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ES CLAIMS TRIBUNAL

دیوان دآوری دعاوی ایران - ایالات متحدہ

ORIGINAL DOCUMENTS IN SAFE

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Case No. 430

Date of filing: 5 Sep 89

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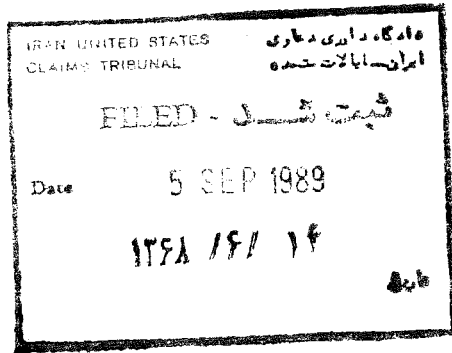
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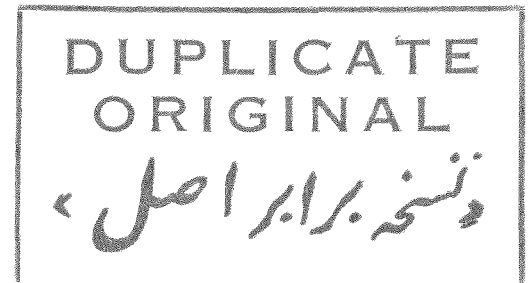


CASE NO. 430

CHAMBER ONE

AWARD NO. 438-430-1

161



ROCKWELL INTERNATIONAL SYSTEMS, INC.,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN
(THE MINISTRY OF NATIONAL DEFENCE),
Respondent.

SEPARATE OPINION OF HOWARD M. HOLTZMANN
CONCURRING IN PART, DISSENTING IN PART

I. Introduction

1. Rockwell International Systems, Inc. ("Rockwell") was the principal contractor employed by the Iranian Ministry of Defense ("the Ministry") to design and construct a highly sophisticated electronic air defense system known as the IBEX project.¹ After the Islamic Revolution, the new

¹The Tribunal has previously decided six cases involving other IBEX contractors. See Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298 (hereinafter "Sylvania"); Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1 (25 Sept. 1985), reprinted in 9 Iran-U.S. C.T.R. 107 (hereinafter "Questech"); Touche Ross & Company and Islamic Republic of Iran, Award No. 197-480-1 (30 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 284; Ford Aerospace & Communications Corp. and Government of the Islamic Republic of Iran, et al., Partial Award No. 289-93-1 (29 Jan. 1987), reprinted in 14 Iran-U.S. C.T.R. 24; Harris International Telecommunications, Inc. and
(Footnote Continued)

Iranian Government eventually decided to abandon the project. The Award in this Case grants Rockwell the largest part of its claims for the services it rendered and also provides other relief requested -- totaling over U.S.\$12 million, plus interest. I fully agree with those parts of the Award. I also agree that in this Case, as in all of the other IBEX cases decided by the Tribunal, Rockwell is not entitled to lost profits because of the particular terms of its two contracts ("the Contracts") with the Ministry. See Award at para. 201.

2. The Award, however, errs in several respects. First, the Majority incorrectly denies Rockwell payment for services it performed after 31 August 1979 to preserve the project's status quo while awaiting instructions from the Ministry. I respectfully dissent from that conclusion. Second, the Majority unfairly denies Rockwell payment of certain fees to which it is contractually entitled for performing Tasks on schedule and within budget. Third, I consider that the costs of arbitration awarded to Rockwell are less than required by the Tribunal Rules.² As explained below, I join in the Award on the amount of those

(Footnote Continued)

Islamic Republic of Iran, et al., Partial Award No. 323-409-1 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 31 (hereinafter "Harris"); Watkins-Johnson Company, et al. and Islamic Republic of Iran, et al., Award No. 429-370-1 (28 July 1989), reprinted in ___ Iran-U.S. C.T.R. __.

²The Award mentions in passing, but does not rely on, the doctrine of "changed circumstances," also referred to as clausula rebus sic stantibus, a concept that I do not consider applicable in the IBEX cases for the reasons explained in my Separate Opinion in Questech, Award No. 191-59-1 at pp. 2-14, reprinted in 9 Iran-U.S. C.T.R. at 138-47. While I believe that the reference to the doctrine of changed circumstances is unnecessary and misplaced, I need not comment further on the doctrine in the context of the present Case inasmuch as the Award is not based on it. See Award at para. 92.

contractual fees and costs of arbitration only to form a majority.³

II. Rockwell's Claims for Payment for Services After 31 August 1979

3. There is no question that Rockwell performed services for the IBEX project until 30 June 1980. Yet, the Majority awards payment for Rockwell's services only until 31 August 1979. Why? The Majority reasons -- erroneously, in my view -- that the Ministry terminated its Contracts with Rockwell on 31 August 1979, and that when Rockwell provided services after that date it took the "risk" that it would not be paid. See Award at para. 192. I believe, to the contrary, that any "risk" was caused by the Ministry's failure to give Rockwell clear notice of termination and therefore should be borne by the Ministry. The Ministry's letter of 16 July, on which the Majority's conclusion is based, was ambiguous on its face and Rockwell's interpretation of that letter as confirming an already existing suspension of the Contracts was reasonable. Moreover, Rockwell expressly informed the Ministry that it was continuing to incur costs under the Contracts and requested clarification of the project's status from the Ministry, yet the Ministry failed to inform Rockwell that it considered the Contracts to be terminated. Under these circumstances, neither the Ministry's 16 July letter nor its subsequent conduct effectively operated to

³For a fuller discussion of the need under Article 31, paragraph 1, of the Tribunal Rules to join in the Award to form a majority lest no award issue, see Concurring Opinion of Howard M. Holtzmann in Starrett Housing Corp., et al. and Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 32-24-1, pp. 1-2 (20 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 159, 159; Concurring Opinion of Howard M. Holtzmann in Economy Forms Corp. and Government of the Islamic Republic of Iran, et al., Award No. 55-165-1, pp. 1-2 (20 June 1983), reprinted in 3 Iran-U.S. C.T.R. 55, 55.

terminate the Contracts, and, therefore, Rockwell should be granted the minimal costs it incurred to keep the Contracts in a state of suspension until 30 June 1980. A brief review of events will demonstrate why these conclusions are compelling.

4. One of Rockwell's principal tasks under the Contracts was to design, construct and install sophisticated electronic intelligence gathering equipment in what was known as the Central Complex. As its name implies, the Central Complex was to be the nerve center of the IBEX system. Located on the Iranian Doshen Tappeh Air Force Base in Tehran, its cost exceeded U.S.\$35 million. Obviously, such a valuable and highly sensitive facility required constant maintenance and protection. Part of Rockwell's contractual obligation was to provide the custodial and security services needed to safeguard the Central Complex. Rockwell performed this service through a sub-contractor, Fischbach-Oman International Corporation ("Fischbach-Oman"). Documentary evidence establishes that Rockwell provided the necessary custodial and security services for the Central Complex, as well as other minimum activities necessary to maintain the project's status quo, until 30 June 1980.

5. Revolutionary unrest began to affect all aspects of the IBEX project in the fall of 1978. As a result, Rockwell gave a force majeure notice for one of the Contracts (known as Contract No. 119) on 30 December 1978, and for the other (known as Contract No. 120) on 1 February 1979. Although force majeure conditions forced the suspension of many of Rockwell's activities, it continued initially to prepare in the United States and ship to Iran drawings, plans and reports under the Contracts. Moreover, Rockwell maintained its Tehran office and a small staff in Iran, and continued to provide, through Fischbach-Oman, custodial and security services at the Central Complex. Over time, Rockwell further reduced its activities and by August 1979 its

principal remaining activities were the custodial and security services at the Central Complex. In addition, Rockwell also continued to maintain its Tehran office with a skeletal staff and to incur other minimal costs necessary to keep the project in a state of suspension.

6. In early August 1979 Rockwell received a letter dated 16 July 1979 from the new Iranian governmental authorities that stated in relevant part:

This is to announce that from the date Bahman 21, 1357 (Feb. 10, 1979), the accomplishment of all the works and expenditures under the Contracts No. 119 & 120 has been considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran. Therefore, your permitted and fully authorized representative having the required documents for contractual negotiations is requested to attend on date Aug. 25, 1979 at 0900 at the place of this organization (Emphasis added.)

7. The statement in the 16 July letter that the project was "considered to be stopped" was inherently ambiguous; it could mean that the project was simply suspended, or it could mean that it was entirely terminated. The Award recognizes this ambiguity and finds that "the Ministry could have phrased this notice [in the 16 July letter] more clearly." Award at para. 189. The other IBEX contractors received substantially identical letters, all also dated 16 July 1979. The Tribunal in deciding the contract claims of other IBEX contractors has, in the light of the circumstances of those cases, generally held that the 16 July letters operated to terminate the contracts involved. In each of those cases, however, the Tribunal was merely confirming the claimants' interpretation of the 16 July letter and

therefore did not opine on whether other interpretations of the letter would also have been reasonable.⁴

8. It is also important to recognize that Rockwell's situation was quite unique. It will be recalled that although Rockwell had, pursuant to its notices of force majeure, already suspended most of its work, it had nevertheless continued to safeguard the Central Complex and to incur the other minimal costs described above. Read in those circumstances, the 16 July letter did not send a sufficiently clear message to Rockwell to abandon all of its activities. Rather, the letter led Rockwell reasonably to consider that the Ministry was merely confirming the suspension of operations due to force majeure that had been in effect for several months, but was not ordering termination of the minimal activities Rockwell had continued to perform during the period of force majeure, particularly the custodial and security services needed at the Central Complex. The reasonableness of that interpretation is reinforced by the fact that the letter, on its face, purported to be retroactive. Moreover, one must consider that the Ministry

⁴In Harris, the Tribunal held that the contract terminated prior to the Ministry's 16 July 1979 letter as a result of the claimant's letter of 25 June 1979 purporting to cancel the contracts due to force majeure. See Harris, Partial Award No. 323-409-1 at para. 123, reprinted in 17 Iran-U.S. C.T.R. at 67. I dissented from that holding on the basis that the Government of Iran intended by the 16 July letter to terminate the contracts and that, in the circumstances of that case, the Tribunal should give effect to that intent. See Separate Opinion of Judge Holtzmann Dissenting from Denial of Termination Costs in Harris, Partial Award No. 323-409-1 at pp. 2-4, reprinted in 17 Iran-U.S. C.T.R. at 88-89; Award at para. 94. The issue in the present Case, however, is not whether the Ministry intended to terminate the Contracts but rather it is whether the Ministry communicated that decision to Rockwell in a clear and unambiguous manner. See infra at para. 15. This issue is strongly dependent on the particular facts of the case and was not raised or considered in the previous IBEX cases.

did not provide any other means for safeguarding its property. It was sensible and responsible for Rockwell to conclude that the Ministry did not intend to leave valuable and sensitive facilities unguarded, but intended only to stop new work, while continuing those minimum activities necessary to maintain the project's status quo in a state of suspension. The reasonableness of Rockwell's interpretation of the letter is further confirmed by the events that followed.

9. Although the 16 July letter invited Rockwell to attend a meeting with the Ministry on 25 August 1979, that meeting actually took place on 22 September. Minutes of the meeting were prepared at the time by the Rockwell representatives who attended. No other record of the meeting was produced in evidence, and the Rockwell Minutes, which constitute a contemporaneous record prepared in the ordinary course of business, are relied on in the Award. See Award at para. 120. Among the subjects discussed at the meeting were the custodial and security services that Rockwell was continuing to provide at the Central Complex. The Minutes state that the Rockwell representatives "made sure that [the Iranian representatives] understood that costs were still being incurred for guards, storage, and custodial personnel." Although the Rockwell representatives made repeated attempts at the meeting to obtain direction from the Iranian representatives, the Minutes state that "neither the [Ministry] nor any of the Iranian representatives provided us with any direction or instructions." Soon after returning to the United States Rockwell wrote to the Ministry emphasizing that "[i]t is our hope that you can provide further direction to us in the near future." But the Ministry failed to give Rockwell any instructions at all.

10. A further factor confirming the reasonableness of Rockwell's understanding is that in the September meeting it was given the impression that the IBEX project had been

suspended and might be resumed, although perhaps in an altered form. The Award correctly confirms this stating that "[t]he evidence presented by both Parties demonstrates that, while Iran may not have ruled out the possibility of continuing with the IBEX project, it was quite clear that it would only have done so under new and substantially changed contractual arrangements." Award at para. 95. But, even under new arrangements, it was highly likely that the Central Complex, which was 80% complete and was the project's nerve center, would be utilized. In that situation, it was entirely reasonable for Rockwell to believe that the Ministry wished it to continue to perform its contractual obligations to safeguard the Complex and to perform other minimal services while awaiting instructions.

11. During the many months in which the Ministry failed clearly to instruct Rockwell to terminate its services at the Central Complex and its other minimal activities, the Ministry was fully aware that Rockwell's services were continuing. Not only had it been given that express information by Rockwell at the 22 September meeting, but also it could plainly see Fischbach-Oman's continued presence within an Iranian military base, and it was equally aware of the existence of the Tehran office. Yet, the Ministry remained mute. That conduct, coupled with the fact that it provided no alternative means to preserve the valuable equipment at the Central Complex, led Rockwell to the reasonable conclusion that the Ministry wanted Rockwell's contractual services to continue.

12. Rockwell was not alone in its impression of the Ministry's intentions concerning the future of the IBEX project. Meetings similar to the meeting between Rockwell and the Ministry were also held with other IBEX contractors in September 1979. Watkins-Johnson Limited's report of its meeting with the Ministry on 24 September 1979 states:

All indications during the meeting were that the [Ministry] is actively interested in continuing

with the [IBEX] project The nature and the scope of the project may be somewhat altered, however. (Emphasis added.)

This report of the Ministry's position is consistent with the political climate then prevailing in Iran. As discussed at length in my separate opinion in Questech, there was nothing about the post-revolutionary climate in Iran at that time that would have made it unreasonable for the Ministry to continue with the IBEX Contracts. See Separate Opinion of Howard M. Holtzmann in Questech, Award No. 191-59-1 at p. 3, pp. 8-13, reprinted in 9 Iran-U.S. C.T.R. at 139, 142-46.

13. Rockwell's view was further confirmed by a February 1980 report from Fischbach-Oman. That report described a meeting on 28 February 1980 of representatives of Fischbach-Oman with the Iranian Air Force and summarized the results of the discussion as follows:

a. The Air Force has not changed its attitude regarding the Program (I believe they mean the Central Complex). They still want the facility completed.

b. It appears that nothing is going to happen at this very moment. When questioned on timing, the Air Force stated nothing would happen until after the new Parliament is elected and seated.

c. Current estimated time factor for these elections is sometime in April 1980. (Emphasis added.)

14. Accordingly, Rockwell continued to furnish limited services until 30 June 1980. By that time the Ministry had demanded payment of bank guarantees provided by Rockwell pursuant to the Contracts, and had improperly caused calls to be made on the standby letters of credit that Rockwell had secured in connection with those bank guarantees. The Award properly holds that Iran's wrongful calls on these letters of credit violated its contractual obligations to Rockwell. See Award at paras. 204, 210. Moreover, these

wrongful calls on the letters of credit were entirely inconsistent with an intent to continue the project in any form. They sent the first clear signal to Rockwell that the Ministry intended to terminate the Contracts, not merely to suspend them while deciding the future of the IBEX project. Accordingly, Rockwell notified the Ministry in writing that it would cease all activity on the IBEX project effective 30 June 1980.

15. Analyzed from the point of view of the legal obligations of the Parties, it is clear that Rockwell is entitled to be paid for the services it rendered from 31 August 1979 to 30 June 1980. The Contracts gave the Ministry the right to terminate the project for its own convenience. But if the Ministry chose to terminate, it had the obligation to notify Rockwell clearly. This widely recognized principal of contract law hardly needs elaboration. Thus, as a leading treatise states in discussing a party's right of termination, "Any notice given must be clear and unambiguous in its terms, . . . otherwise the notice will be of no effect."⁵ Yet, as explained above, the Ministry's 16 July letter and its subsequent conduct was, at best, ambiguous, and, at worst, misleading. In the face of all of this, the Majority denies Rockwell the costs it incurred for work performed and thereby penalizes it for acting responsibly. I consider that both illogical and legally incorrect.⁶

⁵Anson's Law of Contract 439 (A.G. Guest 26th ed. 1984) (citations omitted); see also K. Larenz, Allgemeiner Teil des deutschen Bürgerlichen Rechts 339 (7th ed. 1989) ("Es ist grundsätzlich Sache des Erklärenden . . . , sich so deutlich auszudrücken, dass der Empfänger das Gemeinte normalerweise verstehen kann.") (Translation: In principle, it is up to the declarant to express himself clearly enough so that a receiver of the declaration under normal circumstances can understand what was meant.)

⁶It should also be noted that granting Rockwell's claim would be consistent with the Tribunal's Award in Sylvania.
(Footnote Continued)

16. I conclude that the Contracts were not terminated on 31 August 1979, and that Rockwell should therefore be paid for its services under the Contracts until 30 June 1980, when they came to an end as a result of the Ministry's wrongful calls on the letters of credit.

III. Rockwell's Claims for Fees

17. Contract No. 119 is a cost-plus-fee contract. It required Rockwell to perform a number of so-called "Tasks," and provided that Rockwell, in addition to its actual costs, would be paid fees calculated as a percentage of those costs. For many of the Tasks, the amount of the fee varied depending on Rockwell's performance under the Contract.⁷ If Rockwell performed these Tasks ahead of schedule and/or below costs it was entitled to a stated "maximum" fee. If Rockwell performed the Tasks on schedule and at the estimated cost it was entitled to the "target" fee. If, however, Rockwell did not meet the schedule or cost estimates of the Task the fee for that Task was reduced to the "minimum" fee. The fee structure operated as an incentive for Rockwell to complete the project on schedule and within budget. I agree with the Award's conclusion that Rockwell is entitled to

(Footnote Continued)

In that case, which also involved the IBEX project, the Tribunal awarded the claimant performance costs incurred after the termination date of 16 July 1979 including "payments to the suppliers of goods and services including the cost through December 1984 of storing equipment related to the Contract, labor and fringe benefit expense, expenses for personnel assigned to Iran, and offsets." Sylvania, Award No. 180-64-1 at p. 27, reprinted in 8 Iran-U.S. C.T.R. at 317 (Emphasis added). These costs were granted by the Tribunal partly as "post-breach performance costs" pursuant to a substantially identical termination for convenience provision as that being applied in the instant Case. See id. at p. 29, reprinted in 8 Iran-U.S. C.T.R. at 319.

⁷ However, under Contract No. 119 variable fees did not apply to Tasks 1, 8, 14 and 16. For these Tasks, the Contract provided a fixed fee. (There was no Task 15.)

"target" fees for Tasks 3, 6 and 13, and "minimum" fees for Tasks 4, 7 and 9-12.⁸ As to Tasks 2 and 5, I join the Chairman in voting to award the "minimum" fees only in order to form a majority, inasmuch as it appears that the other Member of the Chamber would deny any payment of fees for these Tasks. I would have preferred, however, for the reasons stated below, to award the "target" fees for Tasks 2 and 5.

18. The Award establishes a correct standard when it states that in determining the amount of fee to be awarded to Rockwell for a particular Task "under generally recognized principals of contract law, and a good faith interpretation of the fee provisions, delays for which the Ministry must be held responsible, or those caused by force majeure, should not deprive Rockwell of fees it would otherwise have earned." Award at para. 152. The Majority, however, misapplies that standard when it awards Rockwell only "minimum" fees for Tasks 2 and 5. In my view, Rockwell has met its burden of establishing that it was on schedule and within budget at the time force majeure conditions caused delays. Similarly, Rockwell was within the schedule and budget for Task 5 at the time the Ministry caused delays by its prolonged failure to release design funds and authorize construction. Therefore, to repeat the apt words of the standard enunciated in the Award, these circumstances outside Rockwell's control "should not deprive Rockwell of fees it would otherwise have earned." Id.

⁸I concur with the Award's granting of "minimum," rather than "target," fees for Tasks 4, 7 and 9-12, although for somewhat different reasons than expressed in the Award for some of those Tasks. In my view, awarding only the "minimum" fee for these Tasks is compelled by the fact that delays in them were due, in part, to delays in securing the Ministry's approval of certain subcontractors, and the Contract contains an express provision placing on Rockwell the risk of any delays in the approval process. See Award at paras. 163-64.

a. Task 2

19. Task 2 involved the construction of the Central Complex, and was by far the most significant Task required by Contract 119. The actual construction was carried out by Rockwell's principal subcontractor, Fischbach-Oman. I agree with the Award that the issue involved in determining Rockwell's entitlement to "target" fees for this Task is whether Rockwell has established that but for the force majeure conditions prevailing in Iran it would have been on schedule and within budget on 30 December 1978 -- the date Rockwell gave its force majeure notice for Contract No. 119. I disagree, however, with the Award's analysis of the evidence.

20. Although many other elements of the IBEX project were in significant delay throughout the life of the project, the Central Complex was not. Contemporaneous monthly status reports prepared by Rockwell (the "Rockwell Reports") and submitted to the Ministry's "Systems Integration Contractor," Harris International Telecommunications, Inc. ("Harris") indicate that Task 2 was generally on schedule and below cost until the onset of force majeure conditions in the fall of 1978. Rockwell submitted extensive correspondence from its subcontractor, Fischbach-Oman, that disclose in detail the force majeure events that affected Task 2 in late 1978. Specifically, these included employee walkouts, death threats, random gun shots, gasoline shortages affecting the operation of vehicles, diesel fuel shortages affecting operation of construction and power generating equipment, inability to obtain delivery of local purchases, and inability to obtain critical United States materials shipped to Iran because of strikes affecting unloading of

vessels at Iranian ports.⁹ There is no evidence that the Ministry at the time denied the existence of these conditions.

21. Moreover, the September and October 1978 Rockwell Reports state with regard to Task 2 that "[c]onstruction continues essentially on schedule." The November 1978 Rockwell Report states concerning Task 2 that "[c]onstruction continues essentially on schedule; however, there have been some delays and slow downs due to civil unrest. These have not been of major consequence because we were ahead of schedule in many areas." (Emphasis added.) This is confirmed by reports submitted by Harris (the "Harris Reports"). The Harris Report for January, 1979 states with regard to Task 2 that "integration of the Central Complex was slowed in January by a lack of manpower, fuel, and materials. Continuing civil disturbances have prevented normal progress." (Emphasis added.) The Report goes on to state that "local . . . responsiveness during extremely adverse conditions has been excellent." (Emphasis added.) The Harris Report for September 1979 states "no construction had occurred during [January, 1979] or in February because of a combination of fuel shortages and civil unrest."

22. Rockwell has borne its burden of proof in establishing a prima facie case that it was on schedule in Task 2 at the time delays in performance were caused by force majeure events. The Ministry has not presented any evidence to the contrary. Moreover, Rockwell's costs incurred for Task 2 at the date of the force majeure notice for Contract No. 119 were less than those budgeted for that Task. Rockwell is

⁹ Although the letters describing such events were sent in late December 1978 in conjunction with the force majeure notice under Contract No. 119, the letters clearly discussed past events that had directly affected Rockwell's timely performance of Task 2.

therefore entitled to "target" fees for Task 2. I concur in the Award's decision to deny "maximum" fees for this Task because Rockwell has failed to establish sufficiently that it was ahead of schedule in all areas of Task 2.

b. Task 5

23. The Majority also erroneously denies Rockwell's claim for "target" fees for Task 5. Task 5 involved the construction of an access road designated as site "W17A." The Rockwell Reports beginning at least as early as April 1978 clearly refer to "delay in authorization of construction effort and release of design funds." Authorization of construction and release of design funds were both responsibilities of the Ministry. In January 1978, Task 5 was terminated by the Ministry when it replaced site "W17A" with site "W7." Rockwell has established prima facie that the delays in Task 5 prior to its termination were caused by the Ministry. Accordingly, absent any evidence to the contrary, it is entitled to the "target" fees for Task 5.

24. The Majority relies on two factors in denying Rockwell target fees for Task 5. First, after the Ministry substituted site "W7" for site "W17A," and consequently terminated Task 5, the Harris Report for January, 1979 stated that a termination proposal would be prepared by Fischbach-Oman and submitted by 15 February 1979. The Majority draws an adverse inference from Rockwell's failure to produce that termination proposal in evidence. That inference is unfounded. It is important to note that the date on which the termination proposal was to have been submitted, 15 February 1979, was just a few days after the victory of the Islamic Revolution. No negative implication can fairly be drawn from Fischbach-Oman's failure to prepare this termination proposal because on that date the project was in a state of suspension due to force majeure, and prevailing conditions made preparation of such a proposal both impossible and

futile. Moreover, the Majority identifies no information that it considers necessary to the assessment of Rockwell's entitlement to fees for Task 5 that might have been contained in such a proposal.

25. Second, the Majority relies on Rockwell's failure to provide proof that it requested the necessary construction authorizations and design fund releases in a "timely and adequate manner." Award at para. 167. Again, the Majority errs. The IBEX contractors developed and maintained a sophisticated information processing system for monitoring the project's status. Rockwell's role in this information system was to place the Ministry on notice of any problems in its progress through its preparation of the monthly Rockwell Reports and the contemporaneous submission of those Reports to Harris. Rockwell fulfilled that responsibility. The Rockwell Reports throughout 1978 make repeated references to the Ministry's delays in authorization of construction and release of design funds. In addition, Rockwell expressly mentioned the Ministry's delays in Task 5 in its letter to the Ministry dated 24 October 1978.

26. Thus, in my view, the evidence presented by Rockwell establishes a prima facie case that any delays in Task 5 were attributable to the Ministry. The Ministry has presented no evidence to refute this. Applying the fair standard referred to above, Rockwell should not be deprived of fees because of the Ministry's delays. Moreover, the costs incurred by Rockwell at the date of termination were less than those budgeted for Task 5. Accordingly, Rockwell is entitled to "target" fees for Task 5.

IV. Rockwell's Claim for Costs

27. Rockwell claimed costs of arbitration including legal fees totaling U.S.\$928,036. The Award unequivocally states that "[t]he Tribunal is satisfied, based on the evidence

presented, that Rockwell incurred arbitration costs in the amount claimed." Award at para. 251. The Award acknowledges that "this Case involved complex factual issues," *id.*; and a mere glance at the Award's table of contents indicates that there were a great many such issues. In addition, as the Award also amply demonstrates, there were substantial legal issues in the Case. Yet, the Award grants Rockwell only U.S.\$70,000 for its legal fees and costs -- less than 8% of the amount it actually incurred.¹⁰ I join in that result only to form a majority for the Award, and I write separately to explain why I consider that the amount awarded is inadequate under the Tribunal Rules.

28. Article 38, paragraph 1 of the Tribunal Rules provides, in relevant part, that the Tribunal shall "fix the costs of arbitration," which include "[t]he costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable." Article 40, paragraph 1 of the Tribunal Rules goes on to state that the costs of arbitration, including legal costs, "shall in principle be borne by the unsuccessful party," and paragraph 2 of the same Article elaborates with respect to legal fees that "the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs [of legal fees] or may apportion such costs between the parties if it determines that

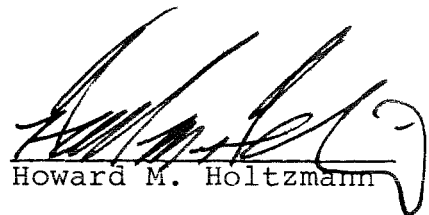
¹⁰The Award correctly grants Rockwell U.S.\$902,563, plus interest, for the full amount of the legal fees it incurred in court proceedings in the United States to secure an injunction against payment of the Ministry's wrongful calls on standby letters of credit. These legal fees were awarded as damages, and are thus quite different from the legal fees Rockwell seeks under the Tribunal Rules for its costs of arbitration in the present Case. See Award at paras. 203-04.

apportionment is reasonable." I need not repeat here the discussion of these provisions that appears in my "Separate Opinion on Awarding Costs of Arbitration" in Sylvania, Award No. 180-64-1, reprinted in 8 Iran-U.S. C.T.R. 329. Suffice it now to note that while these provisions call upon the Tribunal to exercise discretion in determining what costs are "reasonable," they do not permit pulling figures out of thin air. I regret that the Award in the present Case does not include any explanation of how the U.S.\$70,000 of costs awarded was calculated, other than to refer to "criteria of the kind outlined [in the Award] in Sylvania" -- where the calculation of the amount of costs awarded was similarly unspecific. The vague determination of costs in the Award is in striking contrast to the precision with which the other amounts awarded are explained.

29. As indicated in my Separate Opinion in Sylvania, the Tribunal Rules should be applied to allocate legal costs of arbitration based on the degree of success that the prevailing party achieves. See id. In my view, the degree of Rockwell's success is most appropriately measured by reference to the fact that it was awarded approximately U.S.\$12 million of the U.S.\$19 million it sought for work performed under the Contracts -- i.e. about 63%. Also, it prevailed 100% in defending against approximately U.S.\$150 million of counterclaims. In addition, Rockwell unsuccessfully sought U.S.\$17 million for lost profits. As noted above, decisions in prior IBEX cases had already made it clear since 1985 that lost profits were not payable under the IBEX contracts because of the particular provisions of the contracts. Accordingly, it appears that Rockwell's counsel realistically devoted only very limited time to this issue; for example, less than 3 pages of its 85 page Hearing Memorial were directed toward the lost profits claim. From this it is reasonable to infer that almost all of the time represented by the U.S.\$928,036 which the Award finds that

Rockwell incurred in legal fees and costs was spent on issues other than the lost profits issue. Somewhat similarly, the counterclaims that Rockwell successfully defended against involved largely issues for which Tribunal practice was already well-established in prior IBEX cases. Taking all of these factors into consideration, I believe Rockwell is entitled to legal costs of U.S.\$555,000, i.e. approximately 60% of the legal costs it claims. Surely, the legal work performed, as well as the results achieved, warrant an award of at least that amount.

Dated, The Hague
5 September 1989



Howard M. Holtzmann