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Case No. 353 Date of filing: 2 Mar 1987

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

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

- Date _____
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** SEPARATE OPINION of _____

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** DISSENTING OPINION of Mr Bahrami

- Date 2 Mar 1987
18 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In His Exalted Name

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.

DISSENTING OPINION OF HAMID BAHRAMI-AHMADI
WITH RESPECT TO CASE NO. 353

For the reasons set forth below, I hold that the majority's Award in the instant Case is inconsistent with legal standards, at least insofar as it disregards that law which the Parties agreed was to govern the Contract; and I thus hold that it cannot be deemed to constitute a reliable precedent with respect to similar issues in other cases before the Tribunal. Over all, the facts of the Case are as

set forth in the majority's Award. However, I shall reiterate certain unusual aspects of the first claim, in order to make clear why I have come to the conclusion that it is the Claimant who has caused the termination of the Contract.

A. MERITORIOUS ISSUES DESERVING COMMENT

1. The Contract was entered into in February 1978, for a total amount of $20,875,886 (the price of the vehicles, plus costs of repair, spare parts and special tools). It was anticipated in the delivery schedule provided for in the Contract that the last vehicles were to be delivered in March 1980. While the Contract does not precisely specify which part of the Contract price was allocated to spare parts and repairs, it can be presumed that at least 25% of the Contract price had been earmarked for this purpose. Because the Buyer (Iran) made an advance payment of $15.9 million, we can be said to be confronted with a Contract where the Buyer had apparently paid 75% of the Contract price (in actual fact 100% of the total Contract price, and even the stipulated price escalation) one year prior to [the scheduled] delivery of the last vehicle (March 1980).

2. Article 12.2 of the Contract, relating to calculation of termination charges, expressly provides that in the event of termination, expenses already incurred and commitments made by the Claimant prior to termination were to be taken into account. Although the Claimant refers to its production schedule and to commitments possibly made by it, no documentary evidence has been presented to the Tribunal as proof that it did in fact incur those expenses, or that it actually made commitments to third parties. The Claimant apparently maintains that by virtue of having entered into the Contract, it enjoys ownership rights over profits which it has computed unilaterally and on its own initiative,

without having acquainted itself with that principle of law which states that a contract is a relationship embodying mutual rights and duties, and that so long as one party to the Contract has in practice failed to perform on its obligations, it has no right to the profits deriving from performance of the Contract.

3. The actual purchase price of the goods has already been paid to the Claimant, and therefore, as provided under Article 12.3 of the Contract, all of the materials and gains covered by the Contract belonged to the Buyer. Moreover, FMC was to make an effort to sell the said materials if the Buyer so wished. The Claimant in this Case has been unable to justify its unauthorized sale of the vehicles, materials and equipment already paid for by the Respondent. Of course, in paragraph 15 of the Award, the majority has put forth as justification, that the Claimant took this step in order to mitigate its damages. However, because the Claimant did not take the gains realized from sale of the Respondent's vehicles into account in calculating its expenses, its action in selling the vehicles in effect redounded to the Claimant's advantage from both directions, rather than mitigating the damages.

4. At the Hearing conference, the Claimant admitted that it had realized an 11% profit from its sale of the vehicles manufactured with the Respondent's money and to its account. Of course, the Claimant did not explain whether it had sold the said vehicles at an 11% profit over the Contract price plus the full price escalation pursuant to its Contract with the Respondent, or whether it had obtained only an 11% profit over the net production price as at the date of sale. In the latter eventuality, of course, the purchase cost of the vehicles would include the price escalation up to the date of sale. In this way, not only has the Claimant not

suffered damages from the alleged termination of contract, but it has realized a substantial profit as well.

5. According to paragraph 12 of the majority's Award,until March 1979, there was no contact between the Parties, aside from payment of the Contract price. It is then stated in the same paragraph that the Claimant corrected and retyped certain pages of the Contract, and sent them to the Respondent on 26 May 1978 for action thereon, yet the Respondent failed to give a response. It is not clear just what point the majority is trying to establish in making these statements (in footnote No. 6, the majority itself says just the opposite, mentioning instances of contact between the Parties). The Contract does not require the Respondent to maintain regular contact with the Claimant. Rather, the Respondent's rights and duties as provided for by the Contract arose only after manufacture of the vehicles, and related to inspection, crating and shipping thereof. And since the Claimant did not provide any information on those matters in March 1979, the Respondent cannot be expected to have taken any action, either.

Because Article 20 of the Contract appears to make express provision to the contrary, it seems unlikely that the majority means that the Respondent should have signed and returned the said revised pages of the Contract after receiving them. Therefore, the Respondent's inaction should be taken as prima facie evidence that it did not agree to the said proposed revisions. Aside from this, as the majority acknowledges, the Claimant was given whatever cooperation was required, such as in connection with the model radios, which were sent to FMC.

6. Paragraph 13 of the Award notes that on 21 March 1979, FMC received a letter from the Respondent, asking the

Claimant to send one of the vehicles to British Aerospace, rather than to Iran. It then adds that after contacting British Aerospace, and based only on the statement by British Aerospace that Iran had breached its contract with that company, the Claimant asked the Respondent to inform it as to whether it intended to terminate the Claimant's contract. Here, it is necessary to note the following:

(a) According to the delivery schedule, FMC had until September 1979-- ie. six months later-- to deliver the vehicles. It is thus not clear why it was anxious regarding delivery of a single vehicle six months prior to delivery.

(b) Pursuant to the Contract, FMC was to deliver 155 vehicles to Iran, so what effect could a change of one vehicle's place of delivery have had upon FMC's production schedule?

(c) Even if British Aerospace did terminate its contract because Iran was delinquent in making its payments (according to the Claimant's Memorial), just how could FMC, which had already received nearly the full price for the vehicles, possibly have been anxious on this account?

(d) Article 6 of the Contract precisely specified the manner in which the vehicles were to be delivered; indeed, all of the vehicles were to be delivered at the place of origin (FMC's plant in San Jose). Therefore, what problem could FMC possibly have faced, so that it was trying to anticipate difficulties six months prior to delivery?

7. It should be noted that pursuant to Article 17.2 of the Contract, all notices made under the Contract were to be sent by confirmed cable or registered airmail, or else delivered in person. Even if we assume that postal communications with Iran were undependable for some time, shouldn't

FMC have requested the Iranian Ministry of Defence to confirm the telex allegedly terminating the Contract, pursuant to Article 17? And even if we suppose that a telex is in the same category as a cable, couldn't FMC-- which immediately contacted British Aerospace by various means after receiving the order from the Ministry of Defence to deliver one vehicle out of the 155 ordered (to be delivered six months later, at that)-- at least have requested the Respondent to confirm the telex allegedly terminating the Contract, pursuant to Article 17.2 thereof? And shouldn't FMC have regarded the Respondent's alleged termination notice as an error (since the Respondent had fulfilled all of its financial obligations under the Contract), and thus requested the Respondent to clarify the matter or at least to give an explicit notice of termination? There can be no doubt, if the theory of mitigation of damages in fulfilling contractual obligations applies here, that the Claimant failed to act on its duty in this connection. Although FMC made its routine contacts with the Respondent via telex, it should be noted that important matters were always notified by letter. Furthermore, it cannot be denied that a notice of termination of contract would be among the most important notices affecting the relations between the Claimant and Respondent. Therefore, there can be no doubt that the Claimant should at least have telexed a request for confirmation of the purport of such an ambiguous telex.

8. In its Memorial, the Claimant has provided full details of published reports of the termination of Iran's defence contracts, in order with the help of those details to portray the ambiguous telex which it had allegedly received from the Iranian Ministry of Defence as stating the Government's unconditional intention of terminating the Contract. On the other hand, on page 6 of its [Statement of Claim] dated 18 January 1982, it cites the following as among the

causes of nonpayment of the called letters of credit covering the advance payments:

> "a. neither the Islamic Republic of Iran nor its Ministry of National Defence was a beneficiary under Credit No. 7011;
>
> "b. Credit No. 7011 was by its terms neither assignable nor transferable without the express consent of FMC and FMC never consented to either its assignment or transfer from the Ministry of War of the Imperial Iranian Government to the Islamic Republic of Iran or any of its agencies."

In this way, it can be seen that the Claimant changed its position as its own interests dictated. On the flimsy excuse that the beneficiary's name had changed, it holds that the calling of the letter of credit was unjustified, so as to find some pretext whereby to terminate the Contract. But it then treats an ambiguous telex-- one which was not, by its own terms, a notice of termination but rather merely reported the position of an agency affiliated with the Ministry of Defence-- as constituting a notice of termination of contract.

In paragraph 26 of its Award, the majority concludes, without taking into account the facts set forth above, that the Contract was terminated by the Respondent, whereas I would infer from the aforementioned points that the Claimant had been trying for some time to sell the vehicles, for which it had already been paid by Iran. Moreover, it took advantage of the administrative disarray prevailing at the time of the Revolution and attributed the termination of contract to Iran,in order to retain Iran's advance payments. Therefore, in my opinion, the provisions of Article 12.2 of the Contract, which permitted the Respondent to terminate the Contract for convenience of the Buyer, are inapplicable here, for the Buyer would clearly have derived no advantage from terminating a contract whose price it had already paid some time earlier. Rather, its own interests would have

dictated that it not pay for lost (prospective) profits on the vehicles built against its account, and then sold to a different buyer.

B. LEGAL ISSUES INVOLVED

1. The Law Governing the Contract:

The majority's Award does not specify the governing law. However, in view of Article V of the Claims Settlement Declaration, which sets forth how the applicable law is to be selected, the Tribunal cannot refuse to enforce that law to which the Parties have agreed in their Contract.

On principle, no court may refrain (save in highly exceptional instances such as [may be required by] the public order) from adjudicating a claim on the basis of that law agreed to by the parties to a contract. Since Article 10.1 of the Contract at issue in this claim expressly provides that "This Contract shall be construed in accordance with the laws of the Government of Iran," there is no basis for applying choice of law rules or the other rules mentioned in Article V of the Claims Settlement Declaration, wherefor the Tribunal should have applied the laws of Iran in the present Case.

On principle, choice of law rules are applied where the parties have not specified what law shall apply, or where the court deems that the selection of the said law is inconsistent with good faith, on the basis of considerations such as that the law selected fails to conform to the public order, or that it is irrelevant to the contractual relationship involved.[1]

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(1) In this connection, see the preliminary discussion in Private International Law, by Cheshire (10th edition, 1979), pages 199ff.

Therefore, Article V of the Claims Settlement Declaration, which requires that the Tribunal respect the law, in no way authorizes the Tribunal to apply rules and principles (at least, without giving compelling resons therefor) other than those of that law agreed to by the Parties.

Where a contract is silent in this respect, Article V of the Claims Settlement Declaration empowers the Tribunal to select the applicable law on the basis of "principles of commercial and international law as the tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." This is because the Tribunal cannot, as an international forum, apply the choice of law rules of that state in which it has been convened, even in commercial claims, whereby the two Governments deemed it necessary to lay down rules for selecting the applicable law. Naturally, the rules thus laid down apply solely to claims wherein one party is a national [of either of the two Governments]; otherwise, in the claims between the two Governments, "respect for law" means nothing other than respect for public international law. Moreover, in claims between two states, international fora refrain from enforcing the municipal law of either of the two states party to an agreement, in order to respect the sovereign equality of both.

Because Article V of the Claims Settlement Declaration also mentions "contract provisions" as among those factors which affect the choice of the applicable law, the Chambers of this Tribunal might have formed the impression that the Tribunal is empowered to waive (implicitly or explicitly) that law provided for in the underlying contract in a claim, where that contract contains a clause specifying the applicable law. In my opinion, this impression is unjustified as well, because even where the parties have not specified the applicable law, the terms and provisions of the contract are

to be taken into account by the Tribunal in its determination of the applicable law, as evidence of what law the transacting parties wished to govern the contract. For example, the way in which the contract has been drafted, the terms in which it is couched, and whether the parties have adopted a standard form contract, are all elements of the contract which might be relied upon as indirect evidence of whether the transacting parties have selected a particular law. Where, incidentally, the Tribunal is confronted with a contract which does not designate any particular law as applicable, it can also apply trade usage in interpreting the parties' obligations.

My point in setting forth these preliminary matters is that, since Article V of the Declaration prescribes how the applicable law is to be determined, in this claim where the laws of Iran have been expressly specified [as applicable], the Contract should be construed solely on the basis of Iranian law, especially since Iranian law makes specific provision with respect to termination of contract and damages arising from termination. Regrettably, however, the majority has not taken this highly important matter into consideration, and the Award was not rendered on the basis of Iranian law. It is on this point that I dissent to the said Award.

2. According to Iranian law, the Contract has not been terminated:

Because in this Contract the Respondent's interests did not dictate that it refuse to take delivery of the vehicles, since it had already paid for them in advance, the ambiguous telex of 9 April 1979 cannot reasonably be construed as constituting termination in the interest, and to the advantage, of the Respondent. Obviously, even if the Iranian Government intended to limit its armaments purchase

programs at the outset of the Revolution, its purpose was to decrease its defence costs, not to waive its right to properties owned by it. Article 199 of the Iranian Civil Code, which embodies a general rule accepted under all legal systems, provides that

> "Consent obtained as a result of error or under duress does not validate a transaction."

This much having been said, what apprehension could the Claimant, which under the Contract was obligated only to make delivery of the vehicles at its own plant, possibly have entertained as to [Iran's] performance on the Contract? And since indirect evidence indicated that the telex was in error, the principle of good faith in performance on a contract would require the Claimant not to rely upon the purport of such an ambiguous telex, and instead at least to request confirmation of the telex in accordance with Article 17 of the Contract.

A notice of termination of contract signifies the severance of a legal relationship; and in importance, it is comparable to the act of entering into a contract. The provisions of Article 17 apply to such a notice, and they cannot be dispensed with even by reliance upon the actual practice of the Parties. An irreparable error cannot be presupposed in lesser matters such as in acquiring technical information or requesting delivery of equipment. The Respondent's error in sending the telex terminating the Contract may, however, be regarded as irreparable, due to the way in which the Claimant dealt with it. Now that the Claimant intends to benefit from the presumable error of the Respondent, the Tribunal should require the former to respect the provisions of the Contract punctiliously. That is, the Tribunal should not take cognizance of this telex, since according to Iranian law on rules of evidence, it carries no legal weight under the Contract.

The inquiries made by the Respondent in January 1980 (nine months after the alleged termination) as to why the export permit for the vehicles had been cancelled, indicate that it was unaware of any termination of the Contract. Moreover, this subsequent conduct of the Respondent reinforces the presumption that an error had been made in despatching the telex, and it refutes the allegation that the Contract had been terminated.

3. The majority has not enforced the provisions of the Contract:

Article 12.2 of the Contract makes provision for calculation of the Claimant's charges in the event of a unilateral termination of contract. In carrying out the provisions of this Article, the Claimant should, first of all, have submitted documentary evidence of the costs incurred by it up to the date of termination. Secondly, it should have offered proof of any commitments made by it to third parties up to that date for the purpose of carrying out the Contract. Thirdly, it should have informed the Tribunal of what amount it realized from sale of the vehicles produced to the order, and against the account, of the Respondent, so that the Tribunal might determine, on the basis of Article 12.2, whether or not FMC had been deprived of its anticipated reasonable profit. However, rather than take this approach, the Claimant company submitted to the Tribunal a report based on mere conjectures and prepared by one of its own employees. In addition to providing unsubstantiated figures, this report gives FMC's anticipated profit as 29%, an amount which would appear unreasonable for a contractor who carries out all his works with the financial resources of the Buyer (Employer)and against an advance payment by the latter. Therefore, in light of Article 24 of the Tribunal Rules, the Claimant in the instant Case has on

principle not proved its claim, because in doing so the Claimant must refer to the documented facts in the case, rather than rest its claim upon hypothetical assumptions.

4. The anticipated profit pursuant to Iranian law:

In order to justify its calculation of damages based on Iranian law, in its Memorial the Claimant invokes Article 230 of the Iranian Civil Code, which provides as follows:

> "If provision is made in a transaction that in the event of default, the defaulting party is to pay a certain amount by way of compensation, the judge cannot award against him for either more or less than that which he was required to pay."(1)

Based on the terms and purport of this Article, the Claimant's invocation thereof is devoid of any justification whatever. For this Article, which relates to contractually liquidated damages, expressly provides that the amount of damages agreed to must have been specified in the contract, whereas the expression, "reasonable termination charges which shall take into account... FMC's anticipated profits..." cannot by any interpretation be construed as constituting contractually liquidated damages.

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(1) I am aware that in some copies of the Civil Code, the word "can" occurs instead of "cannot". This divergence of opinions, however, is irrelevant to the present discussion.

As for Iranian law on damages for anticipated profits, Article 728 of the Iranian Civil Procedure Code provides as follows:

> "...The court shall award damages [only] where the 'claimant' establishes that he has suffered injury, and that this injury arises directly as a result of nonperformance of obligations, a delay in same, or nonsatisfaction of the judgment debt. The injury may result from loss of property, or from loss of those profits which could have been realized from performance of the obligation."

Under Iranian law, damages arising from lost profits may be awarded in order to indemnify an injured party. Therefore, until the Claimant proves that he has suffered injury, there is no justification for issuance of an award of damages on the basis of the assumptions and suppositions on which the Claimant's expectations are based. Because the Contract expressly falls under Iranian law, it is to be presumed that in entering into the Contract, the transacting Parties were aware of how Iranian law dealt with the issue, and that they employed the word "reasonable" in connection with the means of calculating compensation in Article 12.2 on this account. The way in which the majority has interpreted Article 12 of the Contract gives rise to the impression that even if the alleged termination had occurred immediately after the Contract was signed, the majority might still have awarded damages at the rate of 29% on the Claimant's alleged profit. In the face of such inequitable conclusions, Article 12 must be interpreted in a reasonable manner. According to Iranian law, the reasonable interpretation would be for the Claimant to submit to the Tribunal an accounting of its actual operations-- and not those which it had in mind-- so that the Tribunal might calculate and award those profits of which the Claimant was actually deprived due to termination of the Contract.

It is my opinion that the Claimant is estopped from claiming lost profits, by its admission that it realized an 11% profit from sale of the vehicles manufactured with Iran's monies. Therefore, this claim must be dismissed under Iranian law for this reason as well.

4. The fact that under Iranian law a sales contract involves a vesting of ownership limits the meaning of termination as incorporated in the Contract:

Article 338 of the Iranian Civil Code defines a sales contract as follows:

> "A sale consists of a vesting of ownership of a property, in return for a known consideration."

In view of this Article, the Respondent acquired ownership over the 155 vehicles involved in the transaction immediately upon execution of the Contract. The Claimant cannot, moreover, even assert termination of contract in reliance upon the delay of payment option, because the Contract price was paid in advance, as stipulated to in the Contract. Therefore, termination by the Respondent in its own interest is substantively precluded, because by the date of the alleged termination the Respondent was already vested with ownership of the vehicles; the alleged termination could thus relate only to repairs thereof. In other words, the Contract at issue in the claim consisted of two parts: (1) manufacture and delivery of the vehicles and spare parts therefor; and (2) repair of the vehicles. The alleged termination of contract does not oust the Respondent from its ownership rights over the vehicles involved in the Contract; rather, it is only necessary to calculate what proportion of the Contract price covers repairs, and to take the ramifications of termination into account in this respect. Article 362 of the Iranian Civil Code, which is

dispositive of the issue, expressly and exactly sustains my opinion. It provides as follows:

> "The consequences of a validly made sale are as follows:
>
> 1. As soon as the sale is effected, the buyer becomes the owner of the object of sale, and the seller becomes the owner of the price thereof..."

If the Respondent had intended to transfer ownership of the vehicles to the Claimant, the [underlying] transaction should have been cancelled by mutual agreement of the Parties; and each Party's expenses would naturally have been taken into account in the course of the cancellation agreement. It is my opinion that the Tribunal cannot cancel a contract validly entered into and performed on by the Respondent in good faith, on the pretext of termination thereof.

C. DEFECTS IN THE AWARD

1. In order to determine the intent of each Party with respect to termination of the said Contract, the Tribunal has relied upon their conduct following the date of the alleged termination. In fact, it can be concluded from the provisions of the Award that the Parties dealt with the terms of the telex in question in different ways. That is to say, in paragraph 30 of its Award, the majority states that

> "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."

Then, several lines further on in the same paragraph, the majority holds that the Ministry of Defence made no reaction

with respect to performance on the Contract, even after the dates for delivery of the vehicles had passed. Of course, in paragraph 29 of the Award, the majority notes that the Ministry of Defence had been formally informed of the cancellation of the export license for the vehicles in question shortly after the date on which delivery of the vehicles was to commence, and that it had initiated steps for the purpose of remedying the problem. This being the case, I do not see how the majority can fail to regard the Respondent's request for an extension of the letters of credit, as well as its other actions, as constituting evidence that it was following up on its legal rights--particularly since any contacts with FMC by the Ministry of Defence following cancellation of the export license would have been fruitless. Moreover, as for Claimant FMC, it could have made delivery of the vehicles at the place of origin in accordance with the Contract and on the dates specified therein for delivery of same.

2. In paragraph 32 of the Award, in assessing termination charges, the majority holds that according to the Contract these charges must be reasonable. Yet, in paragraphs 34 and 35 of the Award, in calculating FMC's anticipated profits it also takes "Price Escalation" into account as constituting a part of the Claimant's profits. However, it would have been totally illogical for the Parties to the Contract to have stipulated that owing to price escalation, FMC would receive a larger net profit as well. Pursuant to Iranian law, the price escalation provision could be justifiable only to the degree that it gave compensation for losses; otherwise, a provision which leaves the price of the transaction unspecified, such that its amount cannot be foreseen, constitutes an aleatory condition and is thus invalid.

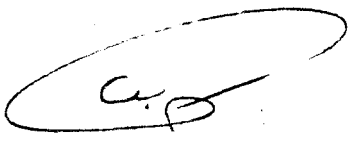
In addition to the foregoing, even the Contract's own price escalation provisions include no factor, capable of

supporting an assumption that the Parties to the Contract had agreed to an increase in FMC's profits owing to price escalation. On principle, an increase of profits owing to price escalation constitutes unjust enrichment, and the award thereof, as compensation for damages arising from termination of a contract which is subject to Iranian law, is devoid of any legal justification.

3. Here, it will not be amiss to note as well that the premises underlying the majority's calculations in its Award (to which premises I dissent for the reasons set forth above) are inconsistent and mutually contradictory. This is because in paragraph 34 of its Award, the Tribunal applies a 10% price escalation rate in calculating the cost of manufacturing the vehicles, whereas in paragraph 37, it arrives at the sum of $960,000 as the price escalation on the final 25% of the Contract price-- ie. a price escalation of approximately 20% over the amount provided for by the Contract. The practical consequences of this calculation are, that since the majority deducts the manufacturing costs from the total Contract price in order to determine FMC's profit, it gives FMC a profit which is certainly even greater than that anticipated by FMC itself.

Based on the foregoing, I am unable to concur in the majority's Award, with respect to FMC's first claim.

Dated The Hague
2 March 1987



Hamid Bahrami-Ahmadi