ICC (INTERNATIONAL CHAMBER OF COMMERCE)

ICC Case No. 7365/FMS

THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN V. CUBIC INTERNATIONAL SALES CORPORATION

FINAL AWARD

05 May 1997

Tribunal:
Werner Wenger (President)
Richard M. Mosk (Appointed by the respondent)
Seyed Jamal Seifi (Appointed by the claimant)
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Final Award

1. THE PARTIES

1.1. The Claimant and Counterrespondent in this Arbitration is the Islamic Republic of Iran acting through its Ministry of Defense and Support for the Armed Forces which entered in 1979 under its former name "Deputy Ministry of Armament" and as an organ of the Government of Iran and therefore as an organ of the Iranian State (known now as the Islamic Republic of Iran) into a contractual relationship with the other party to this Arbitration. The changes of names followed the Revolution of 1979 and important changes in the structure and organisation of the Government of Iran. This party shall hereinafter be referred to as "Iran" or as "Claimant".

1.2. The Respondent and Counterclaimant in this Arbitration is Cubic Defense Systems, Inc., an U.S. corporation and a wholly-owned subsidiary of Cubic Corporation, also an U.S. corporation. Cubic Defense Systems, Inc., is the successor in interest to Cubic International Sales Corporation which initially entered into the above mentioned contractual relationship with Iran in 1977 and which has dissolved in the meantime. It shall hereinafter be referred to as "Cubic" or as "Respondent".

1.3. The parties to the contracts in dispute and to this Arbitration shall together hereinafter be referred to as the "Parties".

2. THE CONTRACTUAL BACKGROUND OF THE ARBITRATION

2.1. The dispute between the Parties arises out of two agreements dated October 23, 1977 (hereinafter "the Contracts"), one relating to the sale of the necessary subsystems and support equipment that comprise an Air Combat Manoeuvring Range (hereinafter "ACMR" or "the System") for use by the Iranian Air Force (hereinafter "the Sales Contract"), the other relating to the installation and integration in Iran of the above military equipment (hereinafter "the Service Contract"). Amendments were made to the Contracts on August 7 and 8, 1978. The two Contracts were concluded by Iran as the customer on the one side and Cubic as the supplier on the other side.

2.2. The Sales Contract provided for progress payments upon completion of a specified portion of the work. By virtue of the Sales Contract, Cubic provided irrevocable standby letters of credit guaranteeing Cubic's performance and the return of the advance payment under certain conditions. Iran paid US$ 12'608'519.-- of the sum due under the Sales Contract. Under the Service Contract, US$ 302'857.-- was paid to Cubic. Under the Sales Contract, Iran was provisionally to accept and take delivery of the System at Cubic's plant in San Diego, California and subsequently transport the System to Iran.

2.3. In accordance with Contract Amendment no. 1 to the Sales Contract, dated August 8, 1978, the Parties agreed to change from a configuration that was to be in vans to a system configured for use
in building to be supplied by Iran. Such building was to be complete and available for installation on September 1, 1979 (cf. Cubic's Defense and Counterclaim Exh. 29). Subsequently, Iran was to transport the System to Iran.

2.4. Under the Service Contract, Cubic was to perform various site preparation tasks prior to formal acceptance in Iran and thereafter to perform installation, maintenance and training in connection with the System for a specified period of almost 3 years.

2.5. For reasons that are the subject matter of the present arbitration, performance of both the Sales Contract and the Service Contract was discontinued in or about 1979.

2.6. Both Contracts included similar *arbitration clauses*, which provide as follows:

"(a) General. Any controversy, dispute or claim arising out of or relating to this contract or breach thereof shall be settled by arbitration in the City of Zurich, Switzerland, in accordance with the laws of the Government of Iran in effect as of the date of this contract.

(b) Notice. In the event the parties are unable to resolve any such dispute, controversy, or claim, either party may give written notice to the other of their intent to submit the matter to arbitration.

(c) Cost of arbitration. The cost of arbitration shall be paid by the losing party." (Sales Contract) / "The cost of arbitration shall be paid equally by CUBIC and the Government of Iran." (Service Contract)

3. THE ARBITRAL TRIBUNAL

3.1. Pursuant to the decisions of the International Court of Arbitration of the International Chamber of Commerce ("ICC Court") of May 20, 1992, December 2, 1992 and May 5, 1993, the Arbitral Tribunal consists of

a) Chairman:

Dr. Werner WENGER
Attorney-at-Law and Notary
Wenger Plattner
Aeschenvorstadt 55
CH-4010 Basel, Switzerland

b) Co-arbitrator as proposed by Claimant and Counterrespondent:

Prof. Dr. Seyed-Jamal SEIFI
Attorney-at-Law, Professor of Law
7, Sorkhabi Street
Kareghar-Janoubi Avenue
Tehran 13169, Iran

c) Co-arbitrator as proposed by Respondent and Counterclaimant:

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1 Sales Contract, Article XII. 15; Service Contract, Article XI. 18
3.2. In accordance with the arbitration clauses quoted in Sect. 2.6 hereinabove and with Article 12 of the ICC Rules of Conciliation and Arbitration (in force as from January 1, 1988) (“ICC Rules”), Zurich, Switzerland, has been confirmed as place of arbitration.

3.3. The Terms of Reference, established in accordance with Art. 13.2. of the ICC Rules, were signed by the Parties on July 14, 1993.

3.4. The time-limit within which this Arbitral Tribunal must render its award (Art. 18 of the ICC Rules) has been extended by the ICC Court on April 2, 1997 until July 31, 1997.

4. THE CHRONOLOGY OF PROCEDURAL STEPS, DEFINITION OF DOCUMENTS

4.1. The proceedings were governed by the ICC Rules, where the ICC Rules remain silent, by the rules contained in the Terms of Reference (Articles 7.1 to 7.15) and, where the Terms of Reference remain silent, by any rules on which the Parties agreed or, failing such agreement, by the rules the Arbitral Tribunal determined from time to time (Terms of Reference, Article 7.1).

4.2. The main steps of the proceedings may chronologically be summarized as follows:


c) On March 6, 1992, Claimant filed its Reply to Respondent’s Answer and Counterclaim (“Claimant’s Reply”).

d) On July 14, 1993, a prehearing conference was held, at which the Terms of Reference were discussed and eventually executed.

e) On August 11, 1993, pursuant to Article 7.1 c) and Articles 7.3 to 7.6 of the Terms of Reference, as well as according to the procedural arrangements discussed at the prehearing conference of July 14, 1993, the Arbitral Tribunal ordered a bifurcation, pursuant to which the issue of quantification of the Claim and Counterclaim respectively be deferred. Accordingly, each Party was advised to simultaneously file its amended Statement of Claim or Counterclaim respectively setting forth
all factual and legal grounds of such claim and offer evidence in support thereof, only with the exception of the quantification of the Claim and Counterclaim (cf. Procedural Order No. 1).

f) On January 17, 1994, Claimant filed its Statement of Claim ("Statement of Claim") which included its arguments, authorities and 44 exhibits ("Statement of Claim Exh. 1 - 44").


h) On March 7, 1994, the Tribunal ruled that Claimant's requests for discovery appear to be premature at this stage of the proceeding since they were relevant only to aspects of quantification (cf. Procedural Order No. 2).

i) On April 21, 1994, Claimant filed its Rebuttal Statement and Answer to Counterclaim ("Claimant's Rebuttal") together with 65 exhibits ("Claimant's Rebuttal Exh. 1-65"), including a legal opinion by Javad Vahedi ("Vahedi, Legal Opinion") and two affidavits.

j) On April 21, 1994, Respondent filed its Rebuttal Statement ("Respondent's Rebuttal") together with 3 exhibits ("Respondent's Rebuttal Exh. 93-95"), one supplementary legal opinion by Mahmoud Katirai ("Katirai, Legal Opinion II") including 22 exhibits ("Katirai, Legal Opinion II Exh. 1 to 22"), two supplemental witness statements as well as one additional witness statement (all in "Respondent's Rebuttal, Witnesses") and a list of legal authorities cited in Respondent's Rebuttal Statement ("Respondent's Rebuttal, Authorities").

k) On June 13, 14 and 15, 1994, a first hearing was held in Zurich ("Hearing I"). At the hearing, oral argument by Counsel was heard on all issues identified in Article 4 of the Terms of Reference, with the exception of the quantification of the Claim and Counterclaim respectively (v. Procedural Order No. 4, Sect. 5.3).

l) On November 22, 1994, the Tribunal ordered an exchange of Parties' Post-Hearing Briefs with respect to the statute of limitations and to legal argument on that subject matter only (cf. Procedural Order No. 5).


o) On April 6, 1995, in consideration of the post-hearing briefs of the Parties, the majority of the Tribunal ruled that both the Claimant's Request for Arbitration with respect to its Claim for reimbursement and Cubic's Counterclaim for damages were not time-barred by the applicable statute of limitations under Iranian law (v. Procedural Order No. 6, Sect. 1.1 to 1.6; dissenting member's opinion on p. 6, id.). Iran's Claim for damages equal to US$ 15 million, however, was considered by the Tribunal as being "lime barred. The Tribunal declared its ruling on this issue as
being provisional subject to confirmation in the final award.

p) Simultaneously, the Tribunal ordered that the bifurcation of the proceedings (as referred to in Sect. e. above) was no longer applicable (cf. Procedural Order No. 6, Sect. 2.2).


r) On August 28, 1995, Claimant filed its Statement of Quantification (“Claimant’s Quantification”) together with 15 exhibits (“Claimant’s Quantification Exh. 1 to 15”) and a legal opinion by Hossein Safai (“Safai, Legal Opinion I”).


t) On October 24, 1995, Claimant filed its Comments on Respondent’s Statement of Quantification (“Claimant’s Comments on Quantification”) together with 7 exhibits (“Claimant’s Comments on Quantification Exh. 1 to 7”), including a supplementary legal opinion by Hossein Safai (“Safai, Legal Opinion II”) and a supplementary financial expert opinion as to the MDC Report I (“Claimant’s MDC Expert Opinion”).


v) On November 7 to 9, 1995, a second and final hearing was held in Zurich at which opportunity was given to both Parties to address legal arguments relating to the liability issues. In particular the question of whether or not the contracts were terminated either by operation of law or by mutual consent and the Parties’ positions with respect to the quantification of their respective claims were the main subjects of this second hearing which basically followed the agenda outlined in section 3 of the Procedural Order No. 9 (“Hearing II”).

w) On December 1, 1995, the Tribunal ordered a further exchange of Parties’ Post-Hearing Briefs with respect to the evidence relating to the quantification taking into account the various liability theories still being contended by the Parties (v. Procedural Order No. 10, Sect. 2).

x) On March 28, 1996, Claimant filed its Post-Hearing Brief commenting on the evidence relating to the quantification of the Claim and Counterclaim (“Claimant’s Post-Hearing Brief II”), together with 10 exhibits (“Claimant’s Post-Hearing Brief II Exh. 1 to 10”).

y) On March 28, 1996, Respondent filed its Post-Hearing Brief commenting on the evidence relating to the quantification of the Claim and Counterclaim (Respondent’s Post-Hearing Brief II), together
with 10 exhibits (“Respondent's Post-Hearing Brief II Exh. 1 to 10”) and a fifth supplemental legal opinion by Mahmoud Katirai (“Katirai, Legal Opinion VI”).

5. SUMMARY OF CLAIMANT'S POSITION

5.1. In the Terms of Reference, Iran's arguments in support of its claim were summarized as follows:

"Iran states that the two Sales Contract and Service Contract were closely interlinked and interdependent and thus constituted a single unity, to the extent that the performance of the Service Contract was a condition to its performance of the Sales Contract. Iran asserts that because of Cubic's breach of the Service Contract and also for reasons of force majeure and frustration it could not pay and was prevented from making the payments corresponding to "Milestone 3" under the Sales Contract. In view of Cubic's breach of the Service Contract through the evacuation of its specialists from Iran and its failure to return afterwards and the close interdependence between the two Contracts, and also in view of the existence of the force majeure condition, such non-payment was neither a breach of the Contracts nor a declaration to terminate them.

The new economic and social circumstances resulting from the Revolution of 1979 had a tremendous impact on every aspect of life in Iran including agreements and contracts with foreign enterprises. The economic and social circumstances which were rapidly evolving and changing in that period, left no room for old standards and policies. Therefore, the Contracts could not be reconciled with the new and changed system; however, the initiative to have the Contracts terminated was not undertaken by Iran but by Cubic.

By expressing its willingness to sell the Systems through Cubic to a third party, which offer was accepted by Cubic, Iran settled its delay in payment and precluded any claim for breach of contract. However, Cubic, without notifying Iran, sold the goods and never supplied Iran the details of the subsequent sale. Cubic retained the goods and the monies paid without any right to do so.

Iran timely interrupted any applicable statute of limitations by the filing of a claim against Cubic at the Iran-U.S. Claims Tribunal. Moreover, Iran made repeated attempts to contact Cubic and settle its claims against Cubic which settlement was stalled by Cubic's failure to co-operate.

Therefore, Cubic will have to reimburse to Iran US$ 12'608'519.-- and 302'875.-- [sic] plus interest from the date of these amounts' payment to Cubic to the date of award in this proceeding, and it will have to pay to Iran relevant damages incurred under the two contracts in the amount of US$ 15'000'000. -- plus interest.

In the aggregate, Iran requests to be awarded a sum of US$ 27'911'394.--plus interest at a rate to be specified in the course of this proceeding."

5.2. In the Terms of Reference. Iran's arguments in support of its Defense with respect to Cubic's Counterclaim (Sect. 6.2 infra) were summarized as follows:
Iran asserts that Cubic has no right to relief under either of the two contracts, because it was Cubic, not Iran, that breached the Contracts. There was an exclusive remedy provided for by the Contracts and Cubic failed to utilize that remedy. Cubic failed to timely request an export license. Cubic failed to perform its obligations under the Service Contract by evacuating its experts from Iran in 1979 and thus frustrated the two Contracts altogether. In addition to Iran's Defenses resulting from force majeure and mitigation, Cubic's counterclaims are barred by the applicable statute of limitations and estoppel and waiver, and by Cubic's letter of September 5, 1991, in which it admitted that it had no dispute with Iran whatsoever.

5.3. Iran stated that it is entitled to the costs of this proceeding if it prevails.

5.4. Iran further developed its arguments in its Rebuttal Statement, in its oral pleadings at the Hearings I and II, in its Post-Hearing Briefs thereto as well as in its filings relating to the quantification of both the Claim and Counterclaim. To the extent relevant, Iran's further development of its arguments shall be described in the context of the various issues discussed in the present Award.

5.5. In consideration of the Tribunal's provisional ruling on the statute of limitations issue in Procedural Order No. 6 Sect. 2.1, Iran modified its argument supporting its prayer for relief as set forth in the Terms of Reference in that it abandoned its claim for damages plus interest based on alleged breaches of the Contracts by Cubic.

In contrast, its original request for restitution of the payments made to Cubic under the Sales Contract amounting to US$ 12'608'519.-- plus interest has remained basically unchanged. In its Post-Hearing Brief dated March 28, 1996, Iran defined its claim for restitution of the above downpayments as being "the starting point" to quantify its claims (cf. Claimant's Post-Hearing Brief II, p. 4).

According to several alternatives for calculation of its claims presented in the said submission Iran requested the Tribunal "to take into consideration the financial advantages Defendant has obtained by having received the downpayment" (id., p. 5) and "to take into consideration that the ACMR System was sold from Defendant" (id., p. 7). Depending on the Tribunal's finding as to the legal ground for Iran's claims and subject to the review by a neutral expert of Cubic's costs and proceeds related to the resale, Iran requested to be awarded an aggregate sum of US$ 26'290'434.46 (in case of mutual termination including a resale agreement, id., pp. 4-11) or US$ 16'458'340.-- (in case of mutual termination without Cubic's obligation to account for the resale, but in consideration of the latter's financial benefits derived from the downpayment, id., pp. 12, 14, 16) or US$ 12'608'519.-- (in case of mutual termination without any further conditions, id, pp. 12, 14, 16 as well as in case that Article XI or Article XII 12 of the Sales Contract be applicable). In the event that the Tribunal holds that the Contracts were terminated due to force majeure/ frustration, Iran requested that such alternative shall apply which is in accordance with "the Parties' intention at the point of time when the force majeure/frustration situation arose" (id., pp. 17/18).

Further, in the said filing of March 28, 1996, Iran specified its original prayer for relief in that it suggested that interest be payable as from January 1982 (without prejudicing its claim "for interest as a substitute to the financial advantages gained by Cubic as a result of holding the Claimant's
downpayment”, cf. id., p. 2) and that “an interest rate of 12 % has to be taken into consideration under Iranian Law” (id., pp. 2 and 22).

Finally, in Exhibit 4 to the said Post-Hearing Brief of March 25, 1996, Iran listed all expenses totalling US$ 2’639’634.-- which it incurred in connection with this arbitration. In accordance with its original prayer for relief put forward on p. 5 of its Request for Arbitration, Iran maintained that Cubic be required to bear all such costs related to the present proceeding.

6. SUMMARY OF RESPONDENT'S POSITION

6.1. In the Terms of Reference, Cubic's arguments in support of its *Defense* to Iran's Claim were stated as follows:

"Cubic asserts that Iran has no entitlement to any relief whatsoever under either of the two Agreements dated October 23, 1977, particularly on Iran's stated ground that Cubic breached the Agreements by failing and refusing to deliver and install an Air Combat Maneuvering Range ("ACMR").

As more fully set forth in Cubic's Answer to the Request for Arbitration and Statement of Counterclaim, Cubic was ready, willing and able to deliver the equipment in question in 1979 but was prevented from doing so by the prior material breach and repudiation of the Agreements by Iran, which failed to make payments due under the Agreements and accept delivery of the equipment.

As is also more fully set forth in Cubic's Answer and Counterclaim, on August 3, 1979, Cubic declared the Sales and Service Agreements to be in default and gave notice of its intention to try to arrange for the private sale of the ACMR to another buyer. Cubic was unsuccessful in its efforts to sell the ACMR, largely due to the uniqueness of this type of system and the small pool of potential government buyers. Ultimately, Cubic was able to salvage some of the component parts of the Iranian system and refashion them for a system it sold to the Canadian Government in a transaction completed in or about March 1984. Cubic had begun negotiations with the Canadian Government for its system prior to Iran's breach of the Sales and Service Agreements, and signed agreements with Canada in 1981.

In October 1991, more than ten years after breaching and repudiating the two Agreements, Iran brought this action. It is Cubic's position that Iran's claim is barred by the plain meaning of the Sales Agreement, specifically since Iran failed to use the mechanism in Article XII. 12 providing for termination for the convenience of the Government of Iran.

Cubic also contends that Iran's claim is barred by well-settled principles of international commercial law barring a late stated claim for reasons of waiver, estoppel and, under the law of Iran at the time the Agreements were entered into, a ten-year statutory period of limitations."

6.2. In the Terms of Reference, Cubic's arguments to support its *counterclaim* were stated as follows:
"With respect to its counterclaim, it is Cubic's position that its damages resulting from Iran's breach, repudiation and termination of the Sales and Service agreements exceed the sum of $10 million, representing the contract balance owed by Iran under the Sales Agreement in the amount of $5'403'651.-- plus an amount billed and unpaid of $74'443.-- under the Service Agreement and lost profits associated with that Agreement in the amount of $4'287'669.-- with interest. Iran is also liable to Cubic for costs Cubic incurred following Iran's breach of contract for storage and maintenance of the equipment (US$ 124'772.-- and US$ 30'704.--respectively) until the September 1981 sale contract and for costs related to Cubic's attempt to sell the system to other users (US$ 483'320.--) with interest.

In the aggregate, Cubic requests that it be awarded a sum of US$ 10'404'559.-- plus interest at a rate to be specified in the course of this proceeding."

6.3. Furthermore, Cubic stated that it is entitled to the costs of this proceeding if it prevails.

6.4. The amount sought in the prayer for relief relating to its Counterclaim has been modified and specified by Cubic according to its most recent submission of March 28, 1996 (Post-Hearing Brief II). Therein, Cubic requested "an award of $8,261,446 in principal for breach of contract by Iran and simple interest at 12% per annum of $17,111,379, for a total of $25,372,825" plus legal fees and arbitration costs amounting to US$ 2'000'975.56 (cf. id., p. 25).

Apart from such principal request, Cubic submitted in the same filing various damage alternatives leading to the following quantification results: In the event that the Tribunal finds that Iran breached the Contracts and Cubic was obligated to mitigate, the damages due Cubic be $4,437,095 (id., pp. 18/19). If the Tribunal finds "force majeure, without a prior breach of contract by Iran", the amount due Cubic be $3,237,468 (cf. id., pp. 19-21). In case of a mutual termination without or with a resale agreement, Cubic requested to be awarded a sum of $7,061,819 or $3,237,468, respectively. If the Tribunal deemed Article XII.12 of the Sales Contract to be applicable by analogy, the sum to be awarded to Cubic be equal to $3,237,468 (id., pp. 23-25). Additionally, Cubic supplemented its claims for interest, costs and legal fees under each of these alternatives.

Further, in the same submission of March 28, 1996, Cubic objected to Iran's request to appoint a neutral expert who shall review the information provided with respect to the financial consequences of the termination of the Contracts and of Cubic's disposal of the subject of the Sales Contract (id., p. 25).

7. THE LAW APPLICABLE TO THE MERITS

7.1. The identical choice of law clauses in the relevant Article XII.3 of the Sales Contract and Article XI.3 of the Service Contract read as follows:

"3. Applicable Law

This agreement shall be construed and performance thereof shall be determined in accordance with the laws of the Government of Iran in effect at the date of this contract."
The Parties’ choice of law has been confirmed, in identical terms, in Sect. 5 of the Terms of Reference.

7.2. Claimant’s initial understanding of the choice-of-law clause was such that all issues are exclusively governed by the laws of the Government of Iran in effect at the date of the Contracts (Terms of Reference, Sect. 3.3.3). Respondent in its first submission contended, however, that to resolve the dispute “well-settled principles of international commercial law” be applicable “notwithstanding the parties’ choice of Iranian law in Article XII.15” (Answer and Counterclaim, p. 6). In its subsequent submission, Respondent described its first contention by stating “that general principles of international law, including the lex mercatoria and trade usages, should complement and, as necessary, supplement the applicable Iranian law” (Defense and Counterclaim, p.29). And finally, in its Rebuttal Statement, Claimant also explicitly agreed to the complementary and supplementary application of general principles of international law emphasizing, however, that “there is no conflict between basic principles of Iranian law and general principles of international law” (Claimant’s Rebuttal, p.11). Claimant further referred to Article 3 of the Iranian Civil Procedure Code which provides that cases must be decided in accordance, i.a., with established trade usages (in particular “where the existing laws of the country are not perfect”) and to a similar provision in the ICC Rules (Article 13 Subsect. 5).

7.3. The Parties’ choice of law is binding on the Arbitral Tribunal pursuant to well established principles of international law and to the law applicable in international arbitrations held in Switzerland (Art. 187 of the Swiss International Private Law Statute).
Since both Parties eventually agreed to the complementary and supplementary application of general principles of international law and trade usages, and based on Article 13 (5) of the ICC Rules, the Tribunal shall, to the extent necessary, take into account such principles and usages as well. As to the contents of such rules, the Tribunal shall be guided by the Principles of International Commercial Contracts, published in 1994 by the Unidroit Institute, Rome (hereinafter referred to as "UNIDROIT Principles").

7.4. In all Articles of the Contracts pertaining to the applicable law the Parties refer to Iranian law at a specific time. Such stabilization or freezing clauses are well recognized and enforceable both under Swiss arbitration law and in international arbitration practice. Hence, Iran's contention that parts of the Iranian law, e.g. the statute of limitations provisions, were repealed by the Council of Guardians as contrary to principles of Islamic law in February 1983 - with retroactive effect to the period of time when the Contracts were executed - is irrelevant. As the Parties had agreed to be bound by the Iranian law as it was in effect on October 23, 1977 (stabilization clause), the subsequent repeal of some provisions of the Iranian Civil Law is without any effect to the instant case. Consequently, the Tribunal concludes that pursuant to the choice-of-law provisions which are incorporated in the Contracts, Iranian law as in effect on October 23, 1977, is applicable to the merits of the dispute.

7.5. The main sources of Iranian law as in effect at the date of the Contracts to which reference shall be made in this Award, are

---

a) the Civil Code of Iran (hereinafter “CC”), and

b) the Civil Procedure Code of Iran (hereinafter "CPC").

8. IMPORTANT CHANGE OF CIRCUMSTANCES BETWEEN 1977 and 1979

A. The Islamic Revolution of February 1979

8.1. When the Contracts were signed in 1977, Iran's relationship with the United States of America was characterized by substantial economical ties. Iran was an important supplier of oil to the United States, and numerous American corporations supplied goods of various kinds to Iranian customers, among them military equipment to the Shah's regime with the consent and support of the U.S. Government.

8.2. This situation changed in the course of the period when the Contracts were due to be performed. As from early 1978, street demonstrations against the Shah occurred in Tehran and other major cities in Iran. In May 1978, religious leaders called for general strike. In October 1978, Iran's oil workers went on strike. As from November 1978, violent demonstrations and strikes swept through the major cities of Iran. Ayatollah Khomeini (at that time still in Paris) stated that an Islamic Republic would be formed by force if necessary and said that *all contracts with foreigners would be renegotiated under an Islamic Republic* (Defense and Counterclaim Exh. 41).

8.3. In early 1979, the revolutionary development culminated in the Shah's departure from Iran and Ayatollah Khomeini's return to Iran. In this same period, many people were killed in Iranian cities in street demonstrations as supporters of Ayatollah Khomeini and the old regime continued to clash. In February, the American Embassy in Tehran was attacked. Subsequently, the American Embassy strongly recommended that all Americans (in non-diplomatic roles) leave the country. Numerous former members of the Shah's regime fled the country and some others were executed. Relations between Iran and the United States continued to worsen when the United States adopted a resolution condemning the "summary executions" in Iran (May 17, 1979). In August 1979, Iran announced *the cancellation of US$ 9 Billion in United States arms agreement made during the Shah's regime* and the U.S. Government suspended the shipment of spare parts for military aircrafts to Iran (Defense and Counterclaim Exh. 41). For the American Community remaining in Iran after the success of the Revolution in mid-February 1979, the situation culminated with the seizure of the American Embassy on November 4, 1979 and with the detention as hostages of the Americans in the Embassy (George H. Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal, Oxford 1996, p. 4).

8.4. As a result of the chaotic events preceding and following the victory of the revolutionary development in February 1979, *force majeure* conditions existed in Iran for at least a few months prior to, and a few months after such event. Apart from the decisions of the Iran-United States Claims Tribunal (Westberg, The Case Law of the Iran-United States Claims Tribunal, pp. 166-168),
reference may be made to various witness statements on file (for instance Bahrami Testimony, Hearing I, Transcript I 128-129).

8.5. The revolutionary events summarized hereinafter occurred and even culminated precisely during the period when the performance of the Sales Contract entered into the milestone 3 phase, which was defined as completion of subsystem tests at Cubic's plant and acceptance of same by Iran's representatives; following this step, the System should have been shipped under an U.S. export licence - to Iran. Not surprisingly, the performance of milestone 3 was disturbed as a result of the chaotic situation during the revolutionary period. Cubic's requests of February 16 and 23, 1979, that Iran's representatives witness achievement of milestone 3 and declare the provisional acceptance of the System at Cubic's plant in San Diego remained unanswered (Defense and Counterclaim Exh. 50 and 51). The same is true for Cubic's requests that Iran pay the milestone 3 amount of US$ 2'701'825.-- (15% of the contract value) and, subsequently, the full amount of the remaining balance (Defense and Counterclaim pp. 15/16). The System has not been shipped to Iran.

B. Cubic's Export Licence

8.6. The Sales Contract contains the following provision relating to "Licence Approvals" (Sect. XI):

"The items being procured under this contract are subject to the licence requirements of the United States Department of State Regulation International Traffic in Arms. Licences are issued for a twelve (12) month period and must be renewed. It is the responsibility of CUBIC to obtain all licences and their renewal. In the event that the required approvals are not granted to CUBIC by the Department of State either for the initial licence or their subsequent renewals, CUBIC, assisted by the government of Iran shall diligently attempt to obtain the required approval. If after one year the required renewal approval is not obtained, the CUBIC will return the advance payment to the GOI and the GOI may call their Faithful Performance Bonds and Cubic will release the outstanding Letter of Credit."

8.7. Cubic had obtained an export licence relating to the Sales Contract valid from May 17, 1978, to May 16, 1979 (Defense and Counterclaim Exh. 79). When the U.S. State Department Office of Munitions Control renewed the licence effective May 16, 1979, the total value lowered from originally "less than $ 20 million to $ 100'000.—" (Defense and Counterclaim Exh. 79); there is no clear explanation on file for such reduction of the licence. The Sales Contract licence was cancelled in November 1979 and the Service Contract licence in December 1979 (Defense and Counterclaim Exh. 81).

8.8. It is disputed between the Parties whether Cubic would have been able to ship the System to Iran in the period up to May 16, 1979, when the export licence was still valid in its original amount or whether the U.S. State Department would have cancelled the licence if it had been advised that the goods were to be shipped to Iran. This hypothetical issue may remain undecided. It suffices to note that a certain risk of export licence cancellation existed at this time since even prior to the revolution of February 1979 some export licences were cancelled and even shipment of goods with export licences already in freight forwarding storage facilities were prevented. Cubic, as a company with particular know-how in the exportation of sensitive military equipment, must have been aware of such risk.

3 Bahrami Statement, Claimant's Rebuttal, Exh. 11 page 3; Bahrami Testimony, Hearing I, Transcript I pp. 138-143
However, the period of time to be reviewed in this context did not end on May 16, 1979, when the export licence was reduced to USD 100'000.-- since the period of time allowed for the export of the equipment by Claimant to Iran ended only on September 1, 1979 under the Contract Amendment dated August 8, 1978 (Sect. 2.3 supra). In view of the general deterioration of political relations between the United States and Iran in that period as described in Sect. 8.3 hereinabove, it would have become impossible to obtain from the U.S. authorities an increase of the export licence from the reduced value back to its original amount. Cubic contends that it was not aware of the dramatic reduction in the value of its export licence. However, it must have been aware that the original licence had expired on May 16, 1979, and that the political situation was extremely unfavourable for the export of sensitive military equipment to Iran. Cubic must also have been aware of the reimbursement obligation it had under the Sales Contract, Clause XI, quoted above:

"...If after one year the required renewal approval is not obtained, the CUBIC will return the advance payment..."

This explains why Respondent - keeping in mind that it was its responsibility to obtain and maintain the export licence - must have been interested in conducting negotiations with Claimant in order to find a mutual solution to the problem of the Contracts.

C. Frustration of Contract Performance

8.9. Legal certainty and stability require that a party to a contract is responsible for its performance. This traditional rule of contract law is known as sanctity of contract or "pacta sunt servanda", and is generally respected in all legal systems of the world. In principle it states that the parties must adhere to the terms of their contract and therefore be excused from non-performance only to the extent such is provided for in the contract.

As a consequence, parties to a long-term contract are expected to foresee to a reasonable extent the developments, including changes, which may occur. This explains, for instance, why economic hardship of one contracting party does not affect the binding effect of international sales agreements under the United Nations Convention on Contracts for the International Sale of Goods ("CISG"; CISG Article 79). The sanctity of contract is applicable by reference to both specific national law and international (private) law. Accordingly, an arbitral tribunal in an earlier case involving Iran as a party stated:

"It is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule of pacta sunt servanda is the basis of every contractual relationship" (Arbitral award in Sapphire v. National Iranian Oil Company, March 15, 1963, I.L.R., 1967, pp. 136ss at 181; quotation from International Arbitration Dossiers, Transnational Rules in International Commercial Arbitration, 1993, p. 108).

8.10. Under the laws of contract in all municipal legal systems exceptions to the basic notion of pacta sunt servanda have been developed on the ground that in particular circumstances fairness and justice require the making of a legal excuse for non-performance of contractual promises. While the excuse
8.11. Iranian law has not explicitly devoted a provision for the doctrine of changed circumstances. However, regardless of the absence of a particular provision in the codification of the Iranian Civil Law, the concept of changed circumstances must be considered as being incorporated into the Iranian legal system for several reasons: (i) first, the concept is implied in the principle of good faith, being a generally accepted principle of Iranian contract law; and (ii) secondly, changed circumstances must be taken into account pursuant to the right and duty of the judges applying Iranian civil law to interpret and complement contracts by referring to notions of equity and general principles of law (Article 3 CPC and Article 220 CC). Thus, an Iranian doctoral thesis recently published to this subject matter comes to the conclusion that in the light of Article 225 CC, which provides for a recourse to customary law when interpreting a contract, and particularly of the provisions of Articles 277 and 652 CC, which both allow the competent authorities to reasonably take the change in circumstances into account when applying the pertaining legal rules to a contract, the doctrine of changed circumstances is undoubtedly a part of the Iranian contract law (Sadeghi-Moghaddam, Changed Circumstances in Iranian Law, 1993).

8.12. In a case in which like in the present one the sale of sensitive military equipment from a U.S. company to the Iranian Government was at issue Chamber One of the Iran-U.S. Claims Tribunal found in 1984 the political changes that had taken place in Iran as a result of the revolution amounted to such a change in circumstances as to end the agreement in summer 1979:

"The fundamental changes in the political conditions as a consequence of the Revolution in Iran, the different attitude of the new government and especially the new foreign policy especially towards the United States..., the drastically changed significance of highly sensitive military contracts..., especially those to which United States companies were parties, are all factors that brought about
such a change of circumstances as to give... the right to terminate the Contract" (9 Iran-U.S. C.T.R., Award No. 191-59-1, Questech, Inc. v. the Ministry of National Defense of the Islamic Republic of Iran, 107, at 123).

8.13. Further, Article V of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of January 19, 1981 (hereinafter referred to as "the Algiers Declaration") makes reference to the concept of changed circumstances which led the Tribunal in the above mentioned Questech case to conclude that "(i)n the context of the Algiers Declaration the inclusion of the term 'changed circumstances' means that changes which are inherent parts and consequences of the Iranian Revolution must be taken into account" (id., pp. 122/123; Sect. 8.12 supra).

8.14. In later awards issued by other Chambers of the Iran-U.S. Claims Tribunal (16 Iran-U.S. C.T.R., at 3; 15 Iran-U.S. C.T.R., at 189; 21 Iran-U.S. C.T.R., at 79), however, the Iran-U.S. Claims Tribunal refused to apply the doctrine of changed circumstances to contracts the termination of which was invoked by the Iranian party due to the political change caused by the Islamic Revolution. The Iran-U.S. Claims Tribunal took the general position that the revolutionary changes per se did not constitute an unforeseeable change of circumstances which could excuse Iran from non-performance of any commercial contract entered into with the United States prior to the beginning of the revolution.

8.15. However, this foregoing practice has been developed on facts essentially different from the factual background of the above quoted Questech case. All of the awards rejecting the applicability of the doctrine of changed circumstances did not involve the national security of Iran but the oil industry. Accordingly, the Tribunal in the Questech award expressly distinguished between the case of sales of highly sensitive military equipment from cases involving "ordinary commercial relations". As a consequence, the Chamber One’s finding in the Questech case must be read in the light of the special circumstances that were given because sensitive military equipment was involved. Taking into account such distinction of the underlying facts, the later decisions of the Chambers Two and Three of the Court may not be viewed as contradiction to, or even outright rejection of, the arguments which lead the majority of the arbitrators of Chamber One in the Questech case to conclude that the revolutionary turmoil justified Iran’s termination of a business relationship which concerned a sensitive area of Iran’s national defense.

8.16. The Contracts at issue have the sale and installation of the necessary subsystems and support equipment that comprise a pilot combat training software for use by the Iranian Air Force as their subject. Undoubtedly, they were part of the military co-operation between the U.S. and Iran and of the military defense of the latter.

The System was designed to operate by means of missile simulation software owned by the U.S. Government. In 1977, when the Parties entered into the Contracts, Iran was able to obtain such equipment which contained classified information from the U.S. Government, provided that an export license was granted to Cubic by the Department of State. Thus, the Contracts involved highly sensitive defense articles and services on the United States Munitions List and, accordingly, the execution of the Contracts was subject to strict regulations by the U.S. Government.
8.17. In this situation which was characterised by the transfer of sensitive military equipment from one country to the other, the political relationship between the countries concerned was of utmost importance. Such relationship had worsened in spring 1979 to an extent that it had become highly improbable that Cubic would obtain, after the expiration of its original export licence, an unrestricted renewal. In fact, as discussed in Sect. 8.7 supra, the new export licence showed an amount of only US$ 100'000.-- instead of the original amount of US$ 20 million.

8.18. This leads the Tribunal to conclude that (i) regardless of whether Claimant was objectively still capable - despite the revolutionary turmoil in its home country - to make payment through a representative in the U.S.A. when Milestone 3 was completed and (ii) regardless of whether the Parties were actually aware of the quasi-cancellation of the needed export license, the fulfilment of the Contracts was undoubtedly on the verge of being frustrated due to the changed political relationship between the countries (Gould Marketing, Inc. v. Ministry of National Defense, 3 Iran-U.S. C.T.R., at 154). Applying the principles referred to in the Questech case (Sect. 8.12 supra) mutatis mutandis, the Arbitral Tribunal concludes that the fundamental change of circumstances entitled each of the Parties to unilaterally request, if not the termination of the Contracts, then at least an adaptation of its terms, in particular the postponement of the contractual dates by a reasonable period of time.

9. THE PARTIES' NEGOTIATIONS UP TO JUNE/JULY 1979

9.1. Both Parties' behaviour and the contents of the exchanged letters show that from early on in 1979 it was the Parties' joint perception that the circumstances prevailing in Iran would have a detrimental impact on the Contracts. So, for instance, as early as on January 15, 1979, Mr James B. Jenkins, Respondent's Director of Contracts at that time, referred to the possibility of a resale of the equipment when he discussed the “Termination Option” in a letter to the Imperial Iranian Air Force (Defense and Counterclaim Exh. 42, p. 5). Such reference to the possibility of a resale clearly shows that Respondent from early on considered termination of the Contracts as being a possible further element in an agreement relating to the resale of the System.

9.2. Mr Jenkins' proposal must be seen in connection with his stay in Iran in January 1979, when he experienced the turmoil caused by the Islamic Revolution in Iran. As a matter of fact, the deterioration of the political relationship between the two countries in connection with the Revolution apparently impeded him from returning home to the United States. In the said letter Mr Jenkins added to the termination proposal that termination costs to be borne by Iran would approximately amount to the contract value of US$ 18,012,170.-- (id., par. 10). Either the high costs predicted by Respondent or the revolutionary chaos affecting Iranian Government's general ability to come to decisions may explain why Claimant's representatives failed to respond positively to Respondent's termination offer.

9.3. Regardless of the extraordinary circumstances in Iran and without referring to its aforementioned letter in January 1979, which for the first time brought up the notion of resale upon mutual termination of the Contracts, Respondent completed the subsystem tests on the ACMR System and, in turn, requested timely performance of the contractual duties by Iran as well. So far, Iran had paid 70% of the price due under the Sales Contract, i.e. the downpayment of 50% and two payments of 10% each relating to Cubic's partial performance identified as "Milestone 1" and "Milestone 2". Cubic
sent several letters to Iran in February and March 1979 asking for payment for Milestone 3, which was allegedly completed on February 26, 1979 (Defense and Counterclaim Exh. 50, 51, 55, 56, 57, 59, 60). None of these letters - most of them transmitted by telex - received any response from the Iranian Government.

9.4. Nevertheless, in April 1979, the idea of resale of the System upon termination of the Contracts was subject of further discussions between the Parties. In order to represent Respondent's position in such discussions, Mr Nomai, a citizen of Iran living in the U.S.A., was stationed in Iran. He was given the mission to negotiate with Claimant's representatives (Defense and Counterclaim Exh. 42, p. 6; id., Exh. 66). According to his own accounts of a telephone conversation he had on April 2, 1979, Major Makooei of the National Iranian Air Forces asked him if any other foreign country could buy Iran's hardware. Mr Nomai replied
"Major, when Iranian Government decides what they want to do with the ACMR, Cubic contract people will assist you in any way they can" (Defense and Counterclaim Exh. 63).

9.5. In a further telex sent on April 6, 1979, Cubic's Director of Contracts, Mr James B. Jenkins, tried to convince the National Iranian Air Force (hereinafter "NIAF") that the project should not be abandoned:
"...the ACMR.. is the most effective means to train [Iran's] pilots and keep them proficient...
As you are aware, the System is complete and termination costs would equal or exceed the contract value" (Defense and Counterclaim Exh., 64).

9.6. A few days later, however, on April 15, 1979, at a telephone conversation between Cubic's representative Mr Nomai and NIAF's Major Safavi, Cubic's position sounded more open towards a termination and resale arrangement. First, Mr Nomai reiterated that Respondent was still expecting payments for Milestones no. 3 and 4, which in his view were both "past due regardless of a cancellation or continuation of the contract". Subsequently, with respect to Claimant's question as to the financial consequences of a termination of the Contracts, Mr Nomai answered
"...at the present time we have no immediate foreign customer for the ACMR and it may take a year or two before we do. However, in case of a cancellation, we will try to sell the hardware and deduct what NIAF owes Cubic and then reimburse NIAF for what amount is left" (Defense and Counterclaim Exh. 66, par. 2; cf. also Statement of Claim Exh. 33)).

9.7. The progress the Parties' negotiations with respect to termination and resale made in the course of spring 1979 is signified by Claimant's request to produce an authorization which should confirm Mr Nomai's right to act on Cubic's behalf. On May 19, 1979, Mr Walter Zable, President, Chairman of the Board and CEO of Cubic, responded to such request expressly confirming that Mr Nomai

"is empowered to negotiate all contractual matters regarding both of the subject contracts" (Claimant's Rebuttal Exh. 34).

Reference is made to Sect. 10.3 hereinafter as to the extent of the authority conferred upon Mr Nomai by Cubic's telex of May 19, 1979.
9.8. At the same time, the competent agencies of Claimant were discussing among themselves the consequences of terminating the Contracts. On May 15, 1979, the Chief of Staff of the Air Force of Iran wrote an internal memorandum to the Deputy Ministry of National Defense for Armament explaining its point of view with respect to the Contracts. After pointing out several problems connected with the performance of the contractual obligations the memorandum ends with the conclusion that

"...continuation of the contract would be of no benefit and inadvisable and it is proposed that the continuation thereof would be abandoned and the purchased material and equipment be sold to the manufacturing corporation or through the corporation to another country" (Defense and Counterclaim Exh. 70, translation by Respondent's legal expert Mr Katirai, January 10, 1984)

9.9. On May 20, 1979, only one day after having provided Claimant with the above quoted written confirmation of Mr Nomai's power to negotiate on Cubic's behalf (Sect. 9.7 supra), Respondent through the said representative in Iran explicitly addressed the subject matter of the negotiations by informing the Iranian Government that

"Implementation of the constructions plans in which the above system were supposed to be installed as provided for in the amendment to the contract discontinued in the month of Bahman of the year '58 (January 21 - February 19, 1979) due to the particular situation of the country of Iran and based on the decision of the Air Force of Iran" (Defense and Counterclaim Exh. 71; emphasis added to Mr Katirai's English translation of the cited letter hand-written by Mr Nomai).

According to a slightly different translation of the same letter - also submitted to the Tribunal by Respondent as same Exhibit to its Statement of Defense and Counterclaim - Respondent's representative referred to the same subject matter as follows:

"Discussion about the building to house the ACMR... was halted on February 1979 by IAF [meaning the "Iranian Air Force"] direction because of the special situation in Iran" (Defense and Counterclaim Exh. 71; emphasis added to an English translation of the original letter by Mr Katirai).

Both translations of this letter, in which Respondent's representative explicitly referred to events which had occurred three months earlier, clearly establish that Respondent was fully aware of the discontinuance of the fulfillment of the contractual duties as originally contemplated and that the discontinuance of the Contracts occurred due to the decision of Iran's Air Force in view of the "special situation in Iran". When indicating "the balance due ($ 5,403,651)", Cubic's representative explicitly referred to "paragraph 12 of Article 12, p. 11" of the Sales Contract which is the contractual provision authorizing Iran to terminate the contract "in whole or in part, when it is in the best interest of the Government" (Sect. 13 infra).

In addition, the same letter of May 20, 1979, also specified the purpose of the ongoing negotiations at the time:

"Cubic Corporation will try all possible ways to assist the Government of Iran to attain a decision and prevent for the loss of time and money" (Defense and Counterclaim Exh. 71).

With respect to the "possible ways" to go in order to achieve the goal of preventing losses, Respondent's representative made the following alternative proposals to the Deputy Ministry of National Defense ("DMOND"):
"a. All subsystems be shipped to Iran.

b. DMOND take the responsibility of selling the system.

c. DMOND will give Cubic Corporation lawful authority to sell the system, and make all required modifications to the new customer specification prior to the sale...(This system has been built according to Iranian specifications.) Needless to say that Cubic Corporation will deduct the cost of any modification to the system and claim a fair percentage as a brokerage fee” (Defense and Counterclaim Exh. 71 in the translation of Cubic's legal expert Mr Katirai).

9.10. On June 10, 1979, in its response to Respondent’s letter of May 20. Claimant agreed to Respondent’s proposal to sell the System to a third party. In a first sentence, Claimant declared: "The Government of Iran is willing to sell the equipment purchased from that corporation at an appropriate price through that corporation or directly" (Defense and Counterclaim Exh. 73; translated by Mr Katirai).

Subsequently, it made its choice as to the possible ways to resolve the problem as suggested in the letter of May 20 by advising Respondent to take

"the necessary action... with respect to the sale of the above system and declare the sale price to this deputy so that if the price is appropriate, the power of attorney for sale would be granted to that corporation" (id.).

9.11. Only two days later, on June 12, 1979, Respondent’s representative sent a further letter to Iran’s Deputy Ministry of National Defense (Defense and Counterclaim Exh. 74). Although such letter does not explicitly refer to Iran’s previous letter of June 10, 1979, it was in response to Iran’s letter (cf. Mr Nomai’s Witness Statement p. 4). After having reiterated that “Cubic Corporation has performed all its contractual obligations and commitments in time” and that the status of the Contracts needed to be clarified by the Iranian Government, Respondent dealt in two paragraphs with the details regarding the resale of the System to a third party as follows:

"[Respondent] again announces that it is ready to take any action with respect to the sale of the system to another country” (Defense and Counterclaim Exh. 74, as translated by Mr Katirai).

Further, Respondent pointed out

"that the possibility of the sale of the system as separate equipment (piece by piece) is more than the possibility of the sale of the system as a complete unit” (id.).

In addition, Respondent drew Claimant’s attention to the fact that

"presently, there is not a new buyer for the system and one cannot possibly predict a specific and precise time limit for finding a proper buyer with an appropriate price. Furthermore, if a buyer would be found,... the time and cost required to adopt the necessary changes for a purchasing country are inpredictable” (id., paragraph 4).

Concluding this letter Respondent’s representative requested that
a. A final decision would be made in order to clarify the status of the contract between this corporation and that deputy.

b. The status of the sale, in case of sale by this Corporation [="Respondent"], with respect to the cost of the necessary changes for the new buyer and brokerage fee, would be determined" (id., in fine).

9.12. The negotiations conducted up to Cubic's letter of June 12, 1979, do not end with Cubic's unconditional consent as to the envisaged solution since Cubic requested the prior clarification of "the status of the Contract" (through "a definite decision" of Iran) and a determination of certain elements of the resale arrangement (brokerage fee and acceptance of modification costs). Accordingly, the Tribunal shall review the evidence on the meetings held between the Parties' representatives subsequently to Cubic's letter of June 12, 1979.

9.13. Pursuant to Mr Nomai's written witness statement (Exh. to Defense and Counterclaim), he had a meeting on June 18, 1979, with Mr Bahrami, Iran's Deputy Ministry of National Defense. He understood that Iran was unable to make the payment of the contract price balance. There is no evidence that clarification as requested by Cubic was reached at that meeting.

9.14. Approximately 20 days after the June 12 letter, at the end of June or beginning July, a meeting was held between representatives of Iran's Ministry of Defense and representatives of the Air Force. Mr Nomai, Cubic's representative, was invited to join such meeting and to be advised of the outcome of the discussion between the Ministry and the Air Force. Pursuant to Mr Bahrami's testimony, Mr Nomai was advised that Iran requested that the System be sold by Cubic. Mr Bahrami testified that Mr Nomai accepted such solution on behalf of Cubic since it corresponded to what Cubic had proposed itself. In the understanding of Iran's representative, this was the final conclusion of the negotiations (Mr Bahrami's witness testimony, Hearing I, Transcript I p. 160).

Mr Nomai testified that final clarification on the status of the contract and on the particulars of the proposed resale was not reached at that meeting. However, he did not testify that he objected to the resale or that he insisted on the Contracts being continued and performed as originally agreed. It has also to be pointed out that Mr Nomai used to make file records of his telephone conversations with Iran's representatives (Defense and Counterclaim Exh. 63, 66 and 69), but failed to give a convincing answer to the question why he did not do so with respect to his final meeting with the most important representatives of the Iranian counterpart (Mr Nomai's witness testimony, Hearing I, Transcript II pp. 133-136).

9.15. Based on the evidence referred to above, the Tribunal concludes that the final meeting of end of June/beginning of July 1979 ended with the common understanding that the Contracts would be discontinued and that Cubic would try to resell the equipment. Respondent contends however that such agreement was conditional, on its side, on Iran's payment of the balance of its contract obligations. Such argument will be reviewed in the following secs.

9.16. to 9.21 hereinafter.

9.16. A close reading of Cubic's representative's letter of May 20, 1979 (Defense and Counterclaim Exh. 71) shows that such letter is divided into two parts:
a. In Secs. 1 to 8, Cubic's representative recalls the major elements of the performance of the Contracts up to May 1979, including the reference to Iran's declaration that the continuation of the project will be of no benefit to Iran. In Secs. 3, 7 and 8 of the letter, the balance due on both Contracts was referred to as "payable". However, the letter does not explicitly indicate that such payments were to be made now prior to any further negotiations or prior to an agreement on termination and on resale. The letter is "not asking for payment. It was just mentioning the price here" (Bahrami testimony, Hearing I, Transcript I, p. 203).

b. In an entirely different spirit, Sect. 9 of the letter lists Cubic's proposals "in order to prevent any loss and damages to the government of Iran and in order to expidit the decisionmaking". The first proposal, explained in subsections a and b of Sect. 9, was that Cubic would ship the System to Iran and Iran would sell it. The second proposal (subsection c) related to the resale of the System by Cubic itself (see the quotation in Sect. 9.9 supra).

9.17. While an additional payment by Iran would have been in accordance with the contractual terms in the event of Cubic's first proposal, the situation would have become entirely *imbanced* in the framework of the second proposal if Cubic had in its hand the entire contract price as well as the System to resell while Iran would stand - except for the letters of credit - with empty hands.

9.18. In Cubic's own understanding, Iran would continue to owe Cubic money in the event of cancellation and resale by Cubic, otherwise Cubic could not have suggested that they "...will try to sell the hardware and deduct what NIAF owes Cubic and then reimburse NIAF for what amount is left" (Mr Nomai's telephone conversation record, Defense and Counterclaim Exh. 66).

Since no amounts other than the milestone 3 and 4 payments (or - more precisely - a reasonable compensation for Cubic's wasted costs, including an allowance for Cubic's profits, Sect. 13 infra) could be due Cubic at this stage, it follows from Cubic's own proposal that no further payments were to be made by Iran prior to the resale. In accordance with such proposal, Iran would have to make an additional payment only later if and when Cubic's resale proceeds would not cover what it owed Cubic (Mr Bahrami's testimony, Hearing I, Transcript II pp. 176 ss). The Tribunal does not overlook the fact that Mr Nomai states in other parts of his telephone conversation record that "Cubic is expecting the full payment for milestone no. 3 and 4...regardless of the cancellation or the continuation of the contract". However, this part of the record does not specify whether Cubic expected that such payment be made immediately or only at the point of time when the resale had been made. This issue is clarified by Mr Nomai's proposal quoted above that the deduction and reimbursement shall be made

"then",

i.e. when the hardware has been sold.

Furthermore, the term "reimburse" indicates that payments already made by Iran would be reimbursed to the extent that the resale proceeds would exceed what Iran owed Cubic.

9.19. Cubic's next letter (June 12, 1979, Defense and Counterclaim Exh. 74, Sect. 9.11 supra) which focused on the resale of the System by Cubic, did again not express that Cubic expected Iran's payment of the balance before it would start its resale activities. However, Cubic requested that "the status of
the contract" be clarified without specifying what it meant by clarification.

9.20. As explained in Sect. 9.14 supra, the Parties' negotiations were finalized in the meetings held in June/July 1979 between Cubic's Mr Nomai and Iran's representatives. Although Cubic's representative clearly understood that Iran was unwilling or unable to pay, he did not withdraw Cubic's offer to resell the System. Mr Nomai's testimony that he continued to state in his negotiations with Iran's representatives that "regardless of the continuation of the contract or cancellation of the contract, we have to be paid" (Hearing I, Transcript II, p. 95), relates either to earlier stages of the negotiations and is, as far as it relates to the concluding meetings in June/July, contradicted by Iran's witness Mr Bahrami (Hearing I, Transcript II, in particular pp. 176/177).

9.21. Based on the above findings relating to
a) the change of circumstances between the time the Contracts had been entered to (1977) and the time when essential elements of contract performance became due (1979) (cf. Sect. 8 supra), and

b) the intentions expressed by the Parties orally and in writing in the negotiations referred to above,

the Arbitral Tribunal concludes - subject to the review of the Parties' subsequent conduct - that the Parties mutually agreed to discontinue the Contracts at least for the time being, i.e. until the results of Cubic's attempt to resell the System would be known.

10. THE PARTIES’ CONDUCT SUBSEQUENT TO THE NEGOTIATIONS PERIOD

A. Cubic's Conduct

10.1. Respondent objects that the agreement to discontinue the Contracts is contradicted by the Parties' conduct subsequent to the negotiation period. In support of its objection, Respondent refers in particular to its letter dated August 3, 1979 (Defense and Counterclaim Exh. 75) which reads, in its essential parts, as follows:
"Cubic...hereby declares that contracts dated 23 October 1977 between Cubic and...Iran...are in default.
Iran has breached the foresaid agreements by the following conduct:

3. Failure to pay to Cubic, after demands therefore, the balance of the hardware contract in the amount of US$ 5'403'651.--, which has been due and owing since March 1979.

Moreover, communications from the Deputy Ministry of the Islamic Republic of Iran have stated that:
1. The present Government of Iran would not or was unable to pay for the ACMR and ACMR/I; and

2. Cubic should take steps to sell the ACMR to another buyer.

...Cubic will...begin arrangements for the private sale of the ACMR to another buyer or buyers. Cubic will continue to hold Iran responsible for any losses as well as all expenses incurred in connection with the resale and modifications to ACMR, including commissions, transportation charges, and all other expenses incurred as a result of Iran's breach of the agreements.

10.2. Cubic's letter is partly consistent and partly inconsistent with the discontinuance and resale arrangement negotiated up to June/July 1979:

a) On the one side, consistently with such negotiations, Cubic took explicitly note of Iran's inability or unwillingness to pay the contract balance. Furthermore, Cubic acknowledged that Iran wanted to have the System resold.

b) On the other hand, Cubic's reference to the Contracts being in "default" and to "breach" of such Contracts by Iran is in obvious contradiction to the discontinuance agreement of such Contracts. It may be construed as Cubic's offer to cancel the discontinuance agreement. However, such offer has not been accepted by Iran. In fact, Claimant which appears to have received such letter only on September 9, 1979, failed to reply.

10.3. To the extent that Cubic's letter of August 3, 1979, appears to be inconsistent with Cubic's previous position, it may reveal a discrepancy between the mind of Cubic's headquarters on the one side and the views expressed by Cubic's representative Mr Nomai in the framework of the negotiations on the other side for the reason "that Mr Nomai has not reported to Mr Jenkins what we had decided in Tehran" (Mr Bahrami's "first reaction" when he received Cubic's letter, Bahrami testimony, Hearing I, Transcript I p. 164). Such discrepancy is, however, without relevance:

a) Contrary to views expressed by Cubic's Mr Jenkins at the Hearing I (Transcript II p. 46s) Mr Nomai's authority was not limited to discussions only. Rather, the reference to "all contractual matters regarding both of the subject contracts" (quotation in Sect. 9.7 supra) strongly indicates the unlimited nature of the representative's authority in this subject matter.

b) The mere use of the word "negotiating" does not constitute a limitation of the authorization. First, the literal and customary meaning of the word "negotiate" is different from "talk" or "discuss". Second, the accurate meaning from a legal perspective is not confined to negotiating "in view of conclusion of an agreement" but also encompasses "to conclude by bargain, treaty or agreement" (Black's Law Dictionary, Sixth Edition, 1994).

c) In addition, the meaning of the above letter as general authorization is supported by the undisputed fact that at the time of this letter Mr Nomai had been already negotiating with officials of Iran for several months. Therefore, if the intention was just to have a confirmation of Mr Nomai's right to talk and discuss with Iran's official, neither Claimant's request therefore nor Respondent's confirmation letter would make sense. Finally, the fact that the letter was signed by Cubic's highest officer Mr Walter Zable, President, Chairman and CEO further emphasizes the importance and,
accordingly, the comprehensive scope of Mr Nomai’s authority.

d) For all reasons referred to above, the Tribunal holds that the letter at issue conveyed the clear impression that Mr Nomai’s authorization in this matter was unlimited. This is sufficient under the fundamental and generally accepted principle of good faith as far as the contracting party relies on the apparent power of attorney. Thus, the argument that Mr Nomai was internally not authorized and thus not entitled to submit to Claimant binding offers or to conclude agreements in connection with the negotiations regarding the discontinuance of the Contracts cannot be successfully raised (cf. ICC Arbitration Case Nr. 5080 [1985], in which under similar circumstances the arbitrator found that “[E]ven if Mr X had only an apparent power of attorney, rather than an actual one, this appearance was largely sufficient under the principle of good faith...respondent cannot invoke against claimant a situation which it has created itself” [Jarvin/Derains/Arnaldez, Collection of ICC Arbitral Awards 1986-1990, pp. 80-84, at p. 81]).

10.4. In addition, Cubic’s reference to alleged breaches of the Contracts by Iran, in its letter of August 3, 1979, was inconsistent both with the contractual situation as well as with Cubic’s prior conduct:

a) Pursuant to the "Government Delay of Work" clause⁵, the consequences of delay resulting from acts (or omissions) by Iran are limited to an adjustment of the contractual prices.

b) Failure, by Iran, to witness Milestone 3 in California, and, subsequently, to make payment of the amounts linked to such Milestone was excused by the fact that Iran was entitled unilaterally to request, if not the termination of the Contracts, then at least that the contractual dates for its performance be reasonably postponed in consideration of the changed circumstances discussed in Sect. 8 supra. Accordingly, Cubic was not in a position, on August 3, 1979, to accuse Iran of default or breach.

c) Cubic’s own presentation of the discontinuance and resale arrangement left no room for any claims for damages against Iran. In the course of the negotiations in spring and early summer 1979, Cubic never referred to any claims for damages in addition to its claims for the contract balance. It did not even reserve any damage claim when it offered, in case of cancellation and resale, to “deduct what NIAF owes Cubic and then reimburse NIAF for what amount is left” (Mr Nomai’s Telephone Conversation Record, Defense and Counterclaim Exh. 66; emphasis added).

10.5. Respondent’s conduct subsequent to its letter of August 3, 1979, is consistent with the above concept of mutual discontinuance or termination combined with an attempt to resell the System to a third party. In spite of the allegations and claims raised in the said letter, Respondent refrained from undertaking any action as provided for in the Contracts in case of breach or default of one party. It did not invoke the dispute settlement provisions of the Contracts (Article XII.14 of the Sales Contract; Article XI.17 of the Service Contract), nor did it institute any legal proceeding against Claimant, not even in courts of the United States. Moreover, Respondent did not promptly submit its “termination account” as provided for in the Termination for Convenience Clause (Sects. 11.26 and 13 infra) and it did not insist, subsequent to its August 3 letter, that the amounts to be paid as a result of the termination be agreed upon with Iran’s Contracting Officer.

⁵ Sect. XII. 11 of the Sales Contract; Sect. XI. 13 of the Service Contract
10.6. In a telex of October 21, 1981, which was a response to Claimant's request for negotiations, Respondent referred to the Contracts as "our former contractual relations" (emphasis added) thus confirming the idea that the Contracts were no longer in existence. It added that Iran should "tell us what you think those issues are" ("issues...you wish to discuss with us") thus conveying Respondent's perception that there were no longer any open issues to be discussed between the Parties (Defence and Counterclaim Exh. 86, emphasis added).

Thus, in the roughly two years between September 1979 and October 1981, when Respondent finally answered to Claimant's several requests for negotiations in Vienna, Respondent did not behave in a way which could have been interpreted by Claimant as being a negation of the concept of discontinuance and settlement of the accounts.

B. Iran's Conduct

10.7. Claimant's conduct in the same period - from summer 1979 until autumn 1981 when it became doubtful whether Respondent would have succeeded to resell the System and whether it would account for the proceeds of such resale - was entirely consistent with the arrangement that the final decisions would only be taken once the result of Cubic's attempt to resell the System would be known.

a) Just like Respondent, it consistently refrained from applying the dispute settlement mechanism of the Contracts and from filing any claim against Respondent during the two years period in which a resale was supposed to take place according to Respondent's expectations set forth in its letter of June 12, 1979 (Defense and Counterclaim Exh. 74). Obviously, Claimant saw no reason to start legal proceedings, even though both the advance payments and the subject of the sale remained with Respondent. The most reasonable explanation for such behaviour of Claimant is that it faithfully believed that the Contracts were mutually discontinued or even terminated at the time and that after having carried out the resale of the System to a third party Respondent would account therefor and settle the open accounts resulting from the discontinuance of the contractual obligations.

b) In its letter of February 25, 1980, Claimant requested from Respondent the extension of the letters of guarantee for the reason "that the problems of the contract dated 23 October 1977 have not been solved between us yet" (Defence and Counterclaim Exh. 90). The letter did not specify whether the problems not yet solved related to the performance of the original contract or to the termination accounts; accordingly, the letter itself is not in contradiction to the assumption of an implicit agreement to discontinue the Contracts. When the signatory of the letter, Colonel Kamkar, testified that "we had just asked them to renew the letter of credit because we wanted the contract to continue as normally as possible" (Hearing I, Transcript I pp. 78/79), his reference to a contract to be continued meant either the contractual relationship with the bank that had issued the letter of credit or the agreement with Cubic including the attempt to resell the equipment:

"All that time, since I was hoping that we would resolve this matter by sale of the equipment, so I asked them to extend the expiration date of the LC's. This letter was because of that." (Bahrami testimony, Hearing I, Transcript I p. 168).

10.8. However, in Iran's claim brought before the Iran-U.S. Claims Tribunal against Cubic and the U.S.
Government in January 1982, Claimant did not mention the conclusion of a discontinuance or termination agreement between itself and Respondent in 1979. It demanded that Cubic be required "to fulfill its obligations to deliver, install and operate the...system" (Statement of Claim Exh. 11, Sect. 5).

At this point of time, roughly two and a half years had elapsed since the Parties had mutually agreed that the System should, if possible, be resold. During this long period, Cubic never informed Iran about its efforts to sell the equipment. When Iran began to inquire in 1981 about Cubic's willingness to enter into settlement negotiation as provided for in the Algiers Declaration of January 19, 1981, Cubic declined on October 21, 1981, to attend any meeting unless Iran would specify the outstanding issues relating to the "former contractual relation" which Iran wished to discuss (Defense and Counterclaim, Exh. 83 to 86). At that point of time, approximately one month had elapsed since Cubic had signed an agreement with the Canadian Government for the sale of an ACMR which allowed it to reuse substantial parts of the equipment manufactured for Iran (Sects. 12.14 and 14 infra).

In view of Cubic's unwillingness to adequately inform Iran on its resale efforts, Iran could reasonably, but erroneously understand that such efforts had remained unsuccessful and that the System for which it had paid more than USD 12 million, stood practically ready to be installed and operated in Iran. When understood in such context, Iran's claim brought before the Iran-U.S. Claims Tribunal for fulfilment of Cubic's obligation to deliver, install and operate the System, was not inconsistent with the assumption of an agreement that Cubic should first attempt to resell the System. Iran's conduct shows however that according to its understanding such attempts should suspend the final determination of the status of the Contracts only for a reasonable period of time, not for an infinite time (cf. Sect. 12.13 infra).

10.9. In its second submission in this arbitration, Claimant also asked for "fulfilment of the original obligation undertaken by Respondent" and, accordingly, it contended that it had never and in no way terminated the Contracts (Claimant's Reply, pp. 5 ss.). However, such denial of termination must be interpreted in its context:

a) Respondent's primary legal argument in its answer to Claimant's request for arbitration was that

"the claim is barred by the plain meaning of the Sales Agreement. Article XII.12 of the Sales Agreement provided for termination for the convenience of the Government of Iran.... The Iranian Air Force's May 15, 1979 letter... constituted a termination under this Article.... Cubic's subsequent sale to Canada constituted an appropriate method of mitigating Cubic's damages resulting from Iran's termination" (Answer and Counterclaim, p. 5).

b) Thus, Respondent based its legal defense primarily on the argument that Claimant terminated the Contracts for its convenience as provided for in Article XII.12 of the Sales Contract. Therefore, Claimant's negation of termination in its Reply to Respondent's Answer and Counterclaim (to Request for Arbitration) can only be interpreted as denial of Respondent's contention that Claimant unilaterally terminated the Contracts:

"Claimant never and in no way terminated the contract; there exists no evidence in support of such an assertion by the Defendant" (Claimant's Reply, p. 5).
c) It is significant that Claimant in its denial of termination did not refer to mutual termination at all. Instead, in the same filing Claimant explicitly asserted that the Parties entered into a resale agreement. Such contention only makes sense, however, if Claimant believed that the Contracts were mutually discontinued.

C. Conclusions

10.10. When assessing the weight of the various factual elements referred to above, the Tribunal finds that more weight has to be given to the negotiation phase itself than to the post-negotiation period. Furthermore, within the post-negotiation period, more weight has to be given to the time immediately following the negotiations than to the subsequent periods when different persons from those personally involved, i.e. persons not fully aware of the contents and results of the negotiation, may have been in charge of the matter.

10.11. Comparing, under these factors, the various elements of the Parties' post-negotiation conduct against the Parties' conduct in the negotiation phase itself, the Tribunal confirms its conclusion that the Parties agreed in 1979 to discontinue the Contracts at least for the time being, i.e. until the results of Cubic's attempt to resell the System would be known.

11. TERMINATION OF THE CONTRACTS

A. Respondent's Procedural Objection

11.1. Claimant contends that the Parties did not only agree to discontinue the performance of the Contracts until the result of the attempt to resell the System was known, but that they mutually terminated the Contracts under the Iranian law concept known as "Eghaleh" (see in particular Claimant's Comments on Quantification, pp. 4ss).

11.2. Respondent states that Claimant failed to timely invoke the mutual termination of the Contracts (Respondent's Comments on Quantification p. 15; Respondent's Post-Hearing, Brief II p. 2).

11.3. In regard of such procedural objection, the Arbitral Tribunal notes that Iran already in its Statement of Claim (pp. 52-55, 59) raised a claim for reimbursement of its payments as an alternative to its claim for damages. Its statements made it clear that its reimbursement claim was based on the termination of the Contracts due to changed circumstances which was also agreed by the exchange of the letters of May 20 and June 10, 1979. It may also be noted that the notions of "termination" and "reimbursement" appear already in the Terms of Reference (Secs. 4.4, 4.5, 4.7).

11.4. Furthermore, in its Rebuttal Statement of Claim, Claimant was able to clarify any ambiguity regarding the legal characterization and signification of the negotiations and exchange of letters in May/June 1979:
"Indeed, the parties to the Contract, due to frustration of the purpose of the Contracts, and the negotiations held in this regard, reached an agreement. Among them is the fact that the Defendant, through letters, including its letter dated 20 May 1979, announced its readiness to sell the materials and equipment. This declaration of readiness for selling the equipment, has to be construed as an implicit termination of the Contracts... in other words, from the date of the agreement to resell, the running of the statute of limitations became dependent on the result of the sale or non-sale of the equipment" (pp. 17-18 emphasis added).

11.5. By invoking the notion of implicit termination, Claimant explicitly referred to Dr. Vahedi's Opinion as saying that "this declaration of readiness for selling the equipment to another buyer can very well be construed as an implicit termination" (p. 18; Vahedi, Legal Opinion, p. 10). In fact, pp. 15-21 and particularly, pp. 48-55 of Claimant's Rebuttal Statement are entirely devoted to the issue of agreement on resale to a third party.

11.6. By referring to Dr. Vahedi's characterization of the communications regarding resale, Claimant made it clear that it agreed with Vahedi's view that the resale agreement had an essential element in it, namely, mutual termination of the Contracts. At the Hearing of June 1994 Dr. Vahedi stated that the "discussion regarding resale could be considered as an implicit termination of the original Contracts, implicit mutual termination" (Hearing I, Transcript Vol. 3, p. 28, lines 17-25). Dr. Vahedi also stated that "this is called "Eghaleh" under Iranian law" (Id., pp. 29-30).

11.7. Claimant's Post-Hearing Brief, dated 19 December 1994, in reliance on and in clarification of its previous discussions strongly invoked mutual termination. Articles 264 and 283-284 of the Civil Code were specifically invoked (pp. 7-12).

11.8. Accordingly, the Tribunal concludes that Iran had timely invoked the mutual termination of the Contracts and that Cubic's procedural objection is not founded.

B. The Concept of "Eghaleh" under Iranian Law

11.9. Under the applicable Iranian law, an existing contract can be mutually terminated by the parties to the contract. The legal term to describe such termination agreement is "Eghaleh". Art. 283 CC pertaining hereto provides that

"(a)fter a contract has been entered into, the parties may cancel the contract with mutual consent or terminate it with mutual agreement".

From the wording of this provision follows that under Iranian civil law Eghaleh constitutes an agreement with the purpose of terminating a specific contractual relationship.

By comparing it with regular contracts, however, the legal authorities put emphasis on the "peculiar and particular legal nature" of Eghaleh (Katouzian, id.; Shahidi, id.). It is deemed particular insofar as its sole purpose is the dissolution of an existing contract and the discontinuance of the contractual commitments. In other words, the particular nature of Eghaleh is characterized by both its extinguishing purpose and its lack of any creative effect (Langroudi, Civil and Commercial Legal

11.10. *Eghaleh* requires **mutual consent** and, hence, must basically meet the same prerequisites as the conclusion of a *contract* (Langroudi, op. cit., p. 242, referred to by Katirai, Legal Opinion III, Exh. 3). Thus, in order to be valid, the mutual termination must meet two essential criteria:

(a) unambiguous mutual consent of the parties, i.e. a meeting of minds to *dissolve* their contract⁶, and

(b) lack of ambiguity with respect to the *subject matter* of the termination (Art. 283 CC; Katirai, Legal Opinion III, p. 3). Its subject matter must be *specific and definite* to the extent that the parties must clearly determine the contract they wish to terminate and whether they want to terminate a portion of a contract or a contract in its entirety⁷.

11.11. Subject to any provision to the contrary, the parties do not need to follow a specific conduct or to comply with particular *formalities* under Iranian law in order to be bound by contract. The lack of any formal requirements to conclude a binding agreement is in accordance with the doctrine of "*ruling of intent*" which is a basic principle of Iranian civil law (Katirai, Legal Opinion I Exh. 3). This general principle of Iranian contract law is explicitly confirmed, with respect to *Eghaleh*, by Article 284 CC which provides that

"(m)utual termination of a contract can be made by any oral declaration or by any act which manifests such termination" (emphasis added).

11.12. Consequently, mutual consent of the Parties to terminate a specific contract (or a identified part of a specific contract, cf. Art. 285 CC) is sufficient, "be it by words or conduct and either be it express or implied" (Katouzian, op. cit., Vol. 5, p. 22; Shahidi, op. cit., p. 58; Katirai, Legal Opinion III, p. 4).

11.13. Due to its specific nature, *Eghaleh* cannot significantly alter or modify the obligations of the original contract. However, in order to specify the goals to be achieved by virtue of the mutual termination, the parties to the agreement may include new terms as *ancillary stipulations* into *Eghaleh*, provided, such stipulations and terms are valid under the general rules of Iranian civil law as set forth in Articles 232, 233 and 234 CC (Emami, op. cit., Vol. 1, p. 328).

**C. Lack of the Parties' Mutual Consent to Terminate the Contracts**

11.14. In the course of the negotiations in 1979, Cubic repeatedly indicated that the balance of the contract price, i.e. an amount of USD 5'403'651.-- representing the payments relating to Milestones 3 and 4 of 15% each of the contract price, remained payable irrespective of the continuation or discontinuance of the Sales Contract:

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a) On January 15, 1979, Cubic estimated that the termination costs to be borne by Iran would approximately amount to the contract value (Sects. 9.1 and 9.2 supra).

b) Cubic restated this position on April 6, 1979 (Sect. 9.5 supra).

c) On May 20, 1979, Cubic referred to the amount of USD 5'403'651.-- as being payable or even as being "now payable" (depending on the translation of the Farsi original; Cubic's Defense and Counterclaim Exh. 71).

11.15. In Iran's understanding however, the reduction of its own commitment was the self-evident effect of the alleged mutual termination. There are no indications in the file that Iran agreed to Cubic's differing understanding. Mr Bahrami's reference to payments to be made by Iran in amounts close to the contract price balance (Hearing I, Transcript II pp. 179/180) was not part of the discussions with Cubic's representative in the course of the 1979 negotiations (since that point was not even discussed with Cubic's representative pursuant that witness' testimony); the witness' reference to contract price balance payments was an explanation of the accounting principle only. Even if more weight was given to Mr Bahrami's statement referred to above, it could only be tied to the other element of the resale mechanism described by the witness, i.e. Iran's prior approval of the resale price. Although Cubic was perfectly aware of this element since Iran had repeatedly referred to it (see Iran's letter discussed in Sect. 9.10 supra), Cubic did not submit any resale or reuse proposal to Iran for its prior approval.

11.16. Furthermore, since Iran's acceptance of Cubic's condition would have led to a more disadvantageous result than if Iran had formally and unilaterally terminated the Contracts for its own convenience under the contractual clauses providing such right for an unilateral termination by Iran (cf. Sects. 11.23 and 13.1 to 13.8 infra), credit must be given to Iran's contention that it did not agree to the full contract price balance remaining payable.

11.17. The record does not contain sufficient evidence to prove that Cubic changed the position described in Sect. 11.14 supra by abandoning the requirement that it would still be credited, also in the event of a contract termination, the entire contract price. It is true that Cubic's letter of June 12, 1979 - unlike the previous letters - did not refer to the amount of USD 5,4 million. However, taking into account that Cubic insisted in that letter that "the status of the contract" be clarified before a final decision will be made, Cubic's silence as to the amount due may not be construed as a sudden waiver of its previous position.

11.18. According to Iran's submission to the Tribunal, final decisions were made at the meeting held between representatives of the two Parties later in June or in July 1979. However, unlike previous stages of the negotiations, no written records exist in the Tribunal's file which would indicate the result of that meeting. The oral evidence does not clarify the issue since it is contradictory (cf. Sect. 9.20 supra). It is however significant that not even Iran's witnesses clearly stated that Cubic changed its previous position and accepted that it would no longer be entitled to the balance of the contract price or that the amount payable was reduced.

11.19. It is without importance in this context whether Cubic's insistence on the contract price balance was reasonable or whether it should have agreed to a reduction taking into account e.g. its risk that it will not be able to have the export licence renewed in the original amount (cf. Sects. 8.6 - 8.8).
suffices to note
a) that Cubic clearly stated, at the beginning of the negotiations, that termination costs would equal the contract value,

b) that there is no sufficient evidence on file as to a change of Cubic's position.

11.20. Thus, Cubic's consent to a contract termination remained conditional upon Iran's acceptance to pay the full contract price even in the event of a contract termination. Such condition has not been agreed to by Iran (cf. Sect. 11.15-11.16 supra). Accordingly, the Tribunal concludes that the requirement of an unambiguous mutual consent of the Parties relating to the termination of the contracts has not been established by Iran.

D. Factual Termination of the Contracts

11.21. The Parties discontinued the Contracts in the manner described in detail in Sects. 9 and 10 supra. While Iran some time after the 1979 negotiations and at the beginning of the instant arbitration again showed some interest to accept delivery of the System (Sect. 10.8 and Request for arbitration, p. 4), it subsequently abandoned this position and concentrated its claims on the reimbursement of its advance payments. During the period from 1981 to 1984, Cubic partly reused the System manufactured for Iran mainly in the context of a sale to the Canadian Government and was then no longer in a position or willing to perform the Contracts.

11.22. Obviously, the present situation amounts to a factual termination of the Contracts at the request of Iran.

E. The Termination for Convenience Clause

11.23. The Contracts explicitly provide for the right of Claimant to terminate, by written notice, the contract in whole or in part “when it is in the best interest of the Government”. In such event, the contractor shall submit his termination claim, including a statement of expended funds. The amounts to be paid by Iran to Cubic by reason of termination under this clause “...may include a reasonable allowance for profit on work done.”

11.24. It is doubtful whether this clause (hereinafter “Termination for Convenience Clause”) directly applies to the instant case. Claimant clearly stated that it did not terminate the Contracts for its convenience (Reply pp. 9 and 10; Hearing II, Transcript pp. 152ss). Respondent's initial alternative allegation in this respect (Answer to the Request, p. 5) has been abandoned and withdrawn in the course of the proceedings (Hearing II, pp. 188ss; Respondent's Post-Hearing Brief II, p. 23).

11.25. Under Article 13(5) of the ICC Rules, the arbitrator must take account, in all cases, of the provisions of the contract (and the relevant trade usages). It is a widely accepted principle that contractual obligations of the parties may be implicit. Implied obligations may stem from the nature and

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8 Sales Contract, Article XII.12; Service Contract, Article XI.15
11.26. Pursuant to such criteria as good faith and fair dealing, parties to a contract may reasonably expect that similar situations should have the same or similar consequences to the extent that the applicable law or the contractual terms do not explicitly provide otherwise. In the instant case, the factual circumstances are extremely close to, if not identical with, a termination of the Contracts by Iran for its convenience:

a) In the negotiations which ultimately led to the provisional discontinuance, it was mainly Iran which expressed the wish to terminate the Contracts, whereas Cubic would obviously have preferred that the project be continued (Sects. 9.5 and 9.8 supra), subject to the timely renewal of the export licence (Sects. 8.6 to 8.8 supra).

b) The change of circumstances that induced the Parties to discontinue the Contracts, i.e. the Islamic Revolution, occurred in Iran's, not in Cubic's area of risks.

c) Claimant's written statements in its letters of May 15 and June 10, 1979 (Sects. 9.8 and 9.10 supra) clearly express Iran's position that it was no longer interested in Cubic's delivery.

d) In its letters of May 20 and June 12, 1979, Cubic confirmed to have received Iran's declarations "that there is no need for the above system by the Air Force" (Defense and Counterclaim Exh. 71 and 74). In his May 20 letter, Cubic's representative explicitly based Cubic's claims for the contract balance on "paragraph 12 of Article 12, p. 11" of the Sales Contract (which paragraph is precisely the Termination for Convenience Clause). Thus, at the relevant time, Cubic understood Iran's statement that it did no longer need the ACMR as Iran's notice of termination under the Termination for Convenience Clause. Iran did not object, at that time, to Cubic's understanding.

e) Furthermore, at an early stage of the present arbitration proceeding, Cubic - when describing one of its alternative positions - expressed the view that the Iranian Air Force's letter of May 15, 1979 (Sect. 9.8 supra) constituted a termination under the Termination for Convenience Clause (Answer and Counterclaim p. 5).

11.27. Except for the absence of an explicit reference, by Iran, to the Termination for Convenience Clause or to a similar language close to the wording of that contractual provision, all requirements of a contract termination under the Termination for Convenience Clause are met. It would be excessively formalistic, and contrary to the principles of good faith, fair dealing and reasonableness if Iran's entitlement to a reimbursement of the advance payments and Cubic's entitlement to further payments would be governed, in the instant case, by different legal or contractual provisions than in the event Iran had formally invoked the contract clause entitling it to terminate the Contracts for its convenience. Accordingly, the Tribunal concludes that the Termination for Convenience Clause shall be applied, if not directly, then at least by analogy, to the assessment of the Parties' respective claims.

11.28. Depending on the result of the attempt to resell the System, either Claimant became entitled to be (partly) reimbursed for the payments it had made to Cubic, or Cubic became entitled to claim, in balance, an additional payment from Iran. Prior to the review of any such claims, certain
preliminary defenses raised by the Parties must be examined.

12. THE STATUTE OF LIMITATIONS AND FURTHER PRELIMINARY DEFENSE ARGUMENTS

A. The Statute of Limitations

12.1. According to the Parties’ choice of law amended by a stabilization clause (Sect. 7.4 supra), the requirements of a plea, the period and the commencement of the statute of limitation must be determined pursuant to Iranian law as in effect on October 23, 1977. Under such law the expiration of the statutory period does not extinguish the right itself, it only removes the right to institute the claim (Art. 64 CC; Art. 731 CPC). In other words, provided such plea has been raised after expiration of the statutory period, the right to claim is barred (Art. 32 CPC).

12.2. It is undisputed that the period of limitation, if at all applicable in the instant case, is ten years (Art. 737 CPC; Claimant’s Post-Hearing Brief I, p. 2; Respondent’s Rebuttal, p. 5). However, the time of the beginning of the running of said statute in the instant case is in dispute between the Parties.

12.3. As a subsidiary and general rule under Iranian law, the statutory period starts to run as from the date the creditor is "entitled to demand" (Art. 741.11 CPC); however, "..... in respect of obligations whose fulfilment has not been fixed or which must be fulfilled on demand, as from the date of demand by the instrumentality of a legal notification or the date of institution of lawsuit" (Art. 741.3 CPC).

12.4. However, as far as particular debts are concerned, the second paragraph of Sect. 10 of Art. 741 CPC (in Exh. 5 of Katirai, Legal Opinion II, p. 4, same wording is added as second paragraph to Sect. 11 of Art. 741) sets forth the following exception to the rule in Sect. 3 of Art. 741: "(t)he debts for the payment of which no period is fixed or the debts which are payable on demand shall not be subject to the provisions of Clause 3 of this Article but the statutory period shall run as from the date the debt is created" (emphasis added).

The purpose of the paragraph is to protect the debtor by means of a reasonable statutory period which shall be independent of the due date of such debts. Otherwise the statute of limitation would never start to run unless the creditor would demand fulfilment and, thus, the payment of such debts could be demanded by the creditor without any time limit in the future.

12.5. However, if a party is not entitled to demand fulfillment of the debts as from the date the debt is created, but only in the future, Art. 756 CPC applies: "In respect of a debt which falls due in future, or the repayment thereof is conditional, the statute of limitation will not start to run, unless it matures or the conditions are fulfilled, and the statutory period shall run as from the maturity date or as from the date the condition is fulfilled, as the case may be" (emphasis added).
12.6. Thus, in accordance with the laws of various legal systems, the statutory period does not run, under Iranian law, as from the date when the right has come into existence ("accrued" may be understood in this sense), but only when the right has matured, i.e. when the creditor is entitled to demand fulfillment of the obligations (Vahedi, Legal Opinion pp. 7/8 and Exh. 9 to 11 to Katirai, Legal Opinion 1; Tschanz, Legal Opinion p. 2).

12.7. In the instant case, the plea of statute of limitations has been raised, by each party, with respect to the entirety of the opponent party's respective claims (see Terms of Reference, Sects. 3.3.2 and 3.4.1, as summarized in Sects. 5.2 and 6.1 supra).

12.8. When examining the applicability of the Iranian statute of limitations to the Parties' various claims, the following categories must be distinguished:

a) claims for which the Parties agreed to postpone the maturity date, i.e.

- for Iran's claim for restitution of the payments it had made to Cubic under the two Contracts ("Iran's Restitution Claim"), and

- Cubic's claim for funds expended and profits under the Termination for Convenience Clause ("Cubic's Compensation Claim")

(see Sects. 12.9-12.19 infra),

b) claims for which no agreement to postpone the maturity date has been established, i.e.

- for Iran's claim for damages in the amount of US$ 15'000'000.--("Iran's Damages Claim"), and

- for Cubic's claim for lost profits associated with the Service Contract in the amount of US$ 4'287'669.-- (Terms of Reference Sect. 3.4.2, as summarized in Sect. 6.2 supra) ("Cubic's Lost Profit Claim"). In subsequent stages of the instant arbitration, such claim was defined as Cubic's "unabsorbed general and administrative expenses" in the amount of US$ 1'583'725.-- (Sects. 17.5 to 17.7 infra)

(see Sects. 12.20 to 12.29 infra).

B. The Parties' Termination Account

12.9. Normally, the Parties' claims resulting from the termination of the Contracts under the Termination for Convenience Clause become due as soon as the contractor and Iran's contracting officer have agreed, on the basis of the contractor's "termination claim" (Termination for Convenience Clause, subparagraph c) on the contractor's compensation.

12.10. In the instant case, Cubic was relieved, as a result of the Parties' negotiations in 1979 described in Sects. 9 and 10 supra, from immediately submitting its termination claim. Cubic did not submit, at that time, a statement of expended funds in the meaning of the Termination for Convenience Clause although it had understood, in its letter of May 20, 1979, that Iran had terminated the Contracts for its convenience (see Sect. 11.26c hereinabove). On the basis, inter alia, of Cubic's own proposal that
the Parties' accounts should only be settled "then", i.e. when the hardware has been sold (cf. Sect. 9.18 hereinabove), the Parties mutually agreed that the outcome of Cubic's resale attempts should first be awaited:

a) Iran was relieved, subject to the determination of the termination account, from making additional payments under the Contracts, for the time being. This part of the understanding related in particular, but not exclusively, to Cubic's alleged entitlement to the contract balance (Milestones no. 3 and 4; see Sects. 9.16 to 9.20) under the Sales Contract. In addition, the Parties' negotiations of 1979 equally related to Cubic's compensation due under the Service Contract: Cubic explicitly referred to an amount of US$ 85'000.-- due under the "Operation & Maintenance Contract" (i.e. to the Service Contract) when it submitted its May 20, 1979 proposals to Iran (Defense and Counterclaim Exh. 71, paragraph 8; Sect. 9.9 hereinabove). Thus, the Parties' understanding related to the entirety of Cubic's Compensation Claim under both Contracts.

b) Cubic was relieved, pending the outcome of its attempt to resell the System and subject to the determination of the termination account, from its obligation to reimburse the advance payments it had received from Iran (Iran's Restitution Claim).

12.11. Such understanding amounts to the agreement that the maturity date of the claim which one of the Parties might have against the other in balance, i.e. looking at Cubic's Compensation Claim and at Iran's Restitution Claim (the Parties' "Termination Account"), should be postponed until the resale of the equipment was made or until such date when it became clear that no resale would occur. The contents of the letters exchanged between the Parties together with oral and written evidence on the Parties' negotiations as well as the Parties' conduct subsequent to the negotiation period constitute the necessary evidence that in 1979 the Parties actually agreed - and not only mutually intended - to deal with the consequences of the discontinuance by defining the resale of the System to a third party as the relevant deadline upon which any outstanding claims under the Termination Accounts should have become due.

12.12. This conclusion follows from the "maxim of the ruling of intent" which constitutes a fundamental principle of Iranian contract law and "requires that in interpreting the contracts what the parties to the contracts wanted specifically or by implication would be taken into consideration. The words of contracts are not considered sacred and are valid to the extent they manifest the real intent of the parties... In summary, a judge when interpreting a contract must try to discover the intent of the parties and give the contract such effect that the parties hereto had in mind". (H. Safai, Introductory Series on Civil Law, Vol. 2, at pp. 51/52, with more references to corresponding opinions of Iranian legal scholars as to this subject matter; translation according to Katirai, Legal Opinion I Exh. 3).

12.13. As pointed out before, the maturity date of the Parties' respective claims was not postponed for an indefinite time, but only until such time as it was reasonably proper to expect that a resale could be made. The postponement period has to be assessed in accordance with the reasonable expectations of the Parties. In a telephone conversation with Major Safavi of Iran's Air Force, Respondent's representative indicated that it may take a year or two before Respondent could find a buyer for the System (telephone conversation record of April 15, 1979, Claimant's Rebuttal Exh. 35; quotation in Sect. 9.6 supra). It transpired in the subsequent correspondence that the resale, if at all possible, would even be more difficult and time consuming (Respondent's letter of June 12, 1979, Defense and
12.14. According to Respondent's own account at the time when in the instant arbitration the Terms of Reference were signed, the resale and reuse activities ended in or about March 1984 only (Sect. 3.4.1 of the Terms of Reference, at p. 8). In the course of the proceedings, it transpired that Cubic's resale and reuse activities consisted in substance in the reuse of parts of the equipment manufactured for Iran in the context of Cubic's sale of an ACMR to Canada (Sect. 14 hereinafter). The relevant agreement was executed by Cubic and by Canada on September 16, 1981. By October 1982, Cubic had completed, installed and put the Canadian system into operation (Cubic's chart No. 6 displayed at the Hearing II, entitled "CUBIC TACTS/ACMI/MDS PERFORMANCE"; Guenther Statement at page 14, Exh. 17 to MDC Analysis). At that time only, i.e. when the Canadian contract was performed, Cubic was in a position to reasonably, comprehensively and precisely account for the reuse of components originally manufactured for Iran and for any modification costs. This was the date the Parties had in mind when they agreed to await the outcome of Cubic's resale attempts.

12.15. Such duration of approximately 3½ years of the resale efforts was within the time frame which the Parties could reasonably anticipate. The fact that Iran filed a suit (for specific performance of the Contract) prior to that date (on January 19, 1982 already) does only express Iran's impatience and, in particular, its lack of recollection of what it had agreed in spring 1979. Since Iran did not refer, in such filing, to the termination of the Contract and to the agreed attempt of a resale, its premature claim may not be understood as an indication that the time in which it was reasonably proper, in Iran's understanding, to expect that a resale could be made, ended earlier than in October 1982.

12.16. Accordingly, the Tribunal holds that October 1982 must be viewed as the date when Iran's Restitution Claim and Cubic's Compensation Claim fell due in the meaning of Article 756 CPC (Sect. 12.5 hereinabove). Therefore, with respect to both such claims, the ten year period of the statute of limitations did not start to run prior to October 1982 and was undoubtedly still running on September 24, 1991, when Claimant's Request for Arbitration has been filed, and on December 20, 1991, when Cubic's Counterclaim was submitted.

12.17. Claimant filed its Request for Arbitration on September 24, 1991, i.e. in any event within the ten year period which started to run in October 1982. Thus Iran's Restitution Claim is not time-barred.

12.18. Respondent's Compensation Claim is not time-barred either since Respondent filed its Counterclaim on December 20, 1991, within the ten year period ending in October 1992.

12.19. Accordingly, the Tribunal's provisional findings set forth in Procedural Order No. 6 are hereby confirmed with respect to the dismissal of the time bar defences raised against Iran's Restitution Claim and Cubic's Compensation Claim.

C. Iran's Damages Claim

12.20. The only possible claim on Claimant's side which the Parties had in mind when they agreed on making the resale the maturity date, was its Restitution Claim. Nowhere in the exchange of written correspondences and in the oral conversations referred to above (Sect. 9 supra) did Iran indicate
that it reserved the right to *claim damages* from Cubic. If at all Iran thought that it could be entitled to damages, it intended to direct such claim to the U.S. Government, not to Cubic (Defense and Counterclaim pp. 25/26, Exh. 87, par. 1).

12.21. In the absence of an agreement to postpone the maturity date, Iran's Damages Claim became due as from the date of the alleged breach of the Contracts by Cubic. Such breach took place
a) at the very earliest when Cubic made it clear to Iran that it would no longer perform the Contracts, i.e. on September 9, 1979, when Iran finally received Cubic's letter dated August 3, 1979 (cf. Sects. 10.1 to 10.2 supra).

b) at the very latest when Cubic made it clear to Iran that it did not intend to properly inform Iran of the results of its attempts to resell the System, i.e. on October 21, 1981 (see Sect. 10.8 hereinabove).

12.22. Thus, the statutory period of ten years expired on September 9, 1989, at the earliest, or on October 21, 1991 at the latest. Iran amended its claim by its Damages Claim more than ten years after October 1981, only on March 6, 1992 (in its Reply) while the Request for Arbitration was limited to its Restitution Claim. The mere reservation of a subsequent claim for damages within the earlier Request for Arbitration did not interrupt the statute of limitations.

12.23. Therefore, the Tribunal concludes that Claimant's filing of its Damage Claim was in any event too late, unless the running of the statutory period relating to Iran's Claim for Damages was *interrupted* by appropriate acts prior to October 1991 independently of the present arbitration.

12.24. The statutory period may be interrupted, under Iranian law, by filing a claim or by serving a legal notification to the obligee (Art. 761 CPC). Claimant did never file a claim for damages against Respondent prior to starting this arbitration proceeding. It is therefore superfluous to discuss whether the filing of a claim with a court which lacks jurisdiction (the Iran-U.S.-Claims Tribunal in the instant case, see Defense and Counterclaim Exh. 87 i.f., "III. Award") can or cannot interrupt the statute of limitations.

12.25. It results from Art. 709 CPC and from the detailed explanations thereto by Respondent's Legal Expert (Katirai Defense and Counterclaim, p. 12, Exh. 13) that the legal notice in the meaning of Art. 761 CPC requires a certain degree of formality - similar to "summons to pay" in certain European legislations - through the involvement of an official authority since service of the notification is made through the department of registration of documents or the offices of a court. Such authority must not necessarily serve the notification on the recipient with the assistance of one of its officers, it may also deliver it through the postal services by registered mail. However, it does not appear that there are any decisions of Iranian Courts which would support the argument that a legal notification may also be made directly, by registered mail, from one Party to the other without the involvement of one of the authorities referred to above.

Apart from this aspect, Iran's correspondences addressed to Cubic in the course of 1988 to 1990 may not be considered as legal notification for another important reason: They do not contain any "demand" (Art. 709 CPC) of Claimant's alleged right to damages in the amount of US$ 15 million; they were mere invitations to negotiate (Claimant's Rebuttal Exh. 51 to 55).
12.26. For all of the above and in confirmation of its preliminary finding set forth in Procedural Order No. 6 the Tribunal concludes that Iran's Claim for Damages in the amount of US$ 15 million is time-barred.

E. Cubic's Lost Profits Claims

12.27. The only possible claim on Cubic's side which the Parties discussed in the course of their 1979 negotiations was Cubic's Compensation Claim as defined in Sect. 12.10b supra, at that time referred to, by Cubic, as the contract balance and the payments for Milestones nos. 3 and 4 in the amount of USD 5,4 million. Nowhere in the exchange of written correspondences and in the oral conversations up to June/July 1979 (Sect. 9 hereinabove) did Cubic indicate that it reserved the right to claim damages for profit lost under the Service Contract or, more generally, under both Contracts. Under the Service Contract, Cubic referred to an outstanding amount of US$ 85’000.-- only on the basis of Item 0002 in paragraph 2 page I of that Contract (letter of May 20, 1979, Defense and Counterclaim Exh. 71). Thus, the maturity date of Cubic's Lost Profit Claim had not been postponed as discussed with respect to Cubic's Compensation Claim.

12.28. The alleged loss of profit occurred when Iran allegedly breached the Contracts and, at the latest, when Cubic became aware of such breach, i.e. on August 3, 1979 (see Cubic's letter of that date as discussed in Sects. 10.1 and 10.2 supra). Thus, the statutory ten year period ended in August 1989.

12.29. Cubic did never file a claim or serve a legal notice to Iran for its alleged loss of profit prior to the Answer and Counterclaim filed in the present arbitration. Accordingly, Cubic's counterclaim under the Service Contract, to the extent such counterclaim exceeds the compensation for services invoiced up to an amount of US$ 85’000.-- approximately, is time-barred.

F. Estoppel, Preclusion

12.30. Respondent repeatedly argued that Claimant should be prevented by its own previous acts from claiming a right for reimbursement based on mutual termination. By doing so, Respondent implicitly (Hearing I, Transcript III p. 146) and in a general way invoked "estoppel" which as a legal principle "provides that an individual is barred from denying or alleging a certain fact or state facts because of that individual's previous conduct, allegation, or denial" (Black's Law Dictionary 6th Edition, p. 551). In such general sense, estoppel is based on the traditional maxim of "allegans contraria non audiendus est" which stems from the principle of good faith. Due to the recognition of fair dealing and acting in good faith in international jurisprudence as well as in Iranian contract law the Tribunal shall - regardless of whether or not Respondent's plea met the highly developed requirements of the Anglo-Saxon concept of estoppel - decide on whether, as a matter of fact. Claimant's course of conduct was inconsistent to the extent that it should be precluded from raising its claims in the instant case.

12.31. From the Tribunal's elaborations with respect to Claimant's actual conduct during the negotiations period in 1979 and subsequent thereto (Sects. 9 and 10 supra) follows that the Tribunal finds no
inconsistency which could support Respondent's Defense stating that any claim based on mutual
termination of the Contracts be denied in application of the principle of estoppel. Moreover, in the
light of the underlying facts the Tribunal regarded Claimant's behaviour in the post-negotiation
period as manifestation of the Parties' mutual consent to discontinue the Contracts and to postpone
the maturity date of their respective claims for a reasonable period of time. The lack of
inconsistency in Claimant's course of conduct prior to this proceeding as established above (cf. Sect.
10 supra) makes a further discussion of the requirements for the application of estoppel irrelevant
and therefore unnecessary here.

Therefore, the Tribunal concludes that in the light of the facts of the case as established above the
principle of estoppel is not applicable here and consequently Claimant is not precluded from
claiming reimbursement on the legal ground of termination of the Contracts.

G. Rule of Admission

In the context of estoppel which has been invoked by Respondent in its general meaning the
Tribunal shall also examine whether Claimant's earlier legal position and contentions included a
binding admission barring it from raising the present claim for reimbursement based on mutual
termination of the Contracts.

Under Iranian civil law, a formal admission of one party to a dispute constitutes a strong evidence.
Article 1259 CC sets forth the following:

"Eghrar [meaning admission] means acknowledging the right of another person against one's own
interest".

It is undisputed among legal authorities of Iranian law that an admission in order to be a strong
evidence against the admitting party must pertain to a factual matter which relates to a right of the
other party (Sadrzadeh, The Law of Evidence, p. 120; Mahmoud Azimi, The Law of Evidence, p. 99;

The Tribunal explained earlier in the reasoning of the present Award (Sect. 10.9 supra) why
Claimant's argument in its Statement of Claim that it "never and in no way terminated the Contract"
(Statement of Claim, p. 5) and similar assertions did not constitute a denial of mutual
disincontinuance of the Contracts in 1979. Thus, the said statement of Claimant cannot be viewed as
an admission or confession of any kind because, as a matter of fact, Claimant did not change its
position but only shifted the weight of its legal arguments in support of its claims (Sect. 5.5 supra).
And even if Claimant indeed had fundamentally modified its legal arguments relating to the legal
interpretation of the exchange of letters in 1979, such change did not alter the factual situation as
alleged from the outset of the present proceeding. Accordingly, the Tribunal finds that the rule of
admission as laid down in Iranian law and acknowledged in international jurisprudence as part of
the principle of good faith is not applicable here.

As a consequence, the Tribunal concludes that neither by the rule of admission nor by estoppel
Claimant is prevented from raising claims against Respondent based on mutual termination of the
**H. Waiver**

12.35 In its Statement of Quantification Claimant contends that Respondent waived its Counterclaim by virtue of several statements in which it announced that it did not have any claim for payment from the resale of the System (Claimant's Quantification, pp. 41/42). For that reason, Claimant requests that Respondent's Counterclaim be rejected by the Tribunal.

12.36 Since Cubic's Counterclaim shall be dismissed for reasons relating to the termination account (see Sect. 16 infra), the issue of the alleged waivers, by Cubic, of its Counterclaim may remain undecided.

**13. RESPONDENT'S COMPENSATION FOR WORK DONE UNDER THE SALES CONTRACT**

13.1 In Sect. 11.27 supra, the Tribunal concluded that the Termination for Convenience Clause shall be applied, if not directly, then by analogy, to the assessment of the Parties' claims. The obvious and most important effect of a contract termination, be it for the convenience of one party or for other reasons, is that "either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received" (UNIDROIT Principles Art. 7.3.6). The same principle applies under Iranian law in the event of mutual termination of a contract (Emami, Civil Law, Vol. I, p. 329; Katouzian, Civil Law, Vol. 5, p. 37). The principle is explicitly referred to in the Termination for Convenience Clause which provides for a refund of payments by the contractor should the contractor's statement of expended funds show excess payments by Iran (subparagraph c).

13.2 Under the Termination for Convenience Clause, the amount to be taken into account in favour of Cubic consists in the first place of a compensation for Cubic's "expended funds". The compensation "may include a reasonable allowance for profit on work done" in addition to the compensation for "expended funds".

13.3 The expression used in the Termination for Convenience Clause "expended funds" appears to exclusively relate to Cubic's direct costs. Had the drafters of the Clause in mind indirect costs such as overheads, general and administrative expenses, research and development costs as well, they would have used terms such as "direct and indirect costs". Under this interpretation of the term "expended funds", Cubic's entitlement to a "reasonable allowance for profits" must be understood as an allowance for Cubic's gross profit margin which shall cover Cubic's general and administrative expenses, its research and development costs as well as its net profits. Cubic's direct costs will be referred to hereinafter as "Expended Funds", whereas for Cubic's profits as defined in this paragraph the term "Gross Profit" shall be used.

13.4 The Termination for Convenience Clause explicitly indicates that the allowance for Gross Profit relates only to "work done". Thus, lost profits on work not already done may not be awarded in the instant case, unlike a case decided by the Iran-U.S. Claims Tribunal based on a contract provision that specified that "reasonable termination charges" were to take into account lost profit on work not already done (cf. Aldrich, op.cit., p. 295).
13.5. The wording of the Termination for Convenience Clause clearly indicates that the Gross Profit to be awarded on work done may, but must not necessarily, be less than the contractual profit:

a) The payment of profit is not obligatory, since the Parties only "may" include such item in their accounts (whereas no such term is used in the context of the reimbursement of "expended funds" in the sense of costs incurred).

b) The word "reasonable" also indicates non-contractual rates. Otherwise, the Parties could have simply used terms such as "normal profits", "contractual profits" or "profits".

c) The term "allowance" strengthens the conclusion that the reasonable profit to be awarded to Cubic may be different from, or more precisely: less than the contractual profit (cf. Black's Law Dictionary, Sixth Edition, Allowance = "A deduction, an average payment, a portion assigned or allowed;...").

13.6. The Termination for Convenience Clause does not explicitly state that Cubic shall credit Iran with the value of any products manufactured for Iran prior to the termination of the Contracts to the extent that such products remain in Cubic's possession. This principle is however an implied term of the Termination for Convenience Clause as it follows from the reference to the possible interest of Iran in property related to the contract in Subparagraph b:

"After receipt of a notice of termination, and except as otherwise directed by the Contracting Officer, the Contractor

... (vi) take such action as may be necessary or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest."

It is obvious that in assessing Cubic's costs account should be taken of the extent to which such costs have resulted in a value in Cubic's possession. Anything to the contrary would be unreasonable and would result in double recovery for Cubic - in violation of the general principle relating to unjust enrichment (cf. George H. Aldrich, The Jurisprudence of the Iran-U.S. Claim Tribunal, 1996, pp. 397ss) - in the sense that Cubic would maintain possession of the goods manufactured and being paid for such goods to the same extent as if they had been delivered to the buyer. Reference may also be made to the doctrine of mitigation since Cubic's claim for wasted work does not fundamentally differ, as to the parties' interests involved, from a claim for damages to which the doctrine of mitigation is normally applicable also under Iranian law (Safai, Legal Opinion II).

Accordingly, Cubic's entitlement to a compensation for its wasted costs and work is limited to the net amount in the sense that its gross amounts must be reduced by the value of potential or actual resale of the goods to third parties or their reuse in the context of such sales or otherwise. Thus, Cubic - when presenting its statement of expended funds - has an implied duty to account to the buyer with respect to the manner in which the goods manufactured or bought for the original buyer were resold or reused and what the proceeds were therefrom. This value shall be referred to hereinafter - in accordance with the term used by Cubic and its experts - as the "Salvage Value".
13.7. The Termination for Convenience Clause does not explicitly make a distinction between situations in which Iran has received benefit from Cubic and situations in which the Contracts were terminated prior to the transmittal of any benefits from Cubic to Iran in terms of goods or services. However, it is evident under the term of "reasonable allowance", which includes the criteria of fairness and equity that the absence of any benefits on the side of Iran should be taken into account when assessing Cubic's profits. Such principle is inherent in Iranian law (Art. 337 CC).

13.8. In summary, under the factors resulting from the Termination for Convenience Clause, Cubic shall be compensated for its work done including a reasonable portion of its contractual profit for work done. Since the hardware manufactured by Cubic remained at Cubic's disposal, its entitlement to be compensated is reduced by the value of resale or reuse of the System. In assessing Cubic's net entitlement, the Tribunal has large discretion as indicated by terms such as "reasonable" and "allowance" (with respect to the Gross Profit) and by the language used in Subparagraph d) of the Termination for Convenience Clause: "...the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work..."

13.9. The Arbitral Tribunal shall examine the various elements relevant for the computation of Cubic's compensation in the following sequence:
   a) Compensation under the Sales Contract:
      - Expended Funds (Sect. 14)
      - Salvage Value of the System manufactured for Claimant (Sect. 15) - Allowance for Profit (Sect. 16)
   b) Compensation under the Service Contract (Sect. 17)

14. EXPENDED FUNDS

14.1. Cubic contends that it incurred total direct costs in design, manufacture and factory testing of the ACMR amounting to USD 9,702 million, exclusive of those General & Administrative Costs which are not "allowable" under the US Government Federal Acquisition Regulations ("FARs") and exclusive of any profit factor (MDC Analysis pp. 1ss). The figure of USD 9,702 million is based on Cubic's Internal Contract Status Reports ("CSRs") as of September 30, 1979. Cubic contends that the following items should be added to the amount of USD 9'702'783.--

   a) Costs incurred up to September 30, 1979, but posted after that date USD 544'398.--
   b) Other material costs USD 922'211.--
      Total Direct Costs USD 11'169'392.--
   c) General & Administrative Expenses Adjustment USD 871'003.--
      USD 12'040'395.--
14.2. Iran objects that Cubic's "documents are not adequate for establishing the accuracy of these costs" and that "the figure of 9,7 million Dollars seems inflated..." (Comments on Quantification Exh. 2 p. 10; Quantification Exh. 12 pp. 10/11). In particular, Iran raises various objections against the amounts claimed by Cubic in excess of the USD 9,702 million based on its CSRs as of September 30, 1979 (Claimant's Quantification Exh. 12 pp. 2ss).

14.3. The Tribunal notes that the burden of proof is Cubic's with respect to its Expended Funds. This follows from various sources:

a) Under the Termination for Convenience Clause, Cubic was to submit its "termination claim, including a statement of expended funds".

b) The Expended Funds form part of Cubic's defense against Iran's Restitution Claim. Under Iranian law "...if the defendant, wishing to defend himself, alleges something which may require evidence, it is he who must prove it" (Article 1257 CC).

14.4. Cubic's offer of evidence consists of the various reports prepared by its experts MDC Systems, a unit of Day & Zimmerman International, Inc., Radnor, Pennsylvania ("MDC") and by oral testimony presented by two MDC professionals at the Hearing II. The Tribunal notes on the basis of the extensive material submitted that both the Day & Zimmerman Group (of which MDC forms a part) as well as the two MDC professionals assigned to the Cubic project (James M. McKay and Christopher Mather) had the required experience and the professional background for the assignment. Extensive efforts, described in some detail in Respondent's MDC Reports and at the Hearing II by Cubic's experts (Transcript pp. 320ss) have been made by Cubic and its experts to locate and identify all relevant documents which still existed in 1995 with respect to the design and manufacture of the System in 1977/1979 until the period of the resale of the equipment to Canada. In addition to reviewing contemporaneous records, MDC interviewed seven Cubic employees who either had first-hand knowledge of the work done on the contracts with Claimant (such as Cubic's AIS Project Manager for the Iranian Project) or general working knowledge of Cubic's procedures at that time. The approach the experts used in overcoming difficulties arising out of incomplete documentation, is convincing. To the extent still existing, the documentation used by MDC has been described in their analysis in extensive details and voluminous documents have been attached to their reports.

14.5. Although MDC acted as party-appointed experts, their professional competence and the approach justify to accept the MDC reports not merely as argument, but as evidence, subject to the Tribunal's assessment of the credibility of the experts' opinion with respect to the various factual elements (see P. Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, Tübingen 1989, p. 485; M.E. Schneider, Technical Experts in International Arbitration, Bulletin ASA - Swiss Arbitration Association 1993, pp. 446ss., at p. 447).

14.6. MDC convincingly explained the characteristics of Cubic's cost accounting system, organized around a "build to contract" approach (MDC Report II pp. 2ss). MDC investigated Cubic's records regarding the construction of each of the ACMR system elements. The list (Exhibit 1 to MDC
14.7. As explained by MDC, Cubic had, already prior to September 30, 1979, begun to transfer various costs out of the Iranian contract account. A CSR dated September 27, 1981 (Exhibit 2 to MDC Analysis) indicates that USD 544,398.--, primarily material purchases, was charged back to that account between September 30, 1979, and September 27, 1981. As additional cost-incurred charges, an amount of USD 922,211.-- was added with regard to components retained by Cubic as documented in Cubic's 1980 disposal memos (Exhibits 10a-d to MDC Analysis). Based on the documents on file and in light of further explanations given by Cubic's experts at the Hearing II (Transcript pp. 350ss.), the Tribunal finds again that evidence supports in principle Cubic's allegation with respect to those two additional amounts of USD 1,466,609.-- in the aggregate; however, MDC has not been able to identify the specific items transferred out of the contract account and to confirm, without reservation, the accuracy of the amount of USD 544,398.-- charged back to that account between September 30, 1979 and September 27, 1981. Equally, with regard to the amount of USD 922,211.--, MDC was only in a position to express what it "believed", i.e. that the "items represent some of the costs backed out of the September 30, 1979 cost total and probably were held in Cubic's 'Inventory' until their ultimate disposition was resolved" (MDC Analysis p. 2, emphasis added). Based on the uncertainty expressed by the experts, the Arbitral Tribunal holds that MDC's conclusions do not constitute persuasive evidence with respect to the entire two amounts. Making use of its discretion, the Arbitral Tribunal concludes that only half of these two amounts, i.e. an amount of USD 733,304.50, may be admitted as Cubic's additional direct costs.

14.8. In accordance with the Tribunal's understanding of the term "Expended Funds" in the Termination for Convenience Clause (Sect. 13.3 supra), Cubic's claim for a General Administrative Expenses adjustment in the amount of USD 871,003.-- shall not be taken into account in the present context.

14.9. Further noting that the total direct costs resulting from the above considerations (USD 10,436,087.--) appear to be in a reasonable proportion to Cubic's contract price of USD 18 million, the Tribunal holds that the issue of Cubic's direct costs is sufficiently clarified by the evidence on file. Accordingly, Iran's request relating to the appointment of a neutral expert is denied.

14.10. Making use of the discretionary authority referred to in Sect. 13.8 supra, the Tribunal concludes that an amount of USD 10,500,000.-- shall be taken into account, as Cubic's Expended Funds, when assessing Cubic's compensation under the Sales Contract.

15. THE SALVAGE VALUE OF THE SYSTEM MANUFACTURED FOR CLAIMANT
A. The Burden of Proof

15.1. Iran contends that the net amount to be credited is substantially higher than the net Salvage Value of USD 3'824'351.-- admitted by Cubic in its Post-Hearing Brief II under the theory of "Termination for Convenience (By Analogy)". Iran estimates that Cubic's gross sales proceeds have been or should have been higher than admitted by Cubic and that the costs charged by Cubic were inflated. Iran requests that an independent expert be appointed to verify Cubic's allegations.

15.2. The Tribunal notes with respect to the Parties' burden of proof the following general rules:

a) The basic principle of proof "actori incumbit probatio" relates to the determination, by the Tribunal, of disputed facts, not to the final result of a dispute. Accordingly, the issue does not necessarily depend on the parties' role as claimant or defendant. Under Iranian law, this principle is clearly expressed in Article 12.57 CC:

"Anyone who claims a right has to establish the same and if the defendant, wishing to defend himself, alleges something which may require evidence, it is he who must prove it."

b) In international arbitrations, both parties have the duty, under the general principle of good faith, to co-operate in offering the relevant evidence (cf. Jarvin/Derains, Collection of ICC Arbitral Awards 1974-1985; Award no. 1434/1975, p. 267). Under this principle, the party who possesses the relevant documentation, may have a duty to submit that documentation in the first place although the burden of proof is on the opponent's side (J.J. van Hof, Commentary on the UNCITRAL Arbitration Rules, 1991, pp. 162s).

c) Prima facie evidence and presumptions (praesumptiones hominis) may alleviate the burden of proof (Baker/Davis, The UNCITRAL Arbitration Rules in Practice, 1992, pp. 110s; Berger, International Economic Arbitration, 1993, p. 449, note 526). Based on experience and commercial reasonableness, there is a presumption that an experienced manufacturer of industrial goods is normally able, in the event of a contract termination, to resell or reuse the goods manufactured at prices or for value corresponding at least to its direct design and manufacturing costs. Should - in a seller's contention - particular circumstances of the case lead to a lower net Salvage Value than direct costs, such particular circumstances should, in the first place, be explained by the seller.

d) "The tribunal may...refuse to admit a party's offer of further evidence if it is convinced that the issue has been sufficiently clarified..." (cf. Berger, op.cit., p. 443).

15.3. In the instant case, applying the principles referred to above, the Tribunal notes:

a) Cubic is the party which possesses the documentation establishing how and to what extent it resold and reused the equipment originally manufactured for Iran. In particular, only Cubic had access to the evidence relating to the costs of adaptation of the equipment to other purchasers' needs. Accordingly, Cubic was the party which had to submit such documentation in the first place by filing its Discovery Statement.

b) Cubic's direct costs relating to the design and manufacture of the System amounted, in its own assessment, to USD 11,169 million (Sect. 13.1 supra). Cubic contends however that the gross Salvage
Value of the equipment amounted to USD 4'416'130.--, i.e. less than 40% of the direct costs it had incurred when it stopped manufacturing the equipment for Iran two years prior to the resale or reuse.

c) The Termination for Convenience Clause, whether applied directly or by analogy, includes an implied duty to account to Iran with respect to the Salvage Value (Sect. 13.6 hereinabove).

15.4. Although the presumption referred to hereinabove does not shift the burden of proof, the Tribunal concludes under the present circumstances that it was Cubic's obligation in the first place to explain for which reasons the Salvage Value is significantly lower than its direct costs and to adduce evidence for such reasons whereas Iran was to submit rebuttal argument and evidence. Accordingly, contrary to Cubic's objections raised at the Second Hearing, it was Cubic which first had to present its expert witnesses on these topics. Thus, Cubic's critical remarks made in its Post-Hearing Brief II (pp. 3 and 4) are ill-founded.

B. Cubic's Resale Efforts

15.5. The Tribunal first deals with Cubic's contention that despite its resale efforts it was not able to resell the System as it existed in 1979 to another purchaser and that it had to be satisfied by reusing parts of the equipment only in the context of an ACMR sale to Canada and to a few other purchasers. Reference will also have to be made to Iran's contention that Cubic's gross sales proceeds were or should have been higher.

15.6. As from August 1979, Cubic tried to resell the System to various states (U.S. Navy, Taiwan, Pakistan, Egypt and Canada) (cf. Mather, Hearing II, Transcript pp. 374, 380). Finally, Cubic was able to reuse important parts thereof in its sale to Canada and other components were sold to various agencies of the U.S. Government. Iran does not specify which other states than those contacted by Cubic could have been interested in buying the System and in buying it at a higher price, or with less modification costs or with a more important part of reused material.

15.7. It was in Cubic's own interest to resell and/or reuse the equipment manufactured for Iran with the best possible result since Cubic did not intend to account for its resale or reuse proceeds to Iran. Accordingly, credit must be given to Cubic's contention that the reuse of the equipment in the sale of an ACMR to Canada was the first and most advantageous "resale" opportunity and that it reused parts of the equipment manufactured for Iran to the best possible extent and with the least possible costs.

C. Cubic's Accounting for the Resale and Reuse of the Equipment

15.8. An entirely different issue is whether credit must also be given to Cubic's assessment of the Salvage Value of the System and to Cubic's accounting for the costs allegedly incurred. In this respect, Cubic relies on the various reports prepared by its expert MDC.
15.9. Cubic's evidence, i.e. MDC's Analysis submitted with Cubic's Discovery Memorandum and the MDC Report I submitted with Cubic's Statement of Quantification on June 30, 1995, was tested in three stages under Iran's rebuttal arguments and evidence:

a) Iran made a first round of critical comments in its Statement of Quantification (Exh. 1 and 2: financial expert opinion by Touche Ross and technical expert opinion). Cubic's experts replied to such comments in the MDC Report II submitted with Cubic's Comments on Quantification (October 24, 1995).

b) Iran made a second round of critical remarks, with reference to Cubic's Statement on Quantification, in Claimant's Comments on Quantification (October 24, 1995). In this respect, Cubic's experts replied when they presented their findings at the Second Hearing.

c) Finally, new critical comments were expressed, at the Second Hearing, by Iran's experts and replied to partly at the hearing itself, partly in Cubic's Post-Hearing Brief II and its annexes.

15.10. In addition, Cubic's experts stated in their Report annexed to Cubic's Comments of October 24, 1995, that their analysis and conclusions were based on a much broader field of documents than that included with the Discovery Memorandum; they added that the entire additional documentation was also available to Iran's experts to perform their own quantification analysis (MDC Report II p. 16). Iran's expert did not make use of this offer.

15.11. At the end of the three day hearing held on November 7 to 9, 1995, the Tribunal - when discussing the next steps in the proceedings with the Parties' representatives - referred to Claimant's request that a neutral expert be appointed in order to verify MDC's assessment and indicated that the panel would be reluctant to appoint a neutral expert (Hearing II, Transcript p. 687). In its Procedural Order no. 10, the Tribunal instructed the Parties to submit Post-Hearing Briefs in which they shall comment upon the evidence relating to the quantification. Iran, although confirming its request that a neutral expert be appointed, failed however to specifically list the critical points which an expert should review in its opinion. Iran's comments were, with respect to quantification, vague and unspecific and consisted mainly of its general reference to its prior critical comments without taking into account the detailed replies it (and the Tribunal) had received in the meantime.

Under these circumstances and for the reasons explained in Sect. 14.5 supra, the Arbitral Tribunal concludes that the MDC reports are, in principle, admissible as evidence, subject to the Tribunal's assessment of the credibility of the experts' opinion with respect to the various factual elements.

15.12. Certain documents submitted by Iran at the Hearing II only were excluded by the Panel from consideration as late filings (Transcript pp. 519 to 520). Iran's late submittal of its experts' counterproposal to Exhibits 14 of the MDC-Analysis however is hereby admitted as a summary of Iran's contentions, not as documentary evidence or as expert opinion.

15.13. Turning to the substance of Cubic's evidence and dealing first with Cubic's assessment of the Salvage Value, the Tribunal notes that Cubic's expert MDC relied on Cubic's Contract Status Reports (“CSRs”) to determine the costs actually incurred in producing the various components or subsystems. Cubic did not charge, in this respect, any modification, factory recertification, or component upgrade
costs. Instead, such costs were charged to its customers receiving the components - mainly Canada and to some extent the U.S. agencies - as part of the purchase price they paid Cubic.

15.14. Among the 22 sales made by Cubic in the last 21 years, only 3 sales (to Iran in the instant case, to Canada, British Aerospace) were "open sales" in the sense that they did not have to conform to US Government requirements. Accordingly, the ACMR manufactured for Iran was not only to be resold or reused in a limited market, but it was "a limited product to sell to a very limited market that would be interested in the first place" (Mather, Transcript pp. 374 and 377). This factor explains part of the devaluation identified by Cubic's Experts.

15.15. The Tribunal further notes that significant differences between the ACMR sold to Iran and the ACMR sold to Canada explain why only parts of the equipment manufactured for Iran could be reused:

a) The Canada Sale (September 1981) has been made four years later than the Sales Contract with Iran (1977). Important developments had occurred in this period of time with the effect that significant parts of the equipment designed for Iran were no longer in accordance with the state of art at the time of the Canada Sale. It was around 1979-1981 that IBM manufactured its first personal computers; computer capacity and sophistication were increasing exponentially in that period (Clowes Statement, Respondent's MDC Report II, Annex B p.1). In addition, the Canadian Sale required a complete overhaul of the Control and Computation Subsystem among others for the reason that "the computer manufacturer had discontinued some of the logic boards within the Central Processing Units, requiring not only board replacement but wiring modifications" (Guenther witness statement, MDC Analysis, Exh. 17 p. 17).

b) The data transmission rate has been doubled from Iran's System to the one sold to Canada (460.8 kbps).

c) The Canadian ACMR was ultimately designed for 36 instead of 8 aircrafts.

d) MDC found that the documentation (manuals in particular) consisted of 491 pages with respect to Iran's System and of more than 1'000 pages for the ACMR sold to Canada (MDC-Report II, Exh. 7).

e) The Iranian shelters for the tracking instrumentation subsystem remotes could not be used in Canada because of the entirely different climate and weather conditions.

f) In his witness statement, Ted Clowes, a Cubic engineer who had worked on both the ACMR for Iran and the ACMR for Canada, identified numerous additional differences in the hardware and in the software. Based on the examples described in detail, he concludes that they "had to redesign and build almost everything from scratch" (Witness Statement p. 7, attached to the MDC Expert Opinion).

g) Moreover, Michael L. Guenther, Cubic's Project Manager for the Canada Sale, described in his witness statement in some detail the portions of the components manufactured for Iran which were incorporated into Canada's ACMR (Exh. 17 to MDC-Analysis). He emphasized that Cubic logged over 25'000 hours on design for Canada.

15.16. Based on the extensive documentation reviewed and on interviews made with numerous Cubic employees, MDC describes in detail the disposal of the individual subsystems for Iran's ACMR, explaining and estimating for each subsystem the Salvage Value in comparison to Cubic's proposal.
estimated costs and to Cubic's costs per CSR's. MDC concludes that Cubic utilized portions of the equipment manufactured for Iran on the Canada contract at a price equal to about two thirds of the price agreed for in the Sales Contract, but which required Cubic to make substantial investment in modifying the equipment. Prior to adjustments, MDC estimates that the aggregate Salvage Value of the material reused in equipments sold to others and the material consumed or kept by Cubic is USD 4'415'930.-- (the total of the various items discussed in MDC's Analysis pp. 14 to 23 is USD 4'415'930.--, not USD 4'416'130.-- as indicated in some of MDC's charts).

15.17. With respect to the various items of the System, the Tribunal takes into account the following points:

a) Site Dependent Software: It was Cubic's practice to charge customers only for the costs necessary to modify the generic software to accommodate the customer's site dependent specifications. The Iranian site dependent software could not be incorporated into any reuse of the System. Therefore, it has been given no salvage value by Cubic's experts. This conclusion is no longer disputed by Iran (Counterproposal to Exh. 14).

b) Display and Debriefing Subsystem (DDS): The displays purchased for Iran would have required modification to be incorporated into the Canadian system. Based on a ledger entry (Exhibit 19 to MDC-Analysis) for the portion of a DDS transferred to a US Navy installation and using the same value as a basis for a further DDS, Cubic's experts estimated the salvage value at USD 1'033'333.--. No plausible reasons were given by Iran's experts for their assessment at USD 1'353'913.--.

c) Control and Computation Subsystem: Both Parties' experts agree with the salvage value of USD 616'318.--.

d) Tracking Instrumentation Subsystem (TIS): Iran's experts criticized in particular Cubic's assessment of the salvage value of the TIS in the amount of USD 139'272.--. They referred to Cubic's significantly higher costs proposal of USD 2'476'645.-- and to Cubic's CSR costs of USD 1'981'371.-- and argued that 40% to 75% of the CSR costs should be credited to Iran.

Cubic's experts indicated that the value shown as salvage related only to the shells for the remote units and some other minor parts incorporated into the Canadian system. The other parts of the TIS manufactured for Iran were totally unusable for Canada for reasons which were convincingly specified in MDC Analysis (pp. 17/18) and in its annex 17 (Statement of Michael L. Guenther). Inter alia, all Canadian TIS units were designed to function entirely unmanned whereas in the Iranian System "pseudo-unmanned" stations (requiring limited maintenance) had been planned. Furthermore, the Government of Canada did not want to rely on the solar panel/battery powering, but insisted on individual propane heaters. The Tribunal finds the explanations given by Cubic's experts persuasive.

e) Diesel Generator Equipment: After it became clear that the System would not be sent to Iran, Cubic returned the units to the manufacturer's representative. MDC stated that Cubic was given a credit of USD 92'500.--. However, MDC does not specifically make reference to such credit note and list it as an exhibit to its analysis. Although Iran's expert expressed considerable doubts as to the plausibility of the suggested amount (Claimant's Quantification Exh. 2, Item No. 5.5), Cubic's experts did not amend their explanations in their Report II (no reference to Item 5.5 on page 18). Taking into account that the equipment has not been described, by Cubic, as differing from normal Diesel generator equipments, 60% of the costs (USD 282'510.--), i.e USD 169'506.-- shall be assigned to this equipment, i.e. USD 73'610.-- more than MDC's estimated salvage value of USD 95'896.--.
f) **Airborne Instrumentation Subsystem:** Both Parties' experts agree with the proposed salvage value of USD 1'715'576.--.

g) **AIS Test Sets:** Cubic's experts credited USD 217'280.--, representing 50% of the total costs (per CSRs) since one test set out of two could be delivered with some modifications made at the expense of Canada to that customer. The other set was never sold and its value would be zero in Cubic's assessment. Iran states that Cubic should have sold the second test set to another customer; however, Iran does not specify what customer could have been interested in purchasing this unit. Taking into account that it was in Cubic's own interest to sell as many items manufactured for Iran to other customers, credit has to be given to its statement that it was unable to find a purchaser with respect to the second AIS test set.

h) **Test Equipment:** The experts of both Parties agree to a Salvage Value of USD 368'154.--.

i) **Spare Parts:** Cubic's experts explained that the cost of acquisition and/or manufacture of the spare parts was included within the CSR for each component subsystem. Only for non-unique, commercially available parts, a separate inventory was kept. Cubic's experts estimated the salvage value at USD 180'373.--. In Iran's view, opportunities to sell spare parts or to use them existed. However, no specific or otherwise plausible opportunities were indicated by Iran.

k) **AIS and Depot Maintenance Facilities:** MDC assumed that like the spare parts, the costs of design, acquisition and manufacturing of additional test and maintenance equipment are included within some other subsystem project authorizations since MDC could identify only a small number of specific pieces of equipment. However, MDC admits that its assessment is a mere assumption and that "Cubic's records are incomplete in this respect" (cf. MDC Analysis p. 21). Accordingly, in this respect, Cubic did not entirely discharge its burden to explain the reasons for which the Salvage Value is significantly lower than its direct costs. Thus, a reasonable portion of 50% of Cubic's cost proposal estimates (USD 391'868.--) shall be taken into account, i.e. USD 195'934.-- instead of USD 205'8.-- only. The difference of USD 193'876.-- shall be added to the gross Salvage Value suggested by Cubic's experts.

l) **Microwave Data Link (MDL):** In Cubic's submission as presented in the MDC Analysis, there were important differences between the design of the MDL for Iran and Canada. The Canadian range required only a direct path link between the TIS and CCS, while the Iranian-ordered system had a relay unit and associated tower. New towers had to be purchased for the Canadian system. Parts of the MDL designed for Iran were ultimately incorporated later into another Canadian contract.

Cubic's experts suggest a Salvage Value of USD 8'112.-- only as compared to Cubic's costs per CSR's of USD 544'148.--. Iran's experts suggest a Salvage Value of USD 408'111.--. In the opinion of Iran's experts, "the amounts recovered from the sale of equipment were probably not credited to P401 account. Otherwise, it is inconceivable [sic] that the value could have been depreciated by such substantial amount" (Claimant's Quantification Exh. 2, Item No. 5-11). Since Cubic's experts did not support, in their replies to Iran's experts, their original assessment by amending the original reasoning (MDC Report II p. 18) and taking into account also that "the exact identification of the components used in the Canadian ACMR cannot be made from the existing Cubic records" (MDC Analysis p. 22), the Tribunal concludes that Cubic did not entirely discharge its burden to explain the reduction in value. Accordingly, one fourth of the costs per CSRs, i.e. USD 136'037.--, USD 127'925.-- more than suggested by MDC, shall be assigned as Salvage Value.
m) Data for the items discussed hereinabove under Subs. a) to l): Both Parties' experts agree that the data (numerous reports, manuals and training material) produced in the context of the System for Iran could not be reused within other contracts. Accordingly, Iran accepts that no Salvage Value is assigned to this item (cf. Iran's Counter proposal for Exhibit 14).

n) Air Conditioning: Pursuant to Contract Amendment No. 2, three air conditioning units were to be furnished and installed by Cubic whereas a fourth unit was to be a spare. The price amounted to USD 143'500.--. Cubic states that "several" units were capitalized and reused by Cubic and suggests a Salvage Value of USD 39'558.-- based on the "full material value" for the air conditioning units. MDC explains the important difference between the contract price of USD 143'500.-- and the Salvage Value of USD 39'558.-- by referring to the fact that the contract price included the installation of the air conditioners. However, Cubic’s evidence is not convincing in this respect. Apart from the fact that Cubic did not explain reasons for the particularly high installation costs, MDC based its assessment of the Salvage Value on the basis of two units only instead of four while it indicated - without the required precision - that "several" units were capitalized and reused. Since Cubic's costs amounted to USD 19'779.-- per unit (MDC Analysis, Exh. 10) and since Cubic intended to credit the full material value (MDC Report II p. 18), the appropriate Salvage Value is USD 79'116.--, i.e. USD 39'558.--more than MDC Salvage Value.

o) Other Costs: Cubic established various subaccounts in its internal record keeping - such as for "support management", "support equipment", "training" and "other" - which did not correspond with any identifiable contract line item. In these categories, Cubic incurred costs in the aggregate of USD 1'013'336.-- in the context of the System built for Iran. Since such costs cannot be applied to specific reusable items, no Salvage Value has been assigned by MDC. Iran's request that 50% of such costs be credited as Salvage Value, is not supported by any plausible argument.

15.18. It follows from the review of the various items hereinabove that the gross Salvage Value amounts to USD 4'850'899.--, i.e. USD 434'969.-- more than USD 4'415'930.-- as suggested by Iran's experts.

15.19. Since the assessment of the above Salvage Value is based on Cubic's costs and taking into account that important parts of the System could be incorporated by Cubic in the Canadian and other contracts with a profit, MDC increased the cost based Salvage Value by 20% in order to arrive at the realistic value of the material (Hearing II, Transcript pp. 676-681). The adjusted gross Salvage Value is thus USD 5'821'080.-- (120% of USD 4'850'899.--).

15.20. MDC suggested to deduct 20% of the value (USD 3'665'360.--) sold to others, i.e. USD 733'072.-- for reasons of obsolescence. Cubic's experts convincingly explained (MDC Analysis p. 5) that the working life of the major components was ten years, at best, for some components (such as computers) even much less, whether the components were in service or not. Since MDC's valuation of components completed in 1979 and sold to others in 1981 or later was made on the basis of Cubic's costs, a reduction by 20% for obsolescence is justified. No persuasive objections have been raised by Iran against this approach. Taking into account the increase of the gross Salvage Value by 10% discussed in Sect. 15.18 supra, the obsolescence reduction has to be applied to USD 4'031'896.-- (110% of USD 3'665'360.--). Accordingly, USD 806'379.-- shall be deducted from the above gross value.

15.21. In accordance with the proposal repeatedly made in the 1979 negotiations of the Parties (Sect. 9
supra), a sales commission or brokerage fee has been applied in favour of Cubic on material sold to others. The rate of 20% suggested by Cubic appears reasonable taking into account the particular nature of the market (Sect. 15.14 supra; Mr McKay, Hearing II, Transcript p. 344). Iran's expert did not submit persuasive arguments in support of a lower brokerage fee (Mr Hammer, Hearing II p. 550).

As conceded by Cubic in its Post-Hearing Brief II (p. 19), the commission shall be applied to the net cost after obsolescence. Pursuant to Cubic's chart under the "Termination for Convenience (By Analogy)" concept annexed to its Post Hearing Brief II, the commission amounts to USD 586'457.--. Consistent with the increase of the total Salvage Value, such commission shall be increased by 10% to USD 645'103.--.

15.22. Finally, MDC suggest that storage expenses and maintenance charges in the amount of USD 124'772.-- and USD 30'704.-- be deducted. No specific objections have been raised by Iran with respect to the detailed breakdown of such costs in annexes 5A and 5B to the MDC Analysis. Accordingly, such deductions in the aggregate of USD 154'772.-- shall be accepted.

15.23. In summary, the following calculation may be made:

<table>
<thead>
<tr>
<th>Description</th>
<th>USD</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Adjusted Gross Salvage Value (Sect. 15.19)</td>
<td>5'821'080.--</td>
</tr>
<tr>
<td>b) Obsolescence (Sect. 15.20)</td>
<td>806'379.--</td>
</tr>
<tr>
<td>c) Sales Commission (Sect. 15.21)</td>
<td>645'103.--</td>
</tr>
<tr>
<td>d) Storage and maintenance (Sect. 15.22)</td>
<td>154'772.--</td>
</tr>
<tr>
<td>Provisional Net Salvage Value</td>
<td>4'214'826.--</td>
</tr>
</tbody>
</table>

15.24. Further taking into account that Iran failed to specify which particular points should still be reviewed by a neutral expert (cf. Sect. 15.11 hereinabove), the Tribunal holds that the issue of the net Salvage Value of the equipment manufactured for Iran is entirely clarified by the MDC reports, in the sense that such reports, together with the additional explanations given by Cubic's experts at the Hearing II, are entirely persuasive evidence that the Salvage Value did not exceed USD 4'214'826.--. Accordingly, the Tribunal rules that Iran's request relating to the appointment of a neutral expert be denied.

15.25. Making use of its discretionary authority referred to in Sect. 13.8 supra, the Tribunal concludes that an amount of USD 4'200'000.-- shall be taken into account, as Salvage Value, when assessing Cubic's compensation under the Sales Contract.

16. ALLOWANCE FOR PROFITS
16.1. When assessing Cubic's Gross Profit as defined in Sect. 13.3 supra, the Tribunal takes into account the following factors:

a) It is not seriously contested that Cubic had practically completed the work to be done under the Sales Contract when such contract was discontinued in June/July 1979 since the installation of the System in Iran as well as flight testing and training was covered by the Service Contract. Since Cubic is an experienced manufacturer of air combat manoeuvring ranges, only a little risk that the provisional acceptance tests (Milestone 3) and the requirements for final acceptance (Milestone 4) would not be completed as scheduled, must be taken into account.

b) But for the Islamic Revolution, Cubic could reasonably expect to be paid under the Sales Contract the total contract price of USD 18'068'670.--. Such revolution occurred in Iran's sphere of risks, not in Cubic's.

c) As a consequence of the Islamic Revolution and its impact on the U.S. American-Iranian relations, Cubic had poor chances of timely obtaining the renewal of its export licence. It was Cubic's responsibility to obtain the licence and its renewal. Pursuant to Sect. XI of the Sales Contract, Cubic was to return the entirety of the advance payments to Iran "if after one year the required renewal approval is not obtained" (Sects. 8.6 to 8.8 supra).

d) High research and development costs secured Cubic's quasi-monopoly in the market of air combat manoeuvring systems. Such market is small in the sense that only states with sophisticated air force defense units qualify as potential customers; it is further limited by the requirement that normal political relations with the U.S. must exist since export licences would not be obtained otherwise. This explains why Cubic made only approximately 22 sales in the last 21 years prior to the Second Hearing (Mather, Transcript p. 374).

e) Expended Funds as credited in Sect. 14 supra cover only Cubic's direct costs. Accordingly, Cubic's profit margin must cover, in addition to the research and development costs referred to above. Cubic's general and administrative costs as well. Taking into account Expended Funds of USD 10.5 million (Sect. 14) and the contract price of USD 18 million, Cubic was to expect a Gross Profit in the amount of USD 7.5 million, representing a gross profit margin of 70% approximately.

f) Iran did not receive any benefits from the Sales Contract (Sect. 13.7 supra).

g) Cubic derived financial advantages from the funds it had received as Iran's advance payments since Iran made an initial payment of 50% shortly after the signing of the Sales Contract (October 23, 1977) whereas Cubic incurred the costs and expenses of manufacturing the System mainly in 1978.

h) Cubic derived further advantages from the reuse of the System manufactured for Iran which occurred in the essence in 1982 (Canada sale, Sect. 12.14 hereinabove) whereas it will compensate Iran for the balance resulting from the Salvage Value as from September 1991 only (Sect. 19.7 hereinafter). The Tribunal notes on the one side that Iran has failed, for many years, to clearly request the reimbursement of its advance payments (it preferred to demand specific performance of the Contracts in contradiction to its earlier statements). On the other hand, Cubic should have submitted its termination account, including the accounting on the Salvage Value, without awaiting Iran's request.
16.2. Applying the discretion granted under the Termination for Convenience Clause ("allowance" for profits, Sect. 13.5 supra) and pondering the various factors referred to hereinabove, the Tribunal concludes that Cubic's contractual gross profit margin shall be reduced from 70% (subparagraph e supra) to 33%. Accordingly, an amount of USD 3'500'000.-- shall be taken into account, as Cubic's Gross Profit, when assessing Cubic's compensation under the Sales Contract.

17. RESPONDENT'S COMPENSATION UNDER THE SERVICE CONTRACT

A. Cubic's Counterclaim for Services Rendered

17.1. Cubic requests to be awarded "an amount billed and unpaid of USD 74'443.-- under the Service Contract" with reference to services rendered and billed by Cubic in the total amount of USD 377'300.-- as compared to Iran's payment in the amount of USD 302'857.-- only (Terms of Reference Sect. 3.4.2). Cubic's contention is supported by two invoices of USD 21'379.-- and 21'050.-- in the total amount of USD 42'429.-- (Exh. 49) to which Cubic explicitly referred when contending the services rendered (Defense and Counterclaim p. 43) and by three additional invoices (Exh. 65) in the total amount of USD 30'014.--. Cubic continued to claim USD 74'443.-- in its Statement of Defense and Counterclaim (p. 60) and in its most recent Memoranda.

17.2. In its Rebuttal Statement and Answer to Counterclaim, Iran did not specifically contest Cubic's allegations relating to services rendered and billed, since - in that period - the issue of the quantification of the Claim and Counterclaim was excluded from the proceeding (cf. Procedural Order No. 1 Sect. 1). Subsequently, Iran contested to have received Cubic's unpaid invoices prior to the instant arbitration and stated that it was not able, for this reason, "to attest the claim thereon" (Claimant's Comments on Quantification Exh. 2 p. 6).

17.3. Under the applicable procedural rules, Cubic should have precisely described the services rendered which are, in its opinion, the basis for its claim (Terms of Reference, Sect. 7.4). Cubic's summary reference to its invoices do not comply with such requirement. At the latest when Iran raised the objections referred to above, Cubic should have amended its factual allegations by stating when it had sent the invoices to Iran and/or what services it had rendered, both with the appropriate offers of evidence. It failed to do so.

Further noting that the burden of proof is Cubic's, the Tribunal concludes that Cubic's counterclaim for the balance of USD 74'433.-- (USD 377'300.-- less payments of USD 302'857.--) must be dismissed.

B. Iran's Claim for Reimbursement

17.4. Iran's claim for the reimbursement of USD 302'875 -- (sic, Terms of Reference, see Sect. 5.1 hereinabove; recte USD 302'857.--) must be dismissed for the following reasons:
a) "...where invoiced amounts for sales were not objected to by the purchaser within a reasonable time after their receipt...the burden shifted to the purchaser to prove that it did not owe the amount of those invoices." (cf. Aldrich, op.cit., pp. 334/335).

b) This principle must be applied, all the more, in the event that a purchaser has not only received, but fully paid the invoices.

c) In the instant case, Iran failed to specify any objections with respect to invoices it had paid prior to the termination of the Service Contract, by alleging e.g. that certain invoiced services had not been rendered at all and/or that other services had not been rendered in accordance with the contractual standards.

d) The fact that Cubic's services were no longer of any benefit to Iran since the ACMR was not delivered, does not represent a valid reason for the reimbursement claimed by Iran. Nothing in the Termination for Convenience Clause permits to assume that the contractor should not remain entitled to a compensation for services rendered prior to the termination. On the contrary, such compensation may even "include a reasonable allowance for profit on work done" (Subparagraph d).

C. Cubic's Counterclaim for Unabsorbed General and Administrative Expenses

17.5. In the context of the Service Contract, Cubic requests to be credited an amount of USD 1'583'725.-- as unabsorbed general and administrative expenses. The entire amount is contested by Iran for various reasons (Claimant's Comments on Defendant's Statement of Quantification, Exh. 2, pp. 4/5). Such claim is equivalent to Cubic's Lost Profit Claim as defined in Sect. 12.8b, found time barred in Sects. 12.27 to 12.29.

17.6. If Cubic's claim was not time-barred, it would have to be dismissed for the following reasons:

a) Cubic does not indicate under which provision of Iranian law or generally accepted principles of international law the service-rendering party might be entitled to an increase of its contractual prices for services rendered in the event of an early contract termination. Cubic's discussion of this topic is exclusively based on a breach of contract theory and fails to take into account that the Parties' respective claims have to be assessed under the Termination for Convenience Clause as discussed in Sects. 11.23ss and 13.1ss hereinabove.

b) Cubic's invoices include - in accordance with Clause VIII of the Service Contract - 15% profits in material and subcontract amounts and 31% "General and Administrative" and 15% profit in transportation expenses.

c) Cubic fails to indicate under which contractual provision the alleged entitlement to an increase of its prices might be justified.

d) The only contractual provision which may be taken into consideration as basis for an "equitable
adjustment" of contractual prices in the event of an early contract termination is lit. c of the Termination for Convenience Clause. However, this clause provides for an "equitable adjustment" of prices only in the event of a partial termination. Accordingly, the Service Contract must be construed, e contraria, in the sense that prices shall not be adjusted in the event that the contract be terminated in its entirety. In the instant case, the Parties' conduct amounts to the termination of the entire future parts of the Service Contract.

17.7. Further noting that the burden of proof is Cubic's, the Tribunal concludes that Cubic's claim in the amount of USD 1'583'725.-- for unabsorbed general and administrative expenses would have to be entirely dismissed if it was not time barred.

17.8. Cubic does not claim lost profit with respect to the terminated parts of the Service Contract under the theory of Termination for Convenience (see chart annexed to its Post Hearing Brief II).

18. SUMMARY OF THE PARTIES' TERMINATION ACCOUNTS

18.1. Under the Sales Contract, credit has to be given to Iran for its advance payments of USD 12'608'519.--

On the other hand, Cubic is entitled to a compensation calculated on the basis of the following elements:

a) Expended Funds
(Sect. 14)
USD./ 10'500'000.--

b) less Salvage Value
(Sect. 15)
USD 4'200'000.--
USD 3'500'000.--

/. 9'800'000.--

Accordingly, Iran is entitled in balance to an amount of USD 2'808'519.--

18.2. No additional claims have been awarded under the Service Contract (Sect. 17).

18.3. The Tribunal concludes in summary

a) that Iran's claim is well founded to the extent of USD 2'808'519.--,
b) that Cubic's Counterclaim must be dismissed.

19. INTEREST

19.1. Iran requests to be awarded interest at the rate of 12% "as from the date of mutual termination or, at least, as from the time MOD filed a case before Iran-U.S. Claims Tribunal on 19 January 1982" (Claimant's Comments on Quantification, p. 63).

19.2. In the context of its Counterclaim, Cubic requested to be awarded - should the Termination for Convenience Clause be applied by analogy - simple interest at the rate of 12% per annum since June 20, 1979, a date to which Cubic referred as "the date of the last meeting held in Iran before Mr Nomai returned to the United States" (Post-Hearing Brief II pp. 23-25). Similarly, in its Statement of Quantification (Report of MDC. p. 10), Cubic stated to be entitled to interest from March 22, 1979 and September 9, 1979 for Milestones 3 and 4 payments, respectively.

19.3. In accordance with the contractual stabilization clause (Sect. 7.4), the applicability of prerevolution Iranian law to the question of interest has not been disputed by either Party.

19.4. Article 719 CPC has a fixed *statutory rate of 12% per annum* for the award of interest. This rate has not been disputed by the Parties. Both Parties have applied this rate in their calculations of and requests for interest (Claimant's Post-Hearing Brief II, p. 22; Respondent's Post-Hearing Brief II, pp. 23, 25). Furthermore, there exists a settled practice in Iranian law that the rate of 12% applies also to foreign currencies (Decision no. 90-4-10-53 of the full panel of the Iranian Supreme Court, reprinted in Collection of the Laws of the Year 1353, section on judicial decisions of the full panel, pp. 28-29).

19.5. With respect to the relevant date from which the interest is to be awarded, the Tribunal takes into account the following points:
   a) Pursuant to Article 720 CPC, the Parties may agree "on the beginning of the period for damages for interest". In the instant case, both Parties applied a similar approach as to the date from which interest should run in the sense that they both referred to the earliest dates on which their respective claims may have come into being. However, such approach does not amount to an (implicit) agreement in the sense of Article 720 CPC since each Party referred to the starting date of interest calculation exclusively in the context of its own claim without accepting this approach also with respect to the opponent's claim or more generally with regard to both Parties' claims resulting from the termination account. Neither of the Parties contended that they implicitly agreed on the maturity date as starting point in the 1979 negotiations. Equally, in the submissions presented in this Arbitration, the Parties did not consistently and unequivocally refer to the maturity date as the date from which interest should be awarded. Thus, the Parties' statements made in the course of the proceedings do not amount to an agreement under Article 720 CPC either.

   b) Accordingly, the applicability of Article 721 CPC which reads:

   "In cases where there has been no arrangement in respect of damages for interest, if the relief is
demanded by legal notice the damage for interest shall be calculated as from the date of service thereof otherwise it shall be calculated as from the date of instituting the suit."

must be discussed.

c) When Iran referred to the date of the claim it had filed against Cubic before the Iran-U.S. Claims Tribunal on January 19, 1982, it did so implicitly as the date of its "legal notice" under Article 721 CPC. The rationale of the legal notice requirement under Article 721 CPC is to clearly place a debtor in default by a notice having the additional weight of being served by an authority. Apart from the fact that Iran, in its filing of January 19, 1982, primarily sought specific performance of the Sales Contract (see "Relief Sought", Statement of Claim Exh. 11) rather than restitution of its advance payments, a notice of default may not validly be given prior to the date on which the claim matured. In 1979, the Parties had agreed to postpone the maturity date until the resale of the equipment was made or until such date when it became clear that no resale would occur (Sects. 12.10 to 12.15 supra). Cubic's resale and reuse activities substantially ended in October 1982. Accordingly, the Tribunal concluded that the Parties' termination claims matured in October 1982 (Sect. 12.14 supra). Thus Iran's filing of a claim on January 19, 1982 was premature and could not serve as a legal notice under Article 721 CPC.

d) The file does not contain any legal notice (in the sense of Article 721 CPC) subsequent to Claimant's premature filing of January 19, 1982. Iran's second memorandum filed in the proceedings before the Iran U.S. Claims Tribunal (Claimant's "Response to Respondent II of September 26, 1983, see Exh. C to Cubic's Comments on Quantification) does not place Cubic in default with respect to Iran's Restitution Claim since Iran confined its allegations, at this stage, to the theory that the Contracts were not terminated and should be performed by Cubic's delivery of the AMCR (Sect. 10.8 supra). Equally, the letters addressed by Iran or on behalf of Iran to Cubic in the course of 1988 to 1990 (Claimant's Rebuttal Exh. 51 to 55) were mere invitations to negotiate; they do not qualify as legal notices under Article 721 CPC either.

e) There is a tendency in international commercial law to award interest from the time when payment has become due without any need for the aggrieved party to give notice of the default (UNIDROIT Principles. Article 7.4.9). However, although such rule has been included in the UNIDROIT Principles, it seems doubtful whether it may be considered to form part of generally accepted principles of international law. E.g., while the Iran-U.S. Claims Tribunal normally awarded interest from the date the debt was due, in a few cases interest was awarded, by the same Tribunal, only from the time it was first demanded or even from the date the claim was filed with the Tribunal (Aldrich, op.cit., p. 478s). Furthermore, even if a generally accepted principle of international law existed in this respect, the Tribunal would only be authorized to apply it as a complementary and supplementary rule, not as a rule in clear contradiction to an unambiguous provision of the Iranian law chosen by the Parties (Sect. 7.3 supra).

f) Accordingly, interest may only be awarded "as from the date of instituting the suit" (Article 721 CPC), i.e. as from the date (September 24, 1991) when Iran filed its Request for Arbitration in the present proceeding. The Arbitral Tribunal does not overlook that Cubic - under the strict application of Article 721 CPC - solely benefits from funds which Iran would have been entitled to receive already in 1982. This aspect has been taken into account, to the extent appropriate, in the assessment of Cubic's allowance for profit (Sect. 16.1 subparagraph h).
19.6. Iran requested to be awarded interest “to the date of award in this proceeding” (cf. Sect. 3.3.1 of the Terms of Reference).

19.7. The Arbitral Tribunal concludes that Cubic shall pay interest at the rate of 12% per annum on USD 2'808'519.-- as from September 24, 1991 until the date of this Final Award.

20. THE ARBITRATION COSTS

20.1. Pursuant to Subparagraph c) of the Arbitration Clause in the Sales Contract (Sect. 2.6 supra) the “cost of arbitration shall be paid by the losing party” whereas such costs shall be borne equally under the Service Contract. While these clauses do not specify whether the term “cost of arbitration” refers only to the costs of the Arbitral Tribunal or whether it includes the legal costs of the Parties as well, Article 20 (2) of the ICC Rules to which the Parties have submitted by signing the Terms of Reference, makes it clear that the “costs of the arbitration shall include...the normal legal costs incurred by the parties”.

20.2. Pursuant to the contractual clause referred to above which is in accordance with a widely accepted allocation principle in international arbitration, the costs of the proceedings are, as a rule, borne by the losing party. If no party wins totally, the costs are allocated proportionally. However, when applying such contractual or general guidelines, the arbitrators have large discretion and they may take into consideration various other aspects as well.

20.3. In the instant case, Iran requested to be awarded a sum of USD 27'911'394.-- in the aggregate plus interest whereas Cubic raised a Counterclaim in the amount of USD 10'404'559.-- plus interest (cf. Sect. 5.1 and 6.2 hereinabove). Taking into account
a) that Iran's claims for damages in the amount of USD 15 million was time barred and did not form the subject matter of a detailed discussion by the Parties and of a detailed review by the Arbitral Tribunal,
b) that Cubic raised various preliminary defenses, in particular a time bar defense also with respect to Iran's Restitution Claim (cf. Sect. 12 supra) which proved to be ill-founded and that Cubic contested its liability in principle,
c) that Iran's Restitution Claim is admitted to the extent of less than 25% and that Cubic's Counterclaim is entirely dismissed,
the Tribunal concludes that neither party may be considered to be the prevailing party in the dispute relating to the Sales Contract. This indicates that the costs should be borne equally by the Parties. Such allocation of costs corresponds to the explicit provision in the Service Contract (quotation in Sect. 2.6 supra).

20.4. Accordingly, the Arbitral Tribunal concludes
a) that the costs of arbitration (in the meaning of the Arbitral Tribunal's fees and expenses and the administrative costs) as determined by the ICC Court shall be equally borne by the Parties, and
b) that each Party shall bear its own legal costs.

20.5. It follows from the Tribunal’s decision relating to the costs of arbitration that Iran is entitled to a reimbursement, by Cubic, in the amount of USD 60'000.-- since such amount has been advanced by Iran in excess of its 50% share in the Parties’ cost deposits as ordered by the ICC Court.

21. FINAL AWARD (DISPOSITIVE PART)

For the reasons set forth above, the Arbitral Tribunal, deciding in accordance with the provisions of the ICC Rules of Conciliation and Arbitration, renders the following Final Award:
1. Cubic Defense System, Inc. (“Defendant”) shall pay the Islamic Republic of Iran (“Claimant”) the amount of U.S. Dollars 2'808'519.-- together with (simple) interest on such amount at the rate of 12% per annum as from September 24, 1991 until the date of this Final Award.

2. Claimant’s further claims as well as Defendant’s counterclaim are dismissed.

3. The costs of this arbitration fixed by the ICC International Court of Arbitration at USD 490'000.-- shall be equally borne by both Parties, i.e. in the amount of USD 245'000.-- by each Party. Accordingly, Defendant shall reimburse Claimant the amount of USD 60'000.-- advanced by Claimant in excess of its 50% share in the Parties’ cost deposits.

4. Each party shall bear its own legal costs.