starting from the amount of Ford Aerospace's profits as expressly provided for in Appendix 5 to the Contracts, namely $3,085,546 for Contract No. 126 and $5,243,250 for Contract No. 130, totalling $8,328,796. It then deducts the profits included in the paid and unpaid invoices, totalling for both Contracts $2,918,437, and the profits included in the alleged termination costs incurred prior to September 1981, totalling, again for both Contracts, $348,594. It arrives at a total remaining amount of $5,061,765.

82. The Claimant bases its claim for future profit on the contention that it should be placed in the position it would have enjoyed if the Contracts had not been terminated prematurely. The Tribunal finds, however, that Articles 8.3. of the Contracts, which apply to this Claim, do not provide for such compensation. These provisions only refer to profit earned until the Respondent's termination for convenience. Such profit is clearly included in the term

"price" which encompasses both costs and profits on costs incurred. Articles 8.3., however, cannot be construed to also cover future profit.

83. Moreover, as in Sylvania, supra, p. 30, the Tribunal notes, that in determining whether one party should be entitled to receive lost profits in the event of termination of a contract by the other party it is necessary to take into consideration whether the payment of such profits could have reasonably been expected. In this Case, the Claimant could not have reasonably anticipated that the Respondent would refrain from ever exercising its right under Articles 4.2. of the Contracts to terminate for its own convenience. Therefore, the Claimant could also not reasonably expect to receive profits for any period after the date of such a termination.

ee) Interest

84. The Claimant seeks interest on its award at the prime rate as published in the Federal Reserve Bulletin on the amount awarded for unpaid invoices from October 1979, on the amounts withheld from submitted invoices from October 1980, and on termination costs and lost profits from 18 November 1981, the filing date of the Statement of Claim.

85. The Tribunal has found that the Claimant is entitled to $7,681,870 for unpaid invoices due on 1 January 1980, $1,281,001 for amounts withheld from invoices due on 18 October 1980, and to costs and profits related to other work performed in the amounts of $491,414 and $237,500, respectively, which the Claimant classified as "termination costs". Having regard to the general considerations set forth in Sylvania, supra, p. 31 et seq, the Tribunal considers it reasonable to award Ford Aerospace simple interest at the rate per annum of 10.75 percent on the amount of $7,681,870 from 1 January 1980, 10.50 percent on the

amount of $1,281,001 from 18 October 1980, 9.50 percent on the amount of $491,414 from 18 November 1981 and 8.50 percent on the amount of $237,500 from 1 January 1983.

ff) Standby letters of credit and bank guarantees

86. Articles 9.1. of the Contracts required the Claimant to submit one or several bank guarantees equal to 10% of the total contract prices as a security for good performance, $2,375,000 for Contract No. 126 and $4,895,000 for Contract No. 130, and also bank guarantees to secure the Respondent's down payments, $3,550,000 for Contract No. 126 and $7,350,000 for Contract No. 130.

87. In accordance with the Contracts, the Claimant caused Bank Iranshahr of Tehran, through Bank of America NT & SA, San Francisco, California ("Bank of America") and Manufacturers National Bank of Detroit, Michigan, ("Manufacturers Bank") to issue the down payment and performance guarantees. Furthermore, the Claimant caused Bank of America to issue letters of credit, No. 016273 in the amount of $3,550,000 and No. 016274 in the amount of $2,375,000, to and for the benefit of Bank Iranshahr as a security for the guarantees it established with respect to Contract No. 126. It also caused Manufacturer's Bank to issue letter of credit No. 05324 in the amount of $7,350,000 and No. 05323 in the amount of $4,895,000 to and for the benefit of Bank Iranshahr to secure the down payment and performance guarantees under Contract No. 130.

88. On 1 May 1980 and 12 May 1980, the Respondent, through Bank Iranshahr, made demands on Bank of America and Manufacturers Bank for payment of the amount of the letters of credit totalling $17,760,000. In proceedings it had commenced in the United States against the Respondent, the Claimant obtained an injunction temporarily barring any

further demand under the guarantees or the letters of credit. The injunction remains in effect today.

89. The Tribunal finds that, since the Contracts were terminated and there was no performance to be guaranteed thereafter, and since the Respondent has been credited for the remaining balance of its down payments for which therefore no more security is necessary, the bank guarantees and letters of credit issued to this end have no further purpose. Moreover, under Articles 9.4. of the Contracts, the Respondent was obligated to release the underlying bank guarantees of good performance when it terminated the Contracts in the absence of any negligence of the Claimant. As to the down payment guarantees, Article 9.5 of Contract No. 126 provides that such guarantees will be released "after four weeks after the clearance of down payments amounts", while Article 9.5 of Contract 130, in a slightly different wording, stipulates that they "will be released within four weeks after clearance of down payments". The Respondent is therefore obliged to withdraw demands for payment of these guarantees and to refrain from making any further demands thereon. It is further obliged to have those bank guarantees cancelled and to ensure the release of the corresponding letters of credit.

d) Tax liability

90. According to Article 3.5. of each Contract, the Respondent was obliged to pay

> "all taxes inside Iran, relating to this Contract, for the Seller's Company and its non-Iranian personnel who work for this Contract."

The provisions also stipulate:

> "If Iranian taxes are assessed on the Seller they shall be recoverable from the Buyer above the Contract amount."

With reference to an assessment of AOSI by the Iranian Ministry of Economic Affairs and Finance of tax charges for payments received with view to Contracts Nos. 126 and 130 totalling Rials 106,639,142, the Claimant requests a declaration that such liability shall be paid by Iran, that it shall be provided with a receipt for such payment and that it and AOSI be released from all tax liability in respect of Contracts Nos. 126 and 130.

91. The Tribunal finds that this request must be dismissed for lack of jurisdiction. The evidence submitted by the Claimant indicates that the tax assessment occurred in 1982. The Claimant did not show that there was any assessment, not to mention payment, of taxes before 19 January 1981, the date of the Claims Settlement Declaration. Considering that there was only a contractual basis for any entitlement of the Claimant to recover taxes, the Tribunal concludes, therefore, that even if there were such a claim, it was not outstanding on 19 January 1981 as required by Article II, paragraph 1, of the Claims Settlement Declaration.

e) Proceedings in Iran

92. The Respondent filed its Counterclaim for $16,657,111 "in respect of the two contracts" and other damages in this Case on 4 May 1982. On 6 December 1982, the Respondent filed suit against the Claimant in the General Court of Tehran, alleging breach of Contracts Nos. 126 and 130 and requesting payment of $16,657,141 plus damages, in respect of these two Contracts. At the request of the Claimant, which had been summoned to appear in the Tehran proceedings, the Tribunal issued Ford Aerospace & Communications Corporation and Government of Iran et al., Interim Award No. ITM 16-93-2 (27 April 1983), requesting the Government of Iran to seek a stay of proceedings before the

General Court of Tehran, pending termination of the proceedings before the Tribunal. Following a second summons to the Claimant to appear before the General Court of Tehran, the Tribunal, in an Order filed on 19 September 1983, reminded the Respondents of the Interim Award and "urgently" repeated its order to stay proceedings in Tehran.

93. Having received the Claimant's "Notice of Iran's Violation of Interim Award", dated 27 February 1984, the Tribunal, in an Order filed on 2 March 1984, asked the Government of Iran for comments and simultaneously reminded it again of the Tribunal's order in the Interim Award and of the Order filed 19 September 1983. The Claimant has submitted a decision of the "Public Court of Tehran", which is identical with the above-mentioned "General Court of Tehran", dated 29 Farvardin 1363 (18 April 1984), denying the Respondent's claim for the repayment of the down payments in the amount of $9,721,584 under Contract No. 130 and of $5,854,016 under Contract No. 126 plus $50,000,000 for "incidental damages". In its Pre-hearing Memorial, filed on 16 October 1985, the Respondent explained that the case decided by the Public Court of Tehran would be pending before the Court of Appeal. As no date had been determined "for investigation" by that Court, the Respondent alleges that the proceedings in Iran were delayed as ordered by the Tribunal. At the Hearing the Claimant objected to this reasoning.

94. Since in this Award the Tribunal is rendering a final decision on its jurisdiction over, as well as the merits of, the respective Claims and Counterclaims, the interim relief granted in this Case expires by its own terms. By virtue of the Tribunal's assumption of jurisdiction over the Claims and Counterclaims, they are, as of the date of their filing with the Tribunal, excluded from the jurisdiction of any other court. This consequence of Article VII, paragraph 2, of the Claims Settlement

Declaration has been confirmed by the consistent practice of the Tribunal since E-Systems, Inc. and Government of the Islamic Republic of Iran, Interim Award No. ITM 13-388-FT (4 February 1983). The effect of the Tribunal's assumption of jurisdiction in the present Case is that as of 4 May 1982, the date of filing of the Respondent's Counterclaims with the Tribunal, the Tehran Court is no longer considered to have jurisdiction to deal with the subject matter of the Claim which the Respondent brought before that Court on 6 December 1982. Therefore, based on Article VII, paragraph 2 of the Claims Settlement Declaration, the judgment of the Public Court of Tehran of 18 April 1984 is without legal effect, and any further proceedings in pursuance of the claim on which that judgment was based will likewise be without legal effect.

f) Costs

95. The Claimant now seeks reimbursement for the expenses of pursuing its Claim against the Respondent before the Tribunal in the total amount of $504,560.81. This amount consists of costs of legal representation related to the proceedings before the Tribunal in this Case in the amount of $434,683.13, costs of translating the Claimant's submissions into Farsi for filing with the Tribunal in the amount of $24,057.75, costs of auditor services in the amount of $36,529.00, and, finally, travel expenses of witnesses in the amount of $9,290.93.

96. Having regard to criteria of the kind outlined in Sylvania, supra, pp. 35-38, and taking into account the factual and legal issues of this Case, the Tribunal determines that $50,000 is a reasonable amount of the Claimant's costs to be paid by the Respondent.

g) The Counterclaims

aa) Balance of the Respondent's down payments and Damages

97. Based upon the premise that Ford Aerospace breached and failed to perform the Contracts, the Respondent seeks recovery of the balance of down payments and invoices paid totalling $16,657,141, plus interest, plus damages resulting from the Claimant's alleged breach of the Contracts. Since the Tribunal has found that the Claimant did not breach the Contracts, but rather fulfilled its contractual obligations as much as possible under the circumstances until Iran terminated the Contracts, there is a basis for a claim neither for payments made nor for damages. These parts of the Counterclaims must therefore be dismissed.

bb) Taxes

98. In its Counterclaim for taxes the Respondent contends that, according to a tax assessment by the Iranian Ministry of Economic Affairs and Finance, the Claimant owes Rials 1,175,994,154 for tax liabilities. The Respondent refers to Articles 3.5. of the Contracts, which the Tribunal has quoted above, stipulating, inter alia, that if taxes are assessed on the Claimant in Iran, they shall be recoverable from the Respondent above the Contract amount. The Respondent argues that because of this provision the Claimant should have asked Iranian tax authorities for tax assessment so that the tax accrued would have been determined and added to the Contract price after the Claimant had paid the taxes. The Claimant could have then, as allegedly envisaged by Articles 3.5., recovered the taxes paid from the Respondent. The Respondent further argues that the Claimant is also responsible for late payment penalties demanded by the Iranian tax authorities because of the failure to pay taxes in compliance with these provisions.

99. The Tribunal finds that Articles 3.5. of the Contracts do not impose any obligation upon the Claimant to pay taxes in Iran. On the contrary, the first sentence of these provisions clearly establishes that the Respondent is obliged to pay any tax in Iran relating to the Contracts. There is also no duty of the Claimant to refer to Iranian authorities for any tax assessment. Rather, the Respondent is obligated to do so. The second sentence of Articles 3.5., which the Respondent unduly isolates from the first, has the sole purpose of ensuring between the Parties that if Iranian taxes are assessed on the Claimant, it can recover payments from the Respondent.

100. Pursuant to Article II, paragraph 1, of the Claims Settlement Declaration, the Tribunal's jurisdiction over counterclaims is limited to those "which aris[e] out of the same contract, transaction or occurrence that constitutes the subject matter" of the main claim. The asserted obligation of the Claimant to pay taxes in this Case is imposed not by the Contracts that are the subject matter of the Claim, but by operation of the applicable Iranian tax law. The obligation to pay taxes is a legal relationship that arises out of the application of the law to a factual situation of a person or legal entity rather than a contractual relationship that exists between the Parties to a contract by virtue of the contract. For these reasons, the Respondent's counterclaim for taxes is outside the Tribunal's jurisdiction.

cc) Buyer-furnished equipment

101. With respect to the Counterclaim for the delivery of equipment, the Claimant acknowledged in its submission filed on 15 March 1984 that it holds equipment in the United States sent to it by the Watkins-Johnson Company on behalf of the Iranian Government. The Claimant also noted that it claims no right to this equipment, to which both Iran and

Watkins-Johnson have allegedly asserted claims to ownership. Rather, it holds the equipment simply as a custodian until the Tribunal or another appropriate forum determines which party is entitled to possession. Upon the issuance of any export or other licence required, the Claimant would then make the equipment available to the appropriate party.

102. At the Hearing the Claimant alleged that Iran was supposed to provide three different types of buyer-furnished equipment, namely equipment to be delivered by Hewlett Packard, by Argo Systems, and by Watkins-Johnson. The Claimant further contended that in fact only some of the equipment due from Watkins-Johnson was delivered which it still had in storage. The Claimant initially indicated that it would seek recovery of minor storage costs, but then agreed to hand over the equipment as determined by the Tribunal.

103. The Respondent contends that the Claimant is also in possession of other equipment delivered, for example, by Argo Systems. The Claimant denies this.

104. Alleging that there is no dispute as to Iran's ownership of the equipment delivered by Watkins-Johnson, the Respondent requested at the Hearing that the Tribunal retain jurisdiction over this part of the Counterclaim until the Tribunal has reached a decision in Watkins-Johnson and Islamic Republic of Iran, Case No. 370, pending before it. According to the Respondent, the Tribunal should then order the Claimant to deliver the equipment to Iran and to obtain an export licence, if necessary. If this should prove impossible, the Respondent suggests that the Claimant should be ordered to reimburse the Respondent for damages.

105. The Tribunal retains jurisdiction over this part of the Counterclaim, pending a decision in the Watkins-Johnson Case.

IV. AWARD

106. For the foregoing reasons,

THE TRIBUNAL DETERMINES AS FOLLOWS:

1. The Respondent THE ISLAMIC REPUBLIC OF IRAN is obligated to pay the Claimant FORD AEROSPACE & COMMUNICATIONS CORPORATION the sum of Nine million six hundred ninety one thousand seven hundred eighty five United States Dollars and no Cents ($9,691,785.00) plus simple interest at the rate of per annum (365-day basis) 9.86 percent on the amount of $7,681,870 from 1 January 1980, 9.03 percent on the amount of $1,281,001 from 18 October 1980, 8.06 percent on the amount of $491,414 from 18 November 1981 and 7.54 percent on the amount of $237,500 from 1 January 1983 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; plus cost of arbitration in the amount of $50,000.

These obligations 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.

2. The Claimant is obligated to pay the costs incurred by BANK MARKAZI in these proceedings in the amount of $5750.

3. With regard to the proceedings commenced by the Ministry of National Defence of the Islamic Republic of Iran in the Public Court of Tehran, the Tribunal determines that the Claims over which this Tribunal has found in this Award that it has jurisdiction were, as of the date such claims were filed in the form of Counterclaims in this Tribunal,

and continue to be, excluded from the jurisdiction of that Court or any other Court by the terms of the Claims Settlement Declaration.

4. The bank guarantees issued by Bank Iranshahr pursuant to Article 9.1. of each Contract, Letters of Credit No. 016273 and No. 016274 issued by Bank of America, and Letters of Credit No. 05323 and No. 05324 issued by Manufacturer's Bank have no further purpose. The Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN shall withdraw all demands for payment in connection with the guarantees and shall refrain from making any further demands thereon. The Respondent shall take all action necessary to ensure that Bank Iranshahr cancels the guarantees, releases the Letters of Credit, withdraws all demands for payment made in respect of the Letters of Credit and refrains from making any further demands thereon.

5. The Tribunal retains jurisdiction over that part of the Counterclaim relating to Watkins-Johnson equipment presently held by the Claimant.

6. The remaining Claims and the Counterclaims are dismissed.

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

Dated, The Hague
29 January 1987

Karl-Heinz Böckstiegel
Chairman
Chamber One

In the name of God

Mohsen Mostafavi
Dissenting Opnion

Howard M. Holtzmann
Joining fully in the Award, except joining solely in order to form a majority in the award of only 10% of the Claimant's demonstrated costs, especially in light of the award to Bank Markazi of the full amount of costs sought. See my Separate Opinion in Sylvania Technical Systems, Inc. and Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985).