

498-115

STATES CLAIMS TRIBUNAL

دیوان داری دعاوی ایران - ایالات متحدہ

498-115

ORIGINAL DOCUMENTS IN SAFE

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Case No. 498

Date of filing: 4-Dec-86

** AWARD - Type of Award Interim
- Date of Award 4-Dec-86
9 pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
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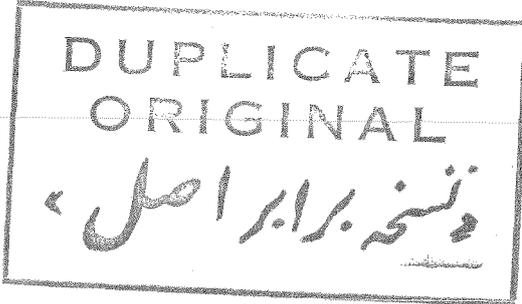
** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of _____
- Date _____
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** DISSENTING OPINION of _____
- Date _____
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** OTHER; Nature of document: _____

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CASE NO. 498

CHAMBER ONE

AWARD NO. ITM 64-498-1

PAUL DONIN DE ROSIERE,
PANACAVIAR, S.A.,

Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN,
SHERKAT SAHAMI SHILAT IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاوی ایران - ایالات متحده	
ثبت شد - FILED		
Date	4 DEC 1986	تاریخ
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No.	498	شماره

INTERIM AWARD

I. PROCEDURAL HISTORY

1. On 18 January 1982, the Statement of Claim of PAUL DONIN DE ROSIERE, and PANACAVIAR, S.A. ("Panacaviar") was filed with the Tribunal, against THE ISLAMIC REPUBLIC OF IRAN ("Iran") and SHERKAT SAHAMI SHILAT IRAN ("Shilat") as Respondents. The Claimants seek damages of U.S. \$27,500,000 for the alleged breach of a contract entered into on 12 December 1976 between Panacaviar and Shilat for the sale and purchase of 275 metric tons of caviar.

2. Statements of Defence were filed by Iran and Shilat on 11 June 1984. In addition, Shilat has raised a counterclaim, filed on 20 February 1985, based on Panacaviar's alleged breach of the same contract, in which it seeks damages of \$36,767,347 and a further \$718,243.80 comprising the amount of a guarantee in the amount of U.S. \$640,000 given by Panacaviar under the contract together with damages occasioned by Panacaviar's action in the Basel court described below.

3. The Claimants filed a Reply to the Statement of Defence and Counterclaim on 30 October 1985. The Respondents filed a Rejoinder on 28 November 1986.

4. On 22 September 1986, Shilat filed a "Request to Compel Panacaviar SA to Withdraw its Claim from Basel Court Switzerland". Subsequently, on 27 October 1986, the Agent of the Government of the Islamic Republic of Iran filed a "Request for an Immediate Order Compelling Panacaviar S.A. to Stay the Hearing in the Appeal Court of Basel Due to be Held on 5 December, 1986".

5. Pursuant to the Tribunal's Order of 30 September 1986, the Claimants filed a Response on 21 November 1986 in which it addressed both of the Respondents' requests to the Tribunal.

II. CONTENTIONS OF THE PARTIES

6. The Tribunal has before it two related requests for interim measures of protection. The first is that the Tribunal order Panacaviar to withdraw the action it commenced in the courts of Basel prior to the commencement of the present proceedings, in connection with the same contract. The second, more specific, request is that the Tribunal order Panacaviar to obtain a stay of a "hearing" scheduled to take place in the same legal action in the Basel Court of Appeal on 5 December 1986.

7. The Respondents argue that the Basel proceedings involve the same allegations of breach of the same contract as are now the subject of the claim before this Tribunal, and that such duplicative proceedings are proscribed by Article VII, paragraph 2, of the Claims Settlement Declaration which states in pertinent part that:

"Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court."

8. The contract of 12 December 1976 required Shilat to sell to Panacaviar 275 metric tons of Iranian caviar at the rate of 55 metric tons per year for five years, at prices fixed for an initial period but later subject to a percentage increase. As a condition of the signing of the contract, Panacaviar was required to give a performance bond to cover 20 percent of the amount to be purchased in any one year. Panacaviar caused Bank Etebarate Iran (now Bank Tejarat) to issue a letter of guarantee in Shilat's favour in the required amount of \$640,000 on 11 December 1976. This guarantee was backed by a guarantee in the same amount

issued by Banque pour le Commerce International, S.A. (now Banque National de Paris (Switzerland) Ltd.) ("BNP") in Basel in favour of Bank Etebarate Iran.

9. During 1979, a dispute arose between Panacaviar and Shilat as to the contract price, as a result of which each now claims, in the proceedings before this Tribunal, that the other was in breach. In May 1980, Shilat instructed Bank Etebarate Iran to pay it \$640,000 under the bank guarantee. The Claimants in their pleadings before the Tribunal have requested, inter alia, an order from the Tribunal directing Shilat to withdraw its allegedly wrongful demand for payment; to release Bank Tejarat from further obligation; and to direct Shilat to instruct Bank Tejarat to withdraw its demand against BNP and to release BNP from further obligation thereon. Shilat has maintained throughout in its pleadings before the Tribunal that its demand under the guarantee was entirely lawful and justified in view of Panacaviar's breach of contract.

10. Panacaviar states that it commenced proceedings in Basel on 9 January 1980 to attach the bank guarantee issued by BNP as it feared that Shilat was likely to demand payment under the guarantee issued by Bank Etebarate Iran. It appears that it was successful in obtaining an attachment. According to Panacaviar, Swiss law requires such an attachment proceeding to be supported by a claim for damages and Panacaviar therefore commenced an action for damages against Shilat in the Basel Civil Court, in which it appears to have sought damages of Swiss Francs 1,200,000 for breach of the 12 December 1976 contract. The Basel Civil Court apparently ruled in favour of Panacaviar in the action for damages on 10 November 1983.

11. Panacaviar informs the Tribunal that on 20 February 1986 Shilat filed an appeal with the Basel Court of Appeal. The Basel Court of Appeal has requested both

parties to appear before it on 5 December 1986. Panacaviar indicates that the purpose of this appointment is the announcement of the Court of Appeal's decision. Shilat, on the other hand, describes the appointment on 5 December 1986 as a "hearing". It claims that an award of damages against it in the Basel proceedings would constitute a violation of Article VII, paragraph 2, of the Claims Settlement Declaration. In answer to this, Panacaviar states that, even if the court rendered a decision in Panacaviar's favour, Shilat would not be compelled to pay damages as such a judgment rendered in an attachment proceeding "does not result in personal liability for the defendant".

12. The Claimants oppose both requests for interim relief. They argue that the purpose of the Swiss proceedings "is neither to collect damages from Shilat nor to obtain a judgment on the merits of the claims before this Tribunal. Rather, the effect of the Swiss proceedings is simply to maintain the status quo pending resolution by the Tribunal of Claimants' Claim and Respondents' Counterclaim". They contend that the result of being compelled to withdraw the Swiss proceedings would be to obligate Panacaviar to pay \$640,000 to satisfy the call on BNP which would be made by Bank Etebarate Iran. Thus, in the absence of any undertaking by Shilat to withdraw its call on Bank Etebarate Iran, the grant of the measures now sought would prejudice the Claimants' position. As to the consequences of a decision being rendered in Panacaviar's favour by the Basel Court of Appeal, the Claimants contend that such a judgment "affects only the attached assets and would simply lead to the acquisition of the attached assets by the plaintiff. The purpose and effect of the Basel proceeding is only to enjoin payment by the BNP on the bank guarantee and not to collect damages from Shilat or obtain a judgment from another court on the merits of the issues before this Tribunal".

III. REASONS FOR AWARD

13. Article 26, paragraph 1, of the Tribunal Rules of Procedure empowers the Tribunal, at the request of either Party, to "take any interim measures it deems necessary in respect of the subject-matter of the dispute" Apart from so protecting the physical subject-matter of a case before it, or the rights of the respective parties where appropriate, the Tribunal has also exercised its inherent power to protect its own jurisdiction in cases where the risk of inconsistent decisions in parallel and duplicative proceedings instituted in other fora have rendered this necessary. See, e.g., E-Systems, Inc. and The Government of the Islamic Republic of Iran., Award No. ITM 13-388-FT (4 February 1983).

14. The Tribunal must determine whether interim measures of the type requested are necessary and appropriate for either of the above reasons in the present Case. It does so on the basis of the Parties' own descriptions of the course and present status of the Basel proceedings, as the only document before the Tribunal in relation to those proceedings is a copy of a translation of Panacaviar's "Writ" and "Cause of Complaint" filed in 1980 contained in the Respondents' Rejoinder filed on 28 November 1986.

15. The Tribunal is faced with considerable difficulty in determining, on the basis of the documents before it, whether the proceedings instituted by Panacaviar in Basel are incompatible with the pursuit of the claim before this Tribunal by reference to Article VII, paragraph 2, of the Claims Settlement Declaration. Shilat must discharge the burden of establishing the existence of such a threat to the Tribunal's jurisdiction if it is to succeed in its present application for an order that those proceedings be withdrawn. It has failed, however, to produce any of the recent orders, decisions or pleadings in the Basel courts, or even

to identify with specificity the exact nature of the "hearing" scheduled for 5 December 1986. The Tribunal notes in this connection that the Basel proceedings were commenced in 1980, and, according to Panacaviar's unchallenged statement, a decision was rendered by the Civil Court of Basel in November 1983 and an appeal filed in February 1986. No request for interim relief was filed until September 1986.

16. In deciding whether there are grounds for granting interim relief, the Tribunal can only rely on Panacaviar's more detailed characterisation of the nature of the Swiss proceedings, which neither Respondent has challenged. The Tribunal is thus prepared to accept, for the sole purpose of deciding the application for interim relief, that the damage claim filed by Panacaviar in Basel was a necessary ancillary proceeding to its application for an attachment of the bank guarantee. Though that suit is founded on the same allegations of breach of contract that form part of the claim before this Tribunal, the Tribunal accepts the Claimants' statement that it is not Panacaviar's intention "to obtain a judgment from another court on the merits of the issues before this Tribunal". Thus, the Tribunal does not find sufficient grounds on the basis of the information presently before it to support the conclusion that the existence of such a suit, commenced before the Statement of Claim was filed in the present Case, and apparently with a view to achieving an entirely different result, constitutes a violation of Article VII, paragraph 2, of the Claims Settlement Declaration so as to justify the grant of interim relief at this time. Should the Respondents later become aware of circumstances which indicate that the Claimants intend to use the Basel proceedings to obtain and enforce a judgment on the merits of the issues before this Tribunal in a manner inconsistent with the limited objective described by them in the present Case, it is open to the Respondents

to apply to this Tribunal for interim measures of protection against such actions.

17. As to the attachment of the BNP bank guarantee obtained by Panacaviar in Basel, the Tribunal considers that its effect is to preserve the status quo as between the parties to the present Case, rather than to jeopardise the position of either vis-à-vis the Tribunal. Such an attachment means, in effect, that Shilat will, for the present, be unable to obtain the proceeds of its demand under the letter of guarantee issued by Bank Etebarate Iran - - a demand the legality of which is currently in issue in the proceedings in this Tribunal. That issue can and will be resolved by the Tribunal in due course when it pronounces upon the merits of the respective claim and counterclaim in its final Award.

18. Thus, the Tribunal can see no risk of grave or irreparable harm resulting to either Party, or to the jurisdiction of this Tribunal, which would justify the granting of either of the measures currently sought by Shilat or Iran.

IV. AWARD

For the foregoing reasons,

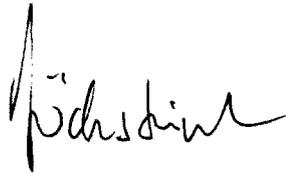
THE TRIBUNAL DETERMINES AS FOLLOWS:

The requests for interim measures filed by the Respondent SHERKAT SAHAMI SHILAT IRAN on 22 September 1986 and by the

Agent of THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN on
27 October 1986 are denied.

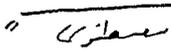
Dated, The Hague

4 December 1986

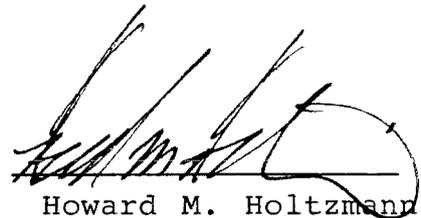


Karl-Heinz Böckstiegel
Chairman
Chamber One

In the Name of God



Mohsen Mostafavi
Dissenting Opinion



Howard M. Holtzmann

It appears that the Basel proceedings involve the same allegations of breach of the same contract as are now before this Tribunal and therefore Article VII para. 2 of the Claims Settlement Declaration requires that such claims be excluded from the jurisdiction of other courts. Based on that the Tribunal, in my opinion, should have granted the relief sought by the Respondent in connection with the stay of the proceedings in Basel.