

430-159

CLAIMS TRIBUNAL

دیوان داری دعاوی ایران - ایالات متحدہ

159

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Case No. 430

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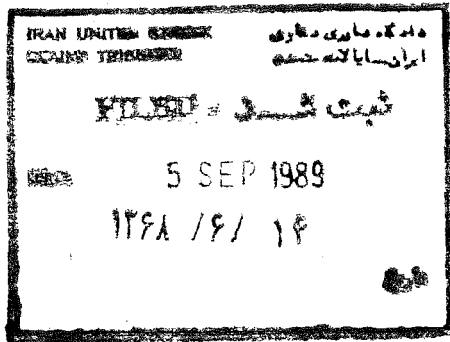
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CASE NO. 430

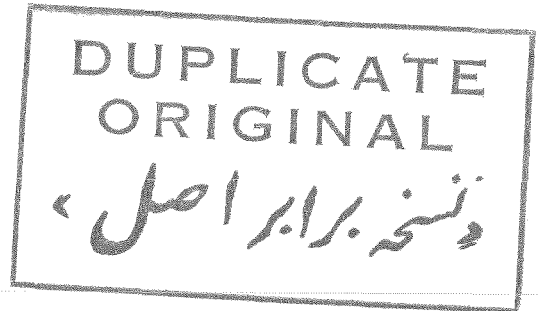
CHAMBER ONE

AWARD NO. 438-430-1

ROCKWELL INTERNATIONAL SYSTEMS, INC.,
Claimant,

and

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



AWARD

Appearances

For the Claimant:

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Mr. Ehsanullah Samimi,
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Ministry of Defense,
Mr. Ali Akbar Ostadifar,
Mr. Ahmad Kashiani,
Representatives of the
Islamic Republic of Iran
Airforce,
Mr. Mahmoud Reza Khavari,
Assistant to the Agent.

Also present:

Mr. Michael F. Raboin,
Deputy Agent of the
United States of America.

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A. INTRODUCTION

1. This Claim arises out of contracts forming a fundamental part of the so-called "IBEX" project which sought to modernize and expand Iran's military electronic intelligence gathering system. See Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298; Questech, Inc. and Ministry of National Defence of the Islamic Republic of Iran, Award No. 191-59-1 (25 Sept. 1985), reprinted in 9 Iran-U.S. C.T.R. 107; Touche Ross & Company and Islamic Republic of Iran, Award No. 197-480-1 (30 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 284; Ford Aerospace & Communications Corp. and Government of the Islamic Republic of Iran, et al., Partial Award No. 289-93-1 (29 Jan. 1987), reprinted in 14 Iran-U.S. C.T.R. 24; Harris International Telecommunications, Inc. and Islamic Republic of Iran, et al., Partial Award No. 323-409-1 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 31; Watkins-Johnson Company, et al. and Islamic Republic of Iran, et al., Award No. 429-370-1 (28 July 1989), reprinted in ___ Iran-U.S. C.T.R. ____.¹ Under the two Contracts at issue in this Case, Contracts No. 119 and 120, the Claimant, ROCKWELL INTERNATIONAL SYSTEMS, INC. ("Rockwell"), was to provide design and engineering services, procurement of construction equipment, construction of the Central Complex at Doshen Tappeh, site preparation, road building, construction of facilities in several remote areas in Iran, equipment installation and testing, and related services. Rockwell claims that the Respondent, THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN (THE MINISTRY OF NATIONAL DEFENCE) ("Ministry"), breached and terminated the Contracts and made

¹ These cases will be referred to in this Award as "Sylvania," "Questech," "Touche Ross," "Ford Aerospace," "Harris," and "Watkins-Johnson."

wrongful calls on bank guarantees that had been issued in connection with these Contracts. The Ministry maintains that Rockwell failed to perform its contractual obligations and raises a counterclaim for breach of contract seeking, among other things, the return of advance payments and damages.

B. PROCEEDINGS

2. On 18 January 1982, Rockwell filed a Statement of Claim.

3. On 5 January 1983, Rockwell filed an "Objection and Request Based on Respondent's Law Suit in Iran" seeking, among other things, a declaration from the Tribunal that a lawsuit instituted by the Ministry against Rockwell in the First Public Court of Tehran was incompatible with the Ministry's agreement to arbitrate before this Tribunal. In Interim Award No. ITM 17-430-1 (5 May 1983), reprinted in 2 Iran-U.S. C.T.R. 310, the Tribunal requested the Government of the Islamic Republic of Iran to move by 8 June 1983 for a stay of the proceedings before the Public Court of Tehran. In the Ministry's response to this request filed on 2 June 1983 it argued, in essence, that: (1) the Contracts with Rockwell provide for the exclusive jurisdiction of the Iranian courts, and (2) another subject matter was at issue in the proceedings in Iran. In Interim Award No. ITM 20-430-1 (6 June 1983), reprinted in 2 Iran-U.S. C.T.R. 369, the Tribunal rejected these arguments and requested the Government of Iran "to take all appropriate measures to ensure that the proceedings before the Public Court of Tehran be stayed, pending determination of the proceedings in the present case." Id. at p. 5, reprinted in 2 Iran-U.S. C.T.R. at 371.

4. A Statement of Defense and Counterclaim was filed by the Ministry on 15 August 1983. Rockwell filed a Reply to the Statement of Defense and Counterclaim on 23 January 1984. On the same date, Rockwell filed evidence in support of its United States nationality.

5. On 12 September 1984, Rockwell filed a notice informing the Tribunal that it had been summoned to appear before the Tehran court and expressed its view that this constituted a violation of Interim Award No. ITM 20-430-1. Rockwell requested that the proceedings before the Tribunal be continued without the participation of the Ministry pursuant to Article 28 (1) of the Tribunal Rules.

6. In separate Orders filed on 17 October and 16 November 1984, the Tribunal called the Ministry's attention to Interim Award No. ITM 20-430-1. In its Response that was also filed on 16 November 1984, the Ministry stated that it would postpone enforcement of any judgment obtained in the Tehran court until an award in the present proceedings was rendered.

7. On 2 January 1985, the Ministry filed its Rejoinder.

8. In its Order filed on 1 March 1985, the Tribunal rejected Rockwell's request to proceed without the Ministry's participation.

9. Both Parties filed Hearing Memorials and evidence on 8 May 1986.

10. On 7 July 1986, a judgment was rendered in the Public Court of Tehran against Rockwell, in absentia, in the amount of \$56,081,400.

11. Rockwell filed its Rebuttal Memorial and evidence on 12 August 1986.

12. On 4 September 1986 a "Statement of Counterclaim Arising out of Bank Guarantee" naming (1) The Government of the Islamic Republic of Iran, (2) The Ministry of Defense, and (3) Bank Tejarat as Counterclaimants, and (1) Rockwell and (2) City Bank of New York as Counterrespondents, was submitted to the Tribunal.

13. An additional Hearing Memorial and evidence was filed by the Ministry on 2 March 1987.

14. A Hearing in this Case was held on 16 and 17 September 1987.

C. FACTS AND CONTENTIONS

I. The Contracts

15. The Parties entered into Contracts No. 119 and 120 on 7 August and 3 September 1977. Contract No. 119 was the far more significant Contract both in terms of the Contract price and scope of work. Appendix I to the Contract contains a detailed "Statement of Work." The work to be done under Contract No. 119 was divided into Tasks 1-14 and 16², as follows:

Task 1 - General Facility Management, Engineering
Planning and Support

Task 2 - Doshen Tappeh Central Complex

Task 3 - Regional Processing Center No. 1

² There was no Task 15.

- Task 4 - Ground Site and Access Road - W1
- Task 5 - Ground Site and Access Road - W17A
- Task 6 - Ground Site and Access Road - W15
- Task 7 - Airborne Support Center
- Task 8 - Communications
- Task 9 - Staging Areas
- Task 10 - High Frequency Receiver Site
- Task 11 - High Frequency Transmitter Site
- Task 12 - Ground Site W12 Improvements
- Task 13 - Doshen Tappeh C-130 Hangar Improvements
- Task 14 - Operational Spares
- Task 16 - Construction Equipment

16. A part of the design, engineering, and procurement work was to be performed in the United States. According to Rockwell, about two-thirds of the work under Contract No. 119 was to be performed through subcontractors, the principal one of which was Fischbach-Oman International Corporation ("Fischbach-Oman").

17. Contract No. 119 was a cost-plus-fee contract, under which the Ministry was to pay Rockwell's actual costs incurred plus fixed or variable fees depending on the Task. The estimated price of Contract No. 119 initially authorized by the Ministry was \$122,885,000 including fees of \$13,407,000. The Contract provided that the Ministry could authorize another \$104,598,000 for additional work and fees, thus increasing the maximum estimated price of Contract No. 119 to \$227,483,000 including fees of \$22,000,000. Rockwell claims that at the time of contracting it expected the Ministry to authorize the additional work in 1978 and 1979. By Amendment No. 1 to Contract No. 119 additional work under Task 2 was authorized at an estimated cost of \$3,500,000 including fees.

18. Under Contract No. 120, Rockwell was to provide overall system engineering and design for the entire IBEX

project as well as advisory services to the Ministry. Rockwell contends that services under this Contract included substantial technical services to be rendered by Rockwell's United States employees who would be sent to Iran.

19. Contract No. 120³ was also a cost-plus-fee contract. Its price was estimated at \$22,252,078 for services and \$1,395,735 for materials including a fixed fee of 10% on costs incurred. Rockwell asserts that all work under this Contract was initially authorized to proceed.

20. All payments to Rockwell were to be made in United States dollars through drawings on letters of credit, issued by Bank Markazi in Rockwell's favor, against presentment of properly processed and countersigned invoices. Rockwell received an advance payment of \$20,436,230 under Contract No. 119 which, pursuant to the Contract, was gradually credited against invoices. It procured bank guarantees in the Ministry's favor as security both for good performance and the advance payment. The bank guarantees were issued by Iranian banks and were backed-up by standby letters of credit issued by United States banks.

21. Contracts No. 119 and 120 provided for complex invoicing procedures. These procedures were established in the "Invoice Certification and Processing Procedures Revision 'B'," dated 10 July 1978. They essentially worked as follows: Rockwell prepared and submitted its invoices to the

³ The wording of contractual provisions in the two Contracts is largely identical. In some cases, the numbering differs. In those instances, the corresponding provision in Contract No. 120 is indicated in this Award in square brackets.

audit contractor Touche Ross & Company⁴ ("Touche Ross") who would review them as required by Appendix B to the Invoicing Procedures ("Progress Payment Procedure"), and in accordance with its "Cost Principles and Procedures Manual." At the same time, Rockwell was obliged to prepare "Monthly Technical, Financial and Schedule Status Reports" ("Rockwell Reports"), a copy of which was forwarded to the "Systems Integration Contractor," Harris International Telecommunications, Inc. ("Harris").⁵ Harris reviewed the work performed during the relevant month and compared it to the work schedule. The schedule was marked by "Milestones" spread over a period from December 1977 to October 1980. On that basis, Harris prepared its monthly "Progress of Works Reports," ("Harris Reports") in which it, among other things, determined a "cumulative Progress of Works evaluation percentage" in accordance with the "Progress of Works Evaluation Procedure," established by Appendix A to the "Invoice Certification and Processing Procedures." The Harris Reports were distributed to the "Contract Administration Working Group."

22. After its audit of Rockwell's invoices, Touche Ross applied the "cumulative Progress of Works evaluation percentage" to cumulative gross billings to date⁶ (rather

⁴ See Touche Ross, Award No. 197-480-1 (30 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 284.

⁵ See Harris, Partial Award No. 323-409-1 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 31.

⁶ According to the "Progress Payment Procedure," "[t]he amount of gross billings shall be the lesser of:

1. The cumulative financial plan price line through the appropriate billing period; or
2. Cumulative actual costs incurred as determined by the Audit Contractor plus fee at the rate prescribed by the contract."

than the individual monthly invoice) and reduced the monthly progress payment accordingly. Subject to adjustments as a result of these procedures, Touche Ross would then recommend to the Ministry payment of the invoices.

II. Performance under the Contracts

23. Rockwell asserts that, notwithstanding some delays, it proceeded satisfactorily with its work under both Contracts at least until the middle of 1978, when revolutionary unrest, exemplified by strikes, street demonstrations, closing of banks, disruption of mail service and air transportation, reduction of oil production, and fuel shortages began to have an increasing impact on its activity in Iran. It eventually gave force majeure notices under Contract No. 119 on 30 December 1978 and under Contract No. 120 on 1 February 1979. Rockwell's personnel who were United States citizens were evacuated from Iran. Rockwell allegedly notified the Ministry that personnel would be kept ready to return after force majeure events subsided, and that certain Iranian supervisors would remain in charge of operations. Rockwell claims that it was approaching the midway point in its performance of the authorized IBEX contract work at the time it gave its force majeure notices.

24. Rockwell contends that, after the declaration of force majeure, it continued to prepare in the United States and ship to Iran, drawings, plans, and reports. It maintained its Tehran office and some employees in Iran. Rockwell further asserts that through its principal subcontractor, Fischbach-Oman, it provided custodial and security services for the Central Complex facilities and the IBEX equipment that was there. Rockwell contends that it continued to incur and document its costs, including subcontractor payments and insurance premiums. It allegedly prepared Rockwell Reports through September 1979 and

submitted them to Harris until Harris ceased to perform its functions as the IBEX "Systems Integration Contractor." Rockwell also submitted its monthly invoices to Touche Ross until Touche Ross cancelled its audit contract with the Ministry.

25. By letter of 18 July 1979, Touche Ross informed Rockwell and other IBEX contractors that it considered its IBEX Contract No. 115 cancelled due to force majeure and that it had ceased to perform any further work thereunder. Harris prepared its last regular Report for January 1979. Touche Ross still reviewed and recommended for payment Rockwell's invoices for November and December 1978. Touche Ross continued to receive invoices from Rockwell for the months of January to June 1979. However, as indicated in the Touche Ross cover letter to the invoices for January to May 1979 addressed to the Ministry, Touche Ross made no recommendation as to payment of those invoices because it lacked the Harris Reports.

26. By letter dated 20 March 1979, Colonel Jalali, the Ministry's Washington representative, instructed Harris to discontinue the distribution of all program data deliverables. Allegedly, Colonel Jalali left the United States for Iran in late May 1979 and was never replaced.

27. Rockwell contends that all of its monthly invoices for November 1978 and thereafter remain unpaid. It further alleges that despite requests from Rockwell, the Ministry did not extend or renew the Bank Markazi letters of credit that Rockwell needed to obtain payment and, accordingly, they expired in March 1979.

28. On 7 or 9 August 1979,⁷ Rockwell received a form letter dated 16 July 1979 from Colonel N. Eskandarzadeh, temporary director of the Communications and Electronic Organization of the Islamic Republic of Iran Ministry of Defense. This same letter was sent to all IBEX contractors. See Sylvania, Award No. 180-64-1 at p. 21, reprinted in 8 Iran-U.S. C.T.R. at 312-13; Questech, Award No. 191-59-1 at p. 7, reprinted in 9 Iran-U.S. C.T.R. at 112; Touche Ross, Award No. 197-480-1 at p. 9, reprinted in 9 Iran-U.S. C.T.R. at 290; Ford Aerospace, Partial Award No. 289-93-1 at para. 21, reprinted in 14 Iran-U.S. C.T.R. at 31; Harris, Partial Award No. 323-409-1 at para. 15, reprinted in 17 Iran-U.S. C.T.R. at 36; Watkins-Johnson, Award No. 429-370-1 at para. 39, reprinted in ___ Iran-U.S. C.T.R. at _____. In this letter, the Ministry announced that "the accomplishment of all the works and expenditures under the Contracts No. 119 & 120 has been considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran. Therefore, your permitted and fully authorized representative having the required documents for contractual negotiations is requested to attend on date Aug. 25, 1979 at 0900 at the place of this organization"

29. On 22 September 1979, representatives of the Parties met in Tehran. There is disagreement as to the events of that meeting. Rockwell alleges that it delivered to the Ministry four transmittal letters and four status reports covering the materials and services portions of Contract No. 119 as of 10 February and 22 September 1979, and of Contract No. 120 as of 31 January and 22 September 1979. These reports allegedly showed performance under the Contracts as well as interim efforts throughout the period of Contract suspension. Moreover, Rockwell submitted three

⁷ Rockwell's date stamp on the letter is unclear.

letters setting forth three alternative recommendations for dealing with Contract No. 119, which included recommendations for: (1) a new contract, (2) completion of certain tasks under the original contract, and (3) contract termination. Rockwell allegedly also delivered a letter recommending termination of Contract No. 120.

30. At that meeting, Rockwell also asserts that it resubmitted its unpaid invoices through January 1979 and submitted a cumulative invoice encompassing the period from February to August 1979 which took into account the then estimated costs and fees to cover an orderly "winding down" and eventual termination of Contracts No. 119 and 120. Rockwell claims that the Ministry's representatives did not raise objections to these invoices.

31. Rockwell contends that it informed the Ministry's representatives that it was still incurring costs to provide, through Fischbach-Oman, guards and custodial personnel for the maintenance and protection of the equipment and facilities at the Central Complex. Rockwell allegedly asked for directions from the Ministry in this respect. According to Rockwell, the Ministry's representatives indicated that in general no work after 10 February 1979 had been required under the Contracts, but they neither agreed or disagreed with Rockwell's proposals for a winding down of the Contracts. Colonel Eskandarzadeh expressed the Ministry's understanding that Rockwell was in default under the Contracts because it had left Iran without informing the Ministry and because it allowed the Central Complex to suffer damage. As reported by Rockwell, the Ministry's representatives indicated that no further meetings had been scheduled and that no further communication was expected from Rockwell. Rather, Rockwell should await further communications from the Ministry as to whether Contracts No. 119 and 120 would be resumed, renegotiated, or terminated.

32. Rockwell allegedly did not receive any further communication from the Ministry until spring 1980. It continued nonetheless to consider the Contracts to be suspended, awaiting receipt of top-level authorization following parliamentary elections in Iran scheduled for April 1980.

33. In mid-March 1980, the Ministry demanded payment under all performance and advance payment bank guarantees procured by the eleven IBEX contractors. The Iranian banks thereupon called upon the United States bank issuers of corresponding standby letters of credit. Thus, Bank Sepah called standby letters of credit issued by Mellon Bank in the total amount of \$28,074,730 and Bank Tejarat called standby letters of credit issued by Citibank in the total amount of \$2,364,782, which had been procured by Rockwell under Contracts No. 119 and 120. Arguing that these calls were fraudulent, Rockwell filed suit on 9 April and 2 May 1980 in New York against Mellon Bank and Citibank and obtained temporary injunctive relief enjoining both banks from making payment under the standby letters of credit. These injunctions remain in effect.

34. As a consequence of these calls, Rockwell notified the Ministry in June 1980 that it would formally close its IBEX program office in Tehran and that Fischbach-Oman would stop furnishing custodial services at the Doshen Tappeh Central Complex as of 30 June 1980. A letter by Rockwell to the Ministry dated 16 June 1980 stated "[u]nder the present circumstances, we have not and cannot make any arrangements for providing any further custodial services." Rockwell contends that its sole remaining employee in Iran closed the office on 7 July 1980.

35. Thereupon, the Ministry, in a letter dated 16 July 1980, which was not received by Rockwell until 5 November 1980, stated that it rejected all of Rockwell's unpaid

invoices and requested that all payments received under the Contracts be returned.

III. The Claims

36. Rockwell argues, in essence, that it fulfilled its contractual obligations under Contracts No. 119 and 120, except as excused by force majeure, while the Ministry breached its obligation to pay Rockwell for costs incurred and fees earned. Moreover, Rockwell takes the position that Contracts No. 119 and 120 came to an end as a result of the Ministry's calls on bank guarantees in the spring of 1980, and, taking into account the time necessary to wind down its activities, 30 June 1980 should be considered as the effective date of Contract termination.

37. Based on these premises, Rockwell seeks payment of its unpaid monthly invoices through August 1979 in the total amount of \$24,026,668. In addition, Rockwell seeks payment of uninvoiced contract costs through 30 June 1980 in the total amount of \$6,667,661. This amount consists of \$2,101,518 in costs and \$4,566,043 in fees.⁸

38. Rockwell further seeks payment of uninvoiced Contract costs and fees after 30 June 1980 in the total amount of \$1,560,461 as of 16 September 1987. These costs include bank fees for the maintenance of standby letters of credit, payments made to its principal subcontractor Fischbach-Oman, certain "contingent" liabilities, legal fees incurred in connection with a litigation arising out of the

⁸ It appears that the total amount claimed is based on a calculation error; adding the costs and fees claimed yields the sum of \$6,667,561.

termination of a subcontract, and costs incurred because of the termination of an office lease and a Tehran employee.

39. Moreover, Rockwell seeks reimbursement for its ongoing costs of maintaining standby letters of credit after 16 September 1987, in the amount of \$487.41 per day plus 4% general and administrative expenses ("G&A") and a 10% fee totaling \$556.60 per day.

40. Rockwell also seeks damages in the amount of \$1,043,515 resulting from the Ministry's allegedly wrongful calls on standby letters of credit. The damages sought include \$902,563 in legal costs incurred to obtain letter of credit injunctions and \$9,600 for injunction bond premiums as of 16 September 1987 plus 4% G&A and a 10% fee. In addition, Rockwell seeks \$1,200 per year after 16 September 1987 for injunction bond premiums until the bank undertakings are released.

41. Rockwell argues that the Ministry acted arbitrarily and with abusive effect when calling the standby letters of credit thus causing Rockwell to terminate Contracts No. 119 and 120. Rockwell therefore seeks reimbursement for lost profits amounting to \$17,323,040 based on the maximum fee for uncompleted authorized and unauthorized work.

42. Rockwell also seeks costs of arbitration in the amount of \$928,036.

43. It is undisputed that Rockwell received \$20,436,230 in advance payments under Contract No. 119, of which \$14,387,301 had not been applied in the invoices through October 1978. Rockwell agrees that this amount should be credited to the Ministry.

44. In addition, Rockwell is prepared to credit the Ministry with \$715,066 for equipment that had been charged

to the Ministry but was not delivered and afterwards was sold by Rockwell.

45. Rockwell also requests the following nonmonetary relief:

- (a) A declaration from the Tribunal that the letters of credit and bank guarantees relating to Contracts No. 119 and 120 are cancelled and null and void.
- (b) A declaration that the Tribunal's Award in this Case supersedes the litigation brought by the Ministry against Rockwell in Tehran, and an order terminating that litigation.
- (c) A declaration that the Ministry is obligated to defend and indemnify Rockwell against all Iranian tax and social security claims levied on it, including those asserted as Counterclaims.
- (d) Retention of the Tribunal's jurisdiction in this Case over any Claims Rockwell may have for damages incurred should the Ministry fail to withdraw its demand for payment under the bank guarantees and letters of credit, or should it fail to protect Rockwell against the Ministry's Tehran litigation or to indemnify Rockwell from Iranian tax and social security claims which are or may be asserted against it.

IV. The Ministry's Position

46. The Ministry denies the Tribunal's jurisdiction over the Claim. The Ministry disputes Rockwell's United States nationality and further argues that the dispute

settlement clause in Article 8 of Contracts No. 119 and 120 provides for the exclusive jurisdiction of Iranian courts, thus ousting the Tribunal of its jurisdiction over the Claims.

47. The Ministry also denies each of the Claims on the merits. It principally argues that it was Rockwell who breached its obligations under Contracts No. 119 and 120 by stopping performance and withdrawing personnel from Iran without sufficient notice and instruction to the Ministry. Moreover, the Ministry denies that force majeure conditions prevailed in Iran at the time when Rockwell gave its force majeure notices and accordingly argues that non-performance was not excused by force majeure.

48. The Ministry further disputes Rockwell's entitlement to payment under the Contracts on other grounds. It asserts that Rockwell was behind schedule even before it invoked force majeure, that work actually performed was insufficient, and that certain equipment was not delivered.

49. The Ministry claims that Rockwell reduced performance considerably beginning in the fall of 1978 and denies that any work was performed after the force majeure notices of December 1978 and February 1979.

50. The Ministry also takes the position that part of the work performed was not authorized at all or was only authorized up to a certain amount. Moreover, the Ministry claims that Rockwell failed to seek the prior approval of subcontractors required under the Contracts.

51. The Ministry denies that it received the invoices and supporting data, which are at issue here, prior to these proceedings. It further argues that it was neither obligated to make payment on these invoices nor to object to them

because they were not processed in compliance with the contractual invoicing procedures.

52. In any event, the Ministry alleges that it did object to the invoices submitted by Rockwell during the 22 September 1979 meeting in Tehran. The Ministry claims that it disapproved these invoices on the basis that they were not authentic and requested Rockwell to produce the documents required for examination of the invoices. The Ministry maintains that Rockwell failed to abide by this request.

53. Moreover, the Ministry argues, in general, that the evidence presented by Rockwell in support of each element of its Claim is insufficient.

54. From the Ministry's point of view, calls upon the bank guarantees were justified because Rockwell had breached its contractual obligations. Consequently, it denies any liability for costs incurred by Rockwell for enjoining payment under the standby letters of credit, and any other expenses resulting from those calls. The Ministry also argues that Rockwell's request for declaratory relief with respect to the bank undertakings should be denied.

55. Finally, the Ministry denies that Rockwell is entitled to profits lost as a consequence of Contract termination.

56. The Parties' arguments will be taken up in more detail in the reasoning of this Award.

V. Counterclaims

57. Based upon its contention that Rockwell breached Contracts No. 119 and 120 through "intentional carelessness" created by delay, insufficient work and unjustified work stoppage without proper notification to the Ministry, the Ministry counterclaims for:

- (a) Return of advance payments plus interest;
- (b) Unblocking of good performance bank guarantees in the amount of \$15,003,282 that were procured by Rockwell in the Ministry's favor;
- (c) Damages in the minimum amount of \$80,245,000;
- (d) Payment of social security premiums that are allegedly outstanding under the Contracts in the amount of 6,849,064 Rials for Contract No. 119 and 50,730,797 Rials for Contract No. 120; and
- (e) Payment of taxes that are allegedly outstanding under the Contracts in the amount of 1,142,445,059 Rials for the year 1978 plus penalties of 237,964,358 Rials calculated annually.

58. In addition, in the "Counterclaim arising out of Bank Guarantee," the Islamic Republic of Iran, the Ministry of Defense and Bank Tejarat request Counterrespondents, Rockwell and Citibank, to pay the sum of \$2,364,782 under standby letters of credit issued by Citibank in Bank Tejarat's favor, plus interest and damages allegedly suffered by Bank Tejarat as a result of Citibank's refusal to make payment.

59. Rockwell denies each of these Counterclaims on the merits and disputes the Tribunal's jurisdiction over the Counterclaims for social security premiums and taxes.

D. REASONS FOR AWARD

I. Procedural Issues

1. Late-filed Documents

60. At the Hearing, the Tribunal reserved its decision on the admissibility of certain late-filed documents.

61. Rockwell filed late:

- Document No. 146 (filed on 2 April 1987),
- Document No. 149 (filed on 16 July 1987), and
- Document No. 155 (filed on 8 October 1987).

62. Moreover, Rockwell distributed a rearranged collection of "Milestone Summary & Fiscal Status Overviews" at the Hearing.

63. The Tribunal admits these submissions, except for Exhibit 65 to Document No. 155. In determining whether a late-filed document is admissible the Tribunal "considers the character and contents of [the submissions] as well as the length and cause of delay." Harris, Partial Award No. 323-409-1 at para. 62, reprinted in 17 Iran-U.S. C.T.R. at 47. Documents No. 146, 149, and 155 largely contain updated requests for an Award in this Case taking into account the accrual of certain ongoing costs such as bank charges for maintaining the standby letters of credit and legal fees. Rockwell has alleged the underlying facts which it claims gave rise to the incurrence of these costs, together with an explanation of their computation and supporting evidence in

its earlier pleadings. It is in the very nature of ongoing costs that they require updating. Where the underlying facts remain essentially unchanged, a mere arithmetic updating of the relief sought does not cause prejudice to the other party. Therefore, even Document No. 155, filed after the Hearing, is admissible to the extent that it presents an updating of arbitration costs and bank charges together with documentary evidence in support thereof in Exhibits 61-64. See id. at para. 70, reprinted in 17 Iran-U.S. C.T.R. at 50-51.

64. Document No. 155, however, also contains as Exhibit 65 a letter from Rockwell to Citibank dated 15 September 1977. The letter is presented as evidence of an agreement between Rockwell and Citibank, supporting the Claim for a part of the bank charges. The Tribunal finds that this Document confronts the Ministry with new facts and evidence and Rockwell offered no satisfactory explanation for the filing of this document only at this late stage of the proceedings. Exhibit 65 to Document No. 155 is therefore inadmissible.

65. The Tribunal admits the charts distributed by Rockwell at the Hearing because they were submitted earlier in the pleadings and were merely presented in a rearranged manner to clarify Rockwell's oral argument. They do not introduce new facts.

66. The Ministry also filed a number of late documents:

- Document No. 141 (filed on 9 March 1987),
- Document No. 142 (filed on 13 March 1987), and
- Document No. 153 (filed on 11 September 1987).

In addition, at the Hearing the Ministry distributed a chart entitled "Task 2-Doshen Tappeh Central Complex Milestone Schedule."

67. The Tribunal accepts Document No. 141 containing Exhibits No. 33 and 34 to Document No. 137. The Tribunal is satisfied with the Ministry's argument that these Exhibits were inadvertently omitted from the Ministry's previous filings. The Tribunal also admits Document No. 142, which presents a retyped version of Exhibit No. 15 to Document 136, because it merely serves to clarify the Ministry's argument and does not introduce new facts or evidence.

68. The Tribunal does not deem it necessary to decide on the admissibility of Document No. 153 introducing an affidavit of Ehsanollah Samimi Mofakhan. While paragraphs 5 and 6 of the affidavit arguably present Rockwell with new evidence, this evidence, in any event, is not decisive for the outcome of this Case. See infra para. 92 fn. 9, para. 119.

69. Finally, the "Task 2 - Doshen Tappeh Central Complex Milestone Schedule," distributed by the Ministry at the Hearing, is admitted because it merely served to clarify the Ministry's oral argument.

2. Back-up Evidence

70. The Ministry also objects to the admissibility of certain "back-up" evidence filed by Rockwell on 15 October 1986 as Document No. 128. In its Hearing Memorial, Rockwell announced that it intended to file this evidence and on 22 August 1986 filed a submission requesting the Tribunal to issue an Order authorizing it to file only two copies of the voluminous back-up evidence. That request was granted by the Tribunal's Order filed on 18 September 1986. In view of

the secondary relevance of the material and in line with previous Tribunal practice, the Tribunal admits the "back-up" evidence filed as Document No. 128. See Ford Aerospace, Partial Award No. 289-93-1 at para. 8, reprinted in 14 Iran-U.S. C.T.R at 27-28.

3. Amendments

a) Claim

71. Over the course of these proceedings, Rockwell amended its Claim in several respects:

- (a) The Claim for unpaid monthly invoices through 31 August 1979 was increased;
- (b) The Claim for uninvoiced contract costs and fees through 30 June 1980 was added;
- (c) The Claim for uninvoiced contract costs and fees after 30 June 1980 was added;
- (d) The Claim for costs of enjoining calls on standby letters of credit was added;
- (e) The Claim for lost profits was added;
- (f) The Claim for costs of arbitration was updated and increased; and
- (g) The Claim for letter of credit fees was updated and increased.

72. The Tribunal decides that these amendments are admissible under Article 20 of the Tribunal Rules which provides that:

[d]uring the course of the arbitral proceedings either party may amend or supplement his claim . . . unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. (Emphasis added.)

73. In exercising its discretion under Article 20 to permit amendments to claims, the Tribunal must consider whether the other party would be prejudiced by the proposed amendment, whether the other party has had an opportunity to respond to the newly-added or amended claim, and whether the proposed amendment would needlessly disrupt or delay the arbitral process. Subject to these considerations, an amendment is generally admissible if the underlying facts of a dispute, as presented in the Statement of Claim, essentially remain the basis of the dispute, and if the amendment is so closely interrelated to the initial claim that it would be contrary to judicial economy to separate the issues and litigate them separately, or possibly, in different fora. Tribunal practice demonstrates a liberal approach in admitting amendments. See, e.g., International Schools Services, Inc. and Islamic Republic of Iran, et al., Interlocutory Award No. ITL 57-123-1, p. 10 (30 June 1986), reprinted in 10 Iran-U.S. C.T.R. 6, 12; Harris, Partial Award No. 323-409-1 at para. 85, reprinted in 17 Iran-U.S. C.T.R. at 55-56.

74. Rockwell proposed amendments (a) - (e) in the course of the proceedings, but not later than its Hearing Memorial filed on 8 May 1986. The facts on which these amendments are based are central to the dispute as a whole. The Tribunal finds that the Ministry has had sufficient opportunity to respond to the underlying factual allegations and to certain new aspects raised by the amendments. Therefore, amendments (a) - (e) caused neither prejudice to the Ministry nor did they delay the arbitral process.

75. This is also true for amendments (f) - (g). They result from an updating of costs accruing during the course of the proceedings. The underlying facts together with an explanation of the basis for the calculations were presented in Rockwell's earlier pleadings. That was, indeed, all Rockwell could do. See PepsiCo, Inc. and Government of the Islamic Republic of Iran, et al., Award No. 260-18-1, p. 20 (13 Oct. 1986), reprinted in 13 Iran-U.S. C.T.R. 3, 17; Harris, Partial Award No. 323-409-1 at para. 86, reprinted in 17 Iran-U.S. C.T.R. at 56.

76. Accordingly, the Tribunal does not consider it inappropriate to admit all the amendments to the Claim.

b) Counterclaim

77. The Ministry also amended its Counterclaim in several respects:

- (a) The Claim for repayment of amounts paid to Rockwell was added; and
- (b) The Claim for damages was both increased and decreased in certain respects.

78. These amendments similarly arise out of facts and allegations that were presented earlier in the proceedings. The issues are clearly interrelated with the Claim and amendments thereto. The Tribunal cannot find any prejudice to Rockwell or delay of the proceedings as a result of the amendments to the Counterclaim, and no such objection was raised by Rockwell. Therefore, the amendments to the Counterclaim are also admitted.

79. The Counterclaim by the Government of the Islamic Republic of Iran, the Ministry and Bank Tejarat against

Rockwell and "City Bank of New York" for payment under the standby letters of credit was filed on 4 September 1986. After Case No. 886, Bank Tejarat and Government of the United States of America, Citibank New York, was terminated by Order of 2 July 1985, the Agent of the Islamic Republic of Iran requested further guidance on how to proceed with those claims, one of which now forms the basis of this Counterclaim. In a communication to the Agents filed on 16 August 1985, the Tribunal stated that requests for submission of a counterclaim based on letters of credit in the case where the underlying claim is pending "must be timely filed, not later than six months from the date of this communication." Thus, the deadline for raising the letter of credit Counterclaim in this Case was 16 February 1986. The Counterclaimants, however, did not file this Counterclaim until 4 September 1986 and did not offer any explanation for the delay. The Tribunal decides, therefore, to dismiss this late-filed Counterclaim. See Agrostruct International, Inc. and Iran State Cereals Organization, et al., Award No. 358-195-1, para. 29 (15 Apr. 1988), reprinted in __ Iran-U.S. C.T.R. __, __.

4. Appointment of an Expert

80. The Ministry has requested that an expert be appointed to evaluate Rockwell's alleged performance under the Contracts, in particular to assess the scope of the work done and whether it conforms with the contractual requirements. In the Tribunal's view, the question whether to appoint an expert need only be reached in a case where the party requesting the appointment has sufficiently substantiated its claims or defense. It is not the task of an expert appointed by the Tribunal to argue a party's case. As discussed in more detail below, the Ministry has not carried its burden to sufficiently substantiate its defenses to the Claim during these proceedings. Therefore,

considering the circumstances of this Case, the request for the appointment of an expert is denied.

II. Jurisdiction

1. Rockwell's United States Nationality

81. The Claimant, Rockwell International Systems, Inc., has offered evidence that it is a corporation incorporated in the State of Delaware, and that 100% of its voting stock is owned by Rockwell International Corporation, Inc., which is also incorporated in the State of Delaware. Moreover, Rockwell submitted evidence which fulfills the requirements established by this Chamber for proof of its corporate nationality. See Order of 20 December 1982 in Flexi-Van Leasing, Inc. and Islamic Republic of Iran, Case No. 36, Chamber One, reprinted in 1 Iran-U.S. C.T.R. 455; Order of 18 January 1983 in General Motors Corp. and Government of the Islamic Republic of Iran, et al., Case No. 94, Chamber One, reprinted in 3 Iran-U.S. C.T.R. 1. Based on the record before it, the Tribunal is therefore persuaded that Rockwell is a United States national within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration.

2. Forum Selection Clause

82. The Ministry argues that Article 8 of Contracts No. 119 and 120, which is worded identically in both agreements, confers exclusive jurisdiction on the Iranian courts thus precluding the Tribunal's jurisdiction over the present dispute. Article 8 reads as follows:

All differences and disputes which may arise
between the two parties resulting from

interpretation of the Articles of the Contract or the execution of the works which can not be settled in a friendly way, must be settled in accordance with the rules and laws of Iran via referring to the competent Iranian Courts.

83. Virtually identical dispute settlement clauses were at issue in other IBEX cases before the Tribunal. See, e.g., Sylvania, Award No. 180-64-1 at pp. 11-13, reprinted in 8 Iran-U.S. C.T.R. at 306-07; Questech, Award No. 191-59-1 at pp. 11-13, reprinted in 9 Iran-U.S. C.T.R. at 115-16; Harris, Partial Award No. 323-409-1 at paras. 109-11, reprinted in 17 Iran-U.S. C.T.R. at 63-64. Those cases uniformly held that such a dispute settlement clause does not confer exclusive jurisdiction on the Iranian courts. In line with this practice, the Tribunal decides that Article 8 of Contracts No. 119 and 120 does not preclude the Tribunal's jurisdiction over the present dispute.

III. Merits

1. Termination of Contracts No. 119 and 120

84. The primary issue before the Tribunal is whether and how Contracts No. 119 and 120 came to an end. In this context, the question arises whether Rockwell was excused from performance due to force majeure conditions in Iran after December 1978 or February 1979.

85. Rockwell argues that although it had suspended performance under the Contracts due to force majeure on 30 December 1978 and 1 February 1979 respectively, the agreements were not terminated until the Ministry made calls on bank guarantees and standby letters of credit in mid-March 1980. Rockwell argues that the allegedly wrongful calls constituted the first clear signal that the Ministry

intended to terminate the Contracts and, as such, the events of mid-1980 should be considered as the unilateral termination of the Contracts by the Ministry without Rockwell's fault. Accordingly, Rockwell notified the Ministry by letter dated 16 June 1980 that it had become necessary to close its office in Iran and that Fischbach-Oman would cease providing custodial services as of 30 June 1980. Rockwell therefore argues that 30 June 1980 should be considered as the effective date of termination.

86. The Ministry, on the other hand, claims that it had no intention to terminate the Contracts and that it did not do so. Rather, it argues, Rockwell breached the Contracts when it stopped performance. The Ministry denies that Rockwell was entitled to cease performance due to force majeure conditions allegedly prevailing in Iran. According to the Ministry, Rockwell stopped work at the instruction of the United States Government. Moreover, the Ministry argues that the force majeure notices sent by Rockwell were insufficient under Article 6.2 of the Contracts because the anticipated duration of force majeure was not indicated.

87. Article 6.4 of the Contracts defines force majeure conditions as follows:

The case of force majeure includes the following events and circumstances: Flood, epidemics, earthquake, War, cases which are generally accepted by international practice as Force Majeure and if U.S. government cancel the export licence.

88. The Tribunal has held in all previous IBEX cases that the claimant segment contractor was, in principle, excused by force majeure from performance in Iran beginning in February of 1979 and continuing at least through July 1979. See Sylvania, Award No. 180-64-1 at pp. 14-22, reprinted in 8 Iran-U.S. C.T.R. at 308-14; Questech, Award No. 191-59-1 at pp. 16-19, reprinted in 9 Iran-U.S. C.T.R.

at 118-20; Touche Ross, Award No. 197-480-1 at pp. 13-15, reprinted in 9 Iran-U.S. C.T.R. at 294-96; Ford Aerospace, Partial Award No. 289-93-1 at paras. 43-53, reprinted in 14 Iran-U.S. C.T.R. at 35-38; Harris, Partial Award No. 323-409-1 at paras. 114-23, reprinted in 17 Iran-U.S. C.T.R. 65-67. In Sylvania the Tribunal held that, by December 1978, force majeure conditions existing in Iran as a result of civil unrest, upheaval, strikes, etc. increasingly interfered with the IBEX project. See Sylvania, Award No. 180-64-1 at p. 15, reprinted in 8 Iran-U.S. C.T.R. at 308 (citing Gould Marketing, Inc. and Ministry of National Defense of Iran, Interlocutory Award No. ITL 24-49-2, p. 11 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 147, 152-53 (hereinafter "Gould Marketing")). The Tribunal is convinced that these circumstances rendered performance under Contracts No. 119 and 120 in Iran increasingly impossible. However, the extent to which force majeure conditions had an impact on performance of a specific contractual obligation must always be determined with respect to that obligation.

89. A substantial part of Rockwell's work was to be performed in Iran. The Tribunal is persuaded, on the basis of the record before it, that by December 1978 and February 1979, it was impossible for Rockwell to continue to perform its contractual obligations which had to be executed in Iran due to force majeure conditions there. These conditions existed at least until 16 July 1979, the date on which the Ministry sent its letter to all of the IBEX contractors. See supra para. 88 and infra para. 94. Rockwell was entitled, therefore, to invoke the force majeure provisions of the Contracts.

90. The force majeure notices sent by Rockwell on 30 December 1978 and 1 February 1979 meet the requirements established in Article 6.2 of the Contracts. It is true that this provision states that the notice should mention the estimated duration of force majeure. In the

circumstances of this Case, however, it was impossible for Rockwell to foresee how long force majeure conditions would continue to exist in Iran. Consequently, the force majeure notices cannot be regarded as insufficient in the formal sense because they lacked a precise indication of the anticipated duration of force majeure conditions.

91. The force majeure notices demonstrate that, at that time, Rockwell treated the Contracts as suspended, but not as terminated.

92. The Tribunal considered the possibility that the Contracts may have come to an end as a result of "changed circumstances" after the victory of the Islamic Revolution in Iran on 11 February 1979. The concept of "changed circumstances," also referred to as clausula rebus sic stantibus, in its basic form, has been recognized in Tribunal practice as a general principle of law. See Questech, Award No. 191-59-1 at pp. 20-22, reprinted in 9 Iran-U.S. C.T.R. at 122-23. The Tribunal has previously held that this principle may be invoked to terminate a contract under certain circumstances. See Questech, Award No. 191-59-1 at p. 22, reprinted in 9 Iran-U.S. C.T.R. at 123. The Tribunal does not find, however, that the victory of the Islamic Revolution, as such, automatically, that is, without additional action taken by either Party, resulted in a cancellation of all contractual obligations under Contracts No. 119 and 120. See Mobil Oil Iran Inc., et al. and Government of the Islamic Republic of Iran, et al., Award No. 311-74/76/81/150-3, para. 119 (14 July 1987), reprinted in 16 Iran-U.S. C.T.R. 3, 39-40. It is a matter of public record that the new Iranian government expressed its intention to review contracts with foreign companies, and to continue those contracts that it considered in Iran's national interest. The Tribunal is not persuaded that as early as February 1979 the new government had expressed its

intention to discontinue with the IBEX project⁹ or that the circumstances permitted no other conclusion. Even assuming, however, that the victory of the Islamic Revolution would fall within the general concept of "changed circumstances," these circumstances at the most would have entitled the Ministry to terminate Contracts No. 119 and 120 in accordance with the express procedures provided for in these agreements - a right which the Ministry had in any event pursuant to the Contracts.

93. Moreover, even if - as the Ministry contends - the United States government had cancelled export licences for the IBEX project, this would be considered an event of force majeure under Article 6.4 of the Contracts requiring the Parties to find a solution in accordance with the procedures provided in Article 6.2. The Ministry offered no proof that it followed these procedures. The Tribunal is not convinced, therefore, that the Contracts came to an end on 11 February 1979 as a result of the victory of the Islamic Revolution in Iran, without further action by either Party.

94. About five months later, the Ministry did send a letter to all IBEX contractors. The letter was dated 16 July 1979 and states in relevant part that the

⁹ The Respondent presented, in this regard, a letter dated 10 February 1979 from General Tavakoli addressed to Rockwell, and the affidavit by Ehsanollah Samimi Mofakhan, which seem to suggest that the Ministry by the letter of 10 February 1979 proceeded to terminate Contract No. 119. It has not been shown to the Tribunal's satisfaction, however, that this letter was ever delivered to Rockwell. Even if, as a note on the Persian text of the letter and the affidavit indicate, the Respondent tried to deliver the letter to Rockwell's Tehran office, but could not do so because the office was closed, such a single attempt at the peak of revolutionary unrest was clearly insufficient to effect delivery of a notice of utmost importance.

"accomplishment of all the works and expenditures under the Contracts No. 119 & 120 has been considered to be stopped due to the recent transformations arising from the Islamic Revolution of Iran." In previous IBEX cases the Tribunal has considered this letter to be the manifestation of a deliberate policy decision taken by the Ministry not to continue with United States contractors in the IBEX project and accordingly treated the letter as a termination of the IBEX contracts. See Sylvania, Award No. 180-64-1 at p. 21, reprinted in 8 Iran-U.S. C.T.R. at 312-13; Questech, Award No. 191-59-1 at p. 18, reprinted in 9 Iran-U.S. C.T.R. at 120; Ford Aerospace, Partial Award No. 289-93-1 at para. 53, reprinted in 14 Iran-U.S. C.T.R. at 38; Watkins-Johnson, Award No. 429-370-1 at para. 75, reprinted in ___ Iran-U.S. C.T.R. at ____.

95. The same considerations apply in this Case. The evidence presented by both Parties demonstrates that, while Iran may not have ruled out the possibility of continuing with the IBEX project, it was quite clear that it would have only done so under new and substantially changed contractual arrangements. Pursuant to Article 6.7 of the Contracts, the Ministry had the right to terminate the agreements even without the Contractor's fault, and other IBEX contractors understood the 16 July 1979 letter to the effect that the Ministry exercised this right. See Harris, Partial Award No. 323-409-1 at para. 117, reprinted in 17 Iran-U.S. C.T.R. at 66. In light of the situation in Iran at this time, Rockwell bore the risk if it incurred substantial expenses without clarifying the intent of the Ministry.

96. The Tribunal holds, therefore, that Contracts No. 119 and 120 came to an end by the Ministry's letter of 16 July 1979, and not - as Rockwell suggests - as a result of Rockwell's termination allegedly effective on 30 June 1980.

97. The Ministry's letter was received by Rockwell on 7 or 9 August 1979. See supra para. 28. Considering the volume and complexity of Contracts No. 119 and 120, and the necessity to allow some time for the winding down of activities, the Tribunal decides that the termination became effective on 31 August 1979.

2. Claim for Performance Through Contract Termination

98. Article 6.7 of Contracts No. 119 and 120 provides that:

Whenever the Employer terminates the Contract without the fault of Contractor, the Employer will pay to the Contractor approved actual costs up to the time of termination and related fee plus approved actual cost of termination.

Rockwell is accordingly entitled to costs incurred and related fees for its performance through 31 August 1979. The Tribunal must now decide whether Rockwell has carried its burden to prove that it rendered the services and incurred the costs it claims.

99. Based upon the assumption that the Contracts were terminated effective 30 June 1980, Rockwell categorized the relief sought for performance through Contract termination as including both unpaid invoices for the period through 31 August 1979 and uninvoiced costs and fees through 30 June 1980. In fact, the Tribunal has held that the Contracts were terminated effective 31 August 1979 and must analyze the Claim accordingly.

a) Claim for Invoices through the Contract Termination Date of 31 August 1979

100. Rockwell's invoice Claim actually consists of two parts - those invoices alleged to be due on 16 July 1979 and those alleged to be due on 1 November 1979. First, Rockwell claims payment of the following invoices for the period from November 1978 until March 1979 under the due date 16 July 1979:

Invoice No./ Date/ Type	Amount for Cash Payment	Amount for Credit Against Advances	Total Invoice Amount
119-014 Nov. '78 (Services)	\$ 1,554,418	\$ 296,079	\$ 1,850,497
119-015 Dec. '78 (Services)	1,239,617	7,044	1,246,661
120-013 Dec. '78 (Services)	144,290	--	144,290
120-A-011 Dec. '78 (Materials)	7,442	--	7,442
119-016 Jan. '79 (Services)	8,511,715	1,621,280	10,132,995
119-016A Jan. '79 (Materials)	272,390	90,794	363,184
120-014 Jan. '79 (Services)	1,653,360	--	1,653,360
120-A-012 Jan. '79 (Materials)	127,392	--	127,392
119-017 Feb. '79 (Services)	924,701	176,134	1,100,835
120-015 Feb. '79 (Services)	272,568	--	272,568
120-A-013 Feb. '79 (Materials)	2,573	--	2,573
119-018 Mar. '79 (Services)	1,728,869	329,308	2,058,177
119-018A Mar. '79 (Materials)	45,957	15,321	61,278
120-016 Mar. '79 (Services)	149,393	--	149,393
Totals	\$16,634,685	\$2,535,960	\$19,170,645

Second, Rockwell claims payment of the following invoices for the period from April until August 1979 alleged to be due on 1 November 1979:

Invoice No./ Date/ Type	Amount for Cash Payment	Amount for Credit Against Advances	Total Invoice Amount
119-019 Apr. '79 (Services)	\$1,680,356	\$320,067	\$2,000,423
119-019A Apr. '79 (Materials)	193,441	64,480	257,921
120-017 Apr. '79 (Services)	79,017	--	79,017
119-020 May '79 (Services)	190,747	36,334	227,081
119-020A May '79 (Materials)	25,782	8,593	34,375
120-018 May '79 (Services)	170,450	--	170,450
120-A-014 May '79 (Materials)	20,243	--	20,243
119-021 Jun. '79 (Services)	393,488	74,949	468,437
119-021A Jun. '79 (Materials)	89,452	29,818	119,270
120-019 Jun. '79 (Services)	214,562	--	214,562
119-022 Jul. '79 (Services)	294,928	56,179	351,107
119-022A Jul. '79 (Materials)	166,634	55,545	222,179
120-020 Jul. '79 (Services)	57,569	--	57,569
119-023 Aug. '79 (Services)	272,455	51,894	324,349
119-023A Aug. '79 (Materials)	234,017	78,006	312,023
120-021 Aug. '79 (Services)	15,197	--	15,197
120-A-015 Aug. '79 (Materials)	[18,180]	--	[18,180]
Totals	\$4,080,158	\$775,865	\$4,856,023

Against its unpaid invoices through 31 August 1979, Rockwell applied a total of \$3,311,825 in advance payments.

101. In support of its Claim, Rockwell: (a) relies on the assertion that the Ministry did not object to the above listed invoices and accompanying data in a timely and adequate manner, (b) submits an audit opinion of certified public accountants, and (c) presents the Rockwell Reports it prepared as required under the Contracts. The Tribunal will first address each of these arguments separately, and then assess the evidence and counter-evidence in its entirety.

aa) Failure to Object to Invoices

102. Rockwell alleges that through September 1979 it prepared monthly invoices for its performance under Contracts No. 119 and 120 and submitted them to the Ministry, together with supporting data, including the Rockwell Reports. Rockwell claims that the data was presented more than four weeks before the respective due dates in accordance with the relevant Contract provisions, and that the Ministry should be deemed to have accepted the invoices because it failed to object to them within the time limit of four weeks stipulated in Article 14.6 of the Contracts [Contract 120: Art. 14.7]. That Article states: "All payment certificates will be given to the Contractor within 4 weeks after receiving the respective invoices if there is not any objection."

103. The Ministry denies both that it received the invoices prior to these proceedings and that it had a duty under Article 14.6 to object to them within four weeks. The Ministry argues that the invoices were not processed in accordance with the contractually required invoicing procedures. In any event, the Ministry contends that it did object to the invoices in a timely and appropriate manner.

104. In the Tribunal's view, Article 14.6 of the Contracts [Contract 120: Art. 14.7] must be read together with Article 6.1 which provides that:

On occasion the Contractor does not accomplish any of his duties and obligations according to this Contract properly, the Employer informs the Contractor, in writing, about his faults' [sic] or failures and will stipulate a date for correction of such objection without any delay in the approved time schedule and/or additional costs to the Employer.

105. These provisions together are designed not only to provide the Contractor with a fair opportunity to cure any deficiencies and obtain timely payment, but also to avoid the difficulties of proof bound to arise if, in a complex construction project, the fulfillment of contractual obligations is not challenged in a timely manner. They establish a duty on the Ministry's part to timely object to invoices in writing and with specificity. A general denial of claims or nonpayment of an invoice is not sufficient to constitute an objection pursuant to these contractual stipulations. See Sylvania, Award No. 180-64-1 at p. 25, reprinted in 8 Iran-U.S. C.T.R. at 316, Questech, Award No. 191-59-1 at pp. 26-27, reprinted in 9 Iran-U.S. C.T.R. at 126; Ford Aerospace, Partial Award No. 289-93-1 at para. 62, reprinted in 14 Iran-U.S. C.T.R. at 41.

106. Rockwell, on the other hand, was obligated to process its invoices in accordance with the contractually required invoicing procedures. Key elements of these invoicing procedures were the progress of works evaluation by Harris and the audit by Touche Ross.¹⁰ Harris submitted

¹⁰ The terms of reference are specified in detail in Touche Ross' "Iran Contract Cost Audit Cost Principles and (Footnote Continued)

regular Reports for the months through January 1979, and a different form of report for February 1979 which essentially described facts and events during that month relating to the IBEX project.¹¹

107. The auditor, Touche Ross, was not advised by Harris of any progress of works evaluation for the period after December 1979. It continued to receive invoices and advised the Ministry that they were prepared on the basis of a 100% progress of works evaluation, but refrained from making a recommendation as to the processing for payment of these invoices. Indisputably, therefore, beginning in January 1979, Rockwell's invoices were not processed in accordance with the procedures provided for in Contracts No. 119 and 120. These procedures failed entirely when Touche Ross gave force majeure notice on 10 April 1979, and eventually cancelled its contract with the Ministry by letter dated 17 July 1979. See Touche Ross, Award No. 197-480-1 at p. 15, reprinted in 9 Iran-U.S. C.T.R. at 295.

108. In the Tribunal's view, the collapse of the invoicing procedures did not relieve the Ministry of its contractual duty to object to the invoices that it received, or must be deemed to have received, in a timely and adequate manner. Under the Contracts, it was the Ministry's duty to ensure control of invoices submitted by contractors. If it could not maintain the existing invoicing procedures, or chose not to do so, it should have established other control mechanisms subject to contractual agreements with the IBEX

(Footnote Continued)

Procedures Manual, Rockwell International Systems, Inc., Facilities Segment Contractor."

¹¹ Another "Program Report," dated 29 September 1979, was prepared by Harris at the special request of the Ministry; but this was outside the invoicing procedures.

contractors. There is no evidence of any attempts to that effect.

109. Any inference from the Ministry's failure to object is warranted only if Rockwell established that the Ministry actually received the invoices, or that it must be deemed to have received them. The burden then shifts to the Ministry to establish that it did in fact object to the invoices in the manner prescribed by the Contract. The proof of delivery of the invoices by Rockwell to the Ministry falls into essentially three categories depending on the date of the invoice: (1) November 1978-March 1979, (2) April-June 1979, and (3) July-August 1979.

110. Based on the record before it, the Tribunal is convinced that the Ministry actually received monthly invoices for the period from November 1978 to March 1979. Rockwell submitted these invoices to the auditor, Touche Ross, and Touche Ross transmitted them to the Ministry, as evidenced by the Touche Ross cover letters to these invoices. The fact that these invoices were "resubmitted" at the 22 September 1979 meeting does not imply that they were not submitted before, but rather the contrary.

111. It is less clear whether the invoices for April to June 1979 actually reached the Ministry. The invoices for April to May 1979 also carry cover letters from Touche Ross to the Ministry. The cover letters, however, contain the statement that "[t]he original copies of the invoices and supporting documents were returned to the contractor for such further processing as he deemed appropriate." The June 1979 invoice contains no cover letter from Touche Ross to the Ministry, but does carry the transmittal letter from Rockwell to Touche Ross.

112. Touche Ross may have changed its practice following an alleged directive from the Ministry's representative

in the United States, Colonel Jalali, in mid-February 1979 that no further deliveries of IBEX program information be made to Iran. Rockwell submitted a letter from Colonel Jalali to Harris, dated 20 March 1979, stating:

In view of our present program status, it would be appreciated if you would temporarily discontinue the distribution of all program data deliverables. Hereafter, do not forward any data deliverables unless requested. Hold all such material and maintain them as part of your central program library.

113. In any event, the Tribunal is satisfied that the invoices were submitted to Touche Ross. In its capacity as auditor for the IBEX project, Touche Ross acted as the Ministry's agent. Since the Ministry appointed Touche Ross in this capacity, any failure on Touche Ross' part properly to process the invoices would be attributable to the Ministry. Delivery of invoices to Touche Ross, therefore, is deemed to constitute receipt by the Ministry.

114. The invoices for July and August 1979 are not accompanied by either a transmittal letter to Touche Ross or the Ministry. This may be explained by the fact that Touche Ross terminated its contract with the Ministry by notice of 17 July 1979. Notwithstanding this fact, it remains that there is no evidence that these invoices were actually delivered to the Ministry before the 22 September 1979 meeting.

115. The Tribunal is persuaded, however, based on the documentary evidence before it, that at the 22 September 1979 meeting Rockwell "resubmitted" invoices for November 1978 through January 1979, and presented a cumulative invoice covering the period from February 1979 "through termination" which also included estimated post-September 1979 costs. Considering that the Ministry must be deemed to have received the monthly invoices through June 1979, and

that the previously established invoicing procedures had collapsed, the Tribunal finds that submission of the "cumulative" invoice was sufficient to constitute "delivery" of the invoices, even though the nature of the invoice may have an impact on the Ministry's duty to object in an adequate manner. Consequently, the burden shifts to the Ministry to prove its defense argument that it did adequately object.

116. There is no evidence in the record showing any objection by the Ministry, either at the 22 September 1979 meeting or thereafter, more specific than a general denial of all of Rockwell's claims, at least for performance after 10 February 1979. In principle, such a general denial does not meet the standard prescribed by the Contracts. See supra para. 105. The only issue that could be raised in this respect is, therefore, whether such a general denial should nevertheless be considered sufficient under the circumstances of this Case. In this regard, the Ministry argues that it was not in a position to, and accordingly was not required to, object more specifically because it lacked the supporting Contract information.

117. Indisputably, Rockwell did not deliver all accompanying data and information, in particular the Rockwell Reports, directly to the Ministry as required under the Statement of Work. The Ministry contends that, at the 22 September 1979 meeting, it requested "Status Reports" for each outstanding invoice as well as "equipment and stock lists," but did not receive these documents until they were filed with the Tribunal in the course of these proceedings. Rockwell, on the other hand, argues that, in accordance with previously established Contract practice, it submitted data only to Touche Ross, and that it continued to do so until Touche Ross and Harris quit performing their services for the Ministry. Rockwell takes the position that the Ministry waived its right to an extra copy of Contract data by its

failure to object to its nonreceipt of such data over the life of the Contract.

118. The Tribunal initially finds that if the Ministry at any time considered Rockwell's failure to submit data directly to the Ministry to be a breach of its contractual obligations, the Ministry should have notified Rockwell in writing and set a time limit to correct such failure as required by Article 6.1 of the Contracts. There is no proof that the Ministry ever did so.

119. Moreover, the Tribunal is not persuaded on the basis of the evidence before it that at the 22 September 1979 meeting the Ministry gave Rockwell sufficient notice of its objections. Particularly, the Ministry did not specify the data it considered necessary to review the invoices or that review and payment of outstanding invoices was dependant on the receipt of such data. The evidence presented concerning the September meeting consists of a Meeting Report dated 25 September 1979, prepared by one of Rockwell's representatives, and the affidavit of Ehsanollah Samimi Mofakhan. Ehsanollah Samimi Mofakhan has been employed by the Ministry since 1976 in various capacities including Public Relations Officer, Head of the Administrative Affairs Department, and as the individual responsible for dealing with suspended contracts of the Ministry. He was given responsibility over the IBEX project files in 1980. In his affidavit Ehsanollah Samimi Mofakhan testified that

[t]he facts relating to the Sept. 1979 negotiations, reflected in the Defense Ministry's prehearing memorial, are consistent with the notes of Ms Fatemeh Dadbeh and Colonel Eskandarzadeh, and they are correct.

The Tribunal understands that he was not personally present at the 22 September 1979 meeting. The evidentiary value of

this affidavit is therefore limited to the statement that the Ministry's allegations are consistent with the notes of Ms. Dadbeh and Colonel Eskandarzadeh. The actual notes referred to have not been presented in this proceeding.

120. Considering these facts, the only documentary evidence of some value concerning the events of the September meeting is the Rockwell Meeting Report. Although prepared for Rockwell's internal purposes, this Report is a contemporaneous document describing the events of the meeting in considerable detail. The Tribunal does not agree with the Ministry that this Report should be dismissed outright as being "fabricated." In fact, the Ministry discussed the Report in detail in its pleadings. Taking the Ministry's comments into consideration, the Tribunal concludes that the contents of the Report are in part undisputed, or at least not sufficiently contested by the Ministry. It is undisputed that Rockwell produced status reports at the meeting, even though the sufficiency of those reports is in dispute. The Ministry also did not specifically deny the statements in the Report that Rockwell would only be required to provide "status reports" and invoices for performance through 10 February 1979, and that it would be acceptable for Rockwell to deliver these reports to Touche Ross or Harris. It is also undisputed that, at least for the period through February 1979, Rockwell had submitted Contract data, including the Rockwell Reports, to Touche Ross and/or Harris. Harris had knowledge of these Reports when, at the specific request of the Ministry, it prepared its "Program Report" dated 29 September 1979. It was, therefore, unclear exactly what the Ministry wanted Rockwell to do or what its position was with respect to the invoices for performance after 10 February 1979.

121. The Report also states that Rockwell would be told in more detail about alleged damage to the Central Complex. The Report states further that if it proved necessary, the

Ministry would schedule another meeting and that Rockwell should not return to the Ministry's office until it was told to do so.

122. At the specific request of the Ministry, by letter dated 12 October 1979 Rockwell formally notified the Ministry of its correspondence address in the United States. The letter stated: "[i]f you have any questions or require additional information, please advise us It is our hope that you can provide further direction to us in the near future concerning the resolution of the outstanding matters."

123. Rockwell asserts that it received no further communication from the Ministry before the standby letters of credit were called. Rockwell denies receipt of a letter from the Ministry, dated 31 December 1979, allegedly inviting Rockwell to send a representative to Tehran "with a view to making delivery of completed works set forth in the status report of Contract no. 119, which report was prepared and despatched [sic] by you, and also with a view to settling the accounts." Rockwell notified the Ministry by letter dated 16 July 1980 that it had not received the Ministry's letter of 31 December 1979. Regardless of the Ministry's failure to prove delivery of this letter, however, Rockwell could not reasonably be expected to infer from it that it had to provide any further Contract data in order to ensure review and payment of outstanding invoices.

124. Rockwell did receive a letter from the Ministry dated 16 July 1980 which reads, in relevant part, as follows:

Report on the condition of Contract 119, which was presented . . . at the meeting held . . . on Sept. 22, 1979, was reviewed by the Project Owner . . . [who] . . . while dismissing that company's claim as mentioned in the said report, demanded

indemnification of the monies paid to you. . . . The points mentioned in that company's reply on the closure of the offices are incorrect since according to the existing record, that company had prior to the victory of the Islamic Revolution of Iran, closed down its office in Iran. (Emphasis in original.)

Again, this letter failed to identify any lack of Contract data as the reason for rejecting Rockwell's claims.

125. In the light of the Ministry's overall contemporaneous conduct, the Tribunal is persuaded that it was simply unwilling to review Rockwell's invoices covering performance after 10 February 1979. Despite requests from Rockwell, the Ministry failed to give Rockwell clear instructions as to what information it needed to carry out such a review. Even in these proceedings, the Ministry argued that the Rockwell Reports allegedly requested at the 22 September 1979 meeting provided purely "financial" information and, as such, did not indicate the actual work performed because they were not accompanied by other documentary evidence such as receipts and time sheets. There is no evidence, however, that the Ministry specifically requested this voluminous primary documentation.

126. The Tribunal finds that any ambiguity or confusion with respect to the information required to be submitted under the Contracts which resulted from the breakdown of the contractual reporting, auditing, and progress evaluation system is attributable to the Ministry because it was its responsibility to maintain or reestablish such a system. In light of the progress evaluation system's breakdown, at a minimum the Ministry should have clearly and specifically instructed Rockwell concerning the Contract data required. Moreover, for the period after the 22 September 1979 meeting, the Ministry also has not demonstrated that its failure to request the information allegedly required to review the invoices was due to force majeure conditions in Iran.

127. The Ministry's failure to make a good faith effort to explicitly object to Rockwell's invoices in a timely and specific manner created a situation where Rockwell was uncertain concerning what it should do in order to secure payment from the Ministry. The Tribunal has held in previous IBEX cases that this conduct by the Ministry raises the presumption that the contractor's invoices should have been accepted. See Sylvania, Award No. 180-64-1 at p. 25, reprinted in 8 Iran-U.S. C.T.R. at 316; Questech, Award No. 191-59-1 at p. 26, reprinted in 9 Iran-U.S. C.T.R. at 126; Touche Ross, Award No. 197-480-1 at p. 18, reprinted in 9 Iran-U.S. C.T.R. at 298; Ford Aerospace, Partial Award No. 289-93-1 at para. 62, reprinted in 14 Iran-U.S. C.T.R. at 41; Harris, Partial Award No. 323-409-1 at para. 143, reprinted in 17 Iran-U.S. C.T.R. at 73.

bb) Deloitte, Haskins and Sells' Opinion

128. Rockwell further provides an opinion of the firm of certified public accountants, Deloitte, Haskins and Sells, California office, in support of its Claim. Deloitte, Haskins and Sells examined Rockwell's statement of total costs incurred under Contracts No. 119 and 120. The opinion states that the audit was conducted "in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances." After this review, the opinion states that Rockwell's statement of costs incurred in the total amount of \$65,847,822 "presents fairly the costs incurred by Rockwell International Systems, Inc. under the aforementioned Contracts from inception of the Contracts through June 30, 1980 and March 31, 1986."

129. The approach chosen in the Deloitte, Haskins and Sells opinion is different from the one Rockwell used for

invoicing its costs. The opinion, therefore, needs to be adjusted in several respects in order to determine whether it supports the Claim. First, the audit states total costs, while the invoices record, in addition to costs, 70% of the minimum fee. Second, the audit covers the period through March 1986 and accordingly must be adjusted to the termination date of 31 August 1979 established by the Tribunal. After these adjustments are made, the audit opinion states total costs incurred even slightly in excess of the costs invoiced by Rockwell through 31 August 1979.¹²

130. The Tribunal takes into consideration the fact that the audit opinion was prepared on the basis of terms of reference given by Rockwell, and that Deloitte, Haskins and Sells was, of course, not in a position to determine costs incurred in accordance with the invoicing procedures established by the Contracts. The Tribunal is satisfied, however, that the opinion was prepared in accordance with generally accepted auditing standards, and that it further corroborates the Claim in that it endeavors to substitute for Touche Ross' discontinued functions.

cc) Invoices and Supporting Data

131. Rockwell substantiated and documented its Claims in more detail by submitting, in addition to the monthly invoices, invoice summaries specifying the costs and fees for each Task, breakdowns of services into separate Tasks together with separate invoices noting costs, fees, down-payment reduction and invoice amount for each Task, as well as certain other data. Moreover, Rockwell submitted the

¹² As Rockwell explained at the Hearing, certain discrepancies result from Rockwell's practice to invoice subcontractor costs with some delay.

Rockwell Reports it had prepared for each month as required under the Contracts. The Reports contain, among other things, an overview and summary of the work performed to date, the work performed during the relevant month, and the work to be performed during the next month. They also contain a task-by-task description of the work performed during that month. Under the invoicing procedures, Rockwell was to furnish these "Monthly Reports" to Harris who would render its progress of works evaluation on the basis of these Reports.

132. The Rockwell Reports for November 1978 to August 1979 show that Rockwell curtailed its on-site work significantly after the declaration of force majeure, but continued to work outside Iran, maintained its subcontracts, and kept the project in a state of suspension. The costs incurred in doing so were increasingly reduced and remained far below the financial plan figures. The documentation identifies the various cost items and the nature of continued activity. It is true that some Reports for the early stages of the project were even more detailed. However, for example, the Rockwell Report for November 1978 is in the same format and contained similar information as the January to August 1979 Reports, and Touche Ross, as well as Harris, accepted that Report and recommended payment of the invoices in reliance thereon. There is no basis for the argument, therefore, that these Reports did not comply with the contractual requirements.

133. The Ministry further argues that the Rockwell Reports have no evidentiary value because they essentially contain "financial information" and do not prove performance item by item. This is true. This was, however, all that Rockwell was contractually obligated to produce in these Reports. The audit, verification, and assessment of the actual progress of work was Touche Ross' and Harris' function. As explained above, the Ministry should have

replaced these contractors and it must bear the consequences of its failure to do so. Therefore, in the absence of specific objections, the Contract data offered by Rockwell provides additional support for the Claim.

dd) Specific Objections to Recoverability of Costs

134. The question remains whether Rockwell is contractually entitled to recover these costs. Under Article 6.7 of the Contract, in the case of termination by the Ministry Rockwell is entitled to "actual costs up to the date of termination." It is Rockwell's burden to demonstrate conclusively that all fractions of the Claim come under the definition of recoverable "actual costs" pursuant to Article 6.7. The Ministry has raised certain specific objections in this respect.

(a) "Net Adjustments"

135. By invoice No. 119-016 for January 1979, Rockwell invoiced the Ministry for "Net Adjustments" in the total amount of \$6,179,257. This amount represents cumulative withholdings on invoiced costs based on Harris' progress of works evaluation percentage. Under Appendix A to the Invoice Certification and Processing Procedures Revision "B," each month Harris evaluated the work actually accomplished as of the date of evaluation, compared to the work required by the program schedule, and determined the so-called progress of works evaluation percentage. This percentage related solely to the timing of performance, not to the scope of performance in relation to costs incurred. Touche Ross applied this percentage to the lower of total invoiced costs to date or scheduled costs in order to arrive at the amount which it then recommended for payment. The Ministry then remitted the recommended payment amount to

Rockwell and withheld the difference between that amount and the total invoiced costs.

136. The withholdings the Ministry was entitled to make based upon the progress of work evaluation percentage were, therefore, an additional incentive for timely performance or a penalty for late performance. As these withholdings related solely to the timing of performance, they were no longer justified after the Ministry terminated the Contracts for its convenience. The amounts withheld were actual costs of performance under the Contracts, and therefore Rockwell is entitled to receive them under Article 6.7 of the Contracts.¹³

(b) Authorization of Subcontracts

137. Pursuant to Article 9 of the Contracts, Rockwell was required to obtain prior approval of subcontracts from the Ministry. This provision reads, in relevant part, "[t]he cost and [Statement of Work] of subcontracts and any later changes or decision to them either technical or financial needs prior approval of the Employer." Indisputably, Rockwell initially failed to seek such prior approval from the competent Iranian officials. This problem was discussed by representatives of both Parties at a series of meetings in April and May 1978. Thereupon, Rockwell wrote the Ministry a letter, dated 3 May 1979, and

¹³ While Article 6.2 provides in the case of cancellation due to force majeure that the "price of services rendered . . . up to this date be paid according to the latest monthly progress report accepted by the Employer," in the Tribunal's interpretation, this reference to the "latest monthly progress report" contemplates the actual status of performance rather than its timing and withholdings based on Harris' progress of work evaluation.

apologized for its mistake. Attached to this letter was a "Subcontract Summary" which mentioned, among others, Fischbach-Oman as the subcontractor in charge of construction of the Central Complex and listed "current commitments/expenditures" of \$20,000,000. The Ministry interprets this language to indicate that the maximum authorized cost for the Central Complex was \$20,000,000 and that Rockwell was therefore not entitled to any costs in excess of this amount.

138. In the Tribunal's understanding, however, Rockwell's letter was designed to inform the Ministry about the approximate volume of subcontracts as they existed at that time, but was not meant to establish a ceiling price for subcontracts. This is demonstrated by the fact that the attachment to Rockwell's letter states that it relates to "current" commitments. Obviously a larger volume was expected for Task 2 alone for which Fischbach-Oman was the main subcontractor and was initially estimated and authorized to cost \$35,350,244. In fact, the Ministry approved and paid Fischbach-Oman subcontract costs (for all Tasks) through October 1978 far in excess of \$20,000,000.

139. The minutes of meetings held in April and May 1978 show that Iran eventually approved the existing subcontracts, but requested that the procedure for selecting subcontractors be changed in the future. Rockwell abided by this request which led to performance delays. See infra paras. 164-65, 169. There is no evidence of further objections by the Ministry regarding the subcontracts after Rockwell's letter of 3 May 1978. The Tribunal is therefore convinced that the Ministry approved the Fischbach-Oman subcontract and that the approval was not understood by either Party to establish a ceiling of \$20,000,000 for costs to be incurred under this subcontract.

ee) Counter-Evidence

140. The Ministry produced as counter-evidence in these proceedings an undated "List of Defects in Construction and Installation Works at IBEX Central Complex Buildings" prepared by a team of Engineers from the Iranian Air Force, which lists numerous alleged construction defects and shortcomings. This list, however, was filed for the first time on 2 March 1987, more than six years after Rockwell had withdrawn entirely from Iran. The evidentiary value of this list must be questioned considering that it was prepared after such a long time period, and the construction site might well have suffered damage during this period for which Rockwell cannot be held liable. Further, the list does not indicate what unaccomplished construction work should have been completed according to the program schedule and Rockwell's invoices. It is undisputed that the IBEX project was never finished. Accordingly, the Ministry did not pay the Contract price for completion, and paid even less than the financial plan provided for at this stage of the project. The Tribunal is thus unable to identify, on the basis of this list, work for which the Ministry was invoiced that was in fact not carried out.

ff) Conclusion

141. Considering the evidence in its entirety, the Tribunal concludes that, subject to some adjustments, the Claim for invoices through August 1979 is sufficiently substantiated, reasonably documented, and conclusive. Rockwell has, therefore, at a minimum established a prima facie case for payment of the invoices. Prima facie evidence must be recognized as a satisfactory basis to grant a claim where proof of the facts underlying the claim presents extreme difficulty and an inference from the evidence can reasonably be drawn. This is particularly true

where the difficulty of proof is the result of the respondent's failure to raise objections in a timely manner and in such a way that the claimant could adequately establish its Claim. In such a case, a lower standard of proof is acceptable. Cf. D. Sandifer, Evidence Before International Tribunals 169-74 (rev. ed. 1975).

142. The Tribunal considers the evidence presented by the Ministry insufficient to refute the prima facie case established by Rockwell. Neither in its contemporaneous discussions with Rockwell, nor in these proceedings, did the Ministry specify its objections to the invoices. A global denial of all Claims is insufficient to meet either the Ministry's obligation under the Contracts or the requirements of Article 19 of the Tribunal Rules.

143. It remains to be determined when the invoiced amounts became due for payment. The starting point in this respect is Article 14.6 of the Contracts which provides that "[a]ll payment certificates will be given to the Contractor within 4 weeks after receiving the respective invoices if there is not any objection." [Contract 120: Art. 14.7]. Article 14.7 of Contract 119 provides further that "[n]one of the invoices will be paid unless they [are] certified by the Employer's contract advisors." Indisputably, Rockwell was unable to obtain certification from those advisors for most of its unpaid invoices. As noted above, however, this was due to the collapse of the invoicing procedures which must be deemed, in principle, to be the Ministry's responsibility. In these circumstances, issuance or nonissuance of certificates cannot be considered the decisive criterion for determining the due dates of invoices.

144. The Tribunal takes further into account that force majeure conditions in Iran may have delayed the reestablishment of adequate invoice review procedures for the

fundamental and complex Contracts at issue in this Case. Under the circumstances, the four-week period stipulated in Article 14.6 of the Contracts for objections by the Ministry following delivery of invoices cannot be strictly applied. In any event, however, the Tribunal finds that the Ministry should have reviewed and, in the absence of specific objections, paid all invoices within a reasonable time after the 22 September 1979 meeting. See Touche Ross, Award No. 197-480-1 at p. 17, reprinted in 9 Iran-U.S. C.T.R at 297; Ford Aerospace, Partial Award No. 289-93-1 at para. 62, reprinted in 14 Iran-U.S. C.T.R. at 41; Harris, Partial Award No. 323-409-1 at para. 143, reprinted in 17 Iran-U.S. C.T.R. at 73. The Tribunal determines, therefore, that Rockwell's invoices thus became payable in the total amount of \$20,714,843 on 31 October 1979 at the latest.

b) Claim for Uninvoiced Amounts through the Contract Termination Date of 31 August 1979

145. Rockwell also claims for uninvoiced costs and fees incurred prior to 31 August 1979. The most substantial part of this Claim relates to the uninvoiced fees for work performed under the Contracts.

aa) Contract Fees

146. Rockwell claims the following uninvoiced fees allegedly outstanding under Contract No. 119:

- (a) 30% of the minimum fee withheld on invoiced costs for Tasks 1-14;
- (b) Target fee adjustments for Tasks 2-7, 9-13;
- (c) Maximum fee adjustment for Task 2; and

- (d) 100% of fixed fee withheld on invoiced costs for Task 16.

147. Contract No. 119 provided for payment to Rockwell of fees expressed as percentages of Rockwell's costs. As to Tasks 2-7 and 9-13, the amount of the fee was a variable percentage depending on Rockwell's performance. If Rockwell performed those Tasks on schedule and at the estimated cost it was entitled to the so-called "target" fee. If Rockwell completed any of those Tasks ahead of schedule and/or below estimated cost, it was entitled to a fee calculated as a higher percentage up to a stated "maximum" fee. On the other hand, if Rockwell failed to meet the schedule on any of these Tasks, its fee was to be reduced to a lower percentage, within a defined range, down to a stated "minimum" fee. Thus, the target fee was to be paid for performance of a Task on schedule and at the estimated cost; a maximum fee for better performance; and a minimum fee when performance was behind schedule and/or above estimated cost.

148. As to Tasks 1,8, 14 and 16 under Contract No. 119, and all work under Contract No. 120, Rockwell was entitled to fixed fees rather than the variable fees described above.

149. Pursuant to Article 6.7 of both Contracts No. 119 and 120, upon termination of the Contract Rockwell was entitled not only to its actual costs up to the date of termination, but also to the "related fee." The variable and fixed fees described above are clearly related fees. It is true that the fee provisions contained in Appendix 5 to Contract No. 119 contemplate the completion of all Tasks under the Contract. They cannot be construed, however, to the effect that, in case of termination for convenience by the Ministry before completion, Rockwell is categorically confined to the minimum fee. If this were the case, Rockwell's entitlement to fees would be entirely within the control of the Ministry. The fact that not all Tasks were

completed is therefore immaterial in the circumstances of this Case.

150. Before it can decide whether Rockwell was on time and costs with the project, the Tribunal must determine the proper date on which to judge Rockwell's performance. Article 6.7 of Contract No. 119 suggests that the relevant date is the date of termination. In this Case, however, the Tribunal has held that performance under Contract No. 119 was excused by force majeure conditions in Iran from the date Rockwell suspended performance, 31 December 1978, until the date of termination. Accordingly, the Tribunal considers 31 December 1978, in principle, to be the proper date for determining Rockwell's entitlement to fees. An exception applies, however, in the case of those Tasks that were terminated at the request of the Ministry prior to 31 December 1978. For these Tasks, all performance after the stop work order by the Ministry is excused and the proper date for determining Rockwell's entitlement to the fee is the date that the stop work order was given.

151. The Tribunal must next analyze the facts concerning Rockwell's performance as of the relevant dates. Based on the evidence before it, the Tribunal is not convinced that Rockwell was on or even ahead of schedule with respect to the majority of Tasks when it gave notice of force majeure. The Harris Reports, evidence not contested by Rockwell, indicate that Rockwell had missed "Milestones" on most Tasks, and the Tribunal is not persuaded by Rockwell's argument that missed "Milestones" does not necessarily mean delay. In any event, Rockwell did not present satisfactory evidence that timeliness of performance should be determined without regard to missed "Milestones."

152. Rockwell asserts, however, that any delays were either attributable to the Ministry or to force majeure conditions over which it had no control. While Contract No.

119 contains detailed provisions governing the determination of fees where delay is attributable to Rockwell, it is silent concerning the effect of delays attributable to the Ministry or to force majeure. In the Tribunal's view, under generally recognized principles of contract law, and a good faith interpretation of the fee provisions, delays for which the Ministry must be held responsible, or those caused by force majeure, should not deprive Rockwell of fees it would otherwise have earned. This flows from the general principle of contract law that where performance of a contract obligation becomes impossible due to force majeure, that performance is excused. See, e.g., Gould Marketing, Interlocutory Award No. ITL 24-49-2 at pp. 11-14, reprinted in 3 Iran-U.S. C.T.R. at 152-54; Sylvania, Award No. 180-64-1 at pp. 14-17, reprinted in 8 Iran-U.S. C.T.R at 308-10. Rockwell carries the burden of establishing the extent to which its being behind schedule, or above cost, on the relevant date was due to force majeure conditions or actions for which the Ministry is responsible.

153. Before embarking on an examination of the fees due for particular Tasks, the Tribunal observes that, pursuant to Article 6.7 of the Contracts, at a minimum Rockwell is entitled to its fixed or minimum fee on each of the Tasks. As permitted by Article 14.5 of Contract No. 119, in its invoices through August 1979 Rockwell billed 70% of the fixed or minimum fee and withheld billing of 30% pending final acceptance of the project. Therefore, in order to bring Rockwell's fee up to the fixed or minimum amount, the 30% withheld from each billing must be awarded. The 30% withheld on these Tasks through August 1979 totaled U.S.\$617,201. These fees are clearly included within the

term "related fee" and thus became payable as a result of the Ministry's termination of the Contract.¹⁴

Task 2 (Doshen Tappeh Central Complex)

154. Rockwell seeks the maximum fee for its performance under Task 2 arguing that but for the force majeure delays affecting this Task, it would have been completed ahead of schedule and below planned costs. The Rockwell Report for November 1978 states that "construction continues essentially on schedule; however, there have been some delays and slowdowns due to civil unrest. These have not been of major consequence because we were ahead of schedule in many areas." The Harris Report for January 1979, on the other hand, indicates that only 20 out of 24 milestones were complete. Based upon these Reports, the Tribunal concludes that by the end of 1978 Task 2 was in delay.

155. Rockwell argues that any delays in performance of this Task were caused by force majeure conditions which began to occur as early as fall of 1978. Therefore, the question arises whether Rockwell has carried its burden of proof that these delays were in fact caused by force majeure.

156. The Tribunal is not convinced by the evidence presented that all of the existing delays in Task 2 were

¹⁴ For Tasks 1, 8 and 14 this Award brings Rockwell up to the contractually required fee and those Tasks will, therefore, not be discussed further. For Task 16, however, questions have been raised concerning Rockwell's entitlement to the entire fixed fee. Therefore, the fee for Task 16 is not included in the U.S.\$617,201 awarded in this paragraph, but will be considered in the detailed discussion of the specific Tasks which follows.

caused by force majeure conditions. It is well known that from the outset the entire IBEX project was subject to significant delays. For example, in its Program Report of September 1979, Harris identifies the "management structure" as by far the single most important problem of the IBEX program. The Tribunal has no doubt that delays were caused by numerous factors and finds it necessary, therefore, for Rockwell to substantiate and prove in detail the force majeure events and their impact on timely performance.¹⁵

157. The primary evidence before the Tribunal in support of this element of the Claim are the Harris and Rockwell Reports for January 1979. Both Reports make references to "civil unrest," "fuel shortages," "absence of workers," etc., but they do not state specifically their impact on the time schedule. Through its letter to the Ministry dated 24 October 1978 Rockwell requested schedule extensions with respect to several Tasks under Contract No. 119 but did not refer either to Task 2 or force majeure conditions specifically.

158. The Tribunal finds, therefore, that Rockwell has not carried its burden to prove the impact of force majeure events on Rockwell's timely performance of Task 2 through 31 December 1978. Accordingly, the Claim for "target" or "maximum" fees on Task 2 is dismissed.

¹⁵ As previously discussed, Rockwell was not required to indicate the estimated duration of force majeure circumstances in its force majeure notices to the Ministry. See supra para. 90. In this context, however, Rockwell must carry its burden to prove that it was not responsible for delays prior to these notices. This does not call for speculation on future developments, but for an assessment of facts and events that occurred in the past.

Task 3 (Regional Processing Center)

159. According to the Harris Report for January 1979, Task 3 was formally terminated in September 1978. The same Report states that "Task was on schedule at time of stop work order." In view of this clear statement in the Harris Report, the Tribunal is convinced that Rockwell was on schedule at the time of the stop work order.

160. Rockwell seeks fees based on costs of \$5,959 for this Task. This amount does not exceed the financial plan ceiling. Rockwell is thus entitled to target fees for Task 3. The target fee for Task 3 is 8.93% of costs incurred or \$532. Rockwell was awarded its minimum fee of 1.6% or \$96 above, therefore, it is here awarded the difference of \$436.

Task 4 (Site W1)

161. According to the Harris Report for January 1979, only 18 of the 47 milestones due by January 1979 for Task 4 were complete by that date. Thus, this Task was in significant delay. The Rockwell Report for the same month identifies as reasons for the delay the Ministry's delay in the authorization of construction effort, release of design funds, and approval of construction equipment. On 24 October 1978, Rockwell wrote the Ministry requesting an extension in the contractual performance period for Tasks 1, 4-5, and 9-11. In reference to Task 4, the letter stated:

A schedule slip has been experienced on this task due to delays in the design of the site, road construction delays, the loss of one construction season at the W-1 Site and the requirement for the use of Iranian construction subcontractors.

162. A letter from General Asrejadid to the "General Heading Communication & Electronic," dated 17 December 1978,

clearly indicated that the Ministry was not prepared to assume responsibility for the delays.

163. The evidence in this respect essentially consists of these letters and the Harris and Rockwell Reports. While confirming that certain parts of the work were authorized or approved later than planned, the evidence does not establish the reasons for the delay or the Ministry's responsibility therefore. For example, Rockwell's letter mentions "the requirement for the use of Iranian construction subcontractors." However, Article 9 of Contract No. 119 provides:

Nonacceptance of subcontractor's [sic] by the Employer does not relieve the Contractor from any of his responsibilities . . . and can not cause any delay in performing the work according to approved schedules

164. This clause places the responsibility for delays, in principle, on Rockwell. Moreover, Rockwell has not demonstrated that the Ministry's refusal to approve the subcontracts was arbitrary or in bad faith. The selection and approval of subcontracts was discussed at several meetings between representatives of Rockwell and the Ministry during April and May 1978. At those meetings, the Ministry requested that subcontractors be selected on the basis of competitive bidding among offers from several companies, including Iranian companies. According to the Minutes of these meetings, presented by the Ministry, Rockwell expressed its agreement with the proposed procedure. Moreover, in its letter of 3 May 1978, Rockwell stated that it "deeply regret[s] that the subcontracts . . . did not have prior coordination and approval of the Office of the Vice Minister of War." Together with this letter, Rockwell submitted a list of five subcontractors, most of which were American companies and all of which were approved by the Ministry. See supra paras. 137-39.

165. Rockwell has not presented evidence showing explicit requests for approval of the subcontracts or correspondence demonstrating the Ministry's arbitrary conduct in rejecting proposed subcontracts. Without such information, the Tribunal is not in a position to determine what approval period was reasonable under the circumstances. It is not persuaded, therefore, that the Ministry's failure to authorize or approve work was in violation of its contractual duties. Thus, in light of the delays on Task 4, Rockwell is not entitled to its target fee and the Claim is denied.

Task 5 (Ground Site and Access Road W17A)

166. Under Task 5, Rockwell was to build an access road "W17A." This Task was terminated when the site for "W17A" was replaced by the site "W7." In its letter to the Ministry of 24 October 1978, Rockwell attributes delays on this Task to "design delays, road construction authorization approvals, construction camp approval delays and the loss of one construction season." In the Rockwell Report for January 1979, Rockwell mentions as reasons for the delays "delay in authorization of construction effort and release of design funds." The January 1979 Harris Report states that "FSC is preparing a Termination Proposal which will be submitted 15 February 1979." There is no evidence in the record that such a proposal was ever prepared by Rockwell or accepted by the Ministry. In any event, such a proposal was not produced in these proceedings.

167. Apart from this point, in order to find that the Ministry was in undue delay in approving and authorizing work, the Tribunal must be convinced that Rockwell, in fact, sought such approval in a timely and adequate manner. See supra para. 165. Rockwell has failed to present the necessary proof in this regard. It did not establish, for

example, when exactly it specifically requested the approvals which allegedly delayed Task 5. The Tribunal, therefore, finds that Rockwell did not meet its burden to prove the facts in support of its Claim for target fees and it is dismissed.

Task 6 (Site W15)

168. Similar to Task 3, Task 6 was terminated in September 1978. The Harris Report for January 1979 states that the Task was on schedule at the time of the stop work order. The Rockwell Report for January 1979 indicates that it completed and submitted a termination claim proposal to the Systems Integration Contractor. Although this proposal has not been produced in these proceedings, the Tribunal considers the statement in the Harris Report that the Task was on schedule to be a satisfactory confirmation that Rockwell was in fact on schedule when the Ministry terminated Task 6. The total costs incurred under this Task of \$119,139 do not exceed the financial plan limits. Rockwell is therefore entitled to target fees of 11,57% on costs incurred, or \$13,784. Rockwell was previously awarded its minimum fee of 2% or \$2386. Thus, it is here awarded the difference of \$11,398.

Task 7 (Airborne Support Center)

169. Only eight out of twelve milestones due in January 1979 for Task 7 were accomplished by that date. In its letter of 24 October 1978, Rockwell states that "[t]his task has been delayed due to the requirement to rebid the construction effort with Iranian Contractors." As explained above, absent further specification, this cannot be construed against the Ministry, and the Claim for target fees is dismissed. See supra para. 165.

Task 9 (Staging Areas)

170. As consistently stated in the Harris Report for January 1979, the Rockwell Report for the same month, and Rockwell's letter to the Ministry dated 24 October 1978, delays in completion of this Task were due to the lack of new site requirements and design subcontractor approvals. The Ministry, however, in its letter of 17 December 1978 rejected Rockwell's proposal for a schedule extension for this Task. In the absence of further evidence that Rockwell in a timely and adequate manner requested the necessary documentation, and that the Ministry was indeed in undue delay in providing new site requirements, the Tribunal is not convinced that the Ministry should be held responsible for any such delays. The Claim for target fees on this Task is therefore dismissed.

Tasks 10 and 11 (High Frequency Receiver/ Transmitter Site)

171. Performance under these two Tasks was also delayed. The Harris Report for January 1979 states "[u]ntil an architectural and engineering contract is approved by the Buyer, no work can be performed on this task." Rockwell, in its Report for January 1979 and in its letter of 24 October 1978, also states as the reason for the delay the lack of approval of an architectural and engineering contract. Again, Rockwell has not established that it requested such approval in a timely and adequate manner, or that the Ministry unduly delayed its approval. See supra para. 170. Therefore, the Claim for target fees for these Tasks is likewise dismissed.

Task 12 (Site W12)

172. Rockwell's Monthly Report for January 1979 indicates that delays in completion of this Task were due to construction activities not being authorized as originally forecasted in the financial plan as well as "civil and labor problems." Again, however, Rockwell has not established that it requested authorization in a timely and adequate manner or that the Ministry was in undue delay in granting such authorization. See supra paras. 170-71. Consequently, the Claim for target fees is denied.

Task 13 (Doshen Tappeh C-130 Hangar)

173. Both the Harris Report for January 1979 and the Rockwell Report for the same month confirm that Rockwell was on schedule and, according to the Rockwell Report, below planned costs for this Task at about the time Rockwell declared force majeure. Any delays resulting from force majeure conditions subsequent to that declaration have no adverse influence on Rockwell's right to fees earned up to that date. See supra para. 152. The Tribunal is, therefore, persuaded that Rockwell was on schedule for this Task on 30 December 1978 and that it was excused thereafter from performance in Iran due to force majeure conditions. See supra para. 89. Rockwell is thus entitled to the requested target fee for this Task.

174. Rockwell invoiced \$808,476 for costs incurred for Task 13 through 31 August 1979. However, out of this amount \$610,970 was excluded from the fee base. The target fee for Task 13 was 8.94 percent of costs incurred. Accordingly, Rockwell is entitled to 8.94% of \$197,506 or \$17,657 in fees for this Task. Rockwell was previously awarded the minimum fee of 1.6% or \$3,160. See supra paras. 100, 144, 153. Therefore, it is here awarded, in addition, the difference

between the minimum and the target fee in the amount of \$14,497.

Task 16 (Construction Equipment)

175. Under Task 16, Rockwell invoiced costs incurred for the purchase of construction equipment. Appendix 5 to Contract No. 119 provided for a fixed fee of \$688,000. Although Rockwell had continuously invoiced the Ministry for Task 16 costs throughout the Contract period, it did not invoice the Ministry for fees for this Task before including the entire fixed fee of \$690,690 in its cumulative invoice presented to the Ministry in September 1979.

176. At the Hearing, Rockwell explained that these fees had not been billed prior to the cumulative invoice due to a dispute with the Ministry, in which the Ministry allegedly simply refused to pay any fee with respect to Task 16. Rockwell contends that the issue was ultimately reserved for resolution at the end of the Contract. Neither Party, however, detailed the subject matter of that dispute either in its pleadings or at the Hearing. The only information available to the Tribunal in this regard is contained in the Minutes of meetings between representatives of both Parties that took place in Iran in May 1979. According to these Minutes, the Ministry requested that equipment be purchased in Iran, or at least at lower prices, and that a list of such equipment be submitted for prior approval. During these meetings, several solutions to settle the dispute were discussed but there is no evidence that any of these was finally agreed upon.

177. In examining Rockwell's entitlement to fees for Task 16, the Tribunal's starting point must be the language of Contract No. 119. Appendix 5 to this Contract clearly

provides for fees on construction equipment.¹⁶ Therefore, the only issue is whether the fact that Rockwell did not initially invoice the fees for Task 16 must be construed as a waiver of its contractual right to such fees. The Ministry carries the burden of proof in this respect.

178. The Minutes of the meetings during which this problem was repeatedly discussed suggest that Rockwell was not prepared to waive its right to fees, at least not without satisfactory compensation. Compromise solutions, however, were not reached. In view of the unsettled dispute over fees for Task 16, the Tribunal is not persuaded that Rockwell's decision to withhold invoicing of fees for this Task can be construed as a waiver of its clear contractual right thereto.

179. The Ministry therefore did not carry its burden to establish either a waiver of fees by Rockwell or any other ground on which Rockwell's entitlement to these fees should be denied. Accordingly, the Tribunal finds that Rockwell is entitled to outstanding fees on Task 16 in the amount of \$688,000 which is the amount fixed in the Contract as the maximum fee for Task 16.

Conclusion on Fees

180. For the foregoing reasons, in addition to fees invoiced in the invoices through 31 August 1979, Rockwell is

¹⁶ The Harris Report for January 1979 contains a "Task 16 Construction Equipment Status Report" which establishes that the Ministry received almost all the equipment.

entitled to:

-	30% withholding from fees:	\$ 617,201
-	Target Fee adjustment Task 3:	\$ 436
-	Target Fee adjustment Task 6:	\$ 11,398
-	Target Fee adjustment Task 13:	\$ 14,497
-	Fixed Fee for Task 16:	\$ 688,000
<u>Total</u>		<u>\$1,331,532</u>

181. All fees became payable as a consequence of the Ministry's termination of Contract No. 119. Taking into account a reasonable period after the 22 September 1979 meeting within which the Ministry should have reviewed and, as the case may be, specifically objected to Rockwell's invoices, the Tribunal determines that these fees fell due in the total amount of \$1,331,532 on 31 October 1979. See supra para. 144.

bb) Fischbach-Oman Invoice No. 25 for August 1979

182. Rockwell is also entitled to amounts invoiced by its subcontractor Fischbach-Oman for performance up to the effective date of Contract termination, if and to the extent such amounts were not included in Rockwell's invoices to the Ministry through 31 August 1979. Rockwell contends that its general practice was to send invoices to the Ministry for the charges of its subcontractors only after it had paid the subcontractor. The evidence shows that on 25 October 1979 Rockwell paid Fischbach-Oman invoices no. 21-25 covering Fischbach-Oman's performance during the months of April through August 1979. If Rockwell had followed its usual

practice it would not have sent invoices to the Ministry for these charges until after they were paid in October. The evidence indicates, however, that Rockwell did not in fact follow that practice.

183. In its pleadings, Rockwell lists the Fischbach-Oman charges that it had not invoiced to the Ministry before 31 August 1979. That list refers only to Fischbach-Oman invoices no. 25-35. The Tribunal, therefore, must conclude that, contrary to prior practice, in this instance Rockwell included the charges for Fischbach-Oman's invoices no. 21-24 in the invoices sent to the Ministry before 31 August 1979. Therefore, the claim for these invoices is denied.

184. It follows that only Fischbach-Oman's invoice no. 25, dated 31 August 1979 and covering performance during August 1979, was not previously invoiced to the Ministry. Rockwell is therefore awarded \$36,439 for this invoice.

185. Rockwell claimed this amount under the due date 30 June 1980. The Tribunal finds that Rockwell should have received payment by then, and accordingly sets 30 June 1980 as the due date for this amount.

186. Rockwell also seeks fees on the costs claimed for the Fischbach-Oman invoices. The evidence before the Tribunal, however, does not substantiate the facts on which the fee structure for these costs was based. Consequently, the Tribunal does not have a sufficient basis on which to calculate and award fees and the claim is denied.

3. Claim for Performance After 31 August 1979

187. Rockwell also maintains that it continued to perform under Contracts No. 119 and 120 through 30 June 1980 and seeks costs for its alleged performance from 31 August

1979 to that date in the amount of \$2,101,518 plus related fees. In addition Rockwell seeks, among other things: (1) Mellon Bank fees incurred after June 1980, (2) Fischbach-Oman invoices for \$198,906 received after June 1980, (3) a contingent liability to Citibank totaling \$309,883. To the extent that these costs were incurred after 30 June 1980 Rockwell claims that they nevertheless should be regarded as performance costs because they arose from contractual commitments.

188. In view of the Tribunal's holding that both Contracts were terminated effective 31 August 1979, Rockwell's Claim for contractual "performance" costs after that date must be denied. This particularly applies to costs incurred by Fischbach-Oman after Contract termination in order to keep the project in a state of suspension. Moreover, the Tribunal finds that the Mellon Bank fees and the alleged "contingent" liability to Citibank appropriately fall within the category of damages rather than performance costs and accordingly these costs are dealt with below in the damages section. See infra paras. 208-22.

189. The Tribunal considered the possibility whether, in view of the Parties' conduct, a new "implied" contract was concluded, or whether Rockwell is entitled to compensation under theories of quantum meruit or unjust enrichment. The Tribunal does not find a sufficient basis, however, on which to award these costs under either of these theories. In the Tribunal's view, the Ministry's letter of 16 July 1979 must be construed as a notice of termination. Although it is true that the Ministry could have phrased this notice more clearly, other IBEX contractors understood it as such. In this situation, absent a clear commitment by the Ministry to the continuance of the IBEX program, Rockwell could not reasonably conclude that the Ministry intended to enter into a new contract. There is no evidence of such a commitment. See supra para. 95. Rather, the Ministry's apparent

reluctance to satisfy any of Rockwell's claims for the period after 10 February 1979 clearly demonstrated that the Ministry was not willing to incur further costs for the IBEX program. The Tribunal is not convinced therefore that a new Contract - either express or implied - was entered into between the Parties.

190. Based on the foregoing considerations, it is also unwarranted to award Rockwell performance costs on theories of quantum meruit or unjust enrichment. Such a claim could only be granted if it was established that the Ministry accepted these services under circumstances in which a reasonable person should have promised to pay.

191. Rockwell has failed to establish, however, that the Ministry accepted these services. According to Rockwell's report of the 22 September 1979 meeting in Tehran, Rockwell pointed out to the Ministry's representative that it was continuing to incur costs, particularly for providing custodial services through Fischbach-Oman. The report states "[n]either the Buyer nor any of the Iranian representatives provided us with any direction or instructions, even though we had asked for direction during our briefings. The Buyer made no firm commitments as to when or if payment of invoices would be made" Such silence by the Ministry's representatives cannot reasonably be considered as approval or acceptance of Rockwell's continued activity, nor was Rockwell legally entitled to expect payment for these services under the circumstances.

192. The Tribunal concludes that Rockwell, for its own business reasons, took the risk of incurring further costs to keep the project in suspension, presumably hoping that the Ministry would resume the IBEX project. This risk has materialized. However, this is no basis on which to hold the Ministry liable for Rockwell's costs. Hence, Rockwell

is not entitled to any "performance" costs or fees for the period after 31 August 1979.

4. Termination Costs

193. In addition to its costs and fees for performance through Contract termination, Rockwell is entitled to termination costs. Article 6.7 of the Contracts provides that in the case of termination for convenience by the Ministry, Rockwell is to be paid "approved actual costs up to the time of termination and related fee plus approved actual cost of termination." "Costs of termination" include all costs necessary to wind down the project.

194. Therefore, costs incurred by Rockwell for performance after 31 August 1979 are not recoverable as termination costs. At the Hearing, Rockwell confirmed that "none" of the costs alleged to be performance costs incurred after 31 August 1979 were, in fact, termination costs. According to Rockwell, even the \$198,906 in Fischbach-Oman invoices to Rockwell dated 31 July, 31 August and 30 September 1980 related to "goods and services contracted for (and partially delivered) before 30 June 1980" - the date Rockwell considered to be the date of Contract termination. These costs, therefore, cannot be characterized as "termination" costs.

195. Specified as a cost of termination, Rockwell seeks reimbursement for litigation expenses in the amount of \$196,467 allegedly incurred because the Ministry's termination of the Contracts led to a legal dispute in the United States between Rockwell and one of its subcontractors. Rockwell, however, has failed to establish the causal link between the termination of Contracts No. 119 and 120 and the dispute with the subcontractor. Rockwell did not indicate either the subject matter of the dispute or the points in contention. This Claim is thus dismissed for lack of proof.

196. In addition, Rockwell claimed as termination costs \$6,221 incurred to terminate its Tehran office lease and \$2,984 to terminate the contract of a Tehran employee. These items come within the definition of termination costs. Moreover, the Tribunal is satisfied that Rockwell actually incurred these costs and accordingly awards Rockwell \$9,205 for these Claims.

197. Rockwell also seeks payment of \$309,883 for a "contingent liability to Fischbach-Oman." Based on the evidence before it, the Tribunal does not find a sufficient basis for this Claim. In its "Final invoice" dated 30 September 1980, Fischbach-Oman credited this amount to Rockwell indicating it as a "Fee Adjustment." No evidence has been submitted establishing that Fischbach-Oman maintains a claim for reimbursement of that credit. Accordingly, this Claim is dismissed.

198. The Tribunal, therefore, finds that Rockwell has established its Claim for termination costs only with respect to the lease and employee terminations and awards the total amount of \$9,205 on this Claim. In view of the fact that Article 6.7 makes a distinction between performance and termination costs, and that fees are not mentioned with respect to termination costs, the Tribunal construes this provision to the effect that Rockwell is not entitled to fees on termination costs.

199. While this is a Claim for Contract termination costs which, under ordinary circumstances, become payable only upon proper specification and invoicing; the Tribunal finds that in view of the Ministry's anticipatory refusal to satisfy any of Rockwell's Claims these costs must be deemed to have become payable even without issuance of a formal invoice. Taking into account the date of payment of these amounts by Rockwell, as well as a reasonable period of time

for review, the due date for this Claim is deemed to be 30 September 1980.

5. Damages

a) Lost Profits

200. Rockwell seeks compensation for lost profits in the amount of \$17,323,040 arguing that the Ministry acted arbitrarily and with abusive effect when terminating Contracts No. 119 and 120. This figure allegedly represents the maximum fee on all uncompleted work under Contracts 119 and 120 whether authorized or unauthorized.

201. Pursuant to Article 6.7 of the Contracts, the Ministry had the right to terminate the Contracts "without the fault" of the Contractor at any time. Therefore, because the Ministry had the contractual right to terminate the Contracts, this termination cannot be construed as a breach of the Contracts entitling Rockwell to damages. Rather, Article 6.7 determines the scope of Rockwell's claim in the case of termination for convenience. According to this provision, Rockwell is entitled to "approved actual costs up to the time of termination and related fee plus approved actual cost of termination," but not to compensation for lost profits. Cf. Sylvania, Award No. 180-64-1 at pp. 29-30, reprinted in 8 Iran-U.S. C.T.R. at 319; Ford Aerospace, Partial Award No. 289-93-1 at paras. 81-83, reprinted in 14 Iran Iran-U.S. C.T.R. at 45; Harris, Partial Award No. 323-409-1 at paras. 151-52, reprinted in 17 Iran-U.S. C.T.R. at 76. Hence, lost profits cannot be claimed either under Article 6.7 of the Contracts or as damages for breach of contract. The Claim is therefore dismissed.

b) Standby Letter of Credit Costs

202. Under the Contracts, Rockwell was obligated to provide good performance and advance payment guarantees in favor of the Ministry. Accordingly, Rockwell procured 19 bank guarantees relating to Contract No. 119 in the total amount of \$28,074,730 with Bank Sepah in Iran. These bank guarantees were backed up by standby letters of credit issued by Mellon Bank in the United States. Moreover, Rockwell procured 2 bank guarantees relating to Contract No. 120 in the total amount of \$2,364,782 with Bank Tejarat in Iran backed up by standby letters of credit issued by Citibank in the United States. See also infra paras. 233-34. The Claim for damages in relation to these bank guarantees and standby letters of credit falls into three categories: (1) legal fees, (2) injunction bond premiums, and (3) bank fees.

aa) Legal Fees

203. In mid-March 1980, the Ministry called the full amount of all bank guarantees procured by IBEX contractors, including Rockwell. The Iranian bank that had issued the bank guarantees in turn called on the standby letters of credit. Thereupon, in April and May 1980, Rockwell obtained a court injunction enjoining payment under the standby letters of credit. It now seeks reimbursement for legal fees allegedly incurred in connection with preventing payment under the bank undertakings of \$902,563 plus 4% "G&A" and 10% fees.

204. Based on the findings in this Case, the Tribunal concludes that the Ministry had no right to make calls on either the good performance or advance payment guarantees and therefore these calls were wrongful. In line with its holding in Harris, the Tribunal considers the Ministry

liable for damages, including legal fees, caused by such wrongful calls. See Harris, Partial Award No. 323-409-1 at paras. 156-57, reprinted in 17 Iran-U.S. C.T.R. 77-78. Furthermore, the Tribunal is satisfied, on the basis of the presentation and evidence submitted by Rockwell, that Rockwell incurred legal fees in the total amount of \$902,563 in connection with preventing payment under the bank undertakings. Rockwell is, accordingly, entitled to damages in this amount.

205. Rockwell further suggests that these legal fees should be considered as costs incurred under the Contracts entitling it to 4% G&A and 10% fee. In the Tribunal's view, however, these costs result from a breach of contractual obligations and are not related to performance as envisaged by the fee provisions in Contracts No. 119 and 120. Consequently, these costs come under the definition of "damages" with regard to which Rockwell is not entitled to contractual fees or a flat rate of 4% "G&A." Rockwell did not further specify the administrative costs it actually incurred. There is therefore no factual basis on which to award such costs and the Tribunal need not decide the extent to which such costs might otherwise be recoverable.

206. The Tribunal, therefore, awards \$902,563 for this Claim. In determining the due date, the Tribunal considers that this amount is awarded as damages. In principle, Rockwell is entitled to recover damages as soon as they were incurred, provided the Ministry knew or should have known that it was in breach of the contract. In this Case, the Ministry should have known that the calls for the full amount of all bank guarantees were wrongful under Contracts No. 119 and 120. Under these circumstances, it would be unreasonable to require Rockwell to formally notify the Ministry of the exact amount of damages suffered before the Claim for reimbursement of damages became "due." In this Case, the Tribunal assumes that the legal fees relating to

the injunction lawsuits in April and May 1980 were paid by Rockwell no later later than 30 September 1980. Accordingly, the Tribunal sets 30 September 1980 as the due date for this Claim.

bb) Injunction Bond Premiums

207. Rockwell offered documentary evidence that it procured two injunction bonds in connection with the lawsuits in the United States. As established by a statement of Elmer S. Hyde, Inc., Rockwell has been obligated to pay \$1,000 per year since May 1980 for injunction bond no. 2547189, issued in the amount of \$1,000,000 in the case of Rockwell International Systems, Inc. v. Mellon Bank and Bank Sepah. Moreover, it has been obligated to pay \$200 per year since May 1980 for injunction bond no. 2553273, issued in the amount of \$20,000 in the case of Rockwell International Systems, Inc. v. Citibank, N.A. and Bank Tejarat. The obligation to pay these injunction bond premiums results from the Ministry's wrongful calls on the bank guarantees. The evidence presented does not establish the precise renewal and cancellation terms of the bonds. The Tribunal therefore finds it reasonable to award Rockwell costs incurred to maintain the bonds through May 1989 in the amount of \$10,800 as damages, plus interest thereon from the median date of approximately 1 January 1985. The Claim for fees and "G&A" is denied. See supra para. 205.

cc) Bank Fees

208. Rockwell also seeks to recover fees paid to Mellon Bank and Citibank to maintain the standby letters of credit established under Contracts No. 119 and 120. This Claim

falls into the following subcategories:

- (a) Fees through 30 June 1980: \$ 190,716
- (b) Fees from 1 July 1980
through 31 August 1987: \$1,290,689
- (c) Fees through release: \$ 487.41 per day
- (d) Contingent liability
to Citibank: \$ 37,707

Rockwell also seeks 10% fees and 4% "G&A" on these amounts.

209. Article 7.4 of the Contracts provides that "in the event the Employer cancels the Contract for any reason . . . all Bank Guarantees of Good Performance will be immediately released." Under Article 7.5, downpayment bank guarantees were to be released within four weeks after the clearance of downpayment amounts.

210. The Tribunal finds that according to these clear and express provisions the Ministry was obligated to release all bank guarantees after a reasonable period for review of mutual claims had elapsed. Under the circumstances of this Case, this review should have been completed by 31 October 1979. See infra para. 144. Accordingly, the Ministry was obligated to release all bank guarantees by 31 October 1979, even without a specific request by Rockwell. The Ministry's failure to do so constitutes a breach of contract for which it is liable.¹⁷ Rockwell is therefore entitled to reimbursement of bank fees paid in order to maintain the bank

¹⁷ See also Harris, Partial Award No. 323-409-1 at para. 158, reprinted in 17 Iran-U.S. C.T.R. at 78 where, however, the claim for letter of credit fees was denied for lack of proof.

undertakings after 31 October 1979. These costs, however, fall within the category of damages and accordingly Rockwell is not entitled to additional fees.

211. The Ministry argues that Rockwell failed to comply with its duty to mitigate its damages because Rockwell could and should have opened a "blocked account," pursuant to United States government regulations, in order to avoid fees to maintain the standby letters of credit. The Tribunal finds that, while this may have been an option, Rockwell had no duty to mitigate its damages by establishing a "blocked account."

212. The creation of "blocked accounts" was authorized by § 535.568 of the Iranian Assets Control Regulations, issued by the United States Department of the Treasury. This provision entered into effect on 19 December 1979 and was amended effective 9 January 1980 and 23 March 1982. See 31 C.F.R. § 535.568 (1982). When adopted, § 535.568 was intended as a temporary measure to protect United States account parties from demands against standby letters of credit during the hostage crisis. See Notices, 47 Fed. Reg. 366-67 (5 Jan. 1982, No. 2). Many United States parties, including several IBEX contractors, made use of this possibility.

213. Rockwell, on the other hand, filed suit in New York on 9 April 1980 and 2 May 1980 to enjoin payment under the letters of credit against Mellon Bank and Citibank. Rockwell obtained temporary injunctive relief in both cases. The injunctive relief provided, however, that while the letters of credit remained in effect, Rockwell would be liable for bank fees.

214. The Tribunal initially notes that § 535.568 specifically did not preclude United States parties from raising "any other legal defense to payment under standby

letters of credit." See 31 C.F.R. § 535.568 (e) (1982). In fact, many other parties obtained court injunctions, in some cases combined with a "blocked account."

215. The regulation provides further that "[t]his section does not affect the obligation of the various parties of the instruments covered by this section if the instruments and payment thereunder are subsequently unblocked." 31 C.F.R. § 535.568(f) (1982). Accordingly, the "Notice" published in the Federal Register states:

The United States notes that it could determine at some future time that it would be appropriate to modify the current policy concerning standby letters of credit. In that event, modification or revocation of sections pertaining to those instruments could take place. Sections which might be affected in whole or in part include . . . 535.568

Notices, 47 Fed. Reg. 366-67 (5 Jan. 1982, No. 2).

216. In addition, Iran contests the validity of these regulations under the Algiers Accords before this Tribunal in Case No. A15 (I:C) (Islamic Republic of Iran and United States of America).

217. Considering this background, the Tribunal cannot find that Rockwell's doubts as to the sufficiency of protection under the Treasury Regulations were unreasonable. Because these doubts were not unreasonable, it cannot be construed against Rockwell that between two possible ways of reacting to the Ministry's breach, it opted for the one which in its view offered better protection. This risk fell on the Ministry as the breaching party. Rockwell, therefore, did not violate its duty to mitigate its damages when it obtained court injunctions, instead of creating a blocked account, in order to prevent payment under the standby letters of credit.

218. Having found that the Ministry is liable in principle for payment of the bank fees, the Tribunal will now examine the extent to which Rockwell has established the amount of its damages. For the period through June 1980 Rockwell claims that it paid a total of \$190,716 in bank fees to Mellon Bank and Citibank. The Claim needs to be adjusted, however, because Rockwell is only entitled to reimbursement of fees from the date on which the Ministry should have released the bank guarantees, that is, from 1 November 1979. See supra para. 210. Thus, Rockwell may recover one third, or \$14,622, on the Mellon Bank Debit Advice dated 12-79 plus \$88,708 charged under Mellon Bank Debit Advices dated 03-80 and 06-80 in the total amount of \$103,330 for the period through 2 June 1980.¹⁸ Moreover, Rockwell is entitled to Citibank fees of \$1,478 per month from 1 November 1979 through June 1980 in the total amount of \$11,824. In sum, the Tribunal awards Rockwell bank fees through June 1980 in the amount of \$115,154.

219. Moreover, the Tribunal is persuaded that Rockwell paid \$1,290,689 in Mellon Bank fees for the period from 2 June 1980 to 31 August 1987¹⁹, and that it remains obligated to pay bank fees of 0.625% per year on \$28,074,730 on a 360-day basis from 31 August 1987 until the bank undertakings are released.

220. The Award rendered in this Case should enable Rockwell to obtain release from any continuing liabilities under the standby letters of credit. In any event, the

¹⁸ Apparently, Mellon Bank billed retroactively. Although the debit advice is not in evidence, the record indicates that the billing period ran from the beginning of September 1979 through the beginning of December 1979.

¹⁹ Rockwell failed to substantiate bank charges of \$1,462 for "three additional days."

Tribunal finds no basis to assume or retain jurisdiction over Claims arising out of noncompliance with this Award. See infra para. 235. The Tribunal, therefore, sets the cut-off date for the accrual of bank fees on the date on which this Award is filed with the Tribunal's Registry. Accordingly, Rockwell is entitled to \$350,934 for Mellon Bank fees for the approximately 2 year period from 1 September 1987 until the date of filing of this Award with the Tribunal's Registry. Accordingly, Rockwell is awarded a total of \$1,756,777 in bank fees.

221. The Claim based on an alleged "contingent" liability to Citibank in the amount of \$37,707 pertaining to the period from 1 July 1980 to 15 August 1982 is dismissed for lack of admissible evidence. See supra para. 64.

222. Rockwell is also entitled to interest on bank fee payments from the date on which it made payment. See supra para. 206. The Tribunal deems it appropriate to award interest from the median date of approximately 1 October 1984 for the total amount of bank fees awarded.

6. Credits to the Ministry

223. The Ministry is entitled to certain credits. It is undisputed that Rockwell holds advance payments in the amount of \$11,075,476 which it did not credit to the Ministry in its invoices through 31 August 1979. As this amount was available to Rockwell from the outset of the project, it will be applied against the earliest amounts due to Rockwell from the Ministry.

224. Rockwell also agrees that the proceeds of certain equipment sales have to be credited to the Ministry. This

amount is broken down as follows:

(i)	portable shelters	\$169,124
(ii)	HF radios	\$526,573
(iii)	miscellaneous	\$19,369
	<u>credit total</u>	<u>\$715,066</u>

225. Moreover, the Tribunal finds that certain amounts credited by Fischbach-Oman to Rockwell in Fischbach-Oman's "Final Invoice" dated 30 September 1980 must be credited to the Ministry. These credits include:

Equipment sales	\$361,000
Returned Funds CM 079-1	\$111,217
Returned Funds -	
Prepaid Ocean Freight	\$ 60,000
Cancellation of Otis L/C	\$ 91,587
Fee adjustment	\$309,883
<u>Total</u>	<u>\$933,687</u>

Rockwell took these credits into account in calculating its Claim and reduced it accordingly.²⁰ This shows that Rockwell, in principle, recognizes the Ministry's entitlement to these credits. Moreover, the "Major Subcontractor Invoice Summary" submitted by Rockwell indicates that these credits were applied against the Fischbach-Oman invoices through September 1978. In the absence of any other indication concerning the application of these credits, the Tribunal deems it appropriate to apply all credits against Rockwell's Claim for performance through Contract termination and not

²⁰ Rockwell did raise a Claim based on an alleged "contingent" liability to Fischbach-Oman as the equivalent of the "Fee Adjustment" credit of \$309,883, however, this Claim was dismissed for lack of proof. See infra para. 221.

against the Claim for costs incurred thereafter which has been denied.

226. Considering that Rockwell did not specify the dates on which it sold the equipment, and further that Rockwell set-off the credit of \$715,066 representing the sale of the equipment against its post-June 1980 costs, the Tribunal decides to apply the credit against any amount due from the Ministry on 15 August 1980. Moreover, as Fischbach-Oman credited Rockwell for \$933,687 only in its final invoice dated 30 September 1980, the Tribunal decides to apply this credit against amounts due from the Ministry as of that date.

7. Application of Credits to Claims Awarded and Interest

227. Rockwell is awarded the following amounts:

- (a) \$20,714,843 for invoiced amounts due on 31 October 1979;
- (b) \$1,331,532 for uninvoiced fees due on 31 October 1979;
- (c) \$36,439 for Fischbach-Oman invoice no. 25 for August 1979 due on 30 June 1980;
- (d) \$9,205 for termination costs due on 30 September 1980;
- (e) \$902,563 for the letter of credit legal litigation fees due on 30 September 1980;
- (f) \$1,756,777 for bank fee payments "due" on 1 October 1984; and

- (g) \$10,800 for injunction bond premiums "due" on 1 January 1985.

228. The Ministry is entitled to the following credits:

- (a) \$14,387,301 for advance payments, out of which \$3,311,825 was credited previously in Rockwell's invoices through 31 August 1979, leaving unapplied advance payments of \$11,075,476;
- (b) \$715,066 for equipment sold by Rockwell; and
- (c) \$933,687 for Fischbach-Oman credits to Rockwell.

229. The Tribunal applies these credits taking into account their due dates beginning with the amount which has been outstanding for the longest time.

230. The advance payment of \$11,075,476 was available for application by Rockwell from the outset and therefore should first be applied against the amount of \$22,046,375 due on 31 October 1979, thus leaving an amount of \$10,970,899 due on 31 October 1979. The credit of \$715,066 is applied against the amount of \$11,007,338 due on 15 August 1980 reducing the amount due on that date to \$10,292,272. The credit of \$933,687 is applied against the amount of \$11,204,040 due on 30 September 1980 reducing the amount due on that date to \$10,270,353.

231. In determining the interest rate, the Tribunal follows the Chamber's previous practice as outlined in Sylvania. See Sylvania, Award No. 180-64-1 at pp. 30-34, reprinted in 8 Iran-U.S. C.T.R. at 320-22. Thus, Rockwell is awarded interest in an amount equal to the rate a successful claimant would have been able to earn had it

invested the sum awarded in a form of commercial investment common in its own country. For successful United States claimants, the Chamber customarily uses the average interest rate earned on a six-month Certificate of Deposit for the period from the day following the date on which payment was due to the date on which the Escrow Agent instructs the Depositary Bank to effect payment.

232. Rockwell is thus entitled to simple interest:

at an annual rate of 13.5% on \$10,970,899 from 1 November 1979 to 30 June 1980;

at an annual rate of 9.5% on \$11,007,338 from 1 July 1980 to 15 August 1980;

at an annual rate of 11.00% on \$10,292,272 from 16 August 1980 to 30 September 1980;

at an annual rate of 12.25% on \$10,270,353 from 1 October 1980 to 1 October 1984;

at an annual rate of 10.75% on \$12,027,130 from 2 October 1984 to 1 January 1985;

at an annual rate of 7.75% on \$12,037,930 from 2 January 1985

up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

8. Other Relief Sought

a) Standby Letters of Credit and Bank Guarantees

233. Rockwell requests the Tribunal to determine that all of Bank Sepah's bank guarantees relating to Contract No. 119, Nos. 2760-2777, and No. 2779-2780, and both of Bank Tejarat's bank guarantees relating to Contract No. 120, Nos. 8/237 and 8/238, are of no further purpose, are cancelled, and are null and void. It further requests that the Ministry be ordered to withdraw any and all demands for payment, and to refrain from making any further demands under the above guarantees, and to surrender the same to said banks for cancellation, and to cause Bank Sepah to surrender to Mellon Bank, N.A. for cancellation all of the Mellon Bank, N.A. guarantees relating to Contract No. 119, Nos. G-13 through G-33 (corresponding to its L/C Nos. 40561 through 40581), and finally to cause Bank Tejarat to surrender to Citibank, N.A. for cancellation both Citibank, N.A. standby letters of credit relating to Contract No. 120, Nos. WCG-G70389F and WCG-G70390F. Rockwell also requests the Tribunal to retain jurisdiction in this Case to take any necessary action, including the award of additional damages, in the event that the Tribunal's order is not complied with within 90 days after the date of the Award.

234. Contracts No. 119 and 120 were terminated effective 31 August 1979. Performance therefore did not have to be guaranteed thereafter. The Ministry has been credited for the remaining balance of its down payment for which security is no longer necessary. Consequently both the performance and advance payment guarantees have no further purpose. The Tribunal decides that the Ministry is obliged, therefore, to withdraw demands for payment of these guarantees and to refrain from making any further demands thereon. The Ministry is further obliged to cancel these bank guarantees and to take all necessary steps that the

corresponding letters of credit be released. The evidence presented by Rockwell indicates that Bank Sepah's bank guarantees Nos. 2775 and 2578 have been released and therefore the relief granted does not relate to these guarantees or to the corresponding Mellon Bank guarantees Nos. 6-28 and 6-31, or their corresponding Mellon Bank standby letters of credit Nos. 40576 and 40579.

235. Rockwell's request that the Tribunal retain jurisdiction in this Case to take further action should the Ministry not comply with this order is denied. That request concerns the execution of this Award. The Tribunal has no jurisdiction over disputes which may arise out of non-compliance with this Award. See supra para. 220.

b) Court Proceedings in Iran

236. Rockwell further seeks a declaration from the Tribunal that the Award in this Case supersedes the court proceedings instituted by the Ministry against Rockwell in Iran. On 10 June 1982, the Ministry filed suit against Rockwell in the First Public Court of Tehran seeking damages for breach of contract relating to Contracts No. 119 and 120. It eventually obtained a judgment signed on 7 July 1986, in absentia, in the amount of \$56,081,400 against Rockwell.

237. In two Interim Awards rendered in this Case, Interim Award Nos. ITM 17-430-1 (5 May 1983), reprinted in 2 Iran-U.S. C.T.R. at 310, and ITM 20-430-1 (6 June 1983), reprinted in 2 Iran-U.S. C.T.R. at 369, the Tribunal rejected the Ministry's view that the Iranian courts have exclusive jurisdiction over the present dispute. The Tribunal held that it considers the Claim, as well as the Counter-claim, to be within its jurisdiction. Therefore, the jurisdiction of the Iranian courts over both the Claim and

the Counterclaim was precluded by Article II, paragraph 1, of the Claims Settlement Declaration.

238. The Tribunal confirms here the reasoning of the Interim Awards and holds that the Iranian Courts have no jurisdiction over the Claim or Counterclaim which are the subject matter of this Case, and that the judgment rendered by the First Public Court of Tehran on 7 July 1986 is therefore without legal effect. See also Touche Ross, Award No. 197-480-1 at pp. 12-13, reprinted in 9 Iran-U.S. C.T.R. at 293-94.

239. Rockwell's request that the Tribunal retain jurisdiction in this Case to award further damages if the Ministry fails to protect Rockwell against the Iranian court proceedings is denied for lack of jurisdiction. See supra paras. 220, 235.

c) Declaration Concerning Iranian Tax and Social Security Claims

240. Rockwell, moreover, seeks a declaration from the Tribunal that the Ministry is obligated to defend and indemnify it against all Iranian tax and social security claims levied on it including those asserted by the Ministry in its Counterclaim. Rockwell relies on Article 5.10 of the Contracts which provides that "payment of all taxes and fees as may be levied on the contractor or its employees by the Government of Iran . . . shall be reimbursed by the employer."

241. The request for such a declaration is denied. In the Tribunal's view, Article 5.10 applies to a situation in which payment of taxes or fees was actually made by the Contractor. This is indisputably not the case here. Rockwell has not claimed that it made tax or social security

payments for which reimbursement might be owed by the Government of Iran. As such a claim was not outstanding on 19 January 1981 as required by Article II, paragraph 1, of the Claims Settlement Declaration, the Tribunal denies its jurisdiction over this request for declaratory relief.

9. Counterclaims

a) Damages

242. The Ministry takes the position that, while it complied with its obligations under Contracts No. 119 and 120, Rockwell breached both agreements in numerous ways. The Ministry asserts that Rockwell was in default under the Contracts, that work performed was defective and that the equipment was not delivered. The Ministry further contends that Rockwell caused its employees to leave Iran without giving proper notice and that it left subcontractors without instructions and the construction site unguarded. The Ministry claims that it suffered severe damages due to such acts of "intentional carelessness," and raises the following Counterclaims:

- (1) Refund of advance payments in the amount of \$14,387,301 plus interest;
- (2) Payment under the good performance bank guarantees in the amount of \$15,003,282, or removal of the "obstacles created in this connection"; and
- (3) Payment of damages in the "minimum" amount of \$80,245,000.

243. Based on the findings in this Case, these Counterclaims must be dismissed. Contracts No. 119 and 120 came to an end because the Ministry terminated the agreements for

its own convenience, and not as a result of any breach of contract by Rockwell. Moreover, under the circumstances, Rockwell was entitled to sell the equipment in its possession in order to mitigate its damages. The Ministry is, therefore, not entitled to damages from Rockwell nor is it entitled to payments under the good performance guarantees.²¹

244. Although Rockwell was in delay with respect to most Tasks, any call on the good performance guarantees was subject to the procedure provided for in Article 6.1 of the Contracts, which reads as follows:

On occasion the Contractor does not accomplish any of his duties and obligations according to this contract properly, the employer informs the Contractor, in writing, about his faults' [sic] or failures and will stipulate a date for correction of such objection without any delay in the approved time schedule and/or additional costs to the Employer. If the Contractor does not rectify the stated objections within that period, the Employer can, in his own judgement, collect and confiscate partly or wholly the good performance guarantees of the Contractor in his benefit and determine a second respite for the elimination of the said objection. In case the Contractor again fails to rectify the defined objection during this second period, the Employer is entitled to cancel the Contract partly or wholly without paying any compensation and if still some of the guarantees were remained, he can collect them on his benefit.

There is no evidence in the record that the Ministry followed the procedure required under this provision.

245. The remaining balance of advance payments has been fully credited to the Ministry against the Claim.

²¹ The Tribunal finds it unnecessary, therefore, to decide the issue of the Parties' standing as to any claims under the good performance bank guarantees.

b) Social Security Premiums

246. The Ministry also seeks payment of social security premiums in the amount of 6,849,064 Rials for Contract No. 119 and 50,730,787 Rials for Contract No. 120. Rockwell denies any liability for social security premiums.

247. It is recognized Tribunal practice that social security premiums are imposed by law and not by the contract which is the subject matter of the claim. The Counterclaim for social security premiums, therefore, does not arise "out of the same contract, transaction or occurrence that constitutes the subject matter" of the Claim as required by Article II, paragraph 1, of the Claims Settlement Declaration. This Counterclaim, accordingly, falls outside the Tribunal's jurisdiction. See, e.g., Sylvania, Award No. 180-64-1 at pp. 40-41, reprinted in 8 Iran-U.S. C.T.R. at 326-27.

c) Taxes

248. The Ministry also seeks payment of taxes allegedly outstanding in the amount of 1,142,445,059 Rials for the year 1978 plus total annual penalties of 237,964,358 Rials. Rockwell denies any liability for Iranian taxes.

249. Taxes, like social security premiums, are imposed by law, and do not arise out of the underlying contract between the parties. Therefore, the Counterclaim for taxes does not arise "out of the same contract, transaction or occurrence that constitutes the subject matter" of the Claim as required by Article II, paragraph 1, of the Claims Settlement Declaration. See, e.g., Questech, Award No. 191-59-1 at pp. 37-38, reprinted in 9 Iran-U.S. C.T.R. at 134; Houston Contracting Company and National Iranian Oil Company, et al., Award No. 378-173-3, paras. 113-20 (22 July

1988), reprinted in ___ Iran-U.S. C.T.R. ___, ___. Accordingly, the Counterclaim for taxes is dismissed for lack of jurisdiction.

10. Costs

250. Rockwell seeks reimbursement of its costs of arbitration in the amount of \$928,036. This amount includes costs of \$682,100 incurred as of 31 December 1986 and \$245,936 for arbitration costs incurred thereafter. The Ministry seeks arbitration costs in an amount to be determined by the Tribunal.

251. The Tribunal is satisfied, based on the evidence presented, that Rockwell incurred arbitration costs in the amount claimed. Having regard to criteria of the kind outlined in Sylvania, Award No. 180-64-1 at pp. 35-38, reprinted in 8 Iran-U.S. C.T.R. at 323-24, and taking into account that this Case involved complex factual issues, the Tribunal determines that \$70,000 is a reasonable amount of costs to be paid by the Ministry to Rockwell.

E. AWARD

252. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

1. The Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN (THE MINISTRY OF NATIONAL DEFENCE) is obligated to pay the Claimant ROCKWELL INTERNATIONAL SYSTEMS, INC. the amount of \$12,037,930 plus simple interest:

at an annual rate of 13.5% on \$10,970,899 from 1 November 1979 to 30 June 1980;

at an annual rate of 9.5% on \$11,007,338 from 1 July 1980 to 15 August 1980;

at an annual rate of 11.00% on \$10,292,272 from 16 August 1980 to 30 September 1980;

at an annual rate of 12.25% on \$10,270,353 from 1 October 1980 to 1 October 1984;

at an annual rate of 10.75% on \$12,027,130 from 2 October 1984 to 1 January 1985;

at an annual rate of 7.75% on \$12,037,930 from 2 January 1985

up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; plus costs of arbitration of \$70,000.

These obligations 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.

2. The bank guarantees Nos. 2760-2674, 2776-2777 and 2779-2780 issued by Bank Sepah pursuant to Article 7.1 of Contract No. 119, and bank guarantees Nos. 8/237 and 8/238, issued by Bank Tejarat pursuant to Article 7.1 of Contract No. 120, and Mellon Bank N.A. guarantees relating to Contract No. 119, guarantee Nos. G-13-G-27, G-29-G-30 and G-32-G-33 (corresponding to L/C Nos. 40561-40575, 40577-40578 and 405780-405781), as well as Citibank N.A. standby letters of credit relating to Contract No. 120, Nos. WCG-G70389F and WCG-G70390F, have no further purpose. The Respondent, THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN

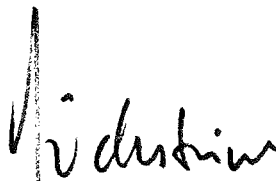
(THE MINISTRY OF NATIONAL DEFENCE), shall withdraw all demands for payment in connection with the guarantees and shall refrain from making any further demands thereon. The Respondent shall take all action necessary to ensure that Bank Sepah and Bank Tejarat cancel the guarantees, release the letters of credit, withdraw all demands for payment made in respect of the letters of credit, and refrain from making any further demands thereon.

3. With regard to the proceedings commenced by the Ministry of National Defense of the Islamic Republic of Iran in the Public Court of Tehran, the Tribunal determines that the Claims which the Tribunal has found in this Award that it has jurisdiction over were, as of the date such claims were filed in the form of Counterclaims in this Tribunal, and continue to be, excluded from the jurisdiction of that Court, or any other Court, by the terms of the Claims Settlement Declaration. The judgement obtained by the Respondent against Rockwell in the Tehran Court, signed on 7 July 1986, is without legal effect.

4. The remaining Claims and Counterclaims are dismissed.

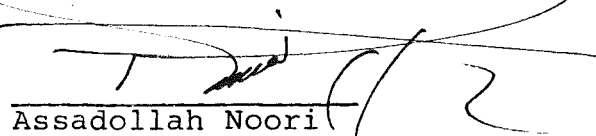
This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague,
05 September 1989

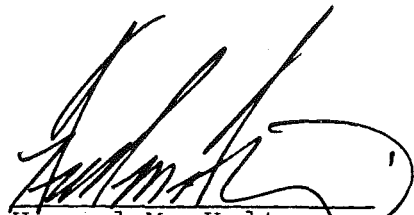


Karl-Heinz Böckstiegel
Chairman
Chamber One

In the Name of God



Assadollah Noori
Dissenting with respect
to the overwhelming bulk
of the Award. See Dissenting
Opinion.



Howard M. Holtzmann
Concurring in part,
Dissenting in part.
See Separate Opinion.