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STATES CLAIMS TRIBUNAL

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Case No. 261

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CASE NO. 261

CHAMBER THREE

AWARD NO. 377-261-3

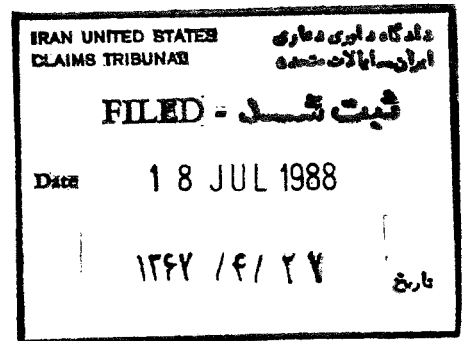
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AVCO CORPORATION,
Claimant,

and

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

Respondent,



PARTIAL AWARD

Appearances:

For the Claimant : Mr. Dean Cordiano,
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Attorneys for the Claimant;

: Mr. Martin Leff,
Mr. Charles Richardson,
Mr. Jay Gross,
Mr. Charles Young,
Representatives for the
Claimant.

For the Respondent : Mr. Mohammad K. Eshragh,
Agent of the Government
of the Islamic Republic
of Iran;
Mr. Mohammad Taghi Naderi,
Legal Adviser to the Agent;
Mr. Hossein Pyran,
Assistant to the Agent;
Mr. Seyed Ahmad Ghorayshi,
Representative of Iran and
IACI;
Mr. Ali Asghar Zargar,
Attorney for IHSRC;
Mr. Mohammad Bagher Aziz Mohammad,
Expert;
Mr. Seyed Abbas Hashemi,
Mr. Alek Ebrahimian,
Representatives of NIOC.

Also present : Mr. John Crook,
Agent of the United States of
America.

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I. PROCEDURAL HISTORY

1. On 14 January 1982 the Claimant, AVCO CORPORATION, ("Avco") filed a Statement of Claim against IRAN AIRCRAFT INDUSTRIES ("IACI"), IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY ("IHSRC"), NATIONAL IRANIAN OIL COMPANY ("NIOC") and THE ISLAMIC REPUBLIC OF IRAN ("Iran"). The claim consists of five different components originally totalling U.S.\$21,365,741.11. During oral proceedings, Avco amended some of its claims, leaving a resulting total amount claimed of U.S.\$20,950,541.11. The first and second claims arise out of the alleged breach by IACI of two different contracts for the sale and servicing of engines, plus interest and storage costs, for which Avco claims U.S.\$19,052,982. The third claim, originally for U.S.\$1,737,243, including interest and storage costs, was subsequently increased to U.S.\$1,746,775, arises out the alleged breach by IHSRC of a series of contracts for sale and repair of aircraft engines. The fourth claim arises out of the alleged failure by NIOC to pay an amount of U.S.\$81,695.55 for services allegedly rendered by Avco. The fifth claim, in the amount of U.S.\$69,088.56, is directed against Iran and based on the alleged confiscation of cash and property owned by Avco and its employees. In addition, Avco claims interest, attorneys fees and costs of arbitration on all claims.

2. The Respondents filed Statements of Defense and raised counterclaims. IACI, IHSRC and NIOC assert counterclaims in a total amount of U.S.\$562,452.01 plus Rls. 34,199,888. The counterclaim raised by Iran is unquantified. In addition, IACI seeks an award directing Avco to return IACI's parts and equipment in Avco's custody.

3. On 11 April 1983 IACI requested the Tribunal to issue an Order, as an interim measure, preventing the sale by Avco of certain properties owned by IACI, the return of which it is claiming in its counterclaim. On 11 May 1983 Avco stated in response that "claimant has made no arrangements for the

sale of any property belonging to IACI, nor are such arrangements presently contemplated by the claimant." Relying on Avco's assurances, the Tribunal decided by Order of 27 January 1984, that it "need not now take a decision with regard to the request for interim measures."

4. A Pre-Hearing Conference was held on 17 May 1985.

5. On 31 July 1986 Bank Tejarat, a non-party to these proceedings, filed a counterclaim. By Order of 11 August 1986 the Tribunal dismissed Bank Tejarat's counterclaim as untimely filed.

6. After an exchange of memorials and evidence a Hearing took place on 16 and 17 September 1986. The parties appeared and presented oral arguments.

7. During the Hearing Avco sought to submit further documentary evidence, to which the Respondents objected. The Tribunal decided not to accept the filing at that stage of the proceedings.

8. At the Hearing Avco withdrew its claim against Iran without objection from the Respondents. The Tribunal takes note of this withdrawal and considers the counterclaim asserted by the Islamic Republic of Iran to be withdrawn as well.

II. JURISDICTION

A. JURISDICTIONAL ISSUES REGARDING AVCO

9. Avco alleges that it is a corporation organized under the laws of the State of Delaware qualifying as a United States national within the meaning of Article VII, paragraph 1, of the CSD ("CSD"). As evidence Avco submitted a certificate of the Secretary of State of Delaware declaring

that it was incorporated in 1929 under the laws of the State of Delaware and that it continued to exist as of July 1985 in good standing. Avco also submitted an affidavit of its Vice President and Corporate Secretary attesting that more than 95% of Avco's shareholders have addresses in the United States. Attached to the affidavit are reports filed by Avco with United States authorities showing that, as of December 1974, 97.66% of Avco's voting stock was held by stockholders with addresses in the United States, and that that percentage was 95.22% in December 1978 and 97.63% in December 1984. Also attached were proxy statements issued in connection with Avco's 1980 and 1981 annual meetings of stockholders as filed with the United States Securities and Exchange Commission. These documents disclose no foreign shareholder with more than 5% ownership of stock.

10. Based on this evidence, the Tribunal is satisfied that Avco is a national of the United States within the meaning of Article VII, paragraph 1, of the CSD.

11. The claims asserted by Avco clearly arose out of "debts, contracts ... or other measures affecting property rights," as required by Article II, paragraph 1, of the CSD.

B. JURISDICTIONAL ISSUES REGARDING THE RESPONDENTS

12. Avco argues that IACI, IHSRC and NIOC are wholly owned, dominated and controlled by Iran, while IACI and IHSRC assert that they are profit-earning, nongovernmental legal entities.

13. The record contains several documents evidencing that IACI and IHSRC are agencies or instrumentalities of Iran or are entities controlled by Iran. For example the "Export Distributor Export Agreement" entered into between Avco and IACI describes the latter as a "corporation wholly owned by the government of Iran." Likewise the "Basic Ordering Agreement" identifies the parties thereto as Avco and the

"Government of Iran represented by IHSRC." Moreover, the Tribunal has already found in previous cases that it has jurisdiction over both IACI and IHSRC. See Theodore Lauth and Islamic Republic of Iran, Award No. 223-10335-3 at para. 4 (8 May 1986); VSI Corporation and Iran Aircraft Industries Corporation, Award No. 56-15-1 at 3 (15 June 1983), reprinted in 3 Iran-U.S. C.T.R. 73; Pan American World Airways, Inc. and Islamic Republic of Iran Award No. 96-488-1, at 2 (19 December 1983), reprinted in 4 Iran-U.S. C.T.R. 205. Therefore, the Tribunal concludes that IACI and IHSRC fall within the meaning of Iran in Article VII, paragraph 3, of the CSD. NIOC has not contested that it, too, is an entity controlled by Iran.

14. Other jurisdictional issues arising with regard to specific claims or counterclaims will be dealt with in this award together with the merits of said claims or counterclaims.

III. CLAIMS AND COUNTERCLAIMS INVOLVING IACI

A. THE EXPORT DISTRIBUTOR FRANCHISE AGREEMENT

15. In or about August 1976 Avco entered into an Export Distributor Franchise Agreement ("Export Agreement") with IACI, pursuant to which IACI was appointed a non-exclusive distributor within Iran with authority to purchase and sell Avco Lycoming T53 and T55 series gas turbine aircraft engines, parts, accessories, tools and equipment.

16. Article 1(C) of the Export Agreement provides that "[t]he franchise granted will remain in effect until 30 November 1980 unless sooner terminated pursuant to the terms hereof." According to Article 3(D) of the same Agreement, payment of Avco's products purchased under this agreement was to be made "within thirty (30) days after receipt of shipment at Tehran, Iran in the case of shipments to be made

by air and within sixty (60) days after receipt of approved shipping documentation in the case of shipping [by] surface." Article 3(F) of the Export Agreement further provides that IACI was to pay to Avco a "25% advanced payment" at the time of issue of any purchase order in excess of U.S.\$1,000,000. Avco was obligated to provide, contemporaneous with the payment of said advance payments, a guarantee in favor of IACI.

17. The Export Agreement entered into effect on 1 August 1976 and was duly implemented until IACI allegedly failed to pay certain invoices for equipment shipped. It appears, despite the absence of explanation by Avco, that the invoices remained unsettled as from September 1978. In about November 1978 Avco elected to treat the performance of its own obligations under the Export Agreement as suspended. Negotiations subsequently took place in an effort to settle the outstanding contractual dispute. The Parties met in Paris in 1980 to discuss "contractual obligations" and "outstanding accounts." This meeting resulted in a Letter of Agreement dated 11 April 1980 ("Paris Agreement") in which the Parties agreed that certain amounts were due to Avco. The Paris Agreement reads in relevant part as follows:

1. As per attachment No. 1 IACI's records show \$10 117 667.05 as valid and approved lycoming invoices. To pay this account, it was decided that IACI will authorize AVCO Lycoming by 30 April to apply said amount against down payments previously provided to AVCO and at the present time the unliquidated portion of such down payments amounts to \$12 746 337.00.

2. Per attachment No. 2 there is \$1 059 771.21 worth of unclarified outstanding invoices not yet confirmed by IACI. It was decided that a study for verification has to be carried out by both parties to thoroughly clarify the differences and reconcile such invoices. Invoices approved by IACI shall be announced to AVCO within 30 days after receipt of required information for offset against the remaining balance of the down payments.

3. The value of proforma invoices for offload work in the amount of \$1 245 406.74 shall likewise be applied to the balance of the down payments. This will be

confirmed in the notice of paragraph (1) above. AVCO agreed to ship the repaired equipment to Tehran as soon as the present barriers are removed and to provide valid invoices to justify the amount above in accordance with article No. 5 of this agreement.

4. 1) IACI shall cancel bank guaranties [sic] 15 5625 (77-27), 3772 (3772), and 7173469 (77-21) in their entirety and shall reduce bank guarantee 155626 (78-7) by the amount of \$1 179 035.00 by 7th May 1980.

2) Further IACI shall reduce bank guarantee 155626 (78-7) by the value of the approved invoices when the reconciliations of paragraph (2) is achieved.

3) Further IACI shall reduce bank guarantee 155626 (78-7) by \$1 245 406.70 when the offload items of paragraph (3) are shipped by Avco to Iran.

5. . . . AVCO shall provide IACI with a corporate guarantee assuring IACI that as soon as the present barriers for shipment of IACI's equipment outside the U.S. are removed AVCO shall take prompt action to ship all of IACI's repaired equipments, and to request disposition instruction with respect to the items not then repaired.

6. Notwithstanding the terms of bank guarantee 155626 (78-7) IACI agrees not to present the guarantee for payment unless and until (1) the present barriers for shipment of IACI equipment to Iran are removed and (2) Avco refuses to ship said equipments.

. . . .

18. The Parties met for further settlement discussions in Vienna in September 1981, but no specific document reflecting negotiations during this meeting was agreed upon.

19. Avco alleges that IACI owes U.S.\$8,764,977 in accounts receivable for products delivered pursuant to the Export Agreement. In addition, Avco claims U.S.\$1,003.279 for other incidental damages allegedly incurred as a result of the disruption of the Export Agreement. Finally, Avco asserts that on 3 January 1982 IACI made a wrongful call on a Letter of Credit provided by Avco to secure performance under the Export Agreement and seeks damages resulting therefrom.

20. IACI denies that it is under obligation to make any further payment. It asserts a counterclaim for the return of the unliquidated portion of the advance payments in the amount of U.S.\$12,741,337.

1. The Claim for Accounts Receivable

21. Avco asserts a right to payment for equipment and products with a total value of U.S.\$8,764,977 which were delivered or shipped to Iran but for which IACI has not paid.

22. As evidence of its contentions, Avco has submitted affidavits of J.R. Gross, Avco's manager of Commercial Business Management, and of M.J. Leff, Avco's Vice-President of Marketing and Product Support. These two affiants attest that an analysis of Avco's records shows that IACI owes Avco the amount of U.S.\$8,764,977.

23. Avco also invokes as evidence of the amount claimed its accounts receivable ledgers dated 23 November 1981. These ledgers show an account receivable from IACI in the total amount of U.S.\$11,199,968.52, including the U.S.\$8,764,977 claimed against IACI under the present claim, and a further amount of U.S.\$2,434,992 for "billed" accounts receivable, as discussed at paragraphs 61-67 below.

24. At the Hearing Avco's representatives testified that each ledger sheet submitted reflects invoices for work or services performed. They further explained that, as a general practice, Avco's invoicing procedure is subject to three internal auditing stages and that, in the present case, a further audit was performed by an independent accountant, who reviewed the invoices and the delivery documents and concluded that the invoices accurately reflect goods delivered and services rendered to IACI. The independent audit is described in an affidavit of a partner of the accounting firm who concludes:

(a) Avco had in its records at the time we performed our procedure a corresponding invoice copy for each entry [on the ledger], except for the May 31, 1977 entry . . . for U.S.\$240.14 under Lycoming Account No. 130-187;

(b) The amount reflected . . . for each individual invoice referenced was the same as the amount reflected on the corresponding invoice copy with the exception noted in paragraph . . . (a) . . .;

(d) The total amount of the underlying invoice copies referenced [on the ledger] was the same as the total amount reflected [on the ledger] with the exception noted in paragraph . . . (a) . . .

25. IACI challenges the adequacy of Avco's evidence, objecting specifically to Avco's failure to submit copies of the invoices. IACI contends in addition that no proof has been adduced to support the allegation that the goods were shipped. According to IACI, the auditing procedure casts doubt on the validity of the claim, the work of the auditing firm being limited to pointing out a list of invoices provided by Avco itself. IACI further states that it was prevented from paying the outstanding invoices by the issuance of the Executive Order of the President of the United States freezing Iranian assets on 14 November 1979.

26. At the Hearing Avco's representative testified that the invoices underlying Avco's claim are available, but stated that Avco chose not to submit them, preferring an alternative method of evidence in order that the Tribunal not be burdened with an excessive amount of material. Avco, furthermore, refers to the Paris Agreement executed by the Parties on 11 April 1980, which reflects that IACI recognized as valid and approved Avco invoices in the amount of U.S.\$10,117.667.05. In its pleadings and during oral proceedings IACI expressly conceded the validity of invoices in this amount.

27. IACI nevertheless disputes any obligation of payment under the Paris Agreement, alleging that it is discharged from its obligations thereunder because Avco has failed to

fulfill its obligation to submit a corporate guarantee provided for at Article 5 of the Paris Agreement.

28. The Tribunal notes that the wording of the first paragraph of the Paris Agreement makes it clear that the Parties intended to clear outstanding claims. In any event, certain of the reciprocal obligations of the Agreement have not been executed, in large part as a result of Avco's inability to implement its terms because of U.S. Government export restrictions. The non-performance of this Agreement, however, does not prevent the Tribunal from relying upon the amounts acknowledged therein as evidence of the status of the outstanding accounts. Especially in light of IACI's express concession before us of Avco's entitlement to payment of the U.S.\$10,117,667.05 acknowledged in the Paris Agreement, the Tribunal finds that Avco is entitled to this amount.

29. The Paris Agreement also refers to "unclarified outstanding invoices not yet confirmed by IACI" in an amount of U.S.\$1,059,771.21 and provides that the Parties would carry out a "study" in order to reach agreement as to those invoices. This Agreement, therefore, reveals the existence of serious differences of views between the Parties about the payability of some unspecified invoices, the existence of which is not at stake, for a substantial amount of money. The Parties were unable at the Paris meeting to settle this dispute, but agreed upon a procedure to be followed in order to try to reconcile their respective positions.

30. Accordingly, the disputed invoices were discussed at the meeting convened in September 1981 in Vienna. Avco contends that IACI approved in Vienna the previously disputed invoices in an amount of U.S.\$1,022,931 and, therefore, the Parties agreed that IACI owed Avco a total amount of U.S.\$11,140,598.05. IACI denies that any such agreement was reached in Vienna and emphasizes that Avco has produced no specific contractual or signed document upon

which the Tribunal could rely relating to the meeting referred to.

31. The Tribunal agrees. The only evidence of the alleged agreement concluded at the Vienna meeting consists of an unsigned draft, to which an Attachment No. 1 is appended, allegedly showing the respective positions of the Parties as to each of the contracts at stake or combination of these contracts. The absence of any signature on such a document clearly demonstrates that the terms of this document, including the figures therein, were not accepted by IACI. The dispute about the payability of certain invoices, therefore, was not settled at the Vienna meeting and the issue is now part of these proceedings. To be in a position to ascertain whether the disputed invoices are payable, however, the Tribunal must be provided with the relevant evidence.

32. The Tribunal notes that the independent accountant retained by the Claimant was instructed only to verify whether there existed an invoice corresponding to each entry of Avco's accounts receivable ledgers submitted by the Claimant and whether the amounts reflected in the ledgers agreed with the amounts reflected on the corresponding underlying copies of invoices. Such a procedure, indeed, provides the Tribunal with adequate evidence of the existence of the invoices listed in Avco's accounts receivable ledgers. It does not, however, include any material allowing the Tribunal to find that the "unclarified outstanding invoices not yet confirmed by IACI" at the Paris meeting were actually payable. The Tribunal therefore, is unable to accept the part of the claim relating to the invoices not accepted as payable at the Paris meeting.

33. The amount of U.S.\$10,117,667.05 which has been found to be payable relates to the accounts receivable owed by IACI to Avco under both the Export Agreement and the Engine Overhaul/Repair Agreement, discussed below. The Paris Agreement does not specify to which contract the conceded

amounts relate, and the Parties have provided no clarification in this respect in their submissions or at the Hearing. In such circumstances, the Tribunal is unable to determine the amount allocable to this contract separately from the amount allocable to the second contract. Therefore the total amount to be awarded to Avco shall be considered together with the claim for the Engine Overhaul/Repair Agreement.

2. The Claim for Incidental Damages

34. In addition to its claim for accounts receivable, Avco introduced a claim for incidental damages allegedly arising from IACI's failure to perform its obligations under the Export Agreement. This claim is composed of three items, namely work-in-process inventory, storage costs and vendor termination charges.

a) Work-in-Progress Inventory

35. Avco seeks U.S.\$796,275 for "work-in-progress inventory," which in the Affidavit of Mr. J.R. Gross is defined as "[c]osts incurred by Avco Lycoming for material, labor and overhead as well as profit. This inventory was in process but uncompleted as of the time that all work was stopped on Iranian contracts. Avco was unable to utilize this inventory for other customers' contracts." Affidavits of Mr. Gross and Mr. M. Leff testify that these costs were incurred.

36. During oral proceedings, Avco's representative explained that in December 1978, upon its determination that IACI had breached the Export Agreement, Avco began to sell the equipment originally ordered by IACI to other customers in order to mitigate damages, thereby reducing the claim otherwise accruing against IACI. According to Avco, the amount of U.S.\$796,275 represents the cost and expenses for inventory in progress which it was unable to resell.

37. IACI denies it has an obligation to pay for the work-in-progress inventory.

38. Avco has produced only the testimony of its officers to prove this claim. No documentary evidence has been submitted by Avco to show that the amount claimed constitutes its actual unmitigable losses following IACI's breach. No evidentiary basis has been provided to allow the Tribunal to make a reasonable estimate of damages. Therefore, without deciding whether Avco would have been entitled to recover had it proved its losses, the Tribunal dismisses this portion of the claim for lack of proof.

b) Storage Costs

39. Avco seeks reimbursement for storage costs accrued as of 30 June 1985 in the amount of U.S.\$71,242. At the Hearing Avco stated that its claim for storage costs had increased to U.S.\$84,960 up to 3 September 1986.

40. As evidence of these storage costs, Avco relies on the affidavit of Mr. Gross who, in addition to stating that these costs are due and owing, states that these costs were for storage of work-in-process inventory which required "space of 3,000 square feet at rates escalating from U.S.\$5.50 per foot in 1979 to U.S.\$6.75 in 1984."

41. According to Avco, these damages are attributable to IACI's breach of the Export Agreement. Avco alleges that after its suspension of its performance of the Agreement upon IACI's failure to remit sums due, it was obligated to keep in storage equipment which otherwise would have been shipped to IACI. At the Hearing Avco stated more specifically that these storage costs were incurred for storing the work-in-progress inventory which could not be sold to other customers. (See paragraph 36, supra). According to Avco, the rates upon which the calculation of the storage costs was

made are published in a price book distributed to all its customers, including IACI.

42. The only specific defense of IACI is based on Article VIII of the Paris Agreement, which provides that "Avco agrees that no claim including cost for interest and storage under all contracts and no cancellation claim . . . will be submitted to IACI." The Tribunal finds that this defense has no merit, since, as already noted, the Paris Agreement has never been implemented by the Parties and is now devoid of any binding force.

43. The data given by Avco, however, do not provide an adequate basis to allow the Tribunal to determine that storage costs have been incurred in the amount claimed, or to make an estimate of such amount. Thus, without reaching the question whether Avco's claim for storage costs has any legal basis and whether the Tribunal has jurisdiction over a claim for storage costs accrued after 19 January 1981, the Tribunal finds that the record contains no proof of the incurred costs. Consequently, the Tribunal disallows this part of the claim.

c) Vendor Termination Costs

44. Avco seeks U.S.\$135,762 in vendor termination costs. Avco alleges that it bore these costs when it terminated contracts with suppliers and subcontractors following its stoppage of work on the Export Agreement.

45. As evidence that these costs were incurred, Avco has submitted the affidavits of Mr. Gross and Mr. Leff, who testify that Avco incurred these costs upon suspension of the Export Agreement. Avco states that in the normal course of dealing, in the event of cancellation of contracts, vendors were paid "for their costs incurred plus a reasonable profit rate."

46. IACI denies any obligation of payment.

47. Avco's claim is not evidenced in any way other than the affidavits of its officers testifying that these costs were incurred. The Tribunal decides that Avco has not satisfied its burden of proof to establish that it bore the claimed costs. Accordingly, without examining the issue of Avco's contractual or legal entitlement to these costs, the Tribunal dismisses the claim for lack of evidence.

3. The Claim under the Bank Guarantee

48. Pursuant to Article 3(F) of the Export Agreement, the advance payments made by IACI at the time of issuance of the purchase orders were secured by bank guarantees in favor of IACI to ensure performance of Avco's obligations under the agreement. These bank guarantees were in turn secured by standby letters of credit issued on behalf of Avco.

49. At issue is IACI's call on one of the Guarantees. On 21 January 1978 Avco procured Letter of Guarantee 78/7, associated with purchase order No. 04413. This guarantee was secured by a standby letter of credit No. 155626 issued by Manufacturers Hanover Trust Company of New York. Guarantee No. 78/7 was initially in an amount of U.S.\$3,807,705. The Paris Agreement provides that "IACI . . . shall reduce bank guarantee No. 155626 (78/7) by the amount of U.S.\$1,179,035." The Paris Agreement also obligated IACI "not to present the bank guarantee for payment until the present barriers for shipment of IACI equipment to Iran are removed."

50. As agreed, the amount of Guarantee No. 78/7 was reduced on 21 June 1980 to U.S.\$2,628,670. On 21 December 1981, however, IACI demanded payment of the guarantee, despite the terms of the Paris Agreement. By telex dated 3 January 1982 the bank issuing the bank guarantee presented a corresponding demand on the standby letter of credit to Manufacturers

Hanover. Pursuant to this demand, a blocked account was established by Avco under United States Department of Treasury regulations.

51. Avco alleges that IACI's demand for payment under the bank guarantee constitutes a violation by IACI of its contractual obligations and seeks compensation for the loss resulting from IACI's wrongful demand.

52. IACI does not deny that it demanded payment under this bank guarantee but states that Avco's failure to fulfill its obligations under the Paris Agreement entitled it to do so.

53. The Tribunal notes that the call under this guarantee was made after 19 January 1981, the effective date of the CSD. The Tribunal therefore finds that it has no jurisdiction over this claim, which is therefore dismissed. See Ford Aerospace and Communications Corporation and Air Force of the Islamic Republic of Iran, Award No. 236-159-3 para. 71 (17 June 1986), reprinted in 11 Iran-U.S. C.T.R. 184.

4. IACI's Counterclaim

54. IACI has filed a counterclaim in the amount of U.S.\$12,746,337 allegedly due in December 1978, together with interest, for the return of unliquidated down payments which it furnished to the Claimant. Article III (F) of the Export Agreement required IACI to make a 25% advance payment whenever it issued any purchase order exceeding U.S.\$1 million, to be secured by a bank guarantee issued by Avco. These down payments were to be liquidated through pro rata reductions on invoices for products sold to IACI.

55. Avco does not deny that it received advance down payments, some of which have not been liquidated. The only issues in dispute concern (1) whether Avco is entitled to offset such down payments against its accounts receivable and (2) the amount of such unliquidated down payments.

56. As to the first issue the Tribunal finds that there is a clear right of offset. The Parties themselves have accepted the right of Avco to offset its accounts receivable against such down payments. In the Paris Agreement they concluded that Avco would apply all accepted unpaid invoices against down payments previously provided to Avco. In addition, in these proceedings, Avco has conceded that it is "willing to accept an offset of the amount of the unliquidated advance deposits against its total claims."

57. As to the amount of unliquidated advances, IACI submits that the total is U.S.\$12,746,337. IACI cites, as evidence, the Paris Agreement (para. 1), in which the Parties agreed that "at the present time the unliquidated portion of such down payments amount to U.S.\$12,746,337." (Emphasis added.) IACI seeks return of this amount. The Claimant, however, alleges that this figure is erroneous, the unliquidated down payments totalling only U.S.\$11,678,145. Avco argues that this amount was agreed upon by the Parties during the meeting in Vienna. As evidence of this agreement Avco has submitted Mr. Leff's affidavit, which affirms that the document submitted by the Claimant reflects the conclusions of the meeting. It is conceded, however, that, although this document was submitted to the representatives of the Parties, it was not signed by them. It, therefore, cannot be considered as embodying or evidencing an agreement.

58. The Tribunal has determined the Paris Agreement to be probative as to the Parties' liabilities. In the absence of any documentary evidence in substantiation of the allegation that another amount was subsequently agreed upon by the Parties, the Tribunal concludes that IACI is entitled to offset the amount mentioned in this agreement against the sums which the Tribunal has found to be owing to the Claimant, i.e., U.S.\$10,117,667.05. This results in a net entitlement to IACI of U.S.\$2,628,669.95. This amount is, however, subject to any further claims or offsets to which the Parties may be entitled. (See para. 86).

B. THE ENGINE OVERHAUL/REPAIR AGREEMENT

59. On 24 May 1976 Avco and IACI entered into an Engine Overhaul/Repair Agreement ("Repair Agreement"), whereby Avco agreed to perform various repair, modification and maintenance services for aircraft engines, accessories, parts and components owned by IACI.

60. Avco contends that IACI has failed to pay invoices issued pursuant to the Repair Agreement totalling U.S.\$3,680,399. Avco also claims incidental damages totalling U.S.\$5,590,609.

1. The Claim for Accounts Receivable

61. This claim has two components. Avco claims U.S.\$2,434,992 for "billed accounts receivable," representing the repair work allegedly completed during the performance of the contract, and U.S.\$1,245,407 for "unbilled accounts receivable," defined as "the cost and profit for overhaul/repair work completed but not shipped or invoiced as of the time that all Iranian work was stopped."

62. Pursuant to Article X of the Repair Agreement, IACI was to pay for work performed within 30 days of receipt of invoices. No provision was made for advance payments.

63. Avco contends that, in compliance with the Repair Agreement, it performed repair work pursuant to orders received from IACI detailing the equipment to be repaired and the nature of the services required. Avco alleges that it fulfilled all its obligations under the Repair Agreement and that it has returned all the equipment repaired or serviced, except for certain equipment which Avco has been prevented from shipping by Executive Orders issued by the President of the United States of America.

64. As with the invoice claims under the Export Agreement, Avco has submitted account receivable ledgers as evidence of "billed amounts" of U.S.\$2,434,992 for invoices to IACI. Avco submitted an affidavit of an independent accountant certifying that the amounts shown on the ledger correspond to invoices for work and services performed and equipment shipped to IACI. Avco relies on the Paris Agreement as further evidence that IACI accepted a portion of the "billed" accounts receivable amounts, and refers as well to the Vienna meeting as proof that IACI admits the total amount of U.S.\$2,434,992 to be due and owing.

65. IACI objects that Avco failed to submit to the Tribunal copies of the invoices. It also alleges that the invoices submitted to it by Avco did not specify the nature of the repair performed as required by the Repair Agreement. IACI contends further that in breach of the agreement Avco failed to return certain equipment within the contractual time limit and that after 14 November 1979 no further shipment was effectuated, as admitted by Avco. IACI concludes that under such circumstances Avco is not entitled to payment.

66. The Tribunal notes that as with the claim under the Export Agreement Avco relies primarily on affidavits of its officers and independent accountant, and has not produced any purchase orders, bills of lading, written demand for payment or other documentary evidence. As with the first claim, the Tribunal cannot grant Avco's claim solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit. On the other hand, as the Tribunal has previously determined, the Paris Agreement constitutes probative evidence of IACI's acknowledgement of its liability for invoices issued under both the Export Agreement and the Repair Agreement in an amount of U.S.\$10,117,667.05.

67. Although the Tribunal cannot make a precise allocation of the conceded amount to specific invoices or contracts,

the Tribunal concludes that for unpaid invoices under both contracts Avco is entitled to a total amount of U.S.\$10,117,667.05.

68. Avco also seeks to recover the amount of U.S.\$1,245,406.74 for "unbilled" accounts receivable. According to Avco, the repair work was performed pursuant to proforma invoices allegedly submitted by Avco to IACI. Avco did not submit the proforma invoices or any other documentary evidence. IACI offered to this claim a defense of a general nature.

69. Paragraph 3 of the Paris Agreement provides that "the value of proforma invoices for offload work in the amount of U.S.\$1,245,406.74 shall likewise be applied to the balance of the down payments." In view of the Tribunal's previous finding regarding the probative value of acknowledgments of amounts outstanding in the Paris Agreement, the Tribunal concludes that IACI is obligated to pay Avco the amount of U.S.\$1,245,406.74 in "unbilled" accounts receivable.

2. The Claim for Incidental Damages

70. In addition to the claim for accounts receivable, Avco alleges that the termination of the Repair Agreement caused incidental damages in the form of inventory off-load costs and storage costs.

a) Inventory Off-Load Costs

71. Avco claims U.S.\$764,059 for costs for inventory which it defines as "costs incurred by Avco Lycoming for the overhaul and repair of Iranian-owned engines. The engine repairs, which were not completed at the time of the work stoppage, included costs for material, labor and overhead, as well as profit." As evidence that these costs were incurred, Avco relies on the affidavit of Mr. Gross.

72. IACI denies any obligation for payment under this claim.

73. The record fails to demonstrate to the Tribunal's satisfaction on what basis the asserted costs have been calculated. The mere assertion that these costs were incurred does not constitute a sufficient basis for an award of the amount claimed. The claim is therefore dismissed for lack of proof. The Tribunal thus need not examine whether the Repair Agreement contemplates payment of such costs.

b) Storage Costs

74. Avco originally claimed U.S.\$5,265,000 in costs through 30 June 1985 for storage of thirty engines sent for repair under the Repair Agreement. At the Hearing Avco's representative stated that in fact Avco had been storing only twenty-three IACI engines, and that the seven remaining engines belonged to the U.S. Army, to which they had been returned. Avco amended its claim accordingly, stating that storage costs for the twenty-three IACI engines accrued up to 1 September 1986 amount to U.S.\$4,826,550. It explained that the claimed storage cost includes labor and overhead costs associated with the protection and maintenance of the engines. Avco states that the storage costs are calculated on the basis of a rate of U.S.\$75 per engine per day by reference to a price book allegedly distributed yearly to Avco's customers including IACI.

75. IACI denies any obligation for payment for the storage charges. It is implicit in IACI's counterclaim, however, which seeks the return of the equipment, that IACI's engines are actually stored in Avco's warehouses.

76. The Tribunal has seen no proof as to a storage rate charged to Avco and it is unable to evaluate whether the storage charges asserted are reasonable for the services provided. The Tribunal therefore finds that Avco has failed

to adduce evidence as to the accuracy of the calculation of the storage costs in order to sustain its claim and dismisses the claim for storage costs for lack of proof, without reaching the issues mentioned in para. 43 above.

3. IACI's Counterclaim

77. IACI has counterclaimed for (1) return of its equipment held by Avco, (2) damages in the amount of U.S.\$10 million, subsequently raised to U.S.\$30 million, caused by delay in the return of the parts, and (3) U.S.\$10 million for breach of contract.

78. IACI submits that Avco breached the contract by not returning the parts pursuant to Article V.1 of the contract which provides that the equipment to be returned to Iran:

. . . shall be shipped FOB Mehrabad Airport, Tehran, Iran to the following or any alternative address supplied by IACI according to the instructions provided on the P.O. [purchase order] Iran Aircraft Industries Mehrabad Airport Tehran Iran.

79. Avco argues that it was excused from shipping the parts because it was prevented from so doing by the governmental regulations promulgated by the United States Government, a factor clearly beyond Avco's control. It invokes Article VIII (3) of the contract which states, inter alia, that:

. . . the company [Avco] will [not] be liable for any delays, loss or damage due to causes beyond control, including . . . request of any government having authority in the premises, or any government office or agency purporting to act under the authority of such government . . . or interference of any government officials.

In conformity with this article, the Parties implicitly recognized in the Paris Agreement that Avco was prevented from proceeding with the shipment by the United States

regulations. They agreed that Avco would "ship the repaired equipment to Tehran as soon as the present barriers are removed. . . ." (Emphasis added.) Furthermore, one of the main provisions of the Paris Agreement relates to the issuance by Avco of a corporate guarantee "assuring IACI that as soon as the present barriers for shipment of IACI's equipment outside the United States are removed Avco shall take action to ship all of IACI repaired equipment. . . ." (Emphasis added.) Subsequent exchanges between the Parties confirm that United States Government restrictions prohibited the return of any of the parts. Thus by telex of 3 July 1980 Avco informed IACI that it was "prohibited by our government from carrying out the terms of the Letter of Agreement." Furthermore, the Tribunal is informed that the restrictions on export to Iran of items of military interest were not lifted before 19 January 1981 and that they are still applicable at the date of the present Award.

80. Under such circumstances the Tribunal finds that Avco was relieved of its obligation to ship the parts to IACI and therefore the claims for damages are dismissed.

81. This conclusion, however, does not fully dispose of the claim for return of IACI's parts. Although, for the reasons set forth above, Avco continues to be prohibited from shipping these parts to Iran, it does not assert title over them and does not dispute that the contract embodies the basic obligation to return such parts. It is therefore not entitled to keep them when their return is requested by IACI but at the same time cannot be obligated to store them indefinitely, if it is prevented, by causes beyond its control, to ship them to Iran in conformity with the terms of Article V, paragraph 1, of the contract.

82. The Tribunal notes that the Article just mentioned provides that the equipment in question shall be shipped FOB

to a specific address in Tehran "or any alternative address" supplied by IACI in the Purchase Order. This obviously does not prevent the Parties from subsequently agreeing on another destination or even disposition of the equipment, if causes beyond their control render the implementation of their initial agreement impossible.

83. In order to find a practical solution to this issue, the Tribunal invites the Parties to meet and to negotiate with a view to arriving at an agreement upon the exact inventory of IACI's parts held by Avco, an issue which is in dispute and was not clarified during the proceedings, and upon the ways and means to deliver these parts to IACI, or otherwise to dispose of them.

84. The Parties could, inter alia, explore the possibility of returning the parts in question to IACI, FOB warehouse of Avco, at any destination in the United States designated by IACI. See Litton Systems, Inc. and The Islamic Republic of Iran, Award No. 249-769-1 at 13-14 (25 August 1986); Behring International Inc. and Islamic Republic of Iran, Award No. ITM 46-382-3 (22 February 1985), reprinted in 8 Iran-U.S. C.T.R. 44. Another possibility would be to authorize Avco to sell the parts and to transfer the proceeds to IACI.

85. If the Parties are not able to arrive at an agreement they may by 4 November 1988 at the latest, apply jointly or separately, to the Tribunal, which will decide upon the issues not settled by the Parties.

C. OFFSET

86. After offsetting the amount awarded to Avco for accounts receivable under the two Agreements (Export Agreement and Repair Agreement), i.e., U.S.\$10,117,667.05 against the amount awarded to IACI on its counterclaim arising out of the Export Agreement, the Tribunal found that IACI was entitled to U.S.\$2,628,669.95 (see para. 58, supra). This

amount has to be offset against the additional amount awarded to Avco in relation to the Repair Agreement, i.e., U.S.\$1,245,406.74 (see para. 69, supra), leaving a net amount of U.S.\$1,383,263.21 in favor of IACI.

IV. CLAIMS AND COUNTERCLAIMS INVOLVING IHSRC

87. Avco's claim against IHSRC arises out of four separate agreements. On 26 June 1977 Avco and IHSRC entered into three substantially identical agreements bearing the references C7BHMC1157 ("1157"), C7BHMC1158 ("1158") and C7BHM1159 ("1159") for the delivery of spare parts and technical services for specified aircraft engines previously delivered by Avco to IHSRC. Subsequently, on 21 November 1977, the Parties executed a "Basic Ordering Agreement," which set forth the terms and conditions applicable to Avco's provision, upon IHSRC's order, of supplies and technical services in support of aircraft equipment previously delivered by Avco to IHSRC. The Basic Ordering Agreement states that it was intended to "take precedence over the terms and conditions of the delivery orders" for the same kinds of engines covered in the three previous agreements.

A. CLAIM FOR ACCOUNTS RECEIVABLE

88. Avco claims U.S.\$1,112,494 in accounts receivable and U.S.\$634,281 in incidental damages for work-in-process inventory costs, vendor termination costs, and for storage costs accrued up to 1 September 1986.

1. Contracts 1157, 1158 and 1159

89. Avco contends that pursuant to Contracts 1157, 1158 and 1159 IHSRC placed with it a number of delivery orders and that it provided in a timely manner the parts and technical services IHSRC requested. It alleges that in conformity with the agreements it sent to IHSRC substantiated invoices but

that IHSRC has failed to pay some of them totalling U.S.\$738,843.07. Avco admits that it was prevented from shipping certain of the goods in November 1979 when the United States Government issued orders freezing the transfer of Iranian assets.

90. As evidence of its contentions Avco has submitted copies of its accounts receivable ledgers associated with the contracts as well as three supporting affidavits. An affidavit sworn by Avco's independent accountant testifies that Avco had in its record an invoice corresponding to each entry on the ledgers. An affidavit of Mr. Leff states that "Avco at all times delivered in a timely manner the spare parts and technical services as called for in the agreements." Mr. Gross attests in the third affidavit that the amount claimed by Avco is actually owed by IHSRC.

91. As further evidence Avco relies on the unsigned document allegedly drafted during the meeting held in Vienna in September 1981. Avco states that while this document "cannot serve as a final accounting of amounts owed by IHSRC," it constitutes sufficient evidence that IHSRC accepted and approved Avco's invoices in an amount of U.S.\$1,003,605.32.

92. In reply IHSRC argues that the invoices submitted to it by Avco were not substantiated by proper documentation; according to IHSRC the evidence should have included "invoices certified by the local Chamber of Commerce, bill of lading, certificate of inspection . . . , and certificate of origin." According to IHSRC, Avco also failed to submit the monthly computer reports contemplated by Article III of each of the contracts and did not deliver the goods to Tehran as allegedly contemplated by Article III(B) of the contracts. IHSRC further alleges that the document drafted at the Vienna meeting was never accepted by it and does not constitute reliable evidence of an agreement. IHSRC finally states that the affidavits proffered by Avco to prove its

claim are inadequate to show that the parts were actually shipped.

93. For the reasons set forth in relation to contracts with IACI in paragraphs 32 and 33 above the evidence submitted by the Claimant is insufficient to convince the Tribunal that Avco is entitled to the amount claimed for delivery of the spare parts and technical services called for in the contract. The Tribunal finds therefore that Avco has failed to carry its burden of proof with respect to this claim, which is dismissed for lack of proof.

94. The Tribunal notes, however, that in its Statement of Defense IHSRC submitted that as of 10 October 1978 Avco has "delivered the equipment under the Contracts for the total value of U.S.\$2,241,153.43." In support of this figure (which is considerably less than the figure of U.S.\$2,831,363.41 advanced by the Claimant), IHSRC submitted a contemporaneous summary of all ordered and shipped equipment under the three Contracts. IHSRC has further submitted evidence establishing to the satisfaction of the Tribunal that of this amount IHSRC has paid U.S.\$1,335,508.21 by way of direct transfers to Avco and U.S.\$504,183.94 by way of liquidation of deposits or a total amount of U.S.\$1,839,692.15. The Tribunal finds that IHSRC's submissions amount to a concession that U.S.\$401,461.28 was outstanding in favor of Avco on 10 October 1978 and that Avco therefore is entitled to that amount. Subject to an award of interest, this amount shall be set off on the date of the Award against the IHSRC's entitlements from Avco (see para. 119, infra).

2. Purchase Order No. C8YFSR 5190

95. Avco claims that U.S.\$290,374.55 remains outstanding for services rendered under Purchase Order No. C8YFSR 5190 ("Purchase Order"). Avco describes the Purchase Order as an individual order placed under the Basic Ordering Agreement

for the supply of services of six technical representatives specializing in the repair of helicopter engines.

96. IHSRC agrees that the work was ordered and performed but objects that this Purchase Order was a separate contract not covered by the Basic Ordering Agreement and not claimed in the Statement of Claim. It does not, however, specifically challenge the Tribunal's jurisdiction over this claim, and in fact concedes that an amount of U.S.\$184,500 is still due and owing to Avco for work performed pursuant to the Purchase Order.

97. As evidence of this claim Avco has submitted its accounts receivable ledgers and supporting affidavits, without further substantiation of the amount it claims. The Tribunal therefore concludes that only the amount admitted by IHSRC to be due, U.S.\$184,500, is payable to Avco. Subject to an award of interest, this amount shall be set off on the date of the Award against the IHSRC's entitlements from Avco (see para. 119, infra).

3. Miscellaneous Orders under the Basic Ordering Agreement

98. Avco claims U.S.\$83,276.16 for work allegedly performed under miscellaneous orders related to the Basic Ordering Agreement. Avco has submitted its accounts receivable ledgers and supporting affidavits as proof of its right to payment. IHSRC submits no defense to this portion of the claim.

99. The issue concerns the adequacy of the evidence adduced by Avco to show that the services were performed and invoiced and that the invoices were followed up by demands for payment. The Tribunal finds there is no conclusive evidence showing that this amount is due and owing and therefore dismisses this claim for lack of proof.

B. CLAIMS FOR INCIDENTAL DAMAGES

100. In addition to its claim for accounts receivable, Avco claims incidental damages composed of three items, namely work-in-process inventory, vendor termination costs and storage costs.

1. Work-in-Process Inventory

101. Avco seeks payment of an amount of U.S.\$550,566 for the value of costs incurred for materials, labor, overhead and profit related to inventory upon which work was in process but uncompleted as of the time that all work was stopped on Iranian contracts. Avco states that the amounts claimed represent the value of work-in-progress inventory which could not be sold to other customers. Avco has submitted by way of evidence the affidavit of Mr. Gross testifying that these costs were incurred.

102. IHSRC denies any obligation of payment under this claim.

103. The Tribunal notes the absence of sufficient proof in the record of the basis upon which the amounts claimed have been computed and concludes that Avco has failed to adduce sufficient evidence as to the loss suffered. Accordingly, this part of Avco's claim is dismissed. In view of this finding, the Tribunal does not need to establish whether such costs would have been payable under the contracts.

2. Vendor Termination Costs

104. Avco claims U.S.\$24,675 in vendor termination costs allegedly incurred when work on the contracts was interrupted. Avco relies on Mr. Gross' affidavit to establish the amount of these costs. IHSRC has provided no defense against this claim.

105. Avco has submitted no evidence allowing the Tribunal to determine the nature of Avco's computation with regard to these costs. Thus, without deciding Avco's legal entitlement to such costs, the Tribunal dismisses this part of Avco's claim for lack of proof.

3. Inventory Storage Costs

106. Avco claims U.S.\$59,040 in storage costs associated with work-in-process inventory accrued up to 1 September 1986.

107. The only evidence that these costs have been incurred is to be found in Mr. Gross' affidavit. No evidence has been produced to prove the damages allegedly suffered and the Tribunal does not have any basis on which to calculate such damages. Under such circumstances, the Tribunal needs not reach the issues mentioned in Paragraph 43 above and disallows this part of the claim for lack of proof.

C. IHSRC'S COUNTERCLAIMS

1. Phase A Counterclaims

108. IHSRC designates its first series of counterclaims as "Phase A" counterclaims, defined as those arising out of the business relations between Avco and IHSRC "from 1973 until Avco Lycoming's [unspecified] failure." IHSRC states they are "based on Purchase Orders and repair orders" other than the Basic Ordering Agreement and Contracts 1157, 1158 and 1159, bearing the reference A7BHMC3475, A7BHMC3300 and LD202R51672000 respectively.

109. IHSRC seeks an award ordering Avco: (1) to deliver the two items that Avco allegedly refused to deliver pursuant to Purchase Order No. A7BHMC3475 "at the price in force at the time the order was placed," i.e., U.S.\$23,109.50; (2) to deliver the two items that Avco allegedly refused to deliver

pursuant to Purchase Order No. A7BHMC3300 "at the price in force at the time the order was placed," i.e., U.S.\$23,100; (3) "to restore 47 turbines, outstanding from Repair Order No. LD202R51672000, and Order Charge dated 15 December 1975 at the price in force at the time the offer was placed," less a discount of 20 per cent per year.

110. No other evidence relating to the Purchase Orders upon which these counterclaims are based has been submitted. It is conceded that such Purchase Orders do not arise out of the contracts upon which Avco has based its claim. In the absence of any further indication and evidence as to the circumstances relating to the Purchase Orders in question, the Tribunal is unable to determine whether they formed part of the same transaction or occurrence within the meaning of the CSD. The Tribunal finds, however, that these counterclaims would fail for lack of proof, since no evidence of Avco's alleged refusal to deliver or repair the items at issue has been adduced. Consequently the Tribunal does not reach the issue of jurisdiction.

2. Counterclaim Arising out of the Basic Ordering Agreement

111. IHSRC alleges that pursuant to the Basic Ordering Agreement it issued Purchase Orders that were accepted by Avco, but that Avco failed to make delivery of 35 items listed in these Purchase Orders, in the amount of U.S.\$343,029.35. According to IHSRC, Avco was required to deliver 20 items (worth U.S.\$232,610.40) prior to February 1979 and the remaining 15 items thereafter. The counterclaim is for an award obligating Avco to deliver the 35 items at the contractual price.

112. In defense to this counterclaim Avco argues that it was prevented from shipping the items by "Executive and Administrative Orders of duly authorized officers of the United States."

113. As evidence of this counterclaim, in addition to the Basic Ordering Agreement and to the letter of credit opened pursuant to this Agreement, IHSRC submitted a list of "delivery orders," without indication of the dates of issuance of these orders and of the specific delivery schedule which was to be established pursuant to Article III of the Basic Ordering Agreement. In view of this lack of documentation, the Tribunal is unable to determine whether Avco breached the contract by failing to deliver the items at issue prior to the issuance of the United States regulations prohibiting the export to Iran of military equipment. Accordingly, the counterclaim is dismissed for lack of evidence.

3. Counterclaims Arising out of Contracts
1157, 1158 and 1159

114. IHSRC submits that Avco is obligated to deliver "the remaining items under Agreements No. 1157, 1158 and 1159 at prices set forth in each Agreement," i.e., U.S.\$8,145,811.95, plus (1) "financial and administrative damages in respect of recession" caused by such nondelivery, in the amount of \$30 million; (2) "direct technical losses owing to non delivery," in the amount of \$41 million; and (3) "indirect technical losses due to nondelivery," in the amount of \$270 million.

115. IHSRC failed to provide the Tribunal with the dates at which Avco was contractually bound to deliver the items at issue and the date at which Avco allegedly stopped delivery to IHSRC. It must be recalled, in this context, that contracts 1157, 1158 and 1159, executed on 26 June 1977, described by IHSRC as "the 5 year Agreements," were concluded in order to provide the latter "a five year supply of specific parts." Its implementation, therefore, was due to extend until June 1982.

116. Contracts 1157, 1158 and 1159 provided that Avco "shall not be liable for delays in performing his obligations

resulting directly or indirectly from (1) any cause which is beyond its reasonable control . . ." including "acts of any Government authority domestic or foreign, including but not limited to . . . guarantees, embargoes [sic], licensing controls or production or distribution restrictions" In such circumstances, the Tribunal must find that Avco was excused by force majeure when it allegedly stopped delivery. The counterclaim, therefore, is dismissed.

4. Counterclaim For Reimbursement of Payments to IHSRC

117. IHSRC finally claims the return of the balance of the unliquidated down payments and the direct payments made to Avco and the value of goods received from Avco. The total amount claimed is of U.S.\$2,264,282.13.

118. Avco does not, per se, dispute the obligation to return payments received in excess of goods delivered. The remaining issue is to determine if any such excess is due to IHSRC and, if so, the amount of such excess.

119. Given the record in this Case, there are different possible ways to calculate the balance of the accounts between the Parties. Depending on the figures used, and the varying level of documentation available, these different ways of calculating may not yield identical results. The figures the Tribunal has decided to apply are based on concessions -- in some cases corroborated by documentary evidence -- and available invoices and payment orders. The Parties agree that IHSRC secured a total amount of U.S.\$2,755,265.91 in favor of Avco, made up as follows: U.S.\$508,948.10 under contract 1157, U.S.\$870,925.84 under contract 1158 and U.S.\$1,375,391.97 under contract 1159. IHSRC has submitted evidence that of this amount U.S.\$504,183.94 was liquidated as part of IHSRC's payment

for goods received. The resulting balance in favor of IHSRC on the deposit is thus U.S.\$2,251,081.97. Subject to the award of interest, this amount shall be used in setting off the amounts IHSRC has conceded to be due to Avco (see para. 94 and 97, supra).

V. CLAIM AND COUNTERCLAIM INVOLVING NIOC

A. AVCO'S CLAIM

120. In this claim Avco seeks from NIOC an amount of U.S.\$81,695.55 for services rendered in connection with oil pipeline pumping equipment previously sold to NIOC by Avco. In 1971 NIOC purchased from Avco a number of portable multi-purpose pumping units for use in case of emergency. In 1977 NIOC decided to use one of these units to power a pumping station to transfer crude oil to Isfahan refinery and, by telex No. 564 dated 18 May 1977, requested Avco to supply "spare parts necessary to activate and operate" the unit and "the services of one technical representative for approximately three months." This telex proposed that "working time will be 5 days per week and over time will be paid at dollar 62 per hour" and estimated the total cost for the service to be U.S.\$33,000. This offer apparently was accepted by Avco, and by a "letter of intent" of 12 July 1977 NIOC confirmed to Avco that "the terms and conditions will be in accordance with telex No. 564."

121. NIOC subsequently requested Avco to provide two further technicians to operate the unit and by telex No. Ro-77-86 dated 2 August 1977 Avco agreed to "supply two (2) additional men to operate and maintain the unit on a twenty four hour basis" at the rate of U.S.\$7,000 per man per month. On 14 September 1977 NIOC requested that Avco "mobilize for two operators as soon as possible." This was accepted by Avco by telex No. Ro-77-86 and Avco dispatched its employees to perform the work requested.

122. Avco states that it invoiced NIOC for a total amount of U.S.\$81,695.55 for the following items: U.S.\$37,289 for services, U.S.\$38,967 for overtime costs, U.S.\$6,399.55 for transportation expenses, less U.S.\$960 in unrelated credits. Avco alleges that the entire amount remains due and owing.

123. NIOC admits that a sum of U.S.\$42,728.55 was properly invoiced for the services of the technicians working under the agreement evidenced by telex No. Ro-77-86 and is due and owing. Furthermore, pursuant to a document entitled "Contract Payment" submitted by NIOC U.S.\$37,218.16 was due in relation to the technician operating under the first exchange of telexes. Thus NIOC has effectively conceded an amount due of U.S.\$79,946.71 for work performed pursuant to both exchanges of telexes. It denies, however, any obligation to pay the remaining U.S.\$1,748.84 claimed and not conceded. NIOC asserts that the unconceded balance relates to overtime work pursuant to the second telex, payment for which was not contemplated by the parties. NIOC argues that the agreement of the Parties relating to two technicians pursuant to telex No. Ro-77-86 contains no provision for overtime payments and is unrelated to the first contract, which did provide for overtime. According to NIOC, under telex No Ro-77-86 the two technicians were to be paid at a set rate of U.S.\$7,000 per man per month, without any possibility of overtime.

124. To deny any obligation of payment under this claim, NIOC further alleges that the two additional technicians "did not work the hours stipulated in the contract" since according to NIOC "the oil supply operations and filling up the pipelines did not require the continued use of services of the said experts throughout the week." By way of evidence, NIOC submits the affidavit of Ghasem Talebzadeh. NIOC has, however, not submitted any evidence satisfactorily rebutting Avco's invoices for overtime work. The Tribunal concludes that this defense has no merit.

125. The agreement formed on the basis of telex No. 564 unequivocally provides that overtime work would be remunerated at the rate of U.S.\$62 per hour. Avco's telex No. Ro-77-86 dated 2 August 1977 contains no provision related to overtime and payment thereof. However, NIOC's telex dated 14 September 1977 concerning the hiring of the two additional technicians makes reference to NIOC's "letter of intent" No. DC-209, dated 12 July 1977, which confirmed the terms of the first telex, No. 564, and states that a "relevant addendum to contract DC 209 is being processed." This strongly suggests that the intention of the Parties was to incorporate the provisions of the telex No. Ro-77-86 as an amendment to the first contract, and thus preserves the overtime provisions for all the work done.

126. In addition, an examination of the rates set out in the two telexes implicitly confirms that overtime would be payable on account of the two additional technicians. Telex No. 564 providing for the first technician specified a total estimated sum of U.S.\$33,000 for services performed over three months, transportation costs and certain needed parts. That apparently represents a billing rate of approximately U.S.\$7,000 per month, the balance of U.S.\$3,000 over a month covering parts and expenses. This is confirmed by the hourly billing rate actually charged by Avco of U.S.\$40.87 per hour, which multiplied by 21.40 working days per month (on the basis of the five day week provided by the contract) equals U.S.\$6,996.94 per month.

127. Remuneration for the two additional technicians provided pursuant to telex No. Ro-77-86 was expressly set at the rate of U.S.\$7,000 per man per month. Thus it appears that a monthly rate of U.S.\$7,000 was applicable to all three technicians, and, therefore, that the overtime terms were also applicable to all three. It appears most reasonable that the three technicians working on the same task and in similar conditions be remunerated on the same basis. This is confirmed by the fact that there was no separate billing for

the various technicians, which tends to indicate that the financial basis of these two contracts was considered identical. The Tribunal therefore finds that the charges for overtime are allowable.

128. The Tribunal has now to determine the accuracy of Avco's computation. Avco has submitted invoices listing the employees, the dates and number of hours for which overtime services were allegedly provided. With respect to the first technician, William Tiechert, Avco billed NIOC on the standard eight-hour basis for services performed on 16 and 18 November 1977. The overtime sheet shows, however, that on the same dates Avco billed NIOC respectively 15 and 14 overtime hours for an apparent total of 23 or 22 hours per day. The Tribunal does not find this part of the evidence to be fully credible and concludes therefore that the amount of U.S.\$1,798, representing 29 hours at the overtime rate of U.S.\$62, must be deducted from Avco's claim for overtime, for an award of U.S.\$79,897.55.

B. NIOC'S COUNTERCLAIM

129. NIOC claims damages totalling Rials 178,309,658, consisting of: (1) a claim of Rials 132,000,890 for the purchase price of eight turbines which were allegedly defective; (2) Rials 6,169,520 for costs incurred in modifying the units; (3) Rials 34,199,888 for loss incurred for the purchase of spare parts; (4) Rials 3,334,240 for costs incurred in training personnel to operate the units; and (5) Rials 2,605,120 for return of the payment of salaries and allowances to Avco technicians.

130. As noted above, the pumping units for which technical services were rendered in 1977 had been purchased by NIOC from Avco in 1971. NIOC's counterclaim is based on alleged defects in those units.

131. Avco alleges that the Tribunal lacks jurisdiction over the counterclaim.

132. The Tribunal has jurisdiction over NIOC's counterclaim only if it can be held to have arisen out of "the same contract, transaction or occurrence that constitutes the subject matter of that national's claim," within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration and, more precisely, if the linkage between the 1971 sale of the units and the 1977 contract for technical services relating to one of the units is sufficiently strong to form a single "transaction."

133. The record shows that throughout the period from 1971, when the units were purchased, to 1977, when the technical service was provided, Avco participated in the testing, maintenance and refurbishment of these pumps. It is also clear that NIOC asked Avco to assist in operating one of the pumping units because it had been purchased from Avco and that there were thus continuous commercial relations between NIOC and Avco throughout this period in relation with the pumping units. The Tribunal, however, finds that the contract for the supply of three technicians and spare parts six years after the sale is too remote and too different from the sales transaction to permit a conclusion that both occurrences constitute a single transaction within the meaning of the Claims Settlement Declaration. The Tribunal, therefore, dismisses NIOC's counterclaim for lack of jurisdiction.

VI. INTEREST

134. In the absence of any contractual provisions for payment of interest, the Tribunal finds it proper to fix the interest rate at 10 percent, pursuant to the principles and guidelines established by the Tribunal in McCollough and Company, Inc. and Ministry of Post, Telegraph and Telephone,

Award No. 225-89-3 (22 April 1986), reprinted in 11 Iran-U.S. C.T.R. 3.

135. Interest on the U.S.\$10,117,666.05 found to be owing from IACI to the Claimant under the Export Agreement and the Repair Agreement is to be calculated from 1 October 1978, the median date of the underlying invoices. Interest on the U.S.\$1,245,406.74 awarded the Claimant for offload work is to be calculated from 1 July 1979, by which date it can reasonably be concluded that such work was completed (the Claimant having given no indication as to when it actually was performed). In respect of both these amounts interest is to be calculated only to 11 April 1980, the date of the Paris Agreement resulting in their payment from advances. The calculated interest amount due the Claimant in this respect is U.S.\$1,640,886.44 which amount shall be set off against the Claimant's dues to IACI.

136. As to the remaining advance of \$1,383,263.21 found to be owing from the Claimant to IACI, interest is to be calculated from 11 April 1980, the date of the Paris meeting, which event must be deemed a demand for return of such advances.¹ Such interest on the sum owed IACI shall run until the date of payment of the Award to it.

137. As to the claims involving IHSRC, the sum of U.S.\$401,461.28 found to be due and owing by IHSRC to the Claimant as of 10 October 1978 in respect of Contract Nos. 1157, 1158 and 1159 is to bear interest from that date to the date of this Award which authorizes its offsetting against the outstanding advances made by IHSRC. Such interest amounts to U.S.\$392,222.19.

¹Although the Paris Agreement, if fully implemented, would have resulted in another settlement, the undisputed fact that the Parties met with the intention to clear outstanding claims between them constitutes, in the view of
(Footnote Continued)

138. On the sum of U.S.\$184,500 found to be due and owing to the Claimant by IHSRC in respect of Purchase Order C8YFSR 5190, interest is to be calculated from 1 January 1979, the approximate median date of the individual orders made and filled pursuant to it, likewise until the date of this Award. The calculated interest on this amount totals U.S.\$176,058.49.

139. As to the advance outstanding in favor of IHSRC of U.S.\$2,251,081.97 from the Claimant, interest will be measured from the date of the meeting in Vienna held between the Parties intended to settle the outstanding claims between them. (See para. 138, fn 1). This meeting was held in September 1981 at an unspecified date. The Tribunal determines that interest shall be calculated as of 30 September 1981. Interest shall run on this amount until the date of this Award as the Respondent IHSRC has so limited its request.

140. In respect of the amount awarded the Claimant from NIOC, U.S.\$79,897.55, interest shall be measured from 9 June 1978 i.e. approximately thirty days from the date of Avco's invoice to NIOC.

VII. COSTS

141. In view of the circumstances of this case, each Party shall bear its own costs of arbitration.

(Footnote Continued)

the Tribunal, a claim for return of the outstanding advances which entitles IACI to interest as of that date.

VIII. CALCULATION OF NET AWARD

142. As discussed above, the Tribunal has decided that the Claimant owes IACI U.S.\$1,383,263.21 plus interest at 10 percent per year from 11 April 1980 and that IACI owes the Claimant U.S.\$1,640,886.44 as calculated interest. After interest has been calculated to the date of this Award, the Claimant's dues to IACI amounts to U.S.\$2,527,013.44. Thus the net amount payable to IACI is U.S.\$886,127 plus interest from the date of the Award until payment.

143. The Tribunal has further decided that the Claimant owes IHSRC U.S.\$2,251,081.97 plus interest at 10 percent per year from 30 September 1981 and that IHSRC owes the Claimant a total amount of U.S.\$1,154,241.96. After interest has been calculated to the date of this Award, the Claimant's dues to IHSRC amounts to U.S.\$3,781,200.99. Thus the net amount payable to IHSRC is U.S.\$2,626,959.03 plus interest from the date of the Award until payment.

144. No offsets are due against the Claimants entitlement from NIOC.

IX. AWARD

145. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

- a) The Claimant AVCO CORPORATION is obligated to pay the Respondent IRAN AIRCRAFT INDUSTRIES the sum of Eight hundred eighty-six thousand one hundred twenty-seven United States Dollars (U.S.\$886,127) plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from the date of this Award up to and including the date of payment.

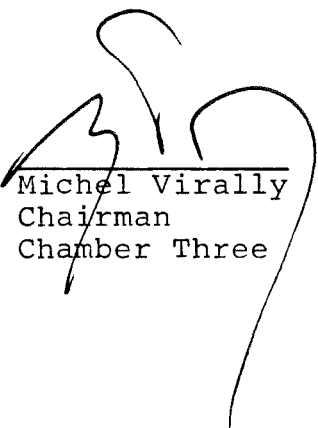
- b) The Claimant AVCO CORPORATION and the Respondent IRAN AIRCRAFT INDUSTRIES shall meet to negotiate an agreement covering the exact inventory of IRAN AIRCRAFT INDUSTRIES's parts held by AVCO CORPORATION and the ways and the means for the Claimant to deliver these parts to IRAN AIRCRAFT INDUSTRIES, or otherwise to dispose of them. If the Parties are not able to arrive at an agreement they may by 4 November 1988 at the latest, apply jointly or separately, to the Tribunal, which will decide upon the issues not settled by the Parties.
- c) The Claimant AVCO CORPORATION is obligated to pay the Respondent IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY the sum of Two million six hundred twenty-six thousand nine hundred fifty-nine United States Dollars and three Cents (U.S.\$2,626,959.03) plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from the date of this Award up to and including the date of payment.
- d) The Respondent NATIONAL IRANIAN OIL COMPANY is obligated to pay the Claimant AVCO CORPORATION the sum of Seventy-nine thousand eight hundred ninety-seven United States Dollars and Fifty-five Cents (U.S.\$79,897.55) plus simple interest due at the rate of ten percent (10%) per annum (365-day basis) from 9 June 1978 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.
- e) The obligation mentioned in paragraph d), supra, shall be satisfied by payment out of the Security Account established pursuant to Paragraph 7 of the Declaration

of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

- f) Each Party shall bear its own costs of arbitration.
- g) With the exception of the still unresolved issue referred to in paragraph b), supra, all other claims and counterclaims in this Case are dismissed.

This award is submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated, The Hague
18 July 1988

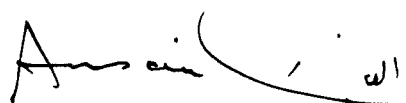


Michel Virally
Chairman
Chamber Three

In the Name of God



Charles N. Brower
Concurring and
Dissenting Opinion



Parviz Ansari Moin
Separate Opinion