IRAN-UNITED STATES CLAIMS TRIBUNAL

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In the Name of God

CASE NO. 430
CHAMBER ONE
AWARD NO. 438-430-1

ROCKWELL INTERNATIONAL SYSTEMS, INC.,
Claimant,

and

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

DISSENTING OPINION OF ASSADOLLAH NOORI

INTRODUCTION

In 1974 and 1975, representatives of the United States' intelligence agencies conceived the idea of creating an intelligence-gathering and espionage facility in the Middle East and Persian Gulf region, and imposing the expenses relating thereto upon the Iranian Government. In order to attain this objective, the United States Government compelled the former regime of Iran to extend bid offers to United States corporations for the construction of a data-gathering project. By introducing United States companies and playing an instrumental role in the performance on the contracts, inter alia by issuing (or not issuing) export licenses for the machinery, equipment and services needed for the project, the United States Government exercised full control over the performance on and progress of the project. Upon having been thus introduced, in 1974 Rockwell International, Inc. ("Rockwell") presented Iran with its terms and conditions for carrying out various segments of the project; and pursuant to a contract, it was required to initiate the project in Iran. Shortly thereafter, Rockwell cancelled the initial contract owing to its lack of expertise, and then it executed Contracts No. 119 and 120 with the Respondent, for carrying out two highly important segments of the IBEX project. The former Iranian regime was obliged, in order to complete the other segments of the project, to conclude further contracts with other American contractors. Those United States contractors undertook to establish a training institute, a data-analysis and processing center, three electronic intelligence-gathering stations, a field analysis center, two airborne electronic and photographic intelligence-gathering units, a hangar, and the related repair facilities; furthermore, they were required to guarantee the project's operations following provisional delivery, and to provide spare parts and the necessary services for up to fifteen years thereafter. After cancellation of the initial

contract with Rockwell International and the waste of the immense expenses that had been incurred up to that time, the contracts concluded with the other United States contractors amounted to some $650 million, more than $200 million of which was poured into the pockets of those contractors by the former regime prior to the victory of the Islamic Revolution. Moreover, tens of millions of dollars more were later demanded by those same contractors from the Government of the Islamic Republic of Iran, in the form of baseless and unfounded claims brought before this arbitral Tribunal, without Iran having in the process received any tangible consideration whatsoever.

JURISDICTION

In examining the jurisdictional issue, the majority has based its findings on other awards rendered in the IBEX cases. Just as I have stated at length in my Dissenting Opinion in Watkins-Johnson, I believe that the Tribunal does not have jurisdiction over such cases, in view of the exclusion provided for in Article II, paragraph 1, in fine, of the Claims Settlement Declaration. See: the Dissenting Opinion of Assadollah Noori in Watkins-Johnson Co. and Watkins-Johnson Ltd. and The Ministry of Defence of the Islamic Republic of Iran, Bank Saderat Iran, Award No. 429-370-1.

MERITS

Breach of contract by Rockwell

In paragraphs 94 and 96 of the Award, the majority concludes that Contracts No. 119 and 120 came to an end by virtue of the Ministry of Defence's letter dated 16 July 1979, which was a manifestation of a general policy

decision taken by the Ministry of Defence not to continue with United States contractors on the IBEX project. In my opinion, this conclusion is incorrect for a variety of reasons, which are in part set forth below and are discussed at greater length in my Dissenting Opinion in Watkins-Johnson (Award No. 429-370-1). Moreover, it constitutes yet another blatant example of the majority's unfairness towards the Respondent. In my opinion, it is the Claimant who was, for the following reasons, in breach of contract owing to his flagrant and fundamental violations both during the performance on the Contract and after the evacuation of his employees from Iran in December of 1978.

1. Article 9 of Contracts No. 119 and 120 provides that:

> "The Contractor, under no circumstances, has [a] right to transfer the execution of the Contract wholly or partly to a third party without Employer's written permission. If such act occurs, the Employer can cancel the Contract after confiscating the good performance guarantee(s)..." (Emphasis added)

Pursuant to this Article, the Claimant was required, before selecting subcontractors, to obtain the Respondent's written consent as to which subcontractors were to be chosen, and as to the price of each subcontract. However, Rockwell proceeded, without the Respondent's knowledge or consent, to appoint his subcontractors, and in particular Fischbach-Oman, the subcontractor for the construction of the Doshan Tappeh Central Complex, and it went ahead to conclude contracts with those subcontractors. After the Respondent notified the Claimant, in its letters dated 19 April and 2 May, and also in the meeting of 19 April 1978, that the Claimant was in blatant violation of this important and fundamental point, the latter replied in its letter of 3 May 1978 by apologizing to the Respondent after admitting that it had violated the Contract, and stated that:

> "... our understanding was incorrect and [we] deeply regret that the subcontracts listed on the attachment did not have prior coordination and approval of the Office of the Vice Minister of War..."

2. On the basis of the schedule of works as set forth in the Statement of Work, which constituted an integral part of Contract No. 119, the Claimant undertook to deliver the training institute which was to be built in the Doshan Tappeh Central Complex over to the Respondent by August 1978. Based on this agreement, Sylvania, the Training Contractor for the IBEX project, had undertaken to deliver the training materials and equipment for the project to Iran in August 1978. Due to its incompetence and mismanagement, the Claimant was unable to carry out this important contractual duty, and as a result, the training materials and equipment for which the Respondent had paid millions of dollars were never delivered to the Respondent. Harris' report for the month of September 1979, and the Award in Sylvania (Award No. 180-64-1, p. 38), both confirm this point. It is stated in the Harris report that:

> "The important central complex at Doshan Tappeh was about 80 percent complete in January [1979], but no construction had occurred during that month or in February... construction was on stop-work status. Facilities [Rockwell's] delays had a direct impact on the program [IBEX] in many ways... the transition of U.S. training operations to Iran, originally scheduled for August 1978, had been delayed because of a lack of facilities to accommodate the student population..." (Emphasis added)

In Award No. 180-64-1, the majority accepted Sylvania's claim that

> "the training Institute equipment was not transferred to Iran because the facilities in Iran for the Institute were never completed by the Respondent", (Emphasis added)

in favor of that claimant. However, in the instant Case, it has closed its eyes to the ramifications of that

decision, and has disregarded this important and fundamental breach on the part of the present Claimant. The delay in delivery of the training institute facility, just as emerges from Harris' report for September 1979, affected the entire IBEX project, because in addition to Sylvania, the other IBEX project contractors, including Ford Aerospace, also assert that their failure to make timely delivery of equipment was due to the fact that the Doshan Tappeh Central Complex was not ready.

3. In addition to the delay in making timely delivery of the training institute facilities, Harris' report for November 1978 and the correspondence exchanged between the Claimant and the Respondent over the course of the performance on the Contract all clearly reflect the fact that the Claimant was considerably and excessively behind schedule in completing other segments of the Contract as well. On page 59 of the Harris report, it is stated that:

> "On a cumulative basis, the total number of milestones missed continues to increase from 165 in October to 189 in November [1978] F.S.C. [Rockwell]... currently has 33 disapproved documents... the quality of the deliverables are [sic] beginning to fall off..."

In paragraph 154 of the present Award, the majority states that "only 20 out of 24 milestones [of Task 2] were complete," and for this reason it concludes that the Claimant was in delay in completing this Task and thus was not entitled to recover the "target" or "maximum" fees. Yet, the majority, which was itself aware of the Claimant's considerable delays, attempts to close its eyes to the facts, and treats the failure to complete the milestones as a minor matter whose only impact was upon the Claimant's fees. It further seeks to avoid arriving at the conclusion that the Claimant is in default owing to its failure to complete more than one-half of the milestones-- i.e., according to the Harris report for November 1978, 189 out of the 315 milestones.

Rockwell, which was itself fully aware that it was behind schedule in completing the various segments of the Contract, requested the Respondent, by its letter of 24 October 1978, to extent its period of time to carry out the Contract, hoping that the Respondent would consent to such request and that Rockwell could persuade the Respondent not to terminate the Contract or to demand the various onerous penalties provided for under Article 6 to Appendix 5 of the Contract. The said Article provides as follows:

> "In addition to above penalties if any delay occurs in starting or progress of work more than 30 day [sic] or completion of works more than 60 days because of the Contractor's negligence, the Employer will be entitled in his own judgement to either prolong the duration of contract or act after the above stated times as follows:
>
> - collection of 0;06% of bank guarantees per day for the first 20 days of delay.
>
> - collection of 0;12% of bank guarantees per day for the second 20 days of delay.
>
> - collection of 0;24% of bank guarantees per day for the further 10 days of delay.
>
> - collection of 0;4% of bank guarantees per day for the last 10 days of delay.
>
> If the delay exceeds more than [sic] 120 days then the Employer can collect the rest of bank guarantees and if wishes [sic] cancel the Contract and in his own judgement determine the amount of relevant damages associated with cancellation and consequently the conclusion of a new Contract and then claim and collect the amount of damages."

Following receipt of the letter of 24 October 1978, General Tavakkoli, the Director of the Communications and Electronic Organization, who had the ultimate responsibility for the project as a whole, gave the responsibility for examining Rockwell's progress of work to General Asrejadid, the Program Director on the project. General Asrejadid reported to General Tavakkoli, by his report dated 17 December 1978, that:

> "Rockwell Company, the construction contractor on the project, will be unable to make timely completion of the construction of the three western stations comprising a part of the Contract (the completion of these facilities will be delayed by approximately one year, and this delay will cause a delay in the work of the other four contractors as well)...
>
> 2. Whatever Rockwell's revised plan is, it would appear to be unacceptable in view of its record and its inability to complete its obligations; therefore, Harris, which is serving as the Systems Integration Contractor, was asked to investigate the matter and prepare a 'recovery plan'..." (Emphasis added)

As noted above, this matter was set forth in Harris' report for September 1978, as follows:

> "Facilities [Rockwell] delays had a direct impact on the program in many ways and Harris had proposed a facilities work-around plan in December 1978 for the consideration of the program director."

Therefore, in December 1978, and totally apart from any force majeure conditions, the IBEX project program director and Harris joined in concluding that Rockwell was unable to perform on its contractual obligations, and that Rockwell's delays had in various respects had a material impact upon the entire IBEX project. The comments made in the margins of the abovementioned report by General Asrejadid indicate that General Tavakkoli had ordered the report to be brought to the attention of the deposed Shah via an American advisor; and then, on behalf of General Tavakkoli, Colonel Khazai sent Rockwell a letter dated 10 February 1979, wherein he referred to Rockwell's breach of contract and then proceeded to terminate the said Contract as follows:

> "...Therefore, this Organization, while reserving its rights with respect to the Company's [Rockwell's] failure to perform on its obligations, hereby terminates the abovementioned Contract. You are hereby directed to deliver the uncompleted works, and to return the remaining monies at the Company's disposal as advance payments, as well as the balance of the letters of credit. Moreover, the necessary measures shall be taken in connection with the penalties to

which the Company is liable on account of its failure to make timely performance on its tasks."

As stated in the affidavit of Ehsanollah Samimi Mofakham, this letter was returned to the Communications Organization due to the fact that Rockwell's Tehran office had been closed and all its employees had been evacuated. Unfortunately, the text of this letter was not later notified to Rockwell, owing to the force majeure conditions in Iran and the flight from Iran of the authorities in charge of the IBEX project, as well as due to changes in the project personnel and the ignorance of the replacement personnel as to the existence of the said letter. In the footnote to paragraph 92 of the present Award, the majority seizes upon the nondelivery of the letter to Rockwell, in order to disregard all these indisputable facts on the strength of this pretext. Yet it is categorically clear that Rockwell was informed of the existence of this important matter, either directly or through the United States advisors, and it is highly unfair that the majority has sacrificed justice for mere formality, on the excuse that the letter was not delivered to Rockwell.

4. There is also ample further evidence, all of which indicates that Rockwell was significantly late in performing on its obligations and consequently in breach of contract. Inter alia, the audit report by Touche Ross, the IBEX project auditor, in connection with the operations up to November 1978 confirms this point and states the percentages of deficiencies in the work on various contractual tasks as follows:

Task no.	Percentage deficiency
1	30
2	4
4	47
5	44
6	10
7	20
8	50

10	61
11	61
12	37
13	2

The Harris report for September 1979 reveals that Rockwell never remedied the said deficiencies. In addition, on the basis of this report, Rockwell terminated the contracts of all its subcontractors on the project after leaving Iran, and refused to participate in the monthly coordination meetings of the project contractors. In its report, Harris states that:

> "... FSC advised Harris at a monthly Segment Review during February that all subcontractors were being terminated. On 1 March 1979 FSC formally declined participation in any program status reviews or monthly reviews until Harris requested FSC reconsideration of a meeting to determine facilities Status at the time of termination of work, but FSC declined to participate..."

In my opinion, the above evidence in itself constitutes sufficient proof that Rockwell was in breach of contract. The majority has disregarded all this evidence, and since in previous IBEX cases it was guilty of serious errors and unfounded decisions in connection with the manner in which the contract was terminated, it has made the same mistake and compounded its injustice in the instant Award too, for the sake of consistency with its prior decisions.

Frustration of the Contract

Not only has the majority failed to award against the Claimant for breach of contract, but it has also purposely excluded from its examination the effects upon the Contract of events arising from and related to the Islamic Revolution of Iran, and it has disregarded the fact that by changing its policy towards the then newly-established Revolutionary Government of Iran, the United States Government frustrated Contracts No. 119 and 120. I shall not deal at

length here with the status of the IBEX project or with the fact that the project was to be implemented in order to advance America's regional and anti-Soviet policies, and at Iran's expense at that, and also that the United States Government was the primary beneficiary of this project, as well as its prime mover; I believe that even from the contractual standpoint alone, America's role as the catalyst for Contracts No. 119 and 120 is quite obvious, for there are numerous places in those contracts which point to America's role in this regard. The most important aspect of that role is, the granting by the United States Government of export licenses for the export, use and procurement of the technical equipment and documents needed by the Contractor, subcontractors and Employer -- it being the duty of the Contractor, pursuant to Article 2.15 of the Contract, to provide the said materials.

As the following terms and conditions imply, the project's viability depended upon whether or not the United States Government decided to issue export licenses. Article 5 to Appendix 4 to the Contract states that:

> "The Contractor shall be responsible to obtain the approval of the related Department of the United States Government for the performance of this Contract..."

Article 10 to the said Appendix provides that:

> "The Contractor will start the works which does [sic] not require the U.S. Government approval at the commencing date of the Contract."

And pursuant to Article 11 to the said Appendix,

> "The other works which need U.S. Government approval will not be effective until such approval be granted."

Moreover, Article 6.6 of the Contract, under the heading of "Force Majeure," also reveals America's decisive power over the viability of the project, stating that:

> "If the U.S. Government approvals... are not received within 90 days after signing this contract, the Employer has the right to extend this period or to cancel the Contract."

In view of the fact that this provision appears under the heading of "Force Majeure," in reality any failure of the United States to issue the necessary licenses would constitute an instance of force majeure, or in more precise terms, an act of State. In other words, in these contracts, the United States Government stands as a third party in whose favor the parties to the Contract have undertaken certain obligations and conditions. It was the United States Government that had paved the way for commencing performance on the Contract, and it was the party that could halt the Contract by not issuing the licenses, or which could abort the project by indicating that it had no intention of ever issuing such licenses. The status of the United States Government as the beneficiary of this Contract can be clearly understood in the light of the final sentence of both Article 196 and Article 234 of the Iranian Civil Code, [1] each of which discusses the permissibility of providing for conditions in favor of third parties. For example, Article 3 to Appendix 4 of the Contract emphasizes the need to safeguard any secrets and intelligence data derived from the implementation of the Contract, and it forbids their divulgence or transmittal to the communist countries.

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[1] Pursuant to the final sentence of Article 196 of the Iranian Civil Code:

> "... however, it is also possible, in the course of a transaction in which someone engages on his own behalf, for him to undertake an obligation for the benefit of a third party."

And according to the final sentence of Article 234 of that Code:

> "A condition as to performance signifies a condition that is placed upon either of the transacting parties or a third party, for performance or nonperformance."

In addition to the contractual provisions mentioned above, the role of the United States Government can be seen through the military advisors whom it had assigned in order to supervise the various stages of the performance on the Contract. By way of example, when the Claimants' invoices had passed through their various contractually-stipulated stages and had been approved by the Employer, the latter gave the invoices to the American advisors, so that they could submit them to the Contractor in order for him to receive payment (by drawing down a letter of credit). There can be no doubt that these advisors had been assigned in order to provide the United States with information on the status of the performance on the works, and to ensure United States control over the project. With the blowing of the winds of revolutionary change in mid-1978, the United States Embassy eventually ordered the Claimant and its American personnel to leave Iran.[2] This document clearly shows that the United States had become so concerned over the direction of the developments in Iran that it considered the implementation of the project to be inimical to its own future interests, and that it had therefore made preparations for evacuating the Claimant, its personnel and its subcontractors from Iran, as well as for halting the works. This evacuation from Iran subsequently coincided with the onset of force majeure conditions, which certainly lasted until July, when the Air Force sent the United States contractors identical termination letters.

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[2] In one part of its letter dated 10 January 1979 to General Asrejadid, Rockwell stated that:

> "...The Embassy [the U.S. Embassy in Iran] further advised the American Companies to remove all non-essential personnel from Iran."

In my opinion, the letter of 16 July 1979 constitutes no more than an express statement of the prevailing situation whereby the Contracts had been met with force majeure conditions and had thus been halted, as a result of the developments stemming from the Islamic Revolution in Iran. Thereafter, as stated by Mrs. Dadbeh, who participated in the September 1979 meetings, the Claimant's representatives expressly told Colonel Eskandarzadeh that the United States Government had terminated the Contracts, because that Government refused to issue or renew the various licenses involved, and that it would be necessary to obtain America's renewed agreement, if the Contract were ever to recommence.

In short, these Contracts lost their purpose and raison d'être, in America's view, after coming up against force majeure conditions, because the United States' purpose in initiating the IBEX project had been, to acquire a highly-advanced intelligence gathering system whose results would always be available to America and at the service of its strategic interests. When the Islamic Revolutionary Government came to power, America found, through the continual assessment which it made of the revolutionary situation in Iran, that the aforementioned objective was unattainable. On the other hand, the new Iranian Government had a different reaction to the Contracts, and desired to purchase scientific technology and knowledge, but without United States control and hegemony over Iran's policies and armed forces. In this way, the convergence of opinion which had prevailed between the former Iranian regime and the United States Government in connection with the IBEX project was transformed into a divergence of objectives and policies following the Islamic Revolution in Iran.

The best evidence that the Contracts had been totally halted -- whether in Iran or abroad -- after December 1978 is that the Claimant's representatives who participated in the September 1979 meeting submitted only one over-all

invoice to the Respondent, for the months subsequent to the Revolution -- which invoice they must surely have prepared after receiving the Respondent's letter dated 16 July 1979. If they had performed any work, they would certainly have submitted an invoice, pertaining to the time thereof, to the Respondent at that same meeting.

The fact that America perceived the IBEX project to have been frustrated became entirely obvious from America's action in giving asylum to the fugitive Shah of Iran -- who had been the direct tool of America's twenty-five year hegemony over Iran, had been involved in the slaughter of tens of thousands of Iranian citizens, and had brought about the plunder of billions of dollars of the nation's wealth -- which led to the intensification of the crisis in the relations between Iran and the United States and the seizure of the United States Embassy in Iran.

The United States must surely have been highly relieved, upon witnessing the events of November 1979, that it had halted the performance on the IBEX project in November of the preceding year. As the Tribunal is aware, Ford Aerospace has submitted compelling evidence that the United States Government had refused to renew the necessary licenses for completing the works relating to the IBEX project ever since the beginning of 1979.[3] And in the meeting of September 1979, Rockwell's representatives stated that the United States Government was not issuing the necessary licenses for continuing with the operations relating to Contracts No. 119 and 120.

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[3] See para. 52 of the Award by the majority in Ford Aerospace & Communications Corp. and The Islamic Republic of Iran and Bank Markazi Iran, Award No. 289-93-1; also the Dissenting Opinion of Judge Mostafavi in that same Case; and 14 Iran-U.S. C.T.R. (1987) 24-37, 57-58.

In addition to the foregoing, the Tribunal is aware, both as a matter of judicial notice and as a universal fact, that following the Islamic Revolution in Iran, the United States barred the export of military goods and services to Iran; and any substantive examination and findings by the Tribunal should take this fact into account. In my opinion, Contracts No. 119 and 120 lost their underlying purpose, in America's view, following the onset of force majeure conditions owing to the fundamental change in the conditions that had underlain the execution of those contracts; and the United States Government's change in policy impelled that Government to prevent the continuation of the contractors' work on a permanent basis. As a result, if one does not subscribe to the position that the Claimant was in breach of contract, the only feasible solution to the question of how the Contract was terminated is provided by Article 6.6 of the Contract.

The majority should have considered the Contract to have been terminated owing to force majeure, on 11 February 1979 -- i.e., the day on which the Islamic Revolution in Iran was victorious and when, in America's view, the IBEX project was no longer viable -- and pursuant to the final paragraph of Article 6.2 of the Contract, the majority should have awarded the Claimant only its relevant expenses in accordance with its last monthly progress report that had been accepted by the Buyer.[4]

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[4] See, for further discussion of the point that the IBEX contracts had been frustrated, my Dissenting Opinion in Watkins-Johnson Co. and Watkins-Johnson Ltd. and The Ministry of Defence of the Islamic Republic of Iran and Bank Saderat Iran, Award No. 429-370-1.

Conclusion

As has been stated in the foregoing paragraphs, Rockwell was in breach of Contracts No. 119 and 120, and the Tribunal should have determined the quantum of the damages incurred by the Respondent as a result of that breach, and awarded it those damages. In my opinion, the instant Award, whereby the Tribunal has awarded the Claimant approximately $12 million, is totally unfounded and unfair. Even if we were to disregard the Claimant's breach, the clear and unambiguous facts would dictate that Contracts No. 119 and 120 be deemed to have been terminated owing to force majeure, and thus that the Tribunal should have acted on the basis of Article 6.2 of the Contract, in order to settle the accounts between the Claimant and Respondent. Article 6.2 provides that:

> "In this case [occurrence of force majeure conditions]... the price of services rendered by the Contractor up to this date [of the onset of force majeure conditions] [must] be paid according to the latest monthly progress report accepted by the Employer."

If the majority had rendered its Award on the basis of this Article, the invoices for November and December 1979, totalling $3,248,890 on the basis of the latest monthly progress report accepted by the Buyer, would have been owing to the Claimant; and this amount should have been deducted from the sum of $14,387,890, representing the balance remaining from the advance payments, with the net amount thereof, i.e., $11,381,411, being restituted to the Respondent.

The claim for performance through Contract termination

Paragraph 98 of the instant Award bases the award of incurred costs and related fees on Article 6.7 of Contracts No. 119 and 120. The said Article provides that:

> "Whenever the Employer terminates the Contract without the fault of Contractor, the Employer will pay to the

> Contractor approved actual costs up to the time of termination and related fee plus approved actual cost of termination." (Emphasis added)

Article 14 of Appendix 5 to the Contract defines "cost" as follows:

> "'Cost' as used throughout this Contract are those expenditures which have been incurred in performance of work of this Contract, in accordance with the terms and conditions of this Contract and approved by the Employer or his representative." (Emphasis added)

Based on this contractual definition, those alleged costs of the Claimant are payable which have, firstly, been "incurred in performance of work of this Contract," and secondly, been "approved by the Employer or his representative."

In other words, any award for payment of costs to the Claimant should have been made in conformity to, and on the basis of, the work actually performed; otherwise, the abovementioned Article 14, which was drawn up pursuant to a meeting of minds between the Parties to the Contract, would be of no effect.

The works which were the subject of the Contract have been described in the Statement of Work, Appendix 1 to the Contract, in great detail over several hundreds of pages of text, and the contractual price for each segment of the work on each task set forth in that Appendix has been quantified. In addition, the works specified in the Statement of Work were to be performed and delivered to the Employer and his representative in accordance with a schedule that was built into the Financial Plan. The plans, drawings, and specifications relating to the Doshan Tappeh Central Complex, plus the other facilities that were to be built in various remote areas of Iran, and the high-frequency transmitters, intelligence and security equipment, hangars,

training program for operating the intelligence-gathering equipment, etc., the requirements relating to spare parts, construction management programs, the construction support equipment for Doshan Tappeh and other facilities, were all called "data deliverables" under the Contract, and pursuant to Article 3.1.4.6, they were to be delivered to the Employer or to Harris, its representative. Based on Article 2.A.1. of the Invoice certification and processing procedure, which was part of the contractual procedures for certifying invoices, Harris was required to evaluate the data deliverables on the basis of the Statement of Work and the Buyer's directives, and to prepare a report taking into account the milestones completed and any work deficiencies; and that report, he was to provide a full description of the Claimant's progress of work and to specify the percentage thereof. Harris' reports were examined in the monthly meetings of a group known as the "Contract Administration Working Group," which was made up of Harris, a representative from the Field Support Services (FSS) unit (the United States advisor), and Touche Ross (the Project Auditor). After it was approved, Harris was to give it, together with the Claimant's monthly invoices, to Touche Ross for auditing of the costs and for a determination of the amount that was payable to the Claimant. Then, based on an accounting schedule, Touche Ross was to examine all the items listed in the invoices, and to arrive at the amount payable in view of the work progress percentage as set forth in the Harris report. Touche Ross would audit the costs in the light of purchases of machinery and raw materials, payment of wages and general costs (overhead). A complete copy of Touche Ross' auditing program is available in the present Case. After verifying the costs and determining the amount payable to the Claimant, Touche Ross would submit its audit report, together with the Claimant's invoice, a list of data deliverables and the work progress report, to the Field Support Services unit, to be delivered to the program director (General Asrejadid). After approving the invoice,

the program director returned it to the FSS, which forwarded it via the Systems Integration Contractor (Harris) courier to the Claimant, for reimbursement by the latter. As a result of the announcement of force majeure conditions in the early stages of the Islamic Revolution, and subsequent thereto the termination of their contracts by Harris and Touche Ross, the system for approving and auditing the Claimant's invoices ceased, for all practical purposes, to exist from December 1978 onwards, and Harris and Touche Ross were in default on the performance of their contractual duties. In paragraph 117 of the Award, the Tribunal also concedes that the said contractual procedures came to a complete halt. I shall analyze these contractual procedures below from the viewpoint of the receipt and approval of invoices, together with the events which, according to the majority, occurred after December 1978.

Receipt of invoices

The Respondent has repeatedly stated that it never received any monthly invoices after December 1978. In paragraphs 100 and 111 of the Award, the Tribunal concludes that the monthly invoices for the period from November 1978 through June 1979 were received by the Ministry of Defence because, based on the available evidence in the Case, they were sent together with Touche Ross' letter addressed to General Asrejadid, the program director. This conclusion on the Tribunal's part is totally erroneous and unfounded. As set forth in the contractual Invoice Certification and Processing Procedures, Touche Ross always sent its audit report, together with the Claimant's invoices, to the FSS representative and addressed to General Asrejadid, whereupon the said representative forwarded those documents to General Asrejadid. Therefore, the Tribunal has not determined whether or not the FSS representative forwarded Rockwell's invoices to the Ministry of Defence along with the

letter from Touche Ross, because the mere fact that Touche Ross' letters were addressed to General Asrejadid along with the invoices does not constitute evidence that the Ministry of Defence ever actually received those invoices. Even the Claimant itself has not indicated whether or not the FSS representative submitted the Contractor's invoices to the Ministry of Defence. Unfortunately, the Tribunal has not carefully followed all the links in the chain of the contractual invoicing procedures, and for this reason it has, whether intentionally or inadvertently, failed to note that according to this procedure, Touche Ross was supposed to submit invoices to the FSS representative, and not to the Ministry of Defence. It is also quite natural, at a time when the United States Government's policy towards the then newly-established Revolutionary Government had totally changed and the United States Government was barring shipment of even those goods which belonged to Iran, that its representative would refuse to forward invoices to Iran, in order thereby to find a pretext for its breaches of contract, i.e., its nonissuance of the necessary licenses and its failure to send military goods. In order to conceal this erroneous and unfounded decision on its part, the Tribunal states in paragraph 112 that Touche Ross may have changed its practice following an alleged directive to Harris in mid-February 1979 from Colonel Jalali, the Ministry of Defence representative, to the effect that no further delivery of IBEX project data was to be made to Iran.

As can be seen from the text of this letter, as set forth in paragraph 112, it was concerned with halting deliveries of "program data deliverables," and not with halting invoices. As stated above, the program data deliverables related to the plans, drawings and documents specified in the Statement of Work. The invoices were not in any sense covered by this definition, and they were distributed in accordance with separate contractual procedures.

Approval of invoices

The Claimant alleges that it presented an over-all invoice at the meeting of 21 September 1979, inclusive of the period from January 1979 through the termination date, and also covering the estimated post-September 1979 costs. On the basis of the available evidence in the Case, this invoice was for the amount of $24,120,454 for Contract No. 119, and $3,159,400 for Contract No. 120. As set forth in the Statement of Work, most of the works under the Contract were to be carried out in Iran. In sum, Rockwell's contractual duties consisted of the following:

- Planning and construction of a two-storey "Central Complex" at the Air Force base at Doshan Tappeh in Tehran, for the establishment of an intelligence analysis center, a training institute, logistics station, supplies and machinery warehouse, restaurant, and power generating equipment building (Task 2);

- Construction of a regional data-processing center at the Shahrokhi Air Force base in Iran (Task 3);

- Construction of ground-based stations in western Iran, Nos. 1, 15 and 17; and of an access road (Tasks 4, 5, 6);

- Construction of an air support center at the Mehrabad Airport in Tehran, consisting of a photographic center and a hangar for the two Boeing-707 airplanes that had been especially outfitted for the IBEX project by E-Systems, one of the other IBEX project contractors (Task 7);

- Preparation and installation of communications equipment for linking the intelligence-gathering apparatus

in the various regions of Iran to the Doshan Tappeh Central Complex (Task 8);

- Establishment of staging areas for equipment for the regional analysis centers, including the analysis center at the Shahrokhi Air Force base (Task 9);

- Construction of transmitter and receiver sites near Tehran (Tasks 10 and 11);

- Ground site W12 improvements, in the west of Iran (Task 12);

- Doshan Tappeh C-130 hangar improvements (Task 13);

- Provision of spare parts and purchase of construction equipment for use in building the facilities (Tasks 14, 16);

- "General facilities management, engineering planning and support" for all the works on the Contract (Task 1).

As can be seen, most of the works under Contract No. 119 consisted of construction, and were to be performed in Iran. On 30 December 1978, Rockwell declared a state of force majeure conditions and withdrew all its personnel and subcontractors from Iran; and from that time on, it did not send any employee or representative to Iran, except to participate in the September 1979 meeting. There is no dispute between the Parties to the Contract, as to the point that Rockwell did not perform any work in Iran after January 1979. As has been noted in the preceding paragraphs of the present Dissenting Opinion, Harris stated in its report for September that from January 1 on, "Construction was on stop-work status." Therefore, the Respondent already knew, when it received an invoice for over $25 million from Rockwell at the September 1979 meeting, that neither

Rockwell nor its subcontractors had performed any work whatsoever in Iran since December 1978. As stated in the affidavit of Ehsanollah Samimi Mofakham, the Respondent objected to the said invoice at that same meeting, and asked the Claimant to send to Iran the data deliverables which were the subject of the Contract, plus the machinery and equipment for which the Claimant had allegedly incurred the expenses listed in those invoices, in order for Iran to examine the invoices and make payment thereon. The Claimant gave no reply to this request from the Respondent. Once more, the Respondent stated to the Claimant, in its letter dated 31 December 1979:

> "With reference to your letter No. 614980 dated 12 Oct. 1979, will you please send to Tehran your fully empowered representative holding power of attorney for handing over the works completed as reflected in your Report of Contract 119, and settling accounts and determination of the contract."

The Respondent received no reply to this letter either, until the Claimant informed the Ministry of Defence in June 1980 that it was formally closing down its IBEX project office in Tehran and would cut off the custodial and security services that were being performed by several of Fischbach-Oman's Iranian employees.

Therefore, as can be seen, even though Rockwell completely ceased to perform on its contractual duties as from December 1978, it demanded that the Respondent pay on an invoice for more than $25 million, for works allegedly performed after January 1979 and up to the date of termination of the Contract. The Respondent repeatedly requested that it be sent the data deliverables and equipment, but the Claimant disregarded those requests. Despite these facts, the Tribunal concludes in paragraphs 104 and 105 of the Award, in reliance on Articles 14.6 and 6.1 of the Contract, that "[these provisions] establish a duty on the Ministry's part to timely object to invoices in writing and with specificity." However, wasn't the abovementioned

letter of 31 December 1979 by the Respondent a timely, written and specific objection? Perhaps what the Tribunal has in mind, is that the Respondent state, for instance, that it has examined the figure of $8,511,715 in the over-all invoice, relating to the alleged works for the month of January, and that since certain of the items allegedly included under that amount have not been delivered to Iran, the Respondent is specifically objecting to the price demanded for these undelivered items! Or, for example, perhaps the Respondent should have compared the claimed amount of $11,470,833 entered in the over-all invoice with the work reports of Rockwell's employees and the goods delivered, and reached the conclusion that part of that sum does not relate to the goods and services allegedly delivered! How could an invoice possibly be examined without regard to the goods and services to which it refers? As was noted in the preceding pages, in the course of the discussion of the invoicing procedures, Harris established what works had been completed, and determined the percentage of progress of works, in the light of an examination of the data deliverables and machinery and equipment, spare parts and other contractual works, and then informed the Claimant of any deficiencies in the work. The fact that the invoice certification procedure fell into abeyance owing to the cessation of work by Harris and Touche Ross cannot excuse the Claimant from his contractual duties, which included the delivery of the equipment and data deliverables for the program. Only when the Claimant made this data available to the Respondent, could the latter examine the invoices and notify the Claimant specifically of any objections he might have. The Respondent repeatedly requested that the Claimant deliver the contractual works to him, so that he could settle the accounts. In my opinion, the Tribunal's findings in paragraph 105 of the Award, to the effect that the Respondent had a duty to pay the invoice even in the absence of the data deliverables and of the equipment that was supposed to be sent, or

at least in the absence of documentation confirming that the work had been performed, is erroneous, because in the light of the terms of the Contract, not every scrap of paper on which certain immense sums have been demanded constitutes an invoice. The term "invoice" is applicable where such document is sent to the Respondent together with at least the minimal data and documentation necessary under the terms of the Contract, and that is when a failure on the Respondent's part to object to the invoice could be used as evidence against him. Unfortunately, the majority has ignored Rockwell's contractual obligations under Article 3.1.4.15 of the Statement of Work, concerning the delivery of the equipment and data deliverables, and has based its decision entirely on the issue of why the Respondent failed to object to the invoice in a timely manner. On the obverse side, the majority has, with an astounding leniency and generosity, excused the Claimant from its burden of proof that it really incurred the over $25 million in alleged costs for a period during which the Claimant did not perform any work at all, either according to the evidence which it has itself submitted, or on the basis of the September report.

It is stated in paragraph 133 of the Award that the Ministry of Defence's argument that Rockwell's monthly reports essentially contain financial information, and thus do not prove performance of the Contract item by item, is incorrect. The Award then goes on to state that "this was ... all that Rockwell was contractually obligated to produce in these reports." Here too, the Tribunal sets aside the terms of the Contract in favor of the Claimant; and in pursuit of its objective, it accepts these reports, which are devoid of any evidentiary value whatsoever, as confirmation of the Claimant's assertion. Article 3.1.4.6. of the Statement of Work, relating to the monthly reports, provides in relevant part that:

> "The seller shall prepare and deliver a monthly technical, financial and schedule status report by the 20th day of each month... This monthly report shall summarize technical status and correlate fiscal data with schedules and accomplishment." (Emphasis added)

Therefore, contrary to the Tribunal's finding, Rockwell was required to present technical and work progress reports in its monthly reports, and to submit to the Employer the financial items thereof in the context of the work performed (accomplishment) and the list of data deliverables (schedule). As stated above, Rockwell was required to deliver the data deliverables and equipment, in addition to these monthly reports, to Harris in order for the latter to be able to determine and assess the progress of works percentage or deficiencies. The monthly financial reports merely contained cost items for materials, wages and overhead, and a comparison thereof with the Financial Plan; and the existence of those reports cannot constitute proof of the validity of the items entered therein. Harris' report for the month of September, moreover, refers to this breach on the Claimant's part. In relevant part, the report states that:

> "Monthly reports consisting almost entirely of financial status have been submitted." (Emphasis added)

Moreover, in the same paragraph of the Award, the majority states that "the Ministry should have replaced these contractors [Harris and Touche Ross]..." This finding by the Tribunal is truly derisive and illogical. It is as though the majority does not know, or does not wish to know, that it is adjudicating the claims between Iran and the United States. The majority seems to be unaware that the American advisors and corporations held complete control over the Iranian armed forces and what the West characterized as the "modernization" of the Iranian Army; and precisely due to this ignorance -- or this expedient "ignorance" -- it holds that it was incumbent upon the Ministry of Defence to find replacements for Harris and Touche Ross

following the Revolution, in a situation where the fate of all its projects lay in the hands of the United States Government and its corporations. At a time when the United States Government had evacuated United States nationals living in Iran from that country and had halted the project, and at a time when it was intentionally refraining from issuing export licenses and the project contractors were invoking such nonissuance of licenses as being among their reasons for stopping work and failing to continue to perform on their contracts, how could the Ministry of Defence possibly have been able to select another contractor for such a sensitive military project? This finding by the majority confirms, once more, that its objective was not to conduct a scrupulous, just and impartial adjudication, but rather to award in favor of the United States claimants involved with the project, with the help of whatever arguments were available, no matter how flimsy and unfounded.

The burden of proof, and the Claimant's failure to bear it

Noting that "proof of the facts underlying the claim presents extreme difficulty," the majority begins by taking the position that the Claimant's allegations themselves constitute prima facie evidence, in relying upon documents and papers which do not in the least evidence its entitlement and which are in fact merely reiterations of its claims. As will be seen below, the Claimant has filed no documentary evidence whatever in proof of its claim. In principle, the Claimant is claiming for its alleged costs over a period of time when, by the Claimant's own admission and as corroborated by the Harris report, no work at all was performed. The Invoice certification and processing procedures were totally disrupted due to the notice of force majeure and to noncooperation on the part of Harris and Touche Ross. No technical report, data deliverables, or equipment and machinery, were ever delivered to the Respondent. The majority has forgotten that pursuant to

Article 24, paragraph 1 of the Tribunal Rules, "Each party shall have the burden of proving the facts relied on to support his claim or defence." It has also forgotten that according to the express language of the said provision, and pursuant to the elementary principles of adjudication, it is first and foremost the Claimant who must prove the meritoriousness of its claims; and for such proof, it certainly bears the responsibility for the contractual provisions. As proof of its claim, the Claimant has merely filed a photocopy of the invoices relating to the period after September 1978. How can this circular reasoning and these invoices constitute proof of their own validity? Proof of the validity of these invoices depends upon it being proved that the works under the Contract were actually performed, and this proof was not forthcoming since the Claimant intentionally refrained from delivering the technical reports, etc., despite the Respondent's repeated requests for same -- and this is because the Claimant did not actually perform any work at all. In such a situation, how can be Respondent possibly be expected to rebut the Claimant's allegation?

One must inevitably conclude from the majority's statement, that "proof of the facts underlying the claim presents extreme difficulty," that every allegation brought before a judicial forum has to be proved. In my opinion, the reason why it is difficult for the Claimant to prove its allegation is that in principle, its claim has no basis in fact, and not that it is inherently difficult to prove. Even if it is difficult to prove a claim, it is the owner of the claim who must bear the consequences of such difficulty of proof; the burden of such proof cannot, in justice, be imposed on the adverse party, on the pretext that it is difficult to prove the claim. And even if, under certain circumstances, "proof of the facts underlying the claim presents extreme difficult," the majority could at least appoint an independent expert to investigate the

claim, if it is unwilling to dismiss the Claimant's claim for lack of evidence in accordance with its own mandate. In my opinion, Rockwell did not perform any work after December 1978, and this is why it cannot prove its claim that it incurred approximately $25 million in costs after December of 1978. Regrettably, despite the abundant and conclusive evidence available, all showing that the Claimant did not perform any work, the majority has sacrificed the substance of the issue to its novel and unfair formalism, and has thereby unjustly awarded the Claimant millions of dollars.

Rejection of the Respondent's repeated requests to refer the issue to an expert

In order to demonstrate the baselessness of the Claimant's claim as to the amount of work performed, the Respondent relied on Article 27 of the Tribunal Rules and on the practice of both the municipal and international courts, from the first to the last stages of adjudication, in requesting appointment of an expert to inspect and visit the project sites. Unfortunately, and contrary to the recognized principles of adjudication, the majority denied all of the Respondent's requests for appointment of an expert with an unparalleled obstinacy and a blatantly stubborn manner, lest its unfounded subjective notions and one-sided prejudgments be confronted with some serious, tangible obstacle. Moreover, like the Scholasticists of the Middle Ages who used to debate in the corridors of the academies over the number of teeth in a horse's mouth, instead of actually going out and counting them, so too has the majority preferred to resort only to the scraps of paper submitted by the Claimant, which were fabricated and filed years after the claim was brought, and also to its own conjectures and prejudgments, in order to determine the number of milestones accomplished by the Claimant -- instead of making an objective and practical examination of those

milestones at the project site. However, unlike the Scholasticism of the Middle Ages, the Western-oriented scholasticism of the majority in this twentieth century is not altogether unproductive. This time, the majority's subjectivity has borne tangible and earthly fruit. Since the majority's flights of fancy have served as the direct and facile instrument for placing the Claimant's hands upon the one-billion dollar Security Account, they are not a bit inferior to the post-Renaissance pragmatism of the twentieth century.

The majority states that since the Ministry of Defence has failed to sufficiently prove its case, and since it is not the duty of a Tribunal-appointed expert to argue on behalf of a party's claims, the request for appointment of an expert is therefore denied in view of the circumstances of this Case.

In my opinion, the majority has acted unjustly in denying the request for appointment of an expert; for the circumstances of this Case required, rather, that an expert be appointed.

In order to prove the need for an expert opinion, the Respondent has referred to the Harris report for September 1979, in connection with Rockwell's breaches of contract and particularly with regard to Rockwell's failure to perform any construction work, its refusal to participate in the monthly project meetings, its termination of the contracts of its subcontractors in February of 1979, and its failure to prepare and submit monthly reports conforming to the terms of the Contract. It has also provided the Tribunal with a list of the defects in the construction works, which list has been prepared by a team of qualified Air Force engineers. Then, in light of the foregoing, as well as in view of the fact that the Claimant has failed to prove his claim and refused to provide the data

deliverables and contractually-stipulated equipment and machinery either, the Respondent has requested that the Tribunal appoint one or a number of experts. The majority's argument that it is not the duty of an expert to argue on behalf of either Party's claims does not justify its refusal of the request for an expert, because if, following careful and objective investigations, an equitable and qualified expert reaches the same conclusions, on the basis of the preponderance of the facts, evidence and calculations, as those asserted by either of the Parties to the adjudication, could it still be said that there is no room for referring the matter to an expert since he has argued in support of that Party? Does that task which all judicial fora perform -- i.e., in that following a substantive and legal examination, and a weighing of the claims of the adjudicating parties, they determine that the arguments and claims of one of the parties are justified and also, in their capacity as a judicial forum, add further arguments to those of the prevailing party pursuant to making an award against the adverse party -- deserve to be rejected and denied, on the pretext that it is not the task of a judicial forum to argue on behalf of a party's claims? It is the task of a Tribunal-appointed expert to endeavor to ascertain the truth, within the framework of his "terms of reference" and under the Tribunal's supervision. Within these limits, the expert actually carries out a part of the Tribunal's own tasks, albeit of course those objections raised by the adjudicating parties against the expert opinion, and possible modifications by the Tribunal, are also to be taken into account. Therefore, the statement that it is not the task of a Tribunal-appointed expert to argue on behalf of a party's claim bears a closer resemblance to an excuse that is more iniquitous than the crime itself -- an excuse advanced in order to relieve the majority of the trouble of conducting a scrupulous and professional adjudication based on principles, an approach which is naturally time-consuming and in which the majority has no patience to engage -- than it does to proper judicial

reasoning in justification of a denial of the request by one of the parties to the claim. If the majority had made its finding in an impartial manner and on the basis of the available evidence, it would certainly have concluded that the Claimant was in breach of contract and should make restitution to the Respondent of not only all its advance payments, but also the damages suffered by the Respondent, just as is provided for under the terms of the Contract.

The majority fails to note that even where an international tribunal has not been expressly granted the right to refer a matter to an expert, yet, on the basis of the general legal principle that international tribunals can resort to all necessary means and avenues for ascertaining the truth and discharging their duty, they can also avail themselves of the institution of the expert opinion.[5] And this is not to mention a situation where, in accordance with Article 27 of the Tribunal Rules, the Tribunal has been expressly granted the right to make use of an expert. It is true that it is, ab initio, the Tribunal's prerogative -- and not its duty -- to refer the issue to an expert. Certainly, however, in exercising its authority it must be mindful of certain limitations, and must differentiate between discretion and "pouvoir arbitraire." The Tribunal cannot arbitrarily deny all requests for an expert wrongfully and without reason, on the excuse that the language of Article 27 is not cast in the imperative mood. As stated by Judge van Eysinga in the Oscar Chinn case:

> "Il faut de très serieuses raisons pour refuser une expertise demandé par les parties."[6]

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[5] M.G. White, The Use of Experts by International Tribunals, Syracuse U Press, New York, 1965, p. 73.

[6] L'affaire Oscar Chinn, 12 decembre 1934, C.P.I.J., serie A/B p. 46. ["There must be very weighty reasons for denying a request by the parties for an expert opinion."]

Contrary to the majority's supposition, one of the instances where it is necessary to refer a matter to an expert is, when the parties have failed to produce sufficient evidence ("insuffisance des preuves"), whereupon the judge resorts to an expert opinion in order to discharge his duty -- which is, of course, to strive as far as possible in seeking to ascertain the truth and to gain the clearest possible perception of the dimensions of the dispute. Even if we take the position that the majority's finding that the Respondent has failed to produce sufficient evidence "in order to prove his pleadings"[7] is justified, the Tribunal should have granted the Respondent's repeated requests to refer the matter to an expert.[8]

One of the few instances where, according to most jurists, the Tribunal is not required to grant a request for an expert opinion, is where nothing is to be gained by doing so; whereas in the present case, the majority's conclusions signify that it could have been highly productive to refer the matter to an expert, since according to the majority, an expert opinion would cause "the Tribunal to argue on behalf of one party's claims." Even if the Respondent had made no request whatsoever for referral of the issue to an expert opinion, the Tribunal would still have been required to act ex proprio motu, in issuing an Order referring the matter to an expert opinion, so as not to be remiss in discharging its duty -- namely to take the proper

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[7] It is strange that the majority holds that the Respondent must sufficiently prove its pleadings, and yet makes a prima facie finding in favor of the unproven claim of the Claimant, who in all legal systems bears the burden of proof, on the pretext that "proof of the facts underlying the claim presents extreme difficulty."

[8] In Switzerland, if either of the parties to a claim requests that an issue be referred to an expert in order to clarify a matter that requires expert knowledge, the court is obliged to grant the request.

and appropriate steps in order to ensure justice on the basis of the best possible perception of the facts, given that the majority itself admits that proof of the facts underlying the claim presents extreme difficulty, and also given, as Witenberg states,[9] that the judge's duty to participate actively in the discovery of the facts in a case constitutes a principle of international arbitration law. Notwithstanding all the conditions requiring referral to an expert opinion in the instant Case, the majority has stubbornly maintained its refusal to agree to such referral, and has denied the Respondent's repeated requests for referral to an expert opinion.[10]

Net adjustments

By invoice No. 119-016 for January 1979, the Claimant invoiced the Respondent for a total of $6,179,257, plus expenses allegedly incurred in the month of January, thereby demanding in all the sum of $8,511,715 from the Respondent, pursuant to a spurious invoice.

The sum of $6,179,257, which was computed following the progress of works assessment by Harris and Touche Ross,

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9 "Le droit international arbitral... applique deux principes inconnus de certains droits internes... c'est d'abord l'obligation pour les parties de collaborer a la preuve; c'est ensuite la faculte sinon meme le devoir pour l'arbitre de participer activement a la recherche des faits." Witenberg, L'organization judiciare, la procedure et la sentence Internationale, Paris, Pedone, 1937, p. 237.

10 It is interesting that the majority in the instant Award has never yet granted a request for referral to an expert opinion, in any of the cases which have culminated in issuance of an award, even though in many of these cases, the Iranian respondent repeatedly, and with justification, requested referral to an expert. This majority is, in principle, reluctant to resort to an expert opinion.

stands for the value of the defects and deficiencies existing in the Claimant's performance of its works through December 1978, a part of which amount Touche Ross had withheld from the Claimant's invoices each month owing to the latter's inadequate performance. Without acquainting itself with the facts of the matter, the Tribunal states in paragraph 135 of the Award, in an erroneous and baseless manner, that "this percentage [the works evaluation percentage] related solely to the timing of performance, not to the scope of performance in relation to costs incurred." Unfortunately, the Tribunal has not presented any evidence to support its finding. However, by an analysis of the relevant contractual provisions, one can easily perceive the baselessness of this finding, and reveal the inconsistency between this finding and the conclusions reached in prior IBEX project case awards by this very same Chamber. Before turning to the nature of the "net adjustments" and the Parties' contractual agreement as to the procedure for applying them in the invoices, I must note that in paragraph 136 of the Award, the Tribunal has distorted the facts as well, in order to find a pretext for furthering its objectives, where it states that the work evaluation percentage was "an additional incentive for timely performance or a penalty for late performance." This finding is also totally incorrect and unfounded, and it is altogether at variance with the Tribunal's own finding in paragraph 147 of the Award. Provision is made in Article 1 of Appendix 5 to the Contract, under the heading of "Fees and Penalties," for this incentive for timely performance or penalty for late performance, as I shall discuss hereinbelow.

The nature of the net adjustments

As the Tribunal states in paragraph 135 of the Award, these adjustments were arrived at through the progress of works evaluation. The progress of works evaluation was to

be carried out on the basis of Revision "B", dated 10 July 1978, to the Invoice certification and processing procedures, which were a part of Contracts No. 119 and 120 (see paragraph 23 of the Award). The said Revision "B" specified the method for evaluation and the nature thereof; based on Article 2.1.A of the said Revision,

> "The Systems Integration Contractor (SIC) shall evaluate milestone accomplishment, deliverable status and deficiencies of each segment and at a monthly invoice certification meeting will provide a detailed progress certification report indicating that technical and Schedule Progress is or is not consistent with the individual Segment statement of work..." (Emphasis added)

As was noted above, the "Statement of Work" lists all of the segments of the contractual works, plus the maximum fee for each segment. Each month, Harris compared the works performed by the Claimant with the "Statement of Work," and then determined the total price of the approved works, in light of the contractual price for each segment; it then compared that price with the total costs incurred and invoiced by Rockwell up to the date of each invoice, and specified the difference as a "Deficiency Factor." Touche Ross applied the deficiency factor to the invoices, and after withholding that amount from those invoices, it specified the price of the works performed and stated this amount in its report.

In other words, the "net adjustments" were applied in order to ascertain the contractual price of the works performed, and to establish a relationship between the costs incurred by Rockwell and the works that were to be performed under the Contract.

In order to avoid any possible ambiguity, in Annex A to Revision "B" the Parties clearly specified the meaning of the "progress of works percentage." It is stated in the first part of this Annex that:

> "The evaluation of progress of works yields a number: that percentage of the contractually required work which has actually been accomplished as of the date of evaluation. It answers the question, "What percentage of the work contracted for as of this date, has been done?..."

The adoption of such a procedure is entirely reasonable, because it is the purpose of the parties to a commercial contract for the one party to the contract to pay the consideration for what he has gained by way of services and goods. In other words, the Respondent and Claimant had intended to agree under these contracts that if Rockwell incurred costs as a result of its own shortcomings, the Respondent would not be responsible for those costs; the Respondent's responsibility would be limited to reimbursing Rockwell for only that portion of the latter's costs that conformed to the work performed in accordance with the Statement of Work and the prices set forth therein. Article 14 of Appendix 5 to the Contract also confirms this point; it provides that:

> "'Cost' as used throughout this Contract are those expenditures which have been incurred in performance of work of this Contract, in accordance with the terms and conditions of this Contract and approved by the Employer or his representative."

The Tribunal has even acted contrary to its own prior practice in the IBEX cases. In Sylvania, the September 1979 report clearly showed that Sylvania had remedied the deficiencies and shortcomings in its work by September 1979, [11] but in the instant Case, on the basis of the Harris report, the Claimant never performed any work after January 1979, not to mention having remedied the defects and deficiencies in such work.

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[11] See: Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1, p. 19.

Unfortunately, the majority has disregarded the existence of all of the contractual provisions relating to the progress of works and net adjustments, and by its unsubstantiated findings, it has awarded in favor of the Claimant for payment of millions of dollars above and beyond the value of the works performed.

Authorization to conclude subcontracts

Pursuant to Article 9 of the Contract, the Claimant was required to obtain the prior approval of the Employer for the "cost and [Statement of Work] of subcontracts and any later changes or decision to them either technical or financial." (Emphasis added)

As indicated on page 4 of this Opinion, Rockwell failed to obtain the Employer's authorization in this connection, and in its letter dated 3 May 1979 written in reply to the numerous letters by the Respondent wherein the latter objected to this breach of contract, the Claimant admitted that it was in violation and apologized to the Respondent. As can be seen from the attachment to the said letter, the amount of the subcontract with Fischbach-Oman, the subcontractor for the Doshan Tappeh Central Complex, was $20 million; and pursuant to Article 9 of the contract, the Claimant was required to obtain the Employer's prior approval for any increase in this amount. The Claimant has alleged that it paid Fischbach-Oman the sum of $32,651,857. On the basis of Article 9 to the contract attached to the said letter of 3 May 1979, wherein the Claimant specified the price of the contract with Fischbach-Oman under the heading of "Current commitments/expenditures," the Respondent states that the authorization issued by it in connection with the contractual payments to Fischbach-Oman was for the sum of $20 million, and that under Article 9, the Claimant was required to

inform the Respondent in advance of any costs above this amount, and to seek the necessary approval from Iran.

In its submissions, the Claimant has been totally unresponsive to the Respondent's pleadings. Nonetheless, in paragraph 138 of the Award, the majority states that the purpose of the aforementioned letter by the Claimant was not "to establish a ceiling price for subcontracts. This is demonstrated by the fact that the attachment to Rockwell's letter states that it relates to 'current' commitments." Regrettably, the Tribunal, which is fully aware that the Respondent is in the right, has resorted to sophistry in order to find a means of rejecting its defences. The Respondent never asserted that the $20 million figure was a "ceiling price" for the Fischbach-Oman subcontract. The final price could have been more or less than $20 million, but if it was for more than $20 million, whether this amount was for "current" commitments or for all commitments together, the Claimant was required by Article 9 to inform the Respondent of "any later changes or decision... either technical or financial..." together with the reasons therefor, and to obtain the necessary authorization. Whether those expenses were "current" or not can have no effect on the application of Article 9 of the Contract.

In addition to this unfounded and irrelevant argument in connection with the final ceiling price for the subcontract, in paragraph 138 the Tribunal states that "in fact, the Ministry approved and paid Fischbach-Oman subcontract costs (for all Tasks) through October 1978 far in excess of $20,000,000."

The majority has not invoked any documentary evidence in support of this statement; nor is it clear how it has arrived at its conclusion, because the available evidence in the Case in no sense indicates what amount the Respondent paid the Claimant through October 1978 for

Fischbach-Oman's services. The invoices submitted by the Claimant to the Respondent, copies of which have been filed with the Tribunal and are in the Case record, have in every instance been arranged on the basis of cost categories and sub-headings under materials, wages, and overhead. These invoices do not by any means indicate what portions of those sums are for payments to subcontractors, and for this reason the Respondent could in no way determine, on the basis of the documents and invoices submitted by the Claimant, what amount of the monies paid to Rockwell was for its subcontractors.

A break-down of the invoices and determination of the amount of the subcontractors' costs has been for the first time provided by the Claimant's Hearing Memorial filed on 8 May 1986. In addition, if it is presumed that the payments by the Respondent through October 1978 included reimbursements of amounts far in excess of $20 million to Fischbach-Oman, then such payment by the Respondent was an act of the utmost of good faith. And if it should subsequently become known that payment had been made on an invoice that was not payable, this would in no sense deprive the Respondent of his rights as set forth in Article 9 of the Contract, because Article 14.8 of the Contract provides, in relevant part, in connection with subcontractors' invoices, that:

> "...If he [the Respondent] does not approve any of paid or unpaid invoices [which act signifies post-payment certification] the Employer is authorized not to pay the amount of that [sic] invoices or future invoices or take the amount from Contractor's bank guarantee(s) or in any form, receive the amount of unapproved invoices from the Contractor."

As can be seen, here too the majority has awarded for payment of millions of dollars in excess of the amount to which the Claimant is entitled, without taking into account the terms of the Contract and through a specious and unfounded argument. The award for payment of the

subcontractors' invoices in an amount far in excess of the amounts authorized under Article 9 to the Contract constitutes a further blatant example of the majority's disregard for the Respondent's contractual rights and of its unjust enrichment of the Claimant to the detriment of the Respondent.

Contract fees

In addition to claiming for 30% of the minimum fee for Tasks 1 through 14, and 100% of the fixed fee for Task 16, for a total of $1,307,891 as reflected in the invoiced costs, the Claimant has also demanded $3,258,152 from the Respondent for the difference between the minimum fee and the "target" or maximum fee.

The majority has awarded in favor of the Claimant for the sum of $1,305,201 for 30% of the base fee, plus the fixed fee for Task 16, as well as the sum of $26,331 for the difference between the minimum fee and the "target" or maximum fee. Based on the following reasons, the payment of these monies to the Claimant is contrary to the provisions of Contract No. 119 and to the accepted principles of the law of obligations; and for this reason, I dissent to the abovementioned payments.

Besides specifying the minimum and maximum levels of the fees for each of Tasks 1 through 14 and 16, Article 1 of Appendix 5 to Contract No. 119 provides that the Contractor's entitlement to receive any part of the fees under that Article is subject to the terms and conditions set forth in that Appendix. By taking into account certain of the terms of the Appendix, as discussed below, it can be concluded without any qualification or ambiguity whatsoever, that any delay in the date of delivery or final acceptance, or any increase in the costs of any Task, vis-à-vis

the deadlines or amounts anticipated in the Contract and its Appendices, would not only deprive the Contractor of his entitlement to all or some part of the fees enumerated in that Article, but would also entitle the Employer, at his own discretion and taking into account the extent of the delay, to attach and draw down all or part of the Contractor's bank guarantees, as a late-performance indemnity. Article 1 to this same Appendix provides that:

> "Upon Employer Acceptance of each Facility Task, the Contractor will receive the following FEES subject to the conditions specified in this Appendix..." (Emphasis added)

Those conditions included, in part:

> Article 3:
>
> "... If the actual cost of a specified Task 2 through 13 exceeds the 'Estimate of Cost' for that Task, the MAXIMUM FEE for that task shall be reduced by six percent (6%) plus one and eight tenths percent (1.8%) for each percent by which the actual cost on the Task exceeds the 'Estimate of Cost' for that Task."

Article 4 provides that the Employer will not pay any costs which exceed the price specified for Task 1 ($27,583,000) under the Contract, and Article 5 provides that:

> "If the date of final acceptance by the Employer was later than the final acceptance date mentioned in SOW [the Statement of Work], then the maximum fee for that task will be reduced by 9% + ¼% for each day delay until the actual acceptance date."

Article 6 to this Appendix provides that:

> "In addition to above penalties if any delay occurs in starting or progress of work more than 30 day [sic] or completion of works more than 60 days because of the Contractor's negligence, the Employer will be entitled in his own judgement to either prolong the duration of contract or act after the above stated times [to draw upon a certain percentage of the] bank guarantees [in accordance with the number of] days of delay."

Moreover, "if the delay exceeds more than [sic] 120 days then the Employer can collect the rest of bank guarantees." Pursuant to this Article, if the Contractor's delay in delivering the work exceeds 180 days beyond the dates specified in the Contract, the Employer shall be entitled to make a call on the entirety of the bank guarantees under Contract No. 119, in the amount of $28,074,730, which is far in excess of the maximum fee for Tasks 2-14 and 16 ($19,242,000). In such an event, not only has the Contractor no right, in practice, to receive any fee whatsoever, but he is required by the Contract to pay the Employer certain monies as well, by way of late delivery penalties. Therefore, Articles 2 through 5 of Appendix 5 to the Contract clearly made Rockwell's entitlement to fees, ranging from one dollar up to the maximum fee, contingent upon the delivery date and the actual cost of the works; moreover, Article 6 of the Contract required Rockwell to pay a penalty for any kind of delay arising from the Contractor's fault.

The majority has ignored all these provisions, and concludes, firstly, that Rockwell was to receive a fixed fee, rather than variable fees, for carrying out Tasks 1, 8, 14 and 16 under Contract No. 119 (paragraph 148 of the Award). This conclusion is contrary to the express language of Articles 3, 4 and 5 of Appendix 5 to the Contract. Article 1 of this Appendix provides that all the fees mentioned in the Article (including the fee for Tasks 1, 8, 14 and 16) are subject to the terms and conditions set forth in that Appendix, inter alia Articles 3, 4 and 5 thereof.

Secondly, having conceded that Rockwell caused delays owing to its default in completing Tasks 2, 4, 5, 7, 9, 10, 11 and 12, the majority disregards the amount of those delays and holds that Rockwell is entitled to receive the minimum fee. In my opinion, pursuant to the terms of Appendix D to Contract No. 119, the majority should, after

recognizing that the Claimant was guilty of delay, have determined the length of such delays on the basis of the available evidence and documentation in the Case, and it should then have ascertained Rockwell's entitlement or nonentitlement to the fees provided for in Appendix D to the Contract, in view of the terms and conditions set forth in that Appendix.

In its letter dated 24 October 1978, the Claimant asked the Respondent for a one-year extension of the Contract's term in order to complete certain of the contractual Tasks. In the letter, the Claimant did not in any sense attribute this request for an extension to fault on the Respondent's part, and the majority concedes as well that on the basis of the available evidence and documentation, the Ministry of Defence is not responsible for those delays (see paragraphs 161, 163, 166, 167, 170, 171 of the instant Award). If, for the sake of argument, we suppose that a one-year extension of the Contract's term for Tasks 1, 4, 5, 9, 10 and 11, as proposed in the Claimant's letter of 24 October 1978, would not in any way have increased the costs of those Tasks over and above the amounts stipulated to in the Contract, and that Rockwell's contractual fees would not, consequently, have fallen under the provisions of Article 3 of Appendix 5 to the Contract, then in that event too, Article 5 of the said Appendix would have decreased Rockwell's maximum contractual fee by 99% (9% plus ¼ x 360). In other words, even without taking into account the applicability of Articles 3 and 6 of the said Appendix, Rockwell would only have been entitled to receive 1% of the maximum contractual fees for the abovementioned Tasks, and not the minimum fee therefor, as awarded by the majority in favor of the Claimant. With the intention of granting the Claimant more than $6 million for the net adjustments, the majority resorts, in paragraphs 135 and 136 of the Award, to unfounded justifications to the effect that the progress of works percentage "related solely to the timing of

performance, not to the scope of performance," or that this percentage was "an additional incentive for timely performance or a penalty for late performance." However, the majority forgets to analyze the effects of delayed performance in the context of the terms and conditions set forth in Appendix 5 to the Contract, and to ascertain Rockwell's entitlement or nonentitlement in the light of its delays. This is unquestionably a blatant case of feigned ignorance, because application of Appendix 5 to the Contract with respect to Rockwell's delays would have not only stripped it of any entitlement to fees, but compelled it to pay penalties under Article 6 as well.

As the majority itself concedes, Rockwell's delays as set forth in its letter dated 24 October 1978, and in Harris' report for November 1978, did not arise from force majeure. Contrary to the majority's finding in paragraph 152 of the Award, the terms and conditions of Appendix 5 to Contract No. 119 cover not only delays that are attributable to Rockwell, but also delays arising from force majeure. Whether according to accepted principles of the law of obligations, or to the practice of this Tribunal, each of the parties to the Contract must bear any losses arising as a result of force majeure.[12] Unfortunately, the majority has disregarded this important principle and has placed the full burden of the loss arising from force majeure on only one party to the Contract (the Respondent). What is certain is that if the performance on the Contract

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[12] See: International Schools Services, Inc. and National Iranian Copper Industries Company, Award No. 194-111-1; International Schools Services, Inc. and The Islamic Republic of Iran, National Defence Industries Organization, Award No. 290-123-1; McCollough & Co., Inc. and The Ministry of Post, Telegraph & Telephone, National Iranian Oil Company, Bank Markazi Iran, Award No. 225-48-3.

were delayed by reason of force majeure, during this period of delay the Respondent would be deprived of the use, benefit and advantages of the construction facilities that were the subject of the Contract. If the period of delay arising from force majeure were to have no impact on Rockwell's costs and fees, the Respondent would be the only party injured as a result of the occurrence of force majeure, and in my opinion this is contrary to the accepted principles of the law of contracts as it pertains to the consequences of force majeure upon each of the parties to the Contract. In my opinion, at the very least the majority should, in view of this principle, have taken into account the date on which, in its opinion, the Contracts were terminated (viz., 31 August 1979), and not 31 December 1978, as constituting the appropriate date for computation of Rockwell's entitlement or nonentitlement to fees.

Despite Rockwell's nonentitlement to the minimum fee, the majority has awarded for payment not only thereof, but also of the sum of $26,331 for the difference between the minimum fee and the target fee for Tasks 3, 6 and 13. The majority's justification in connection with the award for this sum is that at the time that Tasks 3, 6 and 13 were halted, the works under them were "proceeding according to schedule."

In my opinion, this conclusion is incorrect, because firstly, Touche Ross' audit report in connection with the operations up to November 1978 indicates that Tasks 6 and 13 were 10% and 2% behind schedule, respectively. Secondly, the evaluation of whether or not the works under those Tasks were on schedule should at least have been made from the standpoint of the date on which, according to the majority, the Contract was terminated, i.e., 31 August 1979, and not in terms of the date when the works under those Tasks were halted. As noted above, the consequences of

force majeure upon the contractual fees fall upon Rockwell and not on the Ministry of Defence of the Islamic Republic of Iran. Therefore, even if those Tasks were on schedule on the date the works came to a halt, they were certainly behind schedule as at 31 August 1979. And thirdly, based on Article 2 of the Appendix to the Contract:

> "The Contractor will earn the MAXIMUM FEE only if all Facilities are delivered by the Contractor and accepted by the Employer ninety (90) days before the scheduled 'Final Acceptance' dates set forth in Schedule... and, at a total reduction of twenty-five percent (25%) of the cost for each of the Tasks two through thirteen set forth in Attachment III..." (Emphasis added)

Therefore, the Contractor was to be entitled to the maximum or target fees only if he delivered all of the works under the Contract at the stipulated times and at the contractually-agreed prices. What is certain is that the majority has found the Contractor to have been late and in default with respect to most of the Tasks, and therefore to have been unable to deliver all of the facilities in accordance with the terms of the Contract. Thus, even if the force majeure conditions are disregarded, the Contractor would still not be entitled to receive the target fees for any of his contractual Tasks.

In view of the foregoing, I dissent to the award for payment of any fees whatsoever to the claimant.

Legal fees and injunction bond premiums on standby letters of credit

I dissent to the majority's finding in favor of payment of legal fees and injunction bond premiums on the standby letters of credit, for the following reasons. In my opinion:

A. As noted in the preceding paragraphs, Rockwell was in breach of Contracts No. 119 and 120, and therefore the Respondent, availing himself of his contractual rights as set forth in Article 6 of the Appendix to the Contract, acted to call upon and draw down the bank guarantees, inter alia the letter of guarantee relating to the advance payment, which had a remaining balance of over $14 million at the time of Rockwell's breach of contract.

B. As the majority notes -- albeit inadequately -- in paragraph 212 of the Award, on 19 December 1979 the United States Government added Section 535.568 to its existing regulations relating to standby letters of credit. Pursuant to the provisions of that Section, if United States claimants created "blocked accounts" in their books by availing themselves of those regulations, and so informed the banks that had issued such letters of credit, those banks would be barred from making any payment whatsoever to the beneficiaries of the letters of credit. Therefore, to preclude any payment to Iran by Citibank and Mellon Bank, Rockwell needed only to create a blocked account on its books and to inform the relevant banks that it had done so. As stated in paragraph 211 of the Award, the Ministry of Defence has also consistently argued that if Rockwell had opened a blocked account on its books, it would not have had to incur millions of dollars in alleged costs in order to prevent payment on the letters of credit. Because the Claimant has been unable to proffer any logical argument in rebuttal of this reasoning by the Ministry of Defence, the majority thus opines, in defense of the Claimant, in the same paragraph, in fine, that:

> "The Tribunal finds that, while this may have been an option, Rockwell had no duty to mitigate its damages by establishing a 'blocked account.'"

This argument is totally unfounded and biased. The Claimant could do whatever it wished, but at its own expense and not at that of the Ministry of Defence. The consequences

of opening a blocked account are identical to those that result from obtaining an injunction. Both measures would have barred the banks that had opened the standby letters of credit from making any payment to the beneficiaries of such letters of credit. Therefore, it was the Claimant's duty, on the basis of settled principles of the law of contracts, to select those means that would result in the minimum of costs to the Respondent. The majority, which is itself well aware of the validity of the Ministry of Defence's argument, has resorted to all sorts of baseless arguments in order to award millions of dollars to the Claimant. In paragraph 215 of the Award, the majority speaks of the possibility that the provisions of Section 535.568 might be revised; and in paragraph 217, it concludes that "Considering this background, the Tribunal cannot find that Rockwell's doubts as to the sufficiency of protection under the Treasury Regulations were unreasonable." This is the entirety of the majority's argument for awarding millions of dollars in alleged costs in this part of the Award. To what "background" is the majority referring? To the fact that establishing "blocked accounts" would bar the United States banks from making any payment? Or to the notion that the United States Government might change those regulations?[13] The United States Government has not, right up to the present time, changed those regulations, and it is extremely preposterous and credulous to suppose that the United States Government would proceed to act in order to diminish the benefits enjoyed by its own nationals, in the interest of the oppressed Iranian nation. This is the very reason why nearly all of the United States claimants established blocked accounts, whereas very few of them resorted to other measures. A further error by the majority is that in paragraph 204 of the Award, it invokes the award in Harris in order to justify its own

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[13] Even the Claimant itself refrained from adducing such an argument, since it was aware that it was specious.

award of legal fees in connection with the injunction in this Case.

Harris sought a court injunction in 1979, before Section 535.568 of the Iranian Assets Regulations issued by the United States Treasury Department was promulgated. Those regulations had not yet been issued in 1979, and they had no legal effect; therefore, the majority is precluded from relying on the Harris award as precedent in the instant Case.

The foregoing clearly demonstrates that the majority in the present Case has failed to adduce any reasons whatsoever for awarding the said alleged costs, and that it has gone to extremes, in a biased and brazen manner, in its protection of the United States claimants. For this reason, I declare my dissent to the award for payment of the abovementioned costs.

CONCLUSION

For the reasons set forth above, I dissent to the majority's Award, and I regard it as yet another example of the blatant injustices by the majority that has signed the present Award.

Dated
The Hague,
5.9.1369 corresponding to 26.11.1990

Assadollah Noori