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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

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** DISSENTING OPINION of MR. MOSTAFAVI

- Date 18-12-86

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- Date _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

ایران - ایالات متحده

[redacted]

In the Name of God

DUPLICATE ORIGINAL

دونسخه برابر اصل

CASE NOS. 10853/10854/10855/10856
CHAMBER ONE
AWARD NO. 282-10853/10854/10855/10856-1

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date 18 DEC 1986 تاریخ
۱۳۶۵/۹/۲۷
No.

IAN L. McHARG (Case No. 10853),
WILLIAM H. ROBERTS (Case No. 10854),
DAVID A. WALLACE (Case No. 10855),
THOMAS A. TODD (Case No. 10856),

claims of less than $250,000 presented by THE UNITED STATES OF AMERICA,
Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

DISSENTING OPINION OF MOHSEN MOSTAFAVI

I dissent to the Award in Case Nos. 10853 through 10856 on several points. As I have previously commented upon taxes, social security premiums and rates of conversion, I see no need for repetition. As for the other points, I offer the following comments:

1. In my opinion, the majority acted contrary to its own policy in accepting the Claimants' memorial of 12 December, 1985. In its Order of 17 September, 1985 addressing the

Claimants' request for an extension and agreeing to this repeatedly-made request, the Tribunal stated that

> "In view of the scheduled hearing no extensions will be granted without specific and compelling reasons."

The Claimants then proceeded to make a further request for an extension, to which the Tribunal also consented. This time, however, in order to preclude any [other] extension, the Tribunal stated emphatically in its Order of 8 November, 1985, that

> "A joint Hearing will be held on 15 April 1986 as scheduled. In view thereof the Tribunal will not grant any further extensions." (emphasis added)

Notwithstanding the above, the Claimants filed yet another request, this time for a ten-day extension, on the excuse that the Farsi version of their "Supplementary Statement of Claim and Reply to Iran's Statement of Defence" was not yet ready. While it did not respond to this request, the Tribunal proceeded to grant the Respondent an additional ten days to file its rejoinder. And now, the Tribunal accepts the brief in issue as follows:

> "Iran objects to the admission of the Claimants' Documentary evidence and brief because the Farsi version was filed ten days late. The Tribunal is of the view that this delay did not occasion any prejudice as Iran was allowed an equivalent extension to file its own Documentary evidence and brief. Moreover, the Tribunal's action in declining to accept a late-filed post-hearing submission in Computer Sciences Corp. and Islamic Republic of Iran, Award No. 221-65-1, pp. 4-6 (16 April 1986), is not inconsistant. In Computer Sciences, by a posthearing Order, the Tribunal granted the Respondent's request to file posthearing submissions. The Order emphasized, however, that the Tribunal granted the request only because of 'the exceptional circumstances of this case'. The Tribunal also expressly stated in the Order that it would not grant any extensions of the time to file the posthearing submissions. In short, having taken the unusual step of permitting posthearing

> submissions, the Tribunal advised that it would require unusually strict adherence to filing deadlines. Thus, when the posthearing submissions were filed late, the Tribunal, noting that no reasons were given for the delay and that no unforeseen circumstances had occurred, declined to accept the late-filed submissions. Clearly, then, Computer Sciences is inapposite here. The Tribunal accepts the Claimants' pleading."

First of all, however, the delay in filing the brief did not relate solely to the Farsi version thereof; rather, both versions were filed together on 12 December, 1985, as the date indicated on the text of both the Farsi and English versions clearly indicates. Secondly, this policy is totally inconsistent with that applied by the Tribunal with respect to the Iranian respondent in Case No. 65. In that case, pursuant to the Order of 2 July, 1985, the Respondent was granted permission to file certain submissions by 5 August, 1985; the Order added that "The Tribunal will not grant any extensions for the Post-Hearing Submission described in paragraph 2 above." However, the respondent filed its submissions late. This issue is discussed as follows in paragraph 2 of the Order dated 4 September, 1985:

> "On 5 August 1985, the Respondent Information Systems Iran ('ISIRAN') submitted the Farsi text of the Post-Hearing Memorial. On 8 August 1985, ISIRAN submitted the Annexes to its Post-Hearing Memorial in Farsi. On 12 August 1985, the Respondent Iran Aircraft Industries filed a Post-Hearing Memorial. On 14 August 1985, the Respondent Bank Mellat filed a Post-Hearing Submission. And on 20 August 1985, ISIRAN's Post-Hearing Memorial together with the Annexes was filed in English and Farsi."

In the same Order, the Tribunal declined to accept the said memorials on the basis of the following argument:

> "In view of the Tribunal's express statement in its Order filed on 2 July 1985 that it 'will not grant any extensions for the Post-Hearing Submission,' and noting that no reasons were given by the Respondents for the lateness of their submissions, nor was the Tribunal's attention drawn to any unforeseen circumstances which might have affected the filing, the Post-Hearing

> submissions of the Respondents Iran Aircraft Industries, Bank Mellat and ISIRAN filed on 12, 14 and 20 August 1985 respectively are not allowed."

The Tribunal was well aware of the respondents' special circumstances arising out of the war-time conditions in Iran. Indeed, several months prior, the Tribunal's hearing schedules and deadlines were revised precisely because of threats by Iraq to attack passenger aircraft. Nor was the Tribunal unaware of the bombings to which Tehran was being subjected, and in fact the Tribunal was informed of these matters both orally and in writing. In that case, the Agent of the Government of the Islamic Republic of Iran by his letter of 5 August 1985 (Document No. 236) requested a fifteen-day extension, explaining therein that

> "In compliance with the Tribunal Order dated 1 July, 1985, the Farsi text of ISIRAN's Post-Hearing submission has been filed today.
>
> "As to the relevant English text as well as the other Respondents' submissions, as I have been informed, they have already been prepared and despatched from Iran, but not reached my office yet."

The reason for the respondents' delay was obvious, and gave the Tribunal no grounds for stating that "no reasons were given by the Respondents for the lateness of their submissions." Although the letter of 24 September by the Agent of the Government of the Islamic Republic of Iran objecting to this Order was written somewhat after the said Order was issued, it clearly describes those circumstances, of which the Tribunal was aware yet knowingly disregarded. According to that letter:

> "In justifying the inadmissibility of three of the five submissions filed by the Respondents, the Tribunal initially has quoted a sentence from its Order of 2 July 1985, then adding that no reasons were given by the Respondents for the lateness of their submissions.
>
> In this respect, I respectfully draw the Tribunal's attention to the second paragraph of my letter dated 5

August 1985 wherein I expressly submitted to the Tribunal that all the Respondent's briefs had been prepared and had even been sent from Tehran, but that I had not received them yet in order to submit them to the Tribunal.

With regard to the well-known facts and the problems which the Iranian Respondents encounter in preparing and translating their briefs, and especially in view of the prevailing critical conditions and the pressure, to which Iran's internal as well as external communications routes are subjected, the foregoing statement expressly and eloquently presents to the Tribunal an acceptable, justifiable reason for the untimely filing of the other submissions. There is no doubt that the respite originally scheduled by the Tribunal was very limited and inadequate, inasmuch as the relevant order was received by my office on 4 July. Thus, if the Respondents were in The Hague, they would have only 31 days to respond to the Claimant's documents, evidence and arguments-- which were filed shortly before the Hearing in five large volumes and were received by the Respondents only fifteen days before the Hearing-- while the Tribunal is quite well aware of the fact that it takes a minimum of thirty days for the return dispatch of the documents to and from Tehran. It was with regard to this very fact that this same chamber, two months after the Hearing in Case No. 33, issued an order allowing the Respondents two and a half months to file their comments about a documents.

Preparing proper briefs, incorporating responses to the Claimant's submissions and arguments in this case, translation, typing and dispatch thereof to The Hague are not easy tasks that could be accomplished in 31 days. Regarding the time to be allowed for filing of submissions by the United States Claimants, Mr. Holtzmann, the American arbitrator of the Chamber has stated that the Tribunal must allow at least one week for a document to be received by the American party (Holtzmann's Dissenting Opinion of 2 December, 1983, Iran-U.S. Claims Tribunal Reports, Vol. IV, p.64).

Thus, when I submitted to the Tribunal, in my extension request of 5 August, 1985, that the briefs were ready and had been dispatched but had not yet been received by my office, the Tribunal was expected to take judicial notice of the problems in consideration of the well-known prevailing difficult conditions facing the Respondents. Consequently, in my extension request, I mentioned the reasons for the Respondents' failure to file their submissions in time, which cause was beyond their control. In the light of the well-known prevailing circumstances and the existing difficulties, which have

> been repeatedly conveyed to the Tribunal and have been practically felt by the Tribunal, it is not presumptuous to expect the Tribunal to take judicial notice of the problems of either party to the dispute, when setting schedules."

In view of this precedent, the Tribunal should not have accepted the [present] Claimants' late-filed submission, particularly since in its Order the Tribunal expressly stated that in view of the schedule set for the hearing, "the Tribunal will not grant any further extensions" (emphasis added). Moreover, no hearing was scheduled in Case No. 65; that is to say, there was no obstacle to the granting of an extension, whereas in the present case, precisely such an obstacle did exist.

I full concur with the majority that "clearly, then, Computer Sciences is inapposite here." But this is because there was a clear and complete justification for granting an extension in Case No. 65, and yet the Tribunal majority refused to do so; whereas in the instant case, where no extension could possibly be granted, the Tribunal majority magnanimously accepted the late-filed submissions.

2. In elaborating on its comments at the Hearing, the Respondent produced four letters, which the majority has refused to accept on the basis of the following argument:

> "As to the letters referred to by the Respondent at the Hearing, the Respondent did not provide sufficient explanation of its failure until the Hearing itself to produce the letters it sought to rely on at that time. In any event, the Tribunal considers that the Parties' pleadings and other evidence on record deals adequately with the points the Respondent attempts to bring to the notice of the Tribunal through the production of these letters. In all the circumstances, the Tribunal determines that these letters should not be accepted."

The indulgence displayed by the majority in accepting the Claimants' submission is inconsistent with its severity with

respect to the letters produced by the Respondent. Of the four letters submitted by the Respondent, one is a letter from the Claimants to the Respondent, consisting of a request for an extension in order to correct deficiencies; another letter constitutes a response thereto, agreeing to the said request. Production of this letter thus cannot be said to have taken the Claimants by surprise or deprived them of their right to a defence, especially since the Claimants' own submissions indicate that they were already aware of its contents. In Document No. 99, Exhibit 15 [F], we read in a telex dated 1st August to Dr. David Wallace, that

> "He admits that the 145 [sic: read 45] days period starts from the date as we recd their letter which is 7.15.79. They do nointent [sic] to take action during this period.
>
> They are willing to give more period like three months regarding Item A above."

As for the other two letters, both of which are addressed to W.M.R.T. Consulting Engineers, one is a response from the Department of Environment to a letter by the Consulting Engineers wherein they had asserted that the Department of Environment had failed to carry out its obligations. The letter mentioned certain deficiencies and gave notice that pursuant to Article 17 (a) of the Contract, action would be taken unless the defects were corrected. The remaining letter announced termination of the Contract, in invocation of Article 17 (a) thereof. The substance of the said letters is also reflected in the Claimants' memorials and documentary evidence, which clearly show that they had received the letters and were aware of their contents. The communications submitted in Claimants' Document No. 99, Exhibit 15, clearly reveal that they had received and were aware of the substance of Respondent's letter of 28 June, giving notice of deficiencies to be corrected. It is stated in paragraph 2 of Exhibit 15D to Document No. 99, that

> "They had received a letter from the D of E, dated more than a month ago, but only recently received citing WMRT Iran, Inc. as being deficient in not having provided Farsi translations among other things. These items were reported to Narendra Juneja at meeting of October 31, 1978, and presumably refer to the aggregate 20% of the work that Sedaghatfar claimed had not been completed.
>
> The letter reportedly invokes the 45-day period to correct these deficiencies... After this deadline they can declare us in default."

A comparison of this letter with the Respondent's letter dated 28 June 1979 shows clearly that the above-mentioned telex refers to the former letter. The [Respondent's] letter states that

> "The deficiencies in the reports were brought to the attention of Mr. Juvayni[?] at the meeting of 9 Aban-mah 1357 (31 October 1978), but no steps have yet been taken to correct them... In reliance on Article 4, paragraph 3 of the Contract, it would be appropriate for you to correct the deficiencies noted in the meeting of 9 Aban-mah (31 October 1978), and to prepare and submit Farsi translations of all the various phases of the Project and your reports. It goes without saying that action will otherwise be taken against the firm, in reliance on Article 17(a)." [retranslated from the Farsi text]

The 26 December 1979 telex (Claimants' Document No. 99, Exhibit 16), stating that

> "WE ARE IN RECEIPT OF... THE MESSAGE OF THE DEPARTMENT OF ENVIRONMENT, TERMINATING THE PARDISAN CONTRACT.
>
> TERMINATION OF THE CONTRACT UNDER ARTICLE 17A DOES NOT APPLY TO THE CIRCUMSTANCES..."

clearly reveals that the Claimants had the fourth letter at their disposal as well, but had refrained from producing those letters along with the evidence which they did submit, since they did not find it in their interest to do so. Thus, even though the Respondent did not produce this evidence in its submissions, the Claimants would not have been prejudiced or deprived of their rights by production thereof at the

Hearing. In Award No. 222-10517-1 (The Trustees of Columbia University and The Islamic Republic of Iran), this Chamber laid down the following rule regarding admissibility of late filings:

> "... in determining whether the admission of a late-filed document will cause undue prejudice to a party, the Tribunal considers the nature of the submission and the length and cause of the delay."

Thus, the nature of a late-filed document must be taken into account in deciding whether or not it is admissible. And since it is manifest that the Claimants were aware of the substance of the documents, and that they had had them at their disposal and had reacted thereto prior to filing their Statement of Claim, production of those documents at the Hearing would not have taken them by surprise or deprived them of their rights. Declaring the documents inadmissible is absolutely contrary to the rule laid down by this Chamber itself; and in this respect the Respondent has, unfortunately, obviously been prejudiced by the refusal to accept them.

3. The principal point in the present case is, whether the Contract was terminated on the basis of Article 17 (a) or 17 (b) thereof. It will be best to examine the relevant sections of the said article in order to clarify the issue. According to Article 17 (a)[.1] :

> "In cases where it becomes evident to the Employer that the Landscape Architect has failed to bring about in time the necessary technical, scientific and organizational factors required for performance of the obligations arising from this Contract; or he fails to exert the necessary and usual care, which is expected from a Landscape Architect, in the course of performing his duties and services... or if the Landscape Architect fails to comply in general with the terms of this Contract, wholly or partly, the Employer shall notify the Landscape Architect to take corrective measures to eliminate the defects and shortcomings of his work and the Landscape Architect undertakes to do so within a

> reasonable time not exceeding one-and-a-half months. If, at the expiry of such time limit, the Landscape Architect does not act to comply with the notice of the Employer... the Employer reserves the right to cancel this Contract by giving a fifteen (15) days written notice, without any special formalities..." (emphasis added)

Article 17 (b) provides that:

> "The Employer shall, in addition to his rights mentioned in Article 17.a.2. be entitled to terminate this Contract at any time. If for any reason, apart from those stipulated in Section 1 of this Article (Article 17), the Employer decides to terminate this Contract, he will inform the Landscape Architect of his intention at least two (2) months prior to the date of termination. In this case, the Landscape Architect shall be entitled to the following sums..."

The majority, taking the position that the Contract was terminated pursuant to Article 17 (b), argues that

> "...Except as to the alleged deficiencies in translating material and enlarging site plans, the Respondent does not actually dispute the performance of this work by WMRT/Iran and its subconsultants, and the evidence adequately establishes their performance. The Claimants assert that WMRT/Iran originally postponed the enlargement of the site plan after consultation with the Department, and later, when the Department requested that the enlargement be effected, force majeure circumstances prevented performance. Similarly, force majeure circumstances prevented completion of the translation. The Tribunal is satisfied that but for the conditions existing at that time the Claimants would have remedied these defects. These deficiencies, therefore, do not constitute a breach so as to entitle the Respondent to invoke Paragraph 17 (a) of the Contract. Rather, the Tribunal is of the view that the termination of the Contract under Paragraph 17 (b) of the Contract would have been appropriate. Accordingly, the Tribunal determines that these deficiencies do not constitute breach, and the eighth-month payment invoice is payable. The invoices of the subconsultants, whose performance the Respondent does not appear to dispute, are also payable."

In view of the text of Article 17 (a) and Article 17 (b), the inadequacy of this argument is obvious. The Claimants themselves have admitted that they failed to complete a part

of those duties which they had undertaken to perform. Yet, the majority opines that

> "These deficiencies, therefore, do not constitute a breach so as to entitle the Respondent to invoke Paragraph 17 (a) of the Contract."

But Article 17 (a) does not set any limits or degrees, whose violation would allow the Employer to terminate the Contract. This Section expressly provides that [the Employer's] right to cancel the Contract is contingent upon a failure of the Landscape Architect "to comply in general with the terms of this Contract, wholly or partly." As for Article 17 (b), it relates to the right to terminate the Contract in cases other than those provided for in Article 17 (a). Although the Claimants believe (that is, they deem it to be in their interest) that the Contract should have been terminated pursuant to Article 17 (b) thereof, their actions demonstrate that they regarded the Respondent as justified in invoking Article 17 (a). For when the Respondent notified them of the deficiencies, giving them 45 days to correct those deficiencies as per the Contract, while requesting that this time period be extended to three months they made no objection whatsoever to the invocation of Article 17 (a). Therefore, the Respondent's termination of the Contract in invocation of Article 17 (a) thereof, after the said time period had expired, conformed to the procedure provided for by the Contract.

On principle, Article 17 of the Contract is explicit, clear and unambiguous. This article authorizes the Employer to cancel the Contract in cases where "the Landscape Architect fails to comply in general with the terms of this Contract, wholly or <u>partly</u>." (emphasis added) Therefore, the Tribunal may not add terms and conditions thereto, or state that "these deficiencies, therefore, do not constitute a

breach so as to entitle the Respondent to invoke Paragraph 17 (a) of the Contract."

To argue in this manner is to disregard the tangible facts, and to add provisions to the Contract which the Parties thereto never intended and never agreed to.

The Hague,

Dated 17 December 1986

Mohsen Mostafavi