353-346
۳۵۳-۳۴۶

CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

346

ORIGINAL DOCUMENTS IN SAFE

Case No. 353 Date of filing: 12 Feb 87

** AWARD - Type of Award Final
- Date of Award 12-Feb87
32 pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

_____

- Date _____
_____ pages in English _____ pages in Farsi

R/12

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 353
CHAMBER TWO
AWARD NO. 292-353-2

FMC CORPORATION,
Claimant,

and

THE MINISTRY OF NATIONAL DEFENCE,
ZIARAN MEAT PRODUCTION AND
PROCESSING COMPANY LTD.,
BANK MELLI IRAN,
CENTRAL BANK OF IRAN,
SAZEMANE SHAHANSHAHI, and
THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date 12 FEB 1987 تاریخ
۱۳۶۵/۱۱/۲۴
No. 353 شماره

DUPLICATE ORIGINAL
«نسخه برابر اصل»

AWARD

Appearances:

For Claimant:

Mr. Markham Ball
Mr. Michael R. Calabrese
Attorneys for Claimant
Mr. Bruce P. Spoon
Corporate Legal Counsel
of Claimant
Mr. Anthony P. Sapienza
Peat Marwick
Mitchell & Co., Witness
Mr. Domingo Laboy
Accounting Manager
of Claimant
Mr. Philip S. Devirian
Consultant and Former
Vice President of
Claimant

For Respondents:

Mr. Mohammed K. Eshragh
Agent of the Government of the Islamic Republic of Iran
Mr. Seifollah Mohammadi
Legal Adviser to the Agent
Mr. Hossein Piran
Legal Assistant to the Agent
Mr. Haiderali Payandeh
Attorney for the Ministry of Defence
Mr. Mohammad Bahramy
Representative of the Ministry of Defence
Mr. Ramzan Ali Akhondi
Representative of the Ground Forces
Mr. Heshmatollah Badiee
Attorney for Ziaran Meat Company
Mr. Seyyed M. Moussavi
Mr. Mohammed R. Bankian
Assistants to the Attorney for Ziaran Meat Company
Mr. Mohammad Ekhterai Sanai
Representative of the Central Bank of the Islamic Republic of Iran
Mr. Ali Ashgar Mahabadi
Witness

Also present:

Mr. John Crook
Agent of the United States of America
Ms. Mary Catherine Malin
Adviser to the Agent of the United States of America

I. The Proceedings

1. The Claimant, FMC CORPORATION ("FMC"), a Delaware corporation, seeks damages from the Respondents based on five claims.[1] The first claim, directed against the MINISTRY OF NATIONAL DEFENCE (the "Ministry"), is, in part, a claim for U.S. $11,654,047, plus interest, representing charges for the termination by the Ministry of a contract entered into in 1978 between FMC and the Ministry (at that time, the Imperial Ministry of War) for the manufacture and sale of military vehicles to the Ministry. FMC seeks to return to the Ministry the difference between such termination charges as may be awarded by the Tribunal and advance payments of U.S. $15,915,253.50 made by the Ministry to FMC in 1978 and early 1979 pursuant to the relevant contractual provisions. In this connection, FMC also requests that two standby letters of credit, in favor of the Ministry and equivalent in amount to the total of the Ministry's advance payments, be declared null and void. The Ministry denies that it terminated the contract and counterclaims for specific performance, a declaration of the validity of the

---

[1] FMC originally named 14 additional Respondents. FMC withdrew its claims against Hydraulic Company Limited and proceedings were terminated against that entity on 11 July 1985. FMC withdrew its claims against the National Iranian Oil Company, Lavan Petroleum Company, and Flopetrol S.A. and proceedings were terminated on 10 March 1986. On 14 April 1986, a Settlement Agreement was filed by FMC and Dashte Morghab Company, Pardis Poultry Processing and Marketing Company, Garmseer Company, Polyacryl Iran Corporation, and the Airline of the Islamic Republic of Iran pursuant to which a Partial Award on Agreed Terms (Award No. 226-353-2) was issued. FMC withdrew its claim against Set Company and proceedings were terminated on 16 May 1986. FMC withdrew its claims against Aydee Moghim DeKordi and Shirkate Saderati Tazamani and proceedings were terminated against these Respondents on 2 June 1986. At the Hearing on 9 and 10 October, FMC further withdrew its claims against Kharkhane Bastani Sazi Mehr (Mehdipour) and Shirkate Grooh Mohandesin and proceedings were terminated on 19 November 1986.

letters of credit, and interest on the blocked funds, or, in the alternative, U.S. $70 million comprising its advance payments to FMC, interest thereon, and U.S. $45 million in damages.[2] The Ministry also requests the return of six specialized radios loaned to FMC in connection with work on the contract. In addition, Iran asserts a counterclaim here against FMC for 2,543,909 Rials representing taxes allegedly owed to Iran under its tax laws and regulations.

2. The second claim, brought against the ISLAMIC REPUBLIC OF IRAN GROUND FORCE (the "Ground Force"), formerly the Imperial Iran Ground Force and now part of the Ministry of National Defence, seeks compensation in the amount of U.S. $135,521.80, plus interest, for the alleged repudiation of a contract entered into in 1978 for the provision by FMC's Environmental Equipment Division of specially-manufactured sewage treatment units for an Iranian military base. The Ground Force denies attribution of the claim to it, and further denies that the contract was repudiated. In addition, the Ground Force filed on 31 July 1986 a counterclaim in the amount of U.S. $493,509, representing the cost of purchasing the sewage treatment units elsewhere and related damages. At the Hearing, the Tribunal informed the Parties that it found no justification for the delay in filing this counterclaim and dismissed it under Article 19, paragraph 3, of the Tribunal Rules.

3. The third claim, brought against SAZEMANE SHAHANSHAHI KHADAMAT EDITEMAII ("Social Services Organization") is for the amount of U.S. $2,943.45, plus interest, for the alleged breach in May 1979 of a contract entered into with the

---

[2] The Ministry filed a separate direct claim against FMC and the United States of America of which the claim against FMC was dismissed for lack of jurisdiction. Ministry of National Defense of the Islamic Republic of Iran and The US Government, et al, Award No. 88-A/14-2 (6 December 1983).

Social Services Organization for the manufacture and sale of specialized sewage treatment equipment for the Reza Pahlavi Hospital (later the Medical Center of Shohada). The Social Services Organization denies that it breached the contract and alleges non-performance of the contract by FMC.

4. The fourth claim seeks a total of U.S. $296,296.30, plus interest, as compensation from the ZIARAN MEAT PRODUCTION AND PROCESSING COMPANY LTD. (the "Ziaran Meat Company") for the alleged expropriation of FMC's minority equity interest in the Ziaran Meat Company. The Ziaran Meat Company contends that it was not an entity controlled by the Government of Iran and furthermore that the Claimant's interest in the Ziaran Meat Company had not been expropriated.

5. The fifth claim, asserted against the ISLAMIC REPUBLIC OF IRAN ("Iran"), is for compensation totalling U.S. $90,803.96 for the alleged loss of office equipment and for alleged losses and expenses incurred by FMC in evacuating two employees from Iran. Iran asserts a lack of proof of the damages claimed and denies attributability of the claim to Iran.

6. Both Parties seek costs in connection with the arbitration.

7. A Hearing was held on 9 and 10 October 1986.

II. Claim One

A. The Facts

8. On 5 February 1978, FMC and the Ministry entered into a contract (the "Contract") for the sale to the Ministry of 155 armored vehicles (comprising three different types designated M548, M113, and XM806-E1) and the requisite

repair parts and special tools. These 155 vehicles were to be used by Iran to support and resupply 70 missile launchers to be purchased by Iran from another company, British Aerospace Public Limited Co. ("British Aerospace"), under a separate contract not under consideration in this Case.

9. The contract price was to be a combination of an initial contract amount of U.S. $20,875,886 ("Initial Contract Amount") and periodic adjustments (the contractual term is "Price Escalation") to that amount to be made according to a formula provided in the Contract which was intended to reflect changes in the rate of inflation. Delivery of the goods was to be effected in installments from September 1979 through March 1980.

10. The Contract provided for payment by the Ministry in three stages. Pursuant to the Contract, the Ministry first paid 50% (U.S. $10,437,943) of the Initial Contract Amount to FMC on 11 April 1978.[3] At the end of January 1979, the Ministry effected another down payment of U.S. $5,477,310.50, representing 25% of the Initial Contract Amount (U.S. $5,218,971.50) plus the appropriate Price Escalation amount (U.S. $258,339).[4] The final 25% of the Initial Contract Amount plus the appropriate Price Escalation amount would have been paid as goods were delivered, on the receipt of contractually specified documents.[5]

---

[3]The Parties had agreed that this first payment would not be subject to Price Escalation pursuant to the contractual formula. The Contract specified that "in lieu of escalation" there would be a U.S. $750,000 increase in the previously negotiated vehicle prices. This increase is reflected in the Initial Contract Amount.

[4]This payment was due in August 1978 but was delayed to January 1979 for reasons irrelevant to this Case.

[5]For the purpose of effecting the payments after the first 50% down payment, the Ministry, pursuant to the

(Footnote Continued)

11. Article 16 of the Contract required that the down payments by the Ministry were to be secured by and paid against an "unconditional Bank Guarantee" to be established by FMC in favor of the Ministry. The Guarantee securing the down payments was in fact established in the form of two irrevocable standby letters of credit, matching each down payment. On 16 March 1978, FMC caused the first letter of credit to be issued by Bank of America International of Chicago ("BAIC") in the amount of U.S. $10,437,943 ("Letter of Credit No. 7011") with an expiration date of 5 March 1980. FMC caused the second letter of credit to be issued by Bank of America San Francisco ("BASF") on 26 January 1979 in the amount of U.S. $5,477,310.50 ("Letter of Credit No. 024254") with an expiration date of 30 April 1980. Both letters of credit were to be reduced as deliveries were made by FMC.

12. Until March 1979, other than the payments and guarantees mentioned above, contact between the Parties was limited. FMC sent the Ministry monthly updates of the Wholesale Price Index (later the Producer Price Index), the basis on which the Price Escalation adjustments were made. On 28 April 1978, the Claimant sent the Ministry a spare parts list in accordance with Article 2.3 of the Contract. In addition, on 26 May 1978, FMC mailed the Ministry corrected and retyped pages of the Contract, including corrections to the Price Escalation formula, and thereafter requested on several occasions that the Ministry confirm receipt of the documents and act on them. In August, FMC requested by telex that the Ministry comment on the spare parts list. The Ministry made no answer to these and other communications. Throughout the period FMC made several

---

(Footnote Continued)
Contract, opened a documentary letter of credit in late April 1978. It was amended in May to provide for Price Escalation.

attempts -- including attempts by its Tehran representative until he was withdrawn in late 1978 -- to elicit responses from the Ministry, often to no avail.[6]

13. On 21 March 1979, FMC received a letter from the Ministry dated 28 January 1979 asking FMC to deliver one of the 155 vehicles, as soon as available, to British Aerospace instead of delivering it directly to Iran as planned. British Aerospace was to use the vehicle, apparently, for engineering modification purposes in conjunction with its work on the 70 missile launchers. FMC requested British Aerospace to confirm this request. On 26 March 1979, British Aerospace informed FMC that the vehicle was not to be delivered to them and subsequently revealed that the Ministry had terminated its contract with British Aerospace for the 70 missile launchers.

14. FMC then proceeded on 27 March 1979 to telex the Ministry asking for an explanation to "clear the confusion" as to the Ministry's intentions. Further, FMC specifically requested:

> that [the Ministry] clarify this situation with [British Aerospace] and advise FMC of your intentions regarding all of the vehicles in our contract with Iran.

On 9 April 1979, FMC received the Ministry's response in a telex from the Deputy Minister of National Defence for Armament. This telex stated:

> [I]t is specific request of the National Iranian Ground Forces that the contract no. 303-1401-01-147 [the FMC Contract] for M548, 113, and XM806-E1 be cancelled.

---

[6]The Ministry evidently did, however, respond during the course of 1978 to FMC's request to send six model radios to FMC for special engineering purposes.

The telex then stated that FMC was "therefore" to disregard the Ministry's request of 28 January 1979 to send one vehicle to British Aerospace. As of this date, FMC had completed all the required special engineering, had purchased all necessary materials, and a number of vehicles were in an advanced stage of assembly.

15. Assuming this telex to be a termination for the convenience of the buyer pursuant to Article 12.2 of the Contract, FMC acted to mitigate damages by proceeding to build standard FMC vehicles (without the specialized customization required for Iran under the Contract), for eventual sale to future customers. The nonstandard parts were segregated in inventory, some of which were later sold for scrap. Communications thereafter with the Ministry ceased, and the Contract delivery dates passed without comment by either Party.

16. On 5 December 1979, the Ministry received word at its Embassy in Washington, D.C., from the United States Department of State, of the rejection by the United States of the export license which had been applied for by FMC on 24 October 1978. There is some evidence that the Ministry on 8 January 1980 requested its Embassy to investigate further the matter regarding the rejection of export licensing.

17. There were no communications until the Bank Guarantee letters of credit were nearing their expiration dates. On 25 December 1979, Bank Markazi notified BASF of its intention to draw on the two letters of credit. In February 1980, the Ministry requested FMC and BAIC to grant a one-year extension of Letter of Credit No. 7011 as an alternative to immediate payment to the Ministry of the letter of credit. The extension request was denied. Consequently, at the behest of Respondent, a Bank Melli sight draft dated 26 February 1980 drawing on Letter of Credit No. 7011 was presented to BAIC for payment. Shortly thereafter, BAIC informed Bank Melli that, pursuant to

United States Government regulations, it could not honor the draft. On 21 March 1980, concerned about obtaining the termination charges due to it under the Contract, FMC established, in accordance with United States Treasury Department regulations,[7] a blocked account on its books for Letter of Credit No. 7011 in lieu of payment by BAIC into a blocked account and reimbursement by FMC to BAIC of such payment.

18. On or after 7 April 1980, a Bank Markazi sight draft of that date on Letter of Credit No. 024254 was presented for payment. On 19 May 1980, FMC similarly established a blocked account on its books for this letter of credit.

B. Jurisdiction

19. The Claimant, a publicly-held Delaware corporation, has provided evidence, including a good standing certificate and certified copies of pertinent pages of FMC's proxy statements issued during the relevant period, establishing to the Tribunal's satisfaction that FMC's claims in this Case are claims of a national of the United States as defined in Article VII of the Claims Settlement Declaration. There is no dispute that the Ministry is included within the definition of Iran contained within the same Article.

20. The jurisdiction of the Tribunal, however, has been challenged on the ground that the contract in dispute contains a forum selection clause that operates to oust the jurisdiction of the Tribunal by virtue of Article II, paragraph 1, of the Claims Settlement Declaration.

21. The relevant clause in the Contract, Article 10.2, reads in relevant part:

---

[7] 31 C.F.R. §535.568.

> 10.2 Settlement of Disputes. . . . However, should a dispute relating to this agreement arise which cannot be resolved amicably, then the point in dispute shall be referred to a Settlement Committee . . . . In the event that the point in dispute is not settled for any reason, by the Settlement Committee then the point in dispute shall be submitted to binding arbitration. . . . The arbitration shall be conducted in a location agreed upon by the parties. The Arbitrar's [sic] decision shall be final.

The Tribunal finds that the above clause refers specifically to binding arbitration and, therefore, does not preclude the Tribunal from assuming jurisdiction over the claim. See Part III of Gibbs and Hill, Inc. and Iran Power Generation Company (Tavanir), et al., Award No. ITL 1-6-FT (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 236. The Tribunal holds, therefore, that this Claim is within the jurisdiction of the Tribunal and meets the requirements of Article II, paragraph 1, of the Claims Settlement Declaration.

22. The Ministry's counterclaim arises directly out of the same contract as the claim and is therefore within the Tribunal's jurisdiction as set forth by Article II, paragraph 1, of the Claims Settlement Declaration.

23. Iran asserted that its tax counterclaim is owed under the Contract in this Claim. The Tribunal notes, however, that the evidence submitted by Iran clearly shows that the tax debts are allegedly owed by a corporation other than the Claimant, that the Claimant's work under this Contract was performed in the United States, and that those alleged debts have no relevance to the Contract. Accordingly, even if the tax counterclaim could be found to arise out of a contract, rather than out of Iranian law, it cannot be said to arise out of "the same contract, transaction or occurrence that constitutes the subject matter of [FMC's] claim" so as to satisfy the jurisdictional requirements of Article II, paragraph 1, of the Claims Settlement Declaration. Therefore, this counterclaim is dismissed.

C. The Merits

1. Termination of the Contract

24. A discussion of the merits of this claim necessarily begins with the question whether the Contract was in fact terminated for convenience by the Ministry under Article 12.2 of the Contract by its telex of 9 April 1979.

25. The Ministry has denied that it terminated the Contract. It claims that the telex of 9 April 1979 communicated only the views of the Ground Forces, which had decided not to utilize the vehicles, but did not communicate a decision of the contracting Party, the Ministry itself. In this connection, the Ministry has presented evidence that another Iranian military unit, the Gendarmerie, was interested in obtaining the vehicles.

26. The Tribunal cannot accept this view. Whatever the non-communicated intentions of the Ministry may have been, the language, provenance, and context of the 9 April 1979 telex[8] clearly indicated that the Contract was terminated. FMC could not reasonably have drawn any other conclusion, particularly as it knew that the Ministry would not be acquiring the missile launchers from British Aerospace, the weapons system these vehicles were designed to service and support. FMC, furthermore, was never told that another Iranian military unit might want to utilize the 155 vehicles in question nor that the Ministry was even considering the possibility of other uses for them.

27. The context in which the telex was sent is particularly persuasive to the Tribunal in this regard. Since February

---

[8]The relevant language of this telex is cited supra paragraph 14.

1978, the Ministry had been largely unresponsive to FMC's attempts to communicate with it. FMC presented sufficient evidence that it was also aware of widespread cancellations by the Ministry, after the Revolution in February 1979, of its contracts with U.S. companies. Once FMC learned of the cancellation by the Ministry of its related contract with British Aerospace, it understandably asked the Ministry to clarify matters, and it received as a response the 9 April 1979 telex cited above. It would be difficult to hold under these circumstances that the telex in question was not a notice of termination and was merely a communication of the views of one of the Ministry's component entities. Indeed, under all of the above circumstances, it would be difficult to place retrospectively the responsibility on the Claimant to have discerned in that telex the subtleties of meaning which the Ministry now ascribes to it.

28. The Ministry, however, also claims that the telex of 9 April 1979 had no binding legal force given the requirements of Article 17.2 of the Contract that communications be delivered in person or sent by confirmed cable or registered airmail. Evidence has been presented by the Claimant that, given the difficulties of communications -- including postal service interruptions -- with the Ministry over the course of the Contract and especially at the time immediately preceding the telex of 9 April 1979, the Parties, of necessity, had to communicate by whatever method was likely to be feasible or effective under the circumstances. The Tribunal agrees. Moreover, the Tribunal does not see how the Ministry's failure to comply with Article 17.2 could be invoked by it to avoid the consequences of the communication. Only the addressee of a communication that fails to conform to contractual requirements may object to adequacy of notice on that ground.

29. Finally, the Ministry asserts that events occurring after receipt by FMC of the telex, including the actions of

the Parties, were further indications that the Contract had not been terminated. The notification to the Ministry in December 1979 of the rejection of the export license and the Ministry's follow-up of that matter in January 1980, for example, are not logical events, according to the Ministry, had the Contract actually been terminated eight months before. Additionally, the Ministry asserts that its request in early 1980 for a one-year extension of the letters of credit was for the purpose of allowing FMC eventually to deliver the vehicles. Finally, the Ministry argues that FMC's own actions are not consonant with an understanding by FMC that the Contract had been terminated. The Ministry points to FMC's failure to request confirmation of the telex and to provide the Ministry with an accounting under Article 12 of the Contract.

30. The Tribunal is not persuaded by these arguments. The Claimant presented incontrovertible evidence that it decided immediately after receiving the 9 April 1979 telex that the Contract had been terminated and that it consistently acted thereafter on that understanding. Failure to withdraw the export license application from the Department of State is not a sufficient basis for a contrary conclusion. The Ministry has also produced no evidence that its request for extension of the letters of credit or its inquiry as to the export license were in any way related to its expectation of possible future performance of the Contract by FMC. On the contrary, the Tribunal notes that there is presented no evidence that the Ministry ever reacted to the cessation of communications from FMC after 9 April 1979 or to the passing of the delivery dates without performance by the Claimant.

31. In the light of all the evidence before it, therefore, the Tribunal holds that the Contract was terminated for convenience by the Ministry as of 9 April 1979.

2. Termination Charges

32. The Contract sets forth in Article 12.2 a provision for reasonable termination charges to be paid to FMC in the event of termination by the Ministry for its convenience. Article 12.2 reads in pertinent part:

> This Contract will be subject to termination at the convenience of the Buyer only upon payment to FMC of reasonable termination charges which shall take into account expenses already incurred and commitments made by FMC as well as FMC's anticipated profits . . . .

This clause is not without ambiguity, as shown by the terms "reasonable" and "take into account". In another case, the Tribunal stated:

> According to the most fundamental principle of interpretation, the Article in question must be presumed to be capable of being given meaning and effect as the expression of the common intention of the Parties. If one of the words used gives rise to ambiguity, such ambiguity must be resolved in favor of the interpretation most likely to give sensible effect to the Article taken as a whole.

CBA International Development Corporation and The Government of Iran, Award No. 115-928-3 (16 March 1984). Applying that approach, the Tribunal finds that reasonable termination charges as defined by this clause are those that generally compensate the Claimant for not being able to perform the entire Contract as planned. This conclusion is supported by a comparison of Article 12.2 with Article 12.1 which provides for compensation in the event the Ministry terminated the Contract as a result of FMC's default. In that situation, FMC would receive only the costs incurred up to the date of termination. In contrast, when the Ministry terminates for its own convenience, Article 12.2 provides that specific additional compensation is to be accounted for. That these additional amounts are designed to compensate the non-defaulting seller for loss of the contract is

further borne out by the use of the term "FMC's anticipated profits". The Tribunal finds it evident that, at the time the contract clause containing the phrase "FMC's anticipated profits" was drafted and concluded and at the time the Contract was terminated, the profits so anticipated by FMC were those anticipated from the entire Contract, i.e., those arising from the sale of 155 vehicles, repair parts, and special tools. The Tribunal, therefore, cannot agree with the Ministry's position that termination charges should be limited to expenses already incurred and profits on work completed by the date of termination. In examining all of the elements that constitute termination charges under Article 12.2, the Tribunal has followed the contractual directive that they be "reasonable".

a. Anticipated Profits

33. Anticipated profits, which is the difference between the agreed prices and the anticipated costs, are the largest single element of the claim (U.S. $9,274,200). Given the specific wording of Article 12.2, anticipated profits must be taken into account. The Tribunal has done so by closely examining both of the factors making up anticipated profits.

34. Upon examination of the evidence before it, the Tribunal finds at the outset that anticipated costs -- principally as a result of inflation -- would have been about U.S. $15,900,000, approximately 10% higher than asserted by Claimant.

35. With regard to the price, the Tribunal notes that the final total price of the vehicles, parts, and tools was to be comprised of the Initial Contract Amount of U.S. $20,875,886 plus Price Escalation. According to the Contract, there was to be no Price Escalation on the first 50% of the Initial Contract Amount paid by the Ministry on 11 April 1978. In the Ministry's second payment due August

1978,[9] however, it paid U.S. $5,477,310.50, representing the required payment of 25% of the Initial Contract Amount (U.S. $5,218,971.50) plus the appropriate Price Escalation (U.S. $258,339) on that amount.

36. The only calculation left, therefore, is of the appropriate Price Escalation on the final 25% of the price to be paid as goods were delivered over the period September 1979 through March 1980. The Claimant, however, has shown that use of the complex formula provided in the Contract for this purpose would produce an absurd result, and this was one of the reasons FMC attempted to correct the Contract in May 1978.

37. The Tribunal has noted, however, that the Parties, as reflected in Articles 15.4 and 16.2 of the Contract, intended the Price Escalation mechanism to be linked to the rate of inflation. Indeed, the Ministry's inclusion of the Price Escalation amount of U.S. $258,339 in its payment due August 1978 represented an approximate 5% increase on U.S. $5,218,917.50 over 6 months, or 10% per annum, the approximate prevailing rate of inflation. The Tribunal finds it reasonable to apply the same rate to the final 25% of the Initial Contract Amount over a period from February 1978 to December 1979 the planned midpoint of the delivery of the bulk of the goods. This figure is approximately U.S. $960,000. Total price escalation, therefore, on 50% of the Initial Contract Amount is U.S. $1,218,339 and the total contract price, therefore, is calculated at U.S. $22,094,225. Subtracting the anticipated costs of U.S. $15,900,000, a result of U.S. $6,194,225 is reached, a figure the Tribunal deems a reasonable anticipated profit

---

[9] As stated supra paragraph 10, the actual payment was delayed to January 1979.

under the circumstances. Accordingly, the Tribunal awards anticipated profits of U.S. $6,194,225 to the Claimant.

b. Residual Inventory Costs

38. FMC has claimed U.S. $341,731 in residual inventory. The Tribunal notes evidence that 95% of the claimed material costs are supported by physical inventory. The Tribunal finds it reasonable, therefore, to take into account 95% of the residual inventory as "expenses already incurred" and awards the Claimant U.S. $324,644.

c. Special Engineering Charges

39. The Claimant has also sought compensation in the amount of $66,788 for special engineering work performed for the Contract. The Tribunal notes that the Claimant's independent accounting expert has confirmed U.S. $46,645 of this amount and therefore finds it reasonable to award U.S. $46,645 for special engineering expenses.

d. Unrecovered Overhead

40. FMC has presented a claim for U.S. $1,607,868 for overhead allocated to 155 vehicles and unrecovered due to the Ministry's termination. The Tribunal, however, is not persuaded that unrecovered overhead is a compensable item within the scope of Article 12.2. Unlike anticipated profits, it is not referred to specifically in that Article, and the Tribunal does not consider such overhead as "expenses already incurred" or "commitments made". The Tribunal notes further that, had FMC manufactured the vehicles for the Ministry's account, the Ministry would have been credited, pursuant to the appropriate provisions of Article 12.3 of the Contract, with the proceeds of FMC's subsequent resale of those vehicles. Given the logical inconsistency between the provisions of Article 12.3 and a

claim for unrecovered overhead, the Tribunal must deny this part of the claim.

e. Miscellaneous Costs

41. The Claimant has requested compensation for miscellaneous costs under two headings here. First, it claims expenses in connection with the Bank Guarantee in the amount of U.S. $225,307. The Tribunal sees no contractual basis for this claim. The Contract indeed does provide in Article 16.5 that "costs . . . in connection with establishing any Letter of Credit referred to in this Article shall be paid by the Buyer." The only letter of credit referred to in Article 16 is the one the Ministry established to make its payments, not the ones FMC established to guarantee the Ministry's advance payments. This claim is therefore denied.

42. The Claimant also requests payment of an estimated U.S. $138,153 for administrative expenses directly resulting from the Ministry's termination, including expenses incurred in rescheduling production, transfer of inventory, and expenses resulting from FMC's attempt to mitigate losses. The Tribunal finds it reasonable to award the Claimant U.S. $100,000 for these expenses as part of Article 12.2 termination charges.

f. Total Termination Charges and Interest

43. As a result of the above considerations the Tribunal awards FMC a total of U.S. $6,665,514 as termination charges. As termination according to Article 12.2 was possible "only upon payment to FMC" the Tribunal holds that these termination charges were owing to Claimant as of 9 April 1979 and interest is due on that amount from that date.

3. The Bank Guarantee Letters of Credit

44. Nothing in the Contract specifically deals with the disposition of the Bank Guarantees established by the Claimant for the Ministry's advance payments in the situation of a termination of the Contract pursuant to Article 12.2. It is obvious, however, that, in a case like the present where the Ministry has not succeeded in obtaining their proceeds by calling the letters of credit, the Tribunal must take them into account in rendering its award.

45. In this regard, the Tribunal notes that a buyer, upon termination of a contract, is normally entitled to the return of any advance payments not needed to satisfy the buyer's contractual obligations to the seller. The Tribunal finds the situation no different here and, therefore, awards to the Ministry the difference between its advance payments and the termination charges owed to the Claimant as awarded above.

46. The Tribunal notes that the Claimant has itself sought to effect just such a return. The Claimant, however, asserts that no interest is due on the amount of the Ministry's advance payments blocked by FMC since 1980. The Tribunal understands that the Contract provided for no interest on the advance payments, which meant that they could be retained interest-free by the Claimant during the course of the Contract. The Tribunal finds, however, that once the Contract had been terminated and the letters of credit called, there was no basis for the retention thereafter of the advance payments free of interest. Consequently, the Tribunal awards the Ministry interest on the balance of the advance payments from the respective dates of the calls on the guarantee letters of credit.

47. As a result of its determinations above, the Tribunal holds that, upon payment to the Ministry by FMC of the net amount awarded herein, the Bank Guarantees securing the

advance payments will serve no further purpose and the Ministry will be obligated to make no further effort to call or collect on either letter of credit.

4. Interest

48. The Tribunal decides that a single rate of interest should be applied to amounts owing to both Parties and decides that 10 percent is an appropriate rate. The Tribunal finds FMC is entitled to simple interest on the U.S. $6,665,514 in termination charges at an annual rate of 10 percent from 9 April 1979. As the Tribunal has decided to net the amount owing to FMC from the larger amount owing to the Ministry as of 26 February 1980 (see subsection 5 infra), interest on the above amount runs from 9 April 1979 until 26 February 1980.

49. The Ministry is entitled to simple interest on the balance remaining of its advance payment of U.S. $10,437,943 at an annual rate of 10 percent from 26 February 1980 to the date FMC effects payment to the Ministry and to simple interest on its advance payment of U.S. $5,477,310.50 at an annual rate of 10 percent from 7 April 1980 to the date FMC effects payment to the Ministry.

5. Calculation of Award

50. As discussed above, the Tribunal has decided that the Respondent Ministry of National Defence owes the Claimant U.S. $6,665,514 plus interest at 10 percent per year from 9 April 1979 to 26 February 1980. The total amount, therefore, owing to the Claimant from the Ministry as of 26 February 1980 is U.S. $7,255,366.

51. The Tribunal has also decided to net out the above amount owing to the Claimant from the amount of U.S.

$10,437,943 owing to the Ministry as of 26 February 1980. The resulting amount is U.S. $3,182,577.

52. Consequently, the Ministry is owed U.S. $3,182,577 plus interest at 10 percent from 26 February 1980 until the date the Claimant effects payment to the Ministry, and U.S. $5,477,310.50, plus interest at 10 percent from 7 April 1980 until the date Claimant effects payment to the Ministry.

6. The Ministry's Counterclaims

53. Given the holdings above, it is clear that there is no basis for any of the Ministry's counterclaims other than for return of advance payments, with interest, which has been dealt with. These counterclaims therefore must be dismissed. With respect to the six radios loaned to FMC by the Ministry, however, the Tribunal notes that FMC agreed at the Hearing to make them available for return to the Ministry. The Tribunal, consequently, orders FMC to make the three VRC-321 radios and the three VR-46 radios available for return to the Ministry.

III. CLAIM TWO

A. The Facts

54. In early 1978, FMC appears to have entered into an agreement with the Ground Force to sell to it three specially-manufactured sewage treatment units for an Iranian military base. The agreement[10] was concluded by the submission of a pro forma invoice and its acceptance by issuance of a letter of credit.

---

[10]While other parties may have been involved in the transaction, the Tribunal, given its holding below, need not inquire into the exact nature of the contract.

55. The pro forma invoice dated 27 February 1978 was sent to the Ground Force Engineering Office by FMC's sales agent in Iran, Hydraulic Co. Ltd. ("Hydraulic"). It provided the price (U.S. $210,000) and detailed component specifications for the ordered equipment. Additionally, the invoice specified that payment would be made to the order of FMC by an irrevocable letter of credit.

56. The Ground Force, on 11 April 1978, opened through Bank Markazi Iran an irrevocable documentary letter of credit in favor of FMC covering the sewage treatment equipment "as per pro forma invoice dated February 27, 1978." The credit could be drawn down on proof of shipment. By its terms, it was to expire on 14 January 1979.

57. After the establishment of the letter of credit, FMC issued three work orders ("Order Masters") directing its plant to manufacture and ship the ordered equipment. The Order Masters specify that the equipment was to be shipped and sold to the Ground Force with Hydraulic receiving a commission.

58. FMC proceeded to produce the three sewage treatment units. In the Fall of 1978, realizing that it would be prepared to ship the equipment only at the end of January 1979, FMC, through Hydraulic, seems to have attempted to request the Ground Force to extend the letter of credit for two weeks. When the letter of credit expired without any response from the Ground Force, FMC deemed the contract to be breached, refrained from shipping the equipment, and attempted to mitigate damages.

B. Jurisdiction

59. There is no dispute that the Ground Force is an instrumentality controlled by the Government of Iran. The

Tribunal is satisfied that this claim arises "out of debts, contracts . . ., expropriation or other measures affecting property rights" within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. The Tribunal, consequently, has jurisdiction over this claim.

C. The Merits

60. The Ground Force denies that it breached the contract, asserting, among other defences, that FMC made no extension request. The Tribunal notes that the extension request was made indirectly through Hydraulic. There is little evidence before the Tribunal, however, indicating that the request, under the circumstances of civil unrest at the time, was ever received by the Ground Force. Furthermore, FMC avers that, having received no response from the Ground Force, FMC assumed that the contract was breached. Even under the particular circumstances of the time, the Tribunal is not prepared to find FMC's actions entirely appropriate. Having received no response from the Ground Force, FMC was under an obligation to attempt, at least, to inform the Ground Force of FMC's intention to treat the Ground Force's non-response as a breach. This the Claimant did not do. For the above reasons, the Tribunal must dismiss this Claim.

IV. CLAIM THREE

A. The Facts

61. Pursuant to a pro forma invoice of 10 May 1978, FMC contracted with the Social Services Organization to sell it U.S. $63,720 worth of specialized sewage treatment equipment for use by the Reza Pahlavi Hospital. To pay for the equipment, the Social Services Organization, on 21 October 1978, opened a documentary letter of credit in FMC's favor. The letter of credit's original expiration date of 21 April 1979 was extended at FMC's request until 28 May 1979. On 21

November 1978, FMC issued eight internal work orders ("Order Masters") relating to the manufacture and shipment of the ordered equipment, and, thereafter, performed the necessary engineering work.

62. On 28 May 1979, the letter of credit lapsed before FMC had been able to begin production. FMC asserts that the Social Services Organization's failure to extend the letter of credit represented a fundamental breach of contract in the face of which FMC discontinued work. FMC's resulting claim for U.S. $2,943.45 represents the cost of the engineering work it performed for the contract.

B. Jurisdiction

63. Iran and the Social Services Organization challenge the jurisdiction of the Tribunal on the grounds that the Social Services Organization does not fall within the scope of the definition of "Iran" contained in Article VII, paragraph 3, of the Claims Settlement Declaration. The Respondents allege that the Social Services Organization is not a controlled entity of Iran but rather a non-profit, autonomous organization now in the process of liquidation.

64. FMC has presented evidence, however, not disputed by the Respondents, that the Social Services Organization was dissolved as of 11 February 1979 by a formal legislative enactment of 28 February 1982 and that Iranian Government liquidators have been appointed. Further undisputed evidence presented by the Claimant indicates that on 10 March 1979 the Government of Iran removed all health and medical facilities (including the former Reza Pahlavi Hospital) from the Social Services Organization and made them subject to the authority of the Ministry of Health and Well Being.

65. The Tribunal finds this substantial evidence that the Social Services Organization was controlled by the

Government of Iran at the time of the alleged breach of contract. In rebuttal to this evidence, Iran asserted that the Social Services Organization was not a "State Organization" as defined by the Iran Employment Law of 1967, and produced a report from the Iran Corporate Registration Bureau that the entity in question was a non-profit, non-commercial organization under liquidation. In the face of FMC's undisputed evidence, the Tribunal cannot regard these submissions, without more, as evidence that the Social Services Oranization was not a controlled entity.

66. The Tribunal finds, therefore, that the Social Services Organization was controlled by Iran within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration, and that the Tribunal has jurisdiction over this claim.

C. The Merits

67. The Claimant asserts that an essential obligation of the Social Services Organization was the maintenance of a letter of credit until the equipment was shipped. FMC alleges that the extension of letters of credit was not only customary but also a basic condition of the contract. Failure to extend the letter of credit, it therefore argues, was a fundamental breach.

68. The Social Services Organization, however, indicated that FMC never requested it to extend the letter of credit beyond its ultimate expiration date of 28 May 1979. The Tribunal notes that FMC never claims to have done so, either before or after that expiration date. The Tribunal notes further that it was FMC that requested the first extension from 21 April to 28 May 1979.

69. Under these circumstances, and considering all the evidence before it, the Tribunal finds that the Claimant has

presented insufficient proof that the Social Services Organization was obligated, without a request from FMC to extend the letter of credit. This claim, therefore, must be dismissed.

V. CLAIM FOUR

A. The Facts

70. In December 1973, FMC bought 2000 shares of the Ziaran Meat Company, a company founded several months earlier by the Agricultural Development Bank of Iran ("ADBI"), the Industrial and Mining Development Bank of Iran ("IMDBI"), Bank Omran, and other organizations. In late 1974, ADBI, IMDBI, and Bank Omran together owned 67% of the Ziaran Meat Company. As of 1974 and thereafter these three organizations together owned approximately 60% of the company.

71. Until mid-1976, FMC and the Ziaran Meat Company enjoyed the normal relations between shareholder and corporation. FMC asserts that it received financial reports and forecasts and was represented at company shareholder meetings.

72. FMC asserts that from mid-1976, however, virtually all communications from the Ziaran Meat Company ceased. According to FMC, its concern about the lack of information caused it, on 23 September 1976, to offer to sell its shares back to the Ziaran Meat Company. There was no response to this offer. Since 1976, FMC asserts that it has received no financial information nor any notices of shareholder or board of director meetings. This, FMC contends, constituted an expropriation of its minority equity interest in the Ziaran Meat Company.

B. Jurisdiction

73. There is no dispute about the identities of the shareholders of the Ziaran Meat Company or about the extent of their holdings. The evidence presented indicates that the majority shareholders were various Iranian banks. There is also no dispute that as of the nationalization of the banks in Iran on 7 June 1979, a substantial majority of the shares of the Ziaran Meat Company were held by agencies of Iran or entities controlled by Iran.

74. A claim for expropriation is, in any event, a claim against Iran, not a claim against the Ziaran Meat Company. Such a claim meets the jurisdictional requirements of Article II, paragraph 1, of the Claims Settlement Declaration as a claim of a national of the United States against Iran which arises out of "expropriations or other measures affecting property rights."

C. The Merits

75. FMC asserts that the cessation of communications from the Ziaran Meat Company deprived it of its rights as a shareholder and constituted, therefore, a de facto expropriation by Iran for which it is owed compensation.

76. At the outset, the Tribunal notes that the Claimant has some difficulty in determining when the expropriation is supposed to have occurred. The Claimant seems to allege that an expropriation occurred upon the cessation of communications from the Ziaran Meat Company. The Claimant, however, presents no evidence that the Ziaran Meat Company was -- prior to nationalization of the banks in 1979 - controlled by Iran. The Respondent, on the other hand, claims that until 1979 Iran never controlled more than about 30% of the Ziaran Meat Company. It is difficult, in the light of the evidence presented, for the Tribunal to

attribute directly to Iran acts or omissions before June 1979 constituting expropriation.

77. The Tribunal finds that the Claimant has also provided insufficient proof that the alleged acts and omissions of the Ziaran Meat Company actually deprived the Claimant of its rights. With reference to FMC's 1976 offer to sell its shares, for example, the Ziaran Meat Company points out that neither the company nor its shareholders were obligated by the Articles of Association to purchase the Claimant's shares. The Tribunal agrees. Moreover, the evidence suggests that the Claimant's offer reflected its pessimism about the Ziaran Meat Company's economic prospects rather than a lack of information or interference with its rights as a shareholder.

78. The Ziaran Meat Company does admit not having notified FMC by registered letter of shareholder meetings as required by the Articles of Association. The Ziaran Meat Company asserts, however, that it also did not do so prior to mid-1976, the practice being to present notice of shareholder meetings only through newspaper publication. According to the Ziaran Meat Company, FMC never objected to this practice. In this regard, the Tribunal notes that no evidence has been presented that FMC, prior to these proceedings, ever objected to the lack of notice or cessation of communications. Furthermore, evidence exists that the FMC was duly present at shareholder meetings as late as 1978.

79. On the basis of the above considerations and the evidence before it, the Tribunal decides that the Claimant has failed to prove a deprivation of its shareholder rights or that any such deprivation would have been attributable to Iran. The Claim is, therefore, dismissed.

VI. CLAIM FIVE

A. The Facts

80. In late 1978, civil unrest led, FMC asserts, to increasingly hazardous conditions for United States nationals in Iran. As a consequence, FMC employees were allegedly subjected to several threatening incidents and, as a result, were eventually withdrawn from Iran in November and December 1978. FMC alleges that, as a result, it has been unable to recover the use and ownership of U.S. $15,510 worth of office equipment it was forced to leave behind in Tehran. FMC also claims compensation (U.S. $75,293.96) from Iran for the resulting relocation expenses of two FMC employees as well as for the loss by those employees of personal effects in Iran.

B. Jurisdiction

81. There are no significant jurisdictional issues in this claim by FMC against Iran and the Tribunal is satisfied that it has jurisdiction over this claim under the terms of Article II of the Claims Settlement Declaration.

C. The Merits

82. The Tribunal notes that the Claimant has failed to present sufficient evidence to establish any connection between acts or omissions by Iran and the withdrawal of FMC employees and the resulting loss of use and ownership of office equipment. The Tribunal must, therefore, dismiss this claim for lack of proof.

VII. COSTS

83. Each of the Parties shall bear its own costs of arbitration.

VIII. AWARD

84. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(a) The Claimant, FMC CORPORATION, as a result of the netting out of the amounts the Tribunal has determined to be owed to the Claimant by the Respondent and by the Respondent to the Claimant, is obligated to pay the Respondent, MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN, the sum of Three Million One Hundred Eighty-two Thousand Five Hundred Seventy-seven United States Dollars (U.S. $3,182,577), plus simple interest at 10 percent per year from 26 February 1980 up to and including the date the Claimant effects payment to the Respondent, and the sum of Five Million Four Hundred Seventy-seven Thousand Three Hundred Ten United States Dollars and Fifty Cents (U.S. $5,477,310.50), plus simple interest at 10 percent per year from 7 April 1980 up to and including the date the Claimant effects payment to the Respondent.

(b) When the payments in paragraph (a) have been effected, the Bank Guarantees securing the advance payments, in the form of two standby letters of credit of the Bank of America (numbered 7011 and 02454, dated 16 March 1978 and 26 January 1979, respectively), shall have no further purpose, and the Respondent MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN shall make no further effort to call or collect on either of them.

(c) The Claimant, FMC CORPORATION, is obligated to make available for return to the Respondent, MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN, the three VRC-321 radios and the three VR-46 radios.

(d) The Counterclaims of the Respondent, MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN, to the extent they are not already dealt with above, are dismissed on the merits.

(e) The tax counterclaim is dismissed for lack of jurisdiction.

(f) All other claims and counterclaims are dismissed.

(g) Each of the Parties shall bear its own costs of arbitration.

Dated, The Hague
12 February 1987

Robert Briner
Chairman

In the Name of God

George H. Aldrich

Hamid Bahrami-Ahmadi

Dissenting in parts,
Concurring in parts,
See dissenting opinion.