I. INTRODUCTION

1. On 26 September 1972 the Claimant, Anaconda Iran, Inc. ("AI"), entered into an agreement, entitled "Technical Assistance Agreement" ("TAA"), with the Sar Cheshmeh Copper Mining Company of Kerman, the predecessor in interest of the Respondent National Iranian Copper Industries Company ("NICIC"). According to the TAA, AI was to provide NICIC with certain technical assistance in connection with the development, construction and operation of an opencast copper
mine and related plant and smelter in Sar Cheshmeh in Iran. In consideration therefor AI was entitled to reimbursement of expenses incurred and payment of a certain fee. It is common ground in these proceedings that the TAA terminated prior to its term. The circumstances surrounding the rupture of contractual relations essentially are not in dispute between the Parties. They do contest, however, the scope and applicability of certain contractual provisions, each alleging breach of the TAA by the other Party. The issues before the Tribunal include a determination as to whether either Party (or both of them) justifiably could invoke force majeure as an excuse for non-performance of contractual obligations as well as a determination of the cause of termination of the TAA. With respect to the substantial counterclaims raised in this Case, the Tribunal, previously decided to deal initially only with jurisdictional and certain other preliminary issues. Consequently, the present Award does not reach the merits of the counterclaims in this Case.

IV. THE CLAIM

A. Introduction

14. On 7 March 1971, after extensive discussions, representatives of Anaconda and the Imperial Government of Iran signed a "Memorandum Of Principles Upon Which Definitive Agreements Are To Be Based" ("Memorandum Of Principles") with a view towards the development of a copper orebody in Iran known as Sar Cheshmeh. The Memorandum Of Principles, which expressly foresaw "definitive agreements" in due course, specifically provided that the eventual contractual parties would be AI and a then as yet unformed Iranian joint stock company.

15. By 26 September 1972 the definitive agreement, the TAA, was signed by AI and Sar Cheshmeh Copper Mining Company of Kerman, the envisioned Iranian joint stock company agreed by the Parties here to be the predecessor in interest of NICIC. The TAA was accompanied by execution of an agreement between AI and its basic parent, Anaconda, which was to provide AI with various services in performing its obligations under the TAA.

16. Generally, AI's obligations pursuant to the TAA were to provide technical data and assistance of various kinds, a detailed training program for personnel, and, at the outset, an extensive feasibility study. Essentially, AI was to provide the requested data and assistance "for the design, construction, placement into commercial operation and operation and maintenance of" an opencast mine and related equipment and a plant for the milling and concentration of sulfide ores and the smelting of the resulting concentrates by described processes to produce cast blister copper. In return for its services AI was to be paid various described costs and expenses, as well as a fee ("Technical Service Fee"), which after a certain point would be U.S. $333,333 per month "until the first day of the Calendar Month next following Commencement of Commercial Production" (which "Commencement" also is described as the "Date of Operation"). All payments due AI were payable in U.S. Dollars. It is common ground in this proceeding that at all times relevant to the present claim the monthly Technical Service Fee amounted to U.S. $333,333 and that commercial production as contemplated by the TAA did not commence during the life of the TAA.

B. Facts and Contentions

17. As the Claimant has presented its case, both Parties performed under the TAA at least up until 1978. Sometime in 1978 it appears that a dispute emerged between the Parties as to AI's method of billing and justification invoked for allegedly reimbursable expenses. The Parties appear to agree that, following meetings held in June 1978, a procedure was mutually agreed for timely payment of amounts agreed to be due. Although the Claimant alleges that, in spite of this agreement, NICIC remained in default all through the rest of 1978, it is undisputed that AI did not invoke this apparent breach as a ground for termination of the TAA during the course of 1978.

i) Withdrawal of AI'S Personnel

18. The Claimant alleges that by 5 January 1979 social and political unrest in Iran had increased to such a degree that AI felt compelled to exercise its right, pursuant to Section 2.06 of the TAA, to invoke force majeure as an excuse for non-performance of its obligations, and proceeded to withdraw its personnel from Iran. Section 2.06, the only contractual provision on force majeure, reads as follows:
the expiration of such 12-month period. Upon any such termination, [NICIC] shall pay to AI within 30 days after such termination (i) all amounts then due and unpaid under this Agreement, (ii) all Termination Costs, and (iii) an amount in U.S. dollars equal to the aggregate of the fee that would otherwise have been payable to AI under this Agreement during the three-month period subsequent to the date of termination. [The following text contains stipulations regarding the occurrence of *force majeure* incidents after the Date of Operation. These stipulations are not relevant here (cf. paragraph 16, in fine, supra).]

19. AI notified NICIC by letter (and cable or telex) of its invocation of *force majeure* as follows:

Due to the internal disruptions in Iran, it has become impossible for Anaconda-Iran seconded employees to function in their assigned tasks with respect to the Sar Cheshmeh project. The persistence of force majeure incidents beyond the control of Anaconda-Iran requires that we send to you the enclosed notice [not in evidence in this Case] of force majeure and take steps to reassign the seconded staff to locations outside of Iran.

Our present plan is to return the seconded staff and their dependents to their point of origin. Employees will be retained on the payroll and, to the extent feasible, will be assigned other duties. Our objective is to have the staff available to return to Iran when the force majeure conditions cease and work can resume on the Sar Cheshmeh project.

20. The following day, 6 January 1979, NICIC replied, denying the existence of *force majeure* and demanding that "the personnel . . . remain at the site and continue to perform their duties and obligations under the" TAA. The same communication stated also that "we have no objection to Anaconda's seconded staff dependents leaving Iran".

21. Despite NICIC's plea, the Claimant withdrew its personnel and reassigned them to locations outside Iran.

22. NICIC contends that this withdrawal of AI's personnel from Iran constituted a breach of the TAA on the part of AI as NICIC rejected AI's invocation of *force majeure* by its telex of 6 January 1979. In any event, it argues, the . conditions in Iran, at the time, did not constitute force majeure.

**ii) Termination of the TAA**

23. Although the Parties disagree in other respects, it is, in any event, undisputed that neither Party performed under the TAA after 31 May 1979. In support of their respective contentions regarding termination the Parties rely, inter alia, on an exchange of telexes and letters during the period 22 March 1979-31 May 1979.

24. This exchange was initiated by AI's notification to NICIC, by letter and telex dated 22 March 1979, that NICIC was "in arrears" to the extent of U.S. $2,280,944.82 and that if such total were not paid within 25 days AI would exercise its right to terminate the TAA under its Section 9.03.

25. NICIC protested by telex, dated 11 April 1979, stating that "we . . . still await the documents substantiating the expenses incurred by you" and that in any event such action was unjustified because of "your unilateral action of withdrawal". NICIC further suggested that an authorized representative be sent to Tehran to negotiate and settle outstanding differences.

26. By return post (and confirming telex) AI then advised that necessary documentation had been provided already, but noted that nonetheless "we are sending you by courier additional copies of documents substantiating the amounts due" and extended the cure period to 1 May 1979. AI reiterated its decision to terminate as of that latter date pursuant to Section 9.03 if by then payment were not received in full of amounts due as of 1 March 1979. AI stated that a decision whether or not to send a representative to Iran would await the passage of that deadline.

27. On 30 April 1979 NICIC once more dispatched a telex to the Claimant, this time explaining that "due to instructions by
the Islamic Republic of Iran” no payment could be made except “after auditing all accounts”. This message noted that such audit was under way and "we have found out differences which needs [sic] to be solved". Once more the Claimant was urged to send a representative to Iran.

28. By letter and telex of 2 and 3 May 1979, respectively, AI advised NICIC that it would extend the cure period, this time until 25 May 1979. AI suggested that NICIC in the meantime “furnish us as soon as possible your identification of any account items where you believe differences exist that need to be solved”.

29. Just before this last deadline, on 22 May 1979, NICIC telexed that it had completed its audit, that certain documents still were required and that substantially the full amount claimed was still in dispute, i.e., U.S. $2,200,000. NICIC once again reiterated its request that the Claimant send a representative to Iran and that NICIC “will do . . . [its] best to settle all differences in good faith”.

30. Finally, AI notified NICIC by telex and letter, dated and sent 31 May 1979, that:

[T]he agreement is terminated effective May 31, 1979. The reason for the termination is Section 9.03 of the agreement. The reason for termination is that NICIC has failed to pay in accordance with the agreement amounts due AI.

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31. In support of their contentions in this Case, both Parties rely on Article 9 of the TAA, which is entitled “Termination”. This Article provides, in its entirety, as follows:

9.01 Except in the case of force majeure as provided in Section 2.06 of this Agreement, this Agreement may not be terminated by either party without cause and may be terminated for cause only as provided in this Section 9.

9.02 Except as provided in Section 9.03, if this Agreement is breached by either party, the parties will in good faith endeavor to remedy the breach. If a party believes that a material breach has continued unremedied for a period of 90 days following notice to the other party specifying such breach, either party may apply to ICC for a decision as to whether such material breach has occurred. Any failure by [NICIC] to pay in accordance with this Agreement any amounts due AI or Staff will be deemed to be a material breach. The decision of ICC shall be determined by arbitration by three arbitrators all in accordance with the Rules of Conciliation and Arbitration of ICC. Such arbitration shall take place in Paris, France. Pending such decision, the parties will continue to perform their respective obligations in accordance with this Agreement. If a material breach is determined by ICC to have occurred, ICC shall make an award in favor of the non-breaching party terminating this Agreement and setting forth damages to the full extent (but not in excess) of the amounts specified in Sections 9.04 or 9.05, as the case may be, without reductions or offsets of any kind or type whatsoever. The costs of arbitration shall be paid by the parties in the manner directed by the arbitrators in accordance with the Rules of Conciliation and Arbitration of ICC.

9.03 Notwithstanding, and as an alternative remedy to, the provisions of Section 9.02, if [NICIC] fails to pay in accordance with this Agreement any amount due AI or Staff and such amount is not paid within 25 days after AI has given [NICIC] notice of such failure to pay, AI may terminate this Agreement and the amounts specified in Section 9.05 shall be paid by [NICIC] to AI. In the event of such termination, AI shall have the right to request ICC to determine the exact amount payable to AI specified in Section 9.05. Upon such determination by ICC, ICC shall make an award in favor of AI setting forth damages to the full extent (but not in excess) of the amount specified in Section 9.05 without reductions or offsets of any kind or type whatsoever.

9.05 If this Agreement is terminated pursuant to Section 9.02 an account of a material breach by [NICIC] or if AI

days after termination, an amount in U.S. dollars equal to the aggregate fees that shall have been received by AI under this Agreement during the 18-month period preceding the date of termination.
has terminated this Agreement pursuant to Section 9.03, then [NICIC] shall pay to AI within 30 days after termination (i) all amounts then due and unpaid under this Agreement, (ii) all Termination Costs, and (iii) an amount in U.S. dollars equal to the aggregate of the fees paid or due to AI under this Agreement during the 18-month period preceding the date of termination.

9.06 The parties agree that judgment upon the award rendered by ICC under this Section 9, and any amounts payable under Sections 9.03, 9.04 or 9.05, may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the award or amounts and an order of enforcement, as the case may be.

9.07 The parties shall be entitled to no remedies of any kind or type whatsoever (except as specifically provided in Section 2.06 and this Section 9) and to no damages of any kind or type whatsoever (except for amounts payable under Sections 2.06, 9.02, 9.03, 9.04 or 9.05) under this Agreement, with respect to the performance of this Agreement, or in any way relating to the Project, the Facilities or action or inaction of any member of the Staff or any employee of [NICIC], AI or Anaconda.

32. AI contends that NICIC, at the time of termination, as well as during the major part of 1978, was in default in payments due AI. Although AI had furnished duplicate copies of all invoices and supporting documents pursuant to the procedures mutually agreed to by the Parties for timely payments of all amounts due, NICIC had not paid AI reimbursable expenses since early 1978; salaries and fringe benefits since April 1978; and the Technical Service Fee since October 1978. Contractually provided interest had not been paid at all. Section 9.03 explicitly authorized AI to terminate the TAA for failure on the part of NICIC to pay "any amount due" on condition that NICIC was offered an opportunity to cure the default within a prescribed 25 day period. As is evidenced by AI's communications to NICIC, NICIC was in fact offered an opportunity to cure the default. AI even extended this cure period twice. The provisions in Section 9.02, requiring a referral to and determination by the Court of Arbitration of the International Chamber of Commerce as to the existence of a material breach, relate to causes other than default in payment by NICIC. AI specifically contends that pursuant to the TAA it retained its right to terminate the TAA for cause during the period when AI's performance was excused due to force majeure. As the TAA was terminated because of NICIC's material breach, AI claims entitlement to the equivalent of 18 months Technical Service Fee, as provided for in Section 9.05 (iii) ("Termination Damage"), in addition to the amounts due and its "Termination Costs". Pursuant to Section, 1(w) of the TAA "Termination Costs" are defined as "any cost to AI related exclusively to termination of this Agreement that would not have been incurred by AI except for such termination, unless any such cost is specifically excluded by this Agreement".

33. Although NICIC concedes that, as of the beginning of 1979, certain amounts were due AI, it disputes that this non-payment of amounts due to AI constituted a breach of the TAA. NICIC contends that from the execution of the TAA until January 1979 there occurred, on several occasions, delays in the payments to AI. It asserts that in accordance with commercial practice as well as a practice between the Parties good faith negotiations were undertaken when disagreement occurred as to amounts due. When an agreement had been reached, the outstanding amounts were settled in lump sums. Pursuant to this practice, NICIC states it made good faith attempts, which were not heeded by AI, to seek a negotiation with AI concerning the amounts AI alleged NICIC was delinquent in paying. According to NICIC, this is evidenced by, inter alia, NICIC's responses to AI's communications. NICIC further contends that Sections 9.02 and 9.03 of the TAA require that a dispute between the Parties as to the existence of a material breach be referred to the ICC, and that the Parties were required to perform under the TAA pending such a determination. No material breach was determined on the part of NICIC, as AI did not refer this issue to the ICC.

34. NICIC disputes AI's alleged entitlement to payment for Termination Costs and Termination Damage as well as the claimed interest thereon on the ground that AI had ceased to perform its obligations as of 5 January 1979 and that it did not resume performance prior to the termination of the Agreement.

35. NICIC further argues, although not entirely consistently, that "[u]nder the Civil Code of Iran and in accordance with the established general principles of law" AI cannot claim entitlement to payment for services not rendered, i.e., for the services not rendered for the period subsequent to 5 January 1979. NICIC does not, however, invoke this argument as a
ground for disputing AI's claimed reimbursement for "administrative costs". It appears, furthermore, that NICIC's position is modified by statements made in an audit report ("Audit Report") on which it otherwise relies (see paragraph 38, infra). Although it disputes

the amounts claimed pursuant to this Audit Report, NICIC appears to admit liability for employee salaries and fringe benefits as well as for the Technical Service Fee up to and including the whole month of January 1979.

36. In any event, NICIC disputes any present liability to AI. NICIC alleges that AI has been negligent in performing its duties under the TAA, as further evidenced and developed in NICIC's counterclaims, and that AI owes NICIC substantial amounts as damages far exceeding NICIC's debt to AI. In addition, NICIC claims entitlement to a "set-off" an account of unpaid taxes and social security premia in the amount of U.S. $6,814,463.08, also as further developed in its submission. Consequently NICIC asserts it has no present liability to AI; on the contrary, it is AI which is liable to NICIC.

iii) Contentions as to Amounts Claimed

37. On the basis of the foregoing facts and its contentions AI now seeks payment of the following amounts, all allegedly payable under the TAA: (i) U.S. $1,332,176.77 as reimbursable costs incurred through May 1979 (including U.S. $121,876.34 incurred prior to May 1978); (ii) U.S. $839,358.86 for employee salaries incurred from May 1978 through March 1979 and in May 1979 and U.S. $257,742.14 for fringe employment benefits incurred from May 1978 through March 1979; (iii) U.S. $2,333,331 for scheduled unpaid Technical Service Fees from November 1978 through May 1979; and, pursuant to Section 9.05 of the TAA, (iv) U.S. $428,159.73 for Termination Costs and (v) U.S. $6,000,000 equalling the Technical Service Fee paid or due to AI under the TAA during the 18-month period preceding the date of termination. The principal of the Claim thus totals U.S. $11,190,768.50. AI further seeks contractually agreed compound interest. Pursuant to calculations it has provided, AI claims interest, through November 1981, in the amount of U.S. $6,836,665.38, and from "18 December 1981" until "the date of the Award" on the total of U.S. $18,027,433.88. Finally, AI seeks reimbursement for its costs of arbitration in the amount of U.S. $418,049.94.

38. NICIC's position is reflected in the Audit Report drawn up following an audit of AI's invoices on the basis of available documentation. Pursuant to this Audit Report, and subject to the other objections raised, NICIC admits liability to AI for the following amounts: (i) U.S. $201,334.10 as reimbursement for actual costs incurred through May 1979; (ii) U.S. $753,408.02 for direct payments to AI and seconded employees and reimbursable fringe employment benefits incurred from May 1978 up to and including January 1979; (iii) U.S. $999,999 for scheduled unpaid Technical Services Fees from November 1978 up to and including January 1979. In total, NICIC thus recognizes unpaid amounts totalling U.S. $1,954,741.12, all the while disputing all other claimed amounts as well as any interest thereon.

C. Reasons

39. The Tribunal finds that the positions of the Parties, as well as practical considerations, require the Tribunal initially to address the general contentions of the Parties, before entering into a detailed examination of the amounts claimed.

i) Withdrawal of AI's Personnel

40. The first issue before the Tribunal is to determine whether AI'S undisputed non-performance under the TAA starting 5 January 1979 was excused by force majeure as claimed, or instead constituted a breach of contract as NICIC contends.

41. The Tribunal considers it generally recognized that force majeure is an excuse for non-performance of a contractual obligation which depends on the facts and circumstances. When there is a situation of force majeure, the performance of contractual obligations will, partially or totally, be suspended. Force majeure also can have the effect of terminating a contract if force majeure renders performance of the contract impossible in a definitive way or for a prolonged period of time.

42. As force majeure arises out of and depends on factual circumstances, it will affect a contract as soon as the circumstances emerge which create the obstacle to performance. The actual effect force majeure will have on the contract depends, however, on the extent to which these circumstances, practically and objectively, render performance
impossible. Consequently, the existence of force majeure does not depend on, or arise out of, an agreement between the parties as to the existence of such circumstances. Nor is the application of force majeure dependent on any special formal requirements, unless the contract in question so provides.

43. Under a variety of names most, if not all, legal systems recognize force majeure as an excuse for contractual non-performance. Force majeure therefore can be considered a general principle of law. It follows that the right to invoke force majeure does not depend on, or arise out of, an express contractual provision. The parties to a contract may, however, agree that force majeure will have certain specific consequences for their contractual performance or with respect to termination of the contract. They also can decide that their contractual obligations, or some of them, will not be affected by force majeure. It is clear, however, that a limitation on the right to invoke force majeure as an excuse for non-performance cannot be presumed, but requires instead an express contractual provision to that effect.

44. In the present Case it is undisputed that AI notified NICIC by telex, dated 5 January 1979, that AI, as of that date, could not perform its obligations under the TAA due to force majeure. The contractual authority invoked by AI was Section 2.06 of the TAA.

45. The Tribunal finds that it follows clearly from Section 2.06 that AI had a right to invoke force majeure as an excuse for nonperformance of its contractual obligations.

46. The Tribunal does not accept NICIC's argument that force majeure cannot be an excuse for AI's non-performance because it rejected AI's notification by telex of 6 January 1979. As already noted, the Tribunal finds that the existence of force majeure conditions does not depend on, or arise out of, an agreement between parties, but that it is a consequence of certain circumstances.

47. As concerns NICIC's contention that force majeure conditions were not in fact prevailing in Iran at the relevant time, the Tribunal notes that it has previously ruled that, at least during the time from December 1978 until 15 February 1979, the conditions in Iran were such as to amount to force majeure:

It can indeed be concluded that at least by . . . 5 December 1978 the conditions in Iran had ripened into a force majeure situation. As stated by the Tribunal in other cases, "by December 1978, strikes, riots and other civil strife in the course of the Islamic Revolution had created classic force majeure conditions at least in Iran's major cities. By 'force majeure' we mean social and economic forces beyond the power of the state to control through the exercise of due diligence."


48. Furthermore, in the cited awards the Tribunal found that these force majeure conditions entitled United States corporations to withdraw their personnel from Iran and suspend their performance for the period of force majeure. In addition, the Tribunal specifically has found that force majeure prevailed in the Sar Cheshmeh area during the time here relevant. See International Schools Services, Inc. v. National Iranian Copper Industries Company, Award No. 194-111-1 at 13-14 (10 October 1985).

49. In accordance with its established practice the Tribunal finds that AI, in any event, was excused from performance under the TAA from the time of departure of AI'S personnel in January 1979 up until 15 February 1979 due to force majeure.

50. The Tribunal notes that after 15 February 1979 the conditions in Iran gradually evolved towards more normal conditions, but that it is neither possible nor necessary for the Tribunal to establish, with accuracy, the exact point in time when the conditions in Iran, generally, no longer constituted force majeure conditions. Under the circumstances of this
Case, however, the Tribunal finds that at least up until 31 May 1979 the conditions in Iran were such as to justify continued non-performance by AI to the extent that contractual performance required the presence in Iran of United States personnel.

ii) Termination of the TAA

51. AI alleges a material breach on the part of NICIC, i.e., its default in payment of amounts due to AI, as the cause of termination of the TAA. Although AI contends that amounts were outstanding starting with May 1978, it does not contend that this alleged breach was invoked as a ground for termination at any time prior to 22 March 1979.

52. In its Memorial filed 4 February 1985 NICIC for the first time conceded that it owed AI a total of U.S. $1,954,741.12 as of in or about January 1979. NICIC does not allege that it paid these amounts during the year preceding termination of the TAA. NICIC disputes, however, that this default constituted a material breach within the terms of the TAA.

53. NICIC first defends its failure to pay by alleging that a practice between the Parties had emerged whereby they would be bound in case of a dispute to conduct settlement negotiations in good faith prior to exercising their express rights pursuant to the TAA. NICIC contends that AI's refusal to participate in such negotiations in good faith, i.e., by refusing to send a representative to Iran, thus precludes AI from terminating the TAA for NICIC's failure to pay "any amount due". NICIC even has contended that this practice amounts to a general commercial practice. Although it agrees that contracting parties invariably are bound to exercise good faith in the conduct of their contractual relationship, the Tribunal finds that due to the prevailing force majeure conditions AI was justified in not sending any representative to Iran for negotiations. In any event, for want of substantiation, the Tribunal must reject NICIC's allegation of the existence of a practice, either of a general commercial nature or as between the Parties, which would preclude AI from exercising its express contractual rights.

54. It remains to consider two further lines of argument pursued by NICIC. The first argument, which NICIC invokes as a ground for rejecting AI's claim to payment of the Technical Service Fee and reimbursement for employee salaries and fringe benefits as of February 1979, is that AI is not entitled to receive payment for services not rendered.

55. The Tribunal just has found that AI's non-performance as of 5 January 1979 was excused due to force majeure. The issue before the Tribunal is thus to examine if, contractually or otherwise, NICIC remains liable to AI when AI's non-performance was excused due to force majeure. This issue must be distinguished from the issue as to whether NICIC was entitled, contractually or otherwise, to invoke force majeure in its favor. This question is dealt with separately below (see paragraph 60, infra).

56. The Tribunal has already recognized (see paragraph 43, supra) that parties to a contract may regulate and agree as to the effects that force majeure may have on their respective obligations. Consequently, the Tribunal must first examine the contractual provisions. Having examined the TAA, particularly the relevant Section 2.06 (the -text of which is quoted in paragraph 18, supra), the Tribunal notes initially that the TAA contains no provision which either explicitly or implicitly suspends NICIC's obligation to make contractual payments during the period when AI was excused from performance due to force majeure. The Tribunal notes; however, that the TAA does not contain any explicit provision to the contrary. Section 2.06 explicitly only provides for the effects that a force majeure situation will have on AI's obligations and is silent as to the effect of such a situation on NICIC's obligations.

The same section, in relevant parts, authorizes, however, NICIC "alone" to terminate the TAA after six months of continuing force majeure conditions. The Tribunal finds that this right, conferred solely on NICIC, is only explained if NICIC's obligation to make contractual payments was not conditioned on AI's actual performance in case of force majeure. The Tribunal further notes that although such an obligation, prima facie, may appear unfavorable to NICIC, NICIC remained entitled to require AI's unconditional continued performance immediately upon the expiry of the period of force majeure and that it is not unreasonable to assume that such entitlement constituted valuable consideration for NICIC in view of the scope and magnitude of the project in question. Consequently, it was in the interest of NICIC that AI remained obligated to incur the costs related to retention of their personnel in view of an assumed resumption of performance of the TAA. The fact that the TAA subsequently was terminated does not affect this finding. In conclusion, the Tribunal thus rejects NICIC's contention that AI's non-performance justifies NICIC's non-payment of the Technical
Service Fee, employee salaries and fringe benefits for the period from 1 February 1979 until the date of termination of the TAA.

57. The second argument advanced by NICIC is that it contends that AI did not have the right to terminate the TAA and thus obtain entitlement to payment for Termination Costs and Termination Damage under Section 9.05 (ii) and (iii) after the point in time when AI ceased to perform its obligations under the TAA.

58. The Tribunal notes that it is not disputed that AI notified NICIC on 22 March 1979 of its intention to terminate the TAA, at which time, as the Tribunal has found, AI was excused from performance due to force majeure. The issue is thus to determine whether this finding in any way affects AI's right to terminate the TAA.

59. It follows clearly from the TAA that AI, pursuant to Article 9, had the express right to terminate the TAA for failure by NICIC to pay "any amount" due, and this right is neither explicitly, nor, in the view of the Tribunal, impliedly conditioned an actual performance by AI. In the present Case it is undisputed that NICIC was in default prior to 5 January 1979. As of 5 January 1979 AI thus, contractually, had the right to terminate the TAA. The Tribunal finds that the fact that AI chose not to do so at that time, and, due to supervening circumstances, justifiably invoked force majeure, cannot have the effect that AI waived its otherwise express contractual right to terminate the TAA.

60. This issue is, however, quite distinct from the question whether NICIC could have invoked force majeure as an excuse for non-performance of its payment obligations. NICIC has, however, not invoked force majeure as an excuse for its own admitted non-performance. It has, in fact, consistently, and indeed emphatically, maintained the position that force majeure conditions were not prevailing in Iran at the relevant time. The Tribunal is therefore not asked, nor otherwise required, to decide if the circumstances existing at the relevant time were such as to justify a suspension of NICIC's payment obligations pursuant to the TAA. The Tribunal, therefore, does not reach the issue whether such a determination could affect its findings.

61. The Tribunal notes that although NICIC in these proceedings has raised substantial counterclaims on the ground of AI's alleged negligent performance under the TAA, nothing in the record before the Tribunal suggests that NICIC either contemporaneously or in these proceedings has, on this ground, asserted a material breach on the part of AI such as to entitle NICIC to terminate the TAA. Although this does not, per se, preclude a finding of liability on the part of AI on any counterclaim, the cause of termination of the TAA remains unaffected.

62. The Tribunal thus concludes that AI was entitled to terminate the TAA on 31 May 1979 due to NICIC's material breach of the TAA.

63. The Tribunal notes that at the Hearing NICIC for the first time alleged that it was NICIC that terminated the TAA at a date subsequent to 31 May 1979. Irrespective of the fact that NICIC has not substantiated this allegation the Tribunal need not decide this issue in view of its finding above (see paragraph 62, supra).

[...]

1 Separate Opinion, see p. 240 below.
2 The signature of Mr. Ansari is accompanied by the words "Concurring in part, Dissenting in part". Separate Opinion, see p. 244 below.
3 Filed 10 December 1986.

Referring Principles:

VI.3 - Force majeure