261-199

TATES CLAIMS TRIBUNAL

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

- Date _____
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** SEPARATE OPINION of Judge Parviz Ansari

- Date 19. oct 1988
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** DISSENTING OPINION of _____

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In the Name of God

CASE NO. 261
CHAMBER THREE
AWARD NO. 377-261-3

Persian version filed on 24 Oct,.1988

AVCO CORPORATION,
Claimant,

and

IRAN AIRCRAFT INDUSTRIES, IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY, NATIONAL IRANIAN OIL COMPANY and THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

SEPARATE OPINION OF JUDGE PARVIZ ANSARI

INTRODUCTION

On the whole, I concur in the Award issued in the instant Case. This concurrence is based on two grounds: one is that I regard certain parts of the Award to be correct and in conformity to legal standards. The other is that I am concurring in the other parts of the Award for the purpose of forming a majority, but am setting forth my separate opinion with respect thereto, as is reflected in the following pages. Before discussing those points, I must note the following:

The Prehearing conference in this Case was held on 17 May 1985, without my attendance and in the absence of the Respondents. In that meeting, as reflected in the transcript thereof, the Claimant's representative and the former Chamber Chairman discussed how the invoices, or the auditor's report in place of the invoices, were to be presented. The results of those one-sided discussions, which were aimed at facilitating the Claimant's work and were inconsistent with the rules of evidence -- and consequently with the Respondents' rights -- led to an incorrect impression of what constituted proof of the claim. This incorrect impression was that instead of having to submit evidence in proof of the claim, the Claimant could simply rely on affidavits from its corporate staff and on an auditor's report indicating that the invoices at issue in the claim conformed to the claimant company's ledgers. The erroneousness of this impression is too obvious to require much discussion. For on the one hand, the affidavits of the Claimant's employees have no evidentiary value; and on the other hand, even assuming that the auditor was impartial and independent,[1] his report cannot constitute evidence of the veracity of the purport and substance of the invoices in dispute, because the mere conformity of the invoices at issue in the claim with the Claimant's ledgers provides nothing more than the very claim brought by the Claimant. For this reason, the instant Award does not deem the said affidavits and auditor's report to be reliable or to have any evidentiary value.

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[1] The auditor employed by the Claimant was Arthur Young & Company. This company was the Claimant in Case No. 484, brought against the Islamic Republic of Iran, et al, before Chamber One of this Tribunal. That claim culminated in the issuance on 1st December 1987, of Award No. 338-484-1, against Arthur Young & Company. Under these circumstances, it would be difficult indeed to call the said auditor's report impartial and independent.

I. CLAIMS AGAINST IRAN AIRCRAFT INDUSTRIES

1. I concur in the Award, where it finds that the Claimant's affidavits and auditor's report concerning the substantiality and validity of the Claimant's alleged claims lack any evidentiary value, in the absence of evidence in proof of the claims, inter alia purchase orders, shipping documents, evidence of services rendered and written demands for payment. In adjudicating the claims, the Tribunal must be convinced, from a perusal of the evidence relating to orders for goods, that the goods or services were provided at the request of the Respondent, and that the Respondent thus assumed an obligation in that connection. In addition, the Claimant had to present probative evidence, inter alia shipping and delivery documents for the goods, so as to demonstrate that the goods or services requested by the Respondent were delivered to the Respondent in accordance with the terms of the contract and the purchase order form, at the agreed time and place, and that the amounts due were subsequently invoiced in conformity to the purchase order. Unless the Claimant presents the above-mentioned evidence, the Tribunal cannot examine the validity of the claims, and the Respondent is, naturally, also deprived of any opportunity to mount the necessary defence. See: Minnesota Mining and Manufacturing Company and The Islamic Republic of Iran, et al, Award No. 343-423-3 (22 January 1988), para. 100; also, the Separate Opinion of Judge Parviz Ansari re. that same Case (18 February 1988), para. 8.

2. While I concur in the Award as to the invalidity and insufficiency of the witness testimony as probative evidence of the existence and quantum of the incidental costs sought by the Claimant under the rubric of work in progress, storage costs and vendor termination costs, and also with the dismissal of the Claimant's claims under these

rubrics, owing to lack of evidence, at the same time I am of the opinion that in addition to the jurisdictional bar mentioned in paragraph 43 of the Award, these claims should also have been rejected on the basis of paragraph 8 of the Paris Agreement. The non-performance of the Paris Agreement relates entirely to non-performance of that portion of the reciprocal obligations under the said Agreement which the Claimant was to bear. Based on the statements and evidence presented, it is indisputable that the Respondent fulfilled all those obligations which it had undertaken pursuant to the said Agreement.

These obligations consisted of cancelling a number of existing bank guarantees, permitting a set-off of those claims of the Parties that had been found to be valid under the Paris Agreement, and also reducing the amount of one remaining bank guarantee, No. 155626 (78-7). The portion of the Paris Agreement that was not fulfilled relates entirely to the Claimant's obligations to provide a corporate guarantee, withdraw the claim brought against the Respondent, and return the Respondent's property. Although the Award excuses the Claimant from its obligation to return the Respondent's property by reason of its inability to do so, the Claimant has failed to justify its failure to withdraw the claim; nor has it given any reason for refusing to issue the corporate guarantee, even though there was no obstacle to the Claimant's fulfillment of this part of its obligations. Moreover, the Respondent's call on Bank Guarantee No. 155626 (78-7) does not constitute a breach of the Paris Agreement, since this guarantee was called at a date when the Claimant had already refused to fulfill its reciprocal obligations under the Paris Agreement, relating to return of the Respondent's property and submission of the corporate guarantee. For these reasons, in fulfilling its obligations under the Paris Agreement, the Respondent is entitled to the consideration therefor, namely, performance by the Claimant on its reciprocal obligations.

The impossibility of performance on a part of the Claimant's undertakings (ie. delivery of the Respondent's property) should not be construed as prejudicing the rest of the Respondent's acquired rights, or as nullifying the rest of the Claimant's obligations, to whose performance there is no impediment. As a result, I hold that the Respondent is covered by all of the waivers and relinquishments of rights set forth in paragraph 8 of the Paris Agreement, inter alia immunity from claims for costs of termination and storage. In particular, with respect to the Claimant's obligation not to claim for storage costs, it is worth noting that when the Paris Agreement was concluded, the Claimant was fully aware that because of the Executive Orders issued by the United States President, it could not deliver the Respondent's property, and further, that it could reasonably expect the existing barriers to remain for a long time. On the other hand, it should be added that the storage and other costs, assuming that they really were incurred, were suffered as a direct result of measures by the United States Government. The injured party should thus seek recourse against that Government, which was the primary and direct cause of its injury, in order to compensate for its losses.

3. In connection with the interest accrued on the Respondent's deposits with the Claimant, the Award's decision to calculate the interest on the Respondent's claims and deposits as from a date later than the dies a quo for calculation of the interest on the Claimant's claims, is problematic. The Claimant's entitlement to use the Respondent's deposits, in accordance with the contracts entered into between them, was for the purpose of meeting the objectives of the transaction underlying the said contracts. Naturally, this right on the Claimant's part would continue and remain valid so long as the contracts were still operative and in force between the Parties. Consequently, from the time the contracts were suspended, there was no legal justification for the Claimant's

possession and enjoyment of the Respondent's deposits, and the Claimant was required to return them to the Respondent. Based on the available evidence and the Parties' statements, the contracts underlying the claim were totally inoperative as from December 1978. The Claimant concedes that it suspended the contracts as from December 1978, did not send the Respondent any goods, and refused to return its property. Therefore, if interest is awarded, the interest accruing on the Respondent's deposits in the Claimant's possession should be calculated as running from December 1978, the date when the contracts became inoperative. The other date which might be taken as the latest starting point for the calculation of interest on the Respondent's deposits is 14 November 1979, the date of the U.S. President's Executive Order. That is to say, Article 10 of the "Export Distributor Franchise Agreement" sets forth the conditions under which the Agreement could be terminated prior to its expiration date. One of those conditions for early termination is that the obligations of either Party to the Agreement have been frustrated by regulations promulgated by the Government of either of the said Parties. Article 10.A.2 of the Agreement states, in pertinent part, [that the Agreement shall be subject to earlier termination under certain circumstances, inter alia if]:

> "...as a consequence of regulations made by the Government of the United States of America or the Government of Iran it becomes impossible for the other party to fulfill its obligations under this Agreement."

Moreover, the Claimant itself has stated that the issuance of the U.S. President's Executive Orders constituted force majeure and permitted it to be relieved of its liability in connection with the return of the Respondent's property. Therefore, under these conditions, November 1979 is the latest date which should have been selected as the

commencement point for calculation of interest on the surplus amounts of the Respondent's deposits with the Claimant.

4. Another important point is that pursuant to Article 8 of the Paris Agreement, the Claimant agreed not to submit any claim for interest to the Respondent. As has been stated above, although that portion of the Paris Agreement relating to the Claimant's obligations towards the Respondent' was not carried out, the Respondent definitely fulfilled all of the obligations it undertook in favor of the Claimant under the Paris Agreement. By ignoring this point and the Claimant's breach of certain parts of the Paris Agreement in its argument, the Award interprets the impossibility of returning the Respondent's property as meaning that the Paris Agreement had become inoperative in its entirety, that the Agreement was without effect, and that the Parties' obligations had become totally null and void. In this way, it arrives at the illogical conclusion that although the Respondent fulfilled all of its obligations under the Paris Agreement, it shall be deprived of all of the other concessions and rights granted in its favor in the Paris Agreement -- including, inter alia, the Claimant's waiver of interest -- solely because it has been indefinitely deprived of a part of the consideration due it vis-à-vis the obligations on its part, viz. the return of its property. And on the other hand, the Award in effect concludes that the Claimant shall benefit from its breach of the Agreement and non-performance of its obligations, and obtain more than it would have received if it had fulfilled its obligations.

II. CLAIMS AGAINST IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY

5. With respect to the quantity and value of the property delivered to the Respondent, the Award in paragraph 94

attributes to the Respondent a statement which it was in fact attempting to deny. In this section, the Award refers to two specific lines from one paragraph of the Respondent's Statement of Defence (Doc. No. 14), without paying sufficient attention to the following lines of the same paragraph and the Respondent's conclusions at the end thereof. The passage cited from the Respondent's Statement of Defence is as follows:

> "As per the Computerized Report of 10.10.1978, AVCO [Claimant] has delivered the equipment under the [three] Contracts for the total value of US$2,241,153.43 [to Respondent IHSRC]."

The Respondent's purpose in mentioning this point, as it makes clear several lines further on in the same paragraph, was to state that contrary to the statement in the computerized report prepared by the Claimant on 10.10.1978, it has in fact received goods worth only $1,825,925. Therefore, in referring to the computerized report of 10.10.1978 by way of preliminary, the Respondent intended to deny and refute the assertion that it had received all of the goods covered by the said report, worth a total of $2,241,153; indeed, it carried out its intention several lines further on in this same Statement of Defence. Under these circumstances, it is erroneous and contrary to fact to interpret the words quoted from the Respondent as confirming that it had received goods worth $2,241,153. The Respondent has stated the precise value of the goods received under each of the three contracts at issue; and in calculating the amount of its counterclaim, and also in all its subsequent submissions, it has always assessed the value of the goods received from the Claimant at $1,825,925 or, with one minor adjustment, $1,826,927. It has never confirmed the statement in the Claimant's computerized report that it had received goods worth $2,241,153.

6. With regard to the date from which interest should be calculated on the Respondent's remaining claims against the

Claimant, just as was noted in connection with the claims against Iran Aircraft Industries, supra, the interest ought to have been awarded as from December 1978, ie. the date when the contract became inoperative.

III. COUNTERCLAIMS OF IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY

7. With respect to the counterclaims arising from Purchase Order Nos. A7BHMC3475 and A7BHMC3300, there can be no doubt that the counterclaims arise from the contracts relied upon by the Claimant, in view of the fact that the numbers of the said Purchase Orders appear on the list of miscellaneous claims brought by the Claimant (Annex 4 to Doc. No.100). The claim relating to unreturned turbines, which are the subject of Purchase Order No. LD202R51672000 dated 30 July 1975 and the amendment thereto dated 15 December 1975, actually constitutes a part of the on-going commercial relationship between the Parties as well; and in view of the definition given in Article II, paragraph 1 of the Claims Settlement Declaration, the Tribunal had jurisdiction over that claim. As to the merits, it must be noted that the Claimant has not mounted any defence against the aforementioned counterclaims, whereas the Respondent has proved, by submitting the relevant purchase orders (which were also countersigned by the Claimant), that the transaction took place. In its defence, the Claimant was required to prove that the property was delivered to the Respondent. Obviously, on this point, the Respondent should not be expected to prove a nullity, viz. that the property was not delivered. For this reason, the Tribunal should have accepted the counterclaims in question or, in connection with the counterclaim relating to the turbines, just as was done with respect to the property of the other Respondent (Iran Aircraft Industries), at least invited the Parties to enter into negotiations and then, if no agree-

ment was reached, the Respondent should have been given an opportunity to request the Tribunal to make a disposition concerning its property.

IV. CLAIM AGAINST THE NATIONAL IRANIAN OIL COMPANY

8. The Claimant's claim against the Repondent, for $81,695, is based upon a transaction arising from an exchange of telexes between the Parties. The Respondent concedes that it owes $42,728 of the total amount sought in the claim, but it has rejected the balance of the claimed amount. In addition to the said amount of $42,728, the Award also attributes to the Respondent a confirmation that it owes a further $37,218, an attribution which is contrary to the Respondent's statement. Though it states that it paid the Claimant $37,218, the Respondent also explains, in its Statement of Defence (Doc. No. 6), that this payment is unrelated to the contract underlying the Claimant's claim:

> "It worth's [sic] its while to mention that, the defendant has had a contract with the Plaintiff which has been specified in telegram No. 564 dated 18/5/1977 (Enclosure No. 2).
>
> According to the said telegram the total amount of work in the same contract has been $33,000. Of course the work in question has been completed previously and the Plaintiff has collected its dues in conformity with payment certificate 2043 (Enclosure No. 3)."

Payment Certificate 2043, to which the Respondent refers (attached to the Respondent's Statement of Defence), was for $37,218 and is dated 14.12.1356 (5 March 1978). The Respondent maintains this same position in its Memorial (Doc. No. 163), stating in connection with the services rendered pursuant to telex No. 564, dated 18 May 1977, that:

> "The services under the first agreement were completed, and AVCO was paid a net amount of $37,218 in full settlement of those inconclusive services, but the unit did not function. AVCO asserted that two more experts should work in Iran, so that the unit could be commissioned and made operable... The terms and particulars of the new agreement (hereinafter called the second agreement) were specified in telex No. RO-77-86, dated 2 August 1978. Its major and primary difference[s] with the first agreement are as follows..." [retranslated]

Moreover, the Respondent never stated that it had paid the $37,218 as a part-payment on the amount demanded by the Claimant, or that it had asked to have it set-off against the amount sought. Rather, it has always asserted that the amount in question comprises a part of its counterclaim against the Claimant. Another point deserving mention in this connection is that the document submitted by the Respondent concerning payment of US$ 37,218 was issued on 14.12.1356 (5 March 1978), whereas the invoice presented by the Claimant, wherein it demands the sum of $81,695, is dated 9 May 1978. Therefore, the Award's findings lead to the illogical conclusion that the Respondent paid the Claimant's invoice two months before receiving it, or at least that it ordered payment of $37,218 thereon.

V. COUNTERCLAIM OF THE NATIONAL IRANIAN OIL COMPANY

9. With respect to Respondent NIOC's counterclaim, I hold that the contract underlying the Claimant's claim, and the contract for the purchase and delivery of eight turbines, are parts of a chain of commercial relations between the Parties, commencing with the contract for purchase of the eight turbines and culminating in other transactions, all of whose objective was to have the eight turbines at issue made usable and delivered in satisfactory condition. The contract on which the Claimant's claim is based also forms one link in this chain of commercial relations, in respect of which both contracts constitute a single transaction,

despite the time gap between them. Based on Article II, paragraph 1 of the Claims Settlement Declaration, and also according to the Tribunal's own precedent, this issue comes under the definition of "transactions" arising from various sources and, consequently, falls within the Tribunal's jurisdiction.[2] It must be noted that while the contract relating to the purchase of the eight turbines was concluded in 1971, those units were shipped to the Respondent in 1973, but were never delivered in the condition agreed upon by the Parties. Pursuant to paragraph 3 of the Agreement of 19 March 1973, the Claimant undertook to deliver the apparatus to the Respondent in an acceptably usable condition. Paragraph 3 of the Agreement states as follows:

> "3. In respect of fourthly of our [Claimant's] telex F6024 dated 20th January 1973 it is agreed that full speed Mechanical test will be run in Iran by N.I.O.C. in presence of Avco Lycoming representative and if during these tests any part on the package does not perform satisfactory [sic] in accordance to N.I.O.C. specification Avco Lycoming will repair or replace the items so that the package performs in accordance with the specification without any obligation to N.I.O.C."

The dozens of reports, letters and telexes exchanged between the Parties, which have been submitted by the Respondent and are also attached to Mr. Ebrahimian's Affidavit, evidence the fact that the turbines were never delivered to the Respondent in conformity to the intended specifications, and that they never worked. This series of correspondence and reports, which began right from the time that the units were shipped to Iran and went on until 1978,

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[2] Owens-Corning Fiberglass Corp. and The Government of Iran, et al, Award No. ITL 18-113-2 (13 May 1983); American Bell International Inc. and The Government of the Islamic Republic of Iran, et al, Award No. ITL 41-48-3 (9 July 1984); and Westinghouse Electric Corp. and The Islamic Republic of Iran, et al, Award No. ITL 67-389-2 (12 February 1987).

demonstrates the numerous problems, and also the repeated trips and missions undertaken by the Claimant's representatives and technical experts in order to get the turbines into operation. Finally, in 1978, the Claimant proposed to the Respondent by its letters of 11 and 20 June of that year, that one of the turbine units be shipped to the United States for repairs at the Claimant's expense, so that it could serve as a model for eliminating the defects in the remaining units.

In one part of its letter dated 11 June 1978, the Claimant states:

> "It is our firm belief that these pumping units can be refurbished, the problems corrected, and will provide reliable service. To confirm this belief, Avco Lycoming proposes that one complete unit be returned to the United States for factory refurbishment. After successful system checkout the unit will be returned to Iran, installed and satisfactory operation demonstrated."

Elsewhere in this same letter, it is stated that:

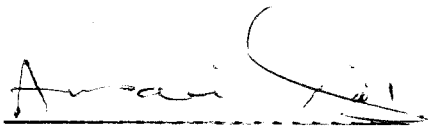
> "This single unit will serve as a model and will provide an accurate definition of effort required to return other units to a satisfactory operating condition, should that be your desire when performance is demonstrated."

This is one example of the abundant correspondence and evidence submitted by the Respondent, and it demonstrates the fact that even in June 1978, ie. at a date later than that of the contract underlying the Claimant's claim, the issue of satisfactory delivery of the units had not yet been solved. The important point is, that the Claimant's claim against the Respondent relates to the cost of the services of the experts sent to Iran by the Claimant in 1977 in order to make one of these same eight turbines sold to the Respondent operational; that this constitutes one aspect of the series of measures carried out for the purpose of commissioning and delivering the said units on the basis of the Parties' agreement; and that it is

therefore sufficiently related to the sales contract for the eight turbines, to serve as a basis for the Respondent's counterclaim.

Consequently, in my opinion the Tribunal has jurisdiction over NIOC's counterclaim.

The Hague,
Dated 27 Mihrmah 1367 / 19 October 1988



Parviz Ansari Moin