

A27-34

ORIGINAL DOCUMENTS IN SAFE

Case No. A 27

Date of filing: 6/6/1998

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of Mr Ameli
- Date 5 June 98
4 pages in English _____ pages in Farsi

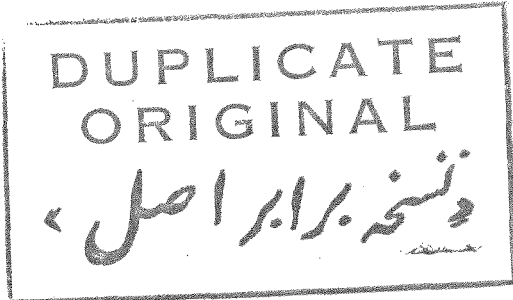
** SEPARATE OPINION of _____
- Date _____
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** DISSENTING OPINION of _____
- Date _____
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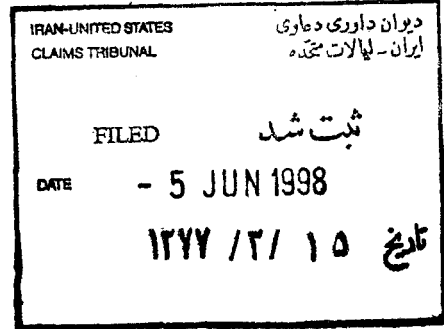
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In His Exalted Name



CASE NO. A27
 FULL TRIBUNAL
 AWARD NO. 586-A27-FT



THE ISLAMIC REPUBLIC OF IRAN,
 Claimant,

and

THE UNITED STATES OF AMERICA,
 Respondent.

CONCURRING OPINION OF KOOROSH H. AMELI

I concur in the Award in this Case and write separately to make a few observations.

I would have preferred that for the rate of interest for the post-breach period, that is, from 24 November 1992 to the date of payment, 10% be applied in accordance with the long established practice of the Tribunal, as indeed the rate of interest applied in the Award for the period from the date of the Avco Award to the breach date, 18 July 1988-24 November 1992. Award, para. 76. In intergovernmental claims, the Tribunal has consistently applied this rate.¹ The Claimant has sought this

¹ Iran National Airlines Co. and The Government of the United States of America, Award No. 334-B51-2 (30 Nov. 1987), para. 26, reprinted in 17 Iran-U.S. C.T.R. 200, 212; Iran National Airlines Co. and The Government of the United States of America, Award No. 335-B9-2 (30 Nov. 1987), para. 36, reprinted

rate and the Respondent has not argued otherwise. The Respondent in fact as recently as a year and a half ago has sought 10% interest, as pleaded by the Assistant Legal Adviser of the United States in B36, another intergovernmental case, where the United States was claimant. Award No. 574-B36-2 (3 Dec. 1996), para.76. I take note that in the present Case, the Tribunal has favored the Sylvania² formula, that is the prevailing standard in private claims, and which for the period between November 1992 and June 1998 yields to 5% on the basis of interest rates for six-month certificates of deposit of the dollar in United States markets.

As to the Claimant's legal expenses concerning the Avco proceeding before the United States Court of Appeals for the Second Circuit, I would have preferred the Tribunal to grant them for they clearly constitute "damages to compensate for a loss resulting from a breach of this Declaration or the Claims Settlement [Declaration]" under paragraph 17 of the General Declaration. In accordance with Article 32, paragraph 2, of the Tribunal Rules, the parties have also undertaken "to carry out the award without delay." As the Tribunal held in its Decision in Westinghouse, the Tribunal awards must be complied with promptly and fully. Decision No. DEC 127-389-2 (23 Apr.1997), para. 5.

in 17 Iran-U.S. C.T.R. 214, 217; Iran National Airlines Co. and The Government of the United States of America, Award No. 337-B10-2 (30 Nov. 1987), para. 22, reprinted in 17 Iran-U.S. C.T.R. 238, 244; Iran National Airlines Co. and The Government of the United States of America, Award No. 336-B12-2 (30 Nov. 1987), para. 28, reprinted in 17 Iran-U.S. C.T.R. 228, 237; Atomic Energy organization of Iran and The United States of America, Award No. 246-B7-1 (14 Aug. 1986), reprinted in 12 Iran-U.S. C.T.R. 25, 28-30; The United States of America and Islamic Republic of Iran, Award No. 128-B29-1 (5 May 1984), reprinted in 6 Iran-U.S. C.T.R. 19; Department of Environment of Iran and The United States of America, Award No. 107-B53-1 (18 Jan. 1984), reprinted in 6 Iran-U.S. C.T.R. 105; see also, Telecommunications Co. of Iran and The United States of America, Award No. 457-B55-1 (19 Dec. 1989), reprinted in 23 Iran-U.S. C.T.R. 320, 337.

² Sylvania Technical System, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 Jan. 1985), reprinted in 8 Iran-U.S. C.T.R. 298, 320-22.

It is unclear why legal expenses directly connected with the breach of the treaty in the enforcement proceeding of a Tribunal award should be incurred by the Claimant. Award, para. 77. Nor is it clear why it should be confused with the situation of successful enforcement, where there is no breach and thus no case. If the Award intends to say that in the United States legal expenses for successful enforcement of Tribunal awards is not recoverable, its relevance is quite questionable in the case of the breach of a special bilateral treaty as the Algiers Declarations. Nevertheless, even the United States has not argued that such legal expenses are unrecoverable in a successful enforcement proceeding before a U.S. court. I believe attorney's fees are likely recoverable in U.S. courts in connection with enforcement of arbitral awards, although one may have to show a bad faith refusal to comply with the award on the part of the award debtor.³ In any event, the legal expenses should be recoverable here, given Article 32, paragraph 2, of the Tribunal Rules and the conduct of Avco in refusing to comply with the award, not seeking its revision before the Tribunal under its practice (Award, para. 64, no. 6) and only contesting it in the U.S. court enforcement proceeding.

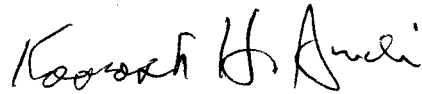
But what is disturbing in the denial of these legal expenses is its effects on the denial of the 24 cost awards for average amount of \$15,000 each on the ground that Iran has not yet sought their enforcement before U.S. courts against the award debtors and U.S. courts have not refused their enforcement and with which I have concurred, Award para. 81. It is disturbing, because by denial of the legal expenses concerning the Avco proceedings, the Tribunal has also made obviously ineffective its own cost awards, as legal expenses for their even successful enforcement would clearly exceed the amount of every cost award, especially if the legal expenses are not readily recoverable in a successful enforcement in the United States. But more importantly, denial

³ See, G. Born, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS, 627-28 (1994).

of the legal expenses here gives the United States and the U.S. cost award debtors a free ticket not to comply with these and similar future cost awards, as no reasonable claimant would commit itself to more than the awarded sum for its enforcement before U.S. courts and this Tribunal.

This will also demonstrate that under A21 there is no practical mechanism in the United States for the enforcement of these cost awards. By denying the legal expenses concerning the Avco proceeding, the Tribunal has taken away the only means for possible enforcement of the cost awards.

Dated, The Hague
5 June 1998



Koorosh H. Ameli