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IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

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DISSENT FROM PROCEDURAL DECISION I
NINE FORUM SELECTION CLAUSE CASES

Case Nos. 6, 51, 68, 121, 140, 159
254, 293 and 466

[redacted]

We dissent from the decision of the Tribunal permitting the Islamic Republic of Iran and the other respondents in these cases, who failed to file any memorial within the period established by order of the Tribunal and who refused even to appear at the hearing, to file a memorial more than six weeks after the hearing. The prejudice to orderly process is manifest, and we fear that respect for the orders of the Tribunal will suffer if the Tribunal shows itself so irresolute.

Our deep concern over this decision can only be understood in the context of the series of events which preceeded it.

Summary of Events

It has long been recognized by the Tribunal that a common jurisdictional issue in many cases would involve the interpretation and application of Article II, paragraph 1 of the Claims Settlement Declaration which excludes from

DUPLICATE ORIGINAL

«نسخه برابر اصل»

the jurisdiction of the Tribunal

> ...claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.

Accordingly, the Tribunal determined to consider and decide this threshold issue promptly. See Tribunal Rules, Art. 21(2). The Tribunal decided that its three Chambers should relinquish to the Full Tribunal the jurisdiction question in a number of cases chosen so as to present a spectrum of the various forum selection clauses. On March 22, 1982, following a proposal of the President, the Tribunal agreed that a briefing schedule should be established with a view to a hearing of the chosen cases during the period from May 31 to June 2. There was no objection to this from any member of the Tribunal.

Analyses of the cases resulted in the identification of nine cases which presented the desired spectrum of contracts and transactions in which forum clause issues arose, thus assisting the Tribunal by expediting consideration of a large number of different cases posing similar issues. See Tribunal Procedural Guideline 1.* The jurisdictional issues in these nine cases were, in accordance with Presidential Order No. 1,

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* That Guideline states:

> 1. The arbitral tribunal may make such orders as it considers appropriate to coordinate and expedite cases which raise important issues, including, but not limited to, relinquishing cases to the Plenary Tribunal in accordance with Presidential Order No. 1, providing that such issues be heard separately and prior to hearing of the remaining issues, and coordinating scheduling of hearings. The arbitral tribunal may authorize arbitrating parties to give through a single designated representative, common explanations on similar issues arising out of different cases, without resulting in consolidation or joinder.

relinquished to the Full Tribunal by the respective Chambers to which they had been assigned. It was understood that issues of interpretation of the Algiers Declarations would be presented by the Agent of the United States, with each of the claimants submitting a memorial and making a short oral argument limited to the unique circumstances of its particular case. The previously discussed date of May 31 was for various practical reasons not suitable, and the full week of June 21 was selected for the hearing and deliberations.

By April 2 an order was ready to be issued. However, at that point the Agent of the Islamic Republic of Iran raised objection to choosing nine cases, preferring that only three cases be considered. No indication was given by the Agent of Iran as to which three cases should be chosen, nor did he make objections directed against choosing any of the nine cases. Similarly, no objection was raised to the participation of the Agent of the United States. In view of the objection of the Agent of Iran to the total number of cases, the President postponed issuing an Order until the matter could be considered by the Full Tribunal at its meeting on April 15, 1982.

The matter was discussed by the Full Tribunal on April 15, with the Agents of the two Governments each presenting his views. Thereafter the President, on

April 16, issued the following order:

> "Jurisdiction over the following cases has been relinquished by the respective chambers to the Full Tribunal for the purpose of deciding whether the claims in these cases fall within the provisions of Article II, paragraph 1 of the Claims Settlement Declaration:
>
> Case Nos. 6, 51, 68, 121, 140, 159, 254, 293, and 466.
>
> All previous orders fixing dates in these cases are hereby modified as follows. Arbitrating parties are directed to submit Memorials by June 1, 1982 addressing the following issue:
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> > Whether the claims should be excluded from the Tribunal's jurisdiction as "arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position."
>
> Furthermore, the Tribunal hereby fixes the week beginning on June 21, 1982 as the time for an oral hearing concerning the above mentioned issue in these cases. The oral hearing will begin with a pre-hearing conference at Parkweg 13, The Hague, on June 21, 1982 at 9.30 a.m.
>
> The two Governments, through their Agents, are invited to participate in the hearing of this issue in accordance with the foregoing schedule."

On May 31, the day before all memorials were to have been filed, the Agent of Iran wrote a letter to the President seeking to undo the Order of April 16. Referring to the steps established by the Order, the Agent of Iran requested that "this system be completely changed" so that only one or two cases be selected for hearing in accordance with a new "timetable". However the letter did not suggest which cases should be heard nor propose any new schedule. The letter stated that it would be "very impractical" for the respondents to submit their memorials by June 1, but it did not request any extension of time for such submission.

The Iranian Agent's letter of May 31 was immediately considered by the Full Tribunal on June 1. After hearing the views of both Agents and a discussion by the Full Tribunal, the President announced that "there was no justification for modifying the Order, and that it should be maintained". (emphasis added)

All of the American claimants in the nine selected cases had filed their memorials by June 1, 1982, as ordered. In addition, the Registry received for filing on June 1, and later filed the memorial of the United States on the common issues. Neither the Islamic Republic of Iran nor any of the other respondents filed any memorials by June 1 or thereafter.

Despite the fact that the Full Tribunal three times had considered the procedure to be followed, the Agent of Iran continued efforts to prevent the hearing from taking place as scheduled on June 21. On June 3, nine identical letters were sent to the President, one relating to each of the selected cases, requesting that the cases be heard separately and that the hearings be postponed indefinitely. A further letter was sent to the President dated June 13, asking that the June 21 hearing be cancelled, that the entire procedure be scrapped, and that there be separate replies, rejoinders, pre-hearing conferences and hearings in each case. In the June 13 letter, Iran for the first time objected to

the presentation of any memorial by the United States, and demanded that the Tribunal issue an order striking out the United States memorial which had been filed on June 1. In his June 13 letter the Iranian Agent said that Iran "does not at present intend to appropriately respond to the substance" of the United States memorial, adding, however, that "such a response is reserved for a more convenient time". Again, Iran did not indicate when, if ever, a time for filing a memorial would be "convenient". The President informed the Agent of Iran that the hearing would be held on Monday, June 21, commencing with a pre-hearing conference at nine a.m., as stated in the Order of April 16.

On Sunday evening, June 20 the Agent of Iran renewed the requests made in his June 13 letter and added that the Agent of the United States should not be permitted even to present an oral argument on the common issues but should merely be present to answer questions.

At nine o'clock on Monday, June 21 the Full Tribunal met to consider the latest Iranian demarche, thus delaying the start of the hearing. After both Agents presented their views, the Tribunal determined that the hearing would go forward as planned.

The hearing in the nine cases took place on June 21 and 22. The Iranian Agent was present in the courtroom but stated that he was not there as representative of any of the

Iranian respondents in the nine cases. The Agent of the United States made an oral argument on the common issues, followed by counsel for each of the nine claimants who presented arguments on the issues peculiar to their particular cases. When their arguments were concluded by mid-morning on June 22, the President inquired if the Agent of Iran wished to be heard. The Iranian Agent again reiterated that he was not representing any of the respondents, but he added that they reserved their "rights". The President then declared the hearings closed, in accordance with Article 24 of the Tribunal Rules.

The Full Tribunal met on the afternoon of June 22, to commence deliberations. At that time, however, the Agent of Iran presented a letter requesting "on behalf of the Iranian arbitrating parties ...that four months be granted for submission of their memorials."

The Full Tribunal, after considering this request, proceeded to vote on the question whether the Iranian respondents should be permitted to file late memorials. A bare majority of the Tribunal decided to permit the respondents to submit memorials, despite their repeated failure to comply with the April 16 Order. The decision was announced to the two Agents, and it is from that decision that we dissent. The President fixed August 10 as the date for filing memorials by the respondents. See Tribunal Rules, Art. 31(2). Once the respondents had been permitted to file memorials it was necessary to provide an opportunity for American counter-

memorials, recognizing that, having not received any Iranian memorials before the hearing and there having been no Iranian oral argument, there had thus far been no opportunity to respond to whatever the Iranian contentions might be. Accordingly, the Full Tribunal decided to permit filing of American counter-memorials by September 10.

Reasons for Dissent

Our main concern is that this last minute capitulation by the Tribunal to unreasonable, unilateral demands will impair the integrity of the orders of the Tribunal. A party who chooses to ignore the orders of the Tribunal must suffer the consequences or the Tribunal risks the loss of its authority.

As the President stated on June 1, Iran had showed "no justification" for modifying the procedure ordered by the Tribunal. It has shown none since. Under Article 28 of the Tribunal Rules, if a party fails to produce documents ordered by the Tribunal within the established time or fails to appear at a hearing, without a sufficient showing of cause, the Tribunal may proceed with the arbitration. That is a fair and necessary rule and one typically found in international

arbitral rules.* This sanction is virtually the sole means available to the Tribunal to enforce its orders and to ensure that it, rather than a party, is in charge of the proceedings. In our view, the Tribunal erred in not applying that rule in these circumstances.

We note further that the Tribunal has a very large case-load and it must be able to plan and carry out its complex schedule. In this respect it is different from typical international arbitrations relating to only one case, because the action of the Tribunal on certain claims, or a group of claims, may affect the progress of a number of other cases. In such a situation, it is crucial that carefully structured procedures ordered by the Tribunal be carried out by all parties lest orderly processes be seriously obstructed by the unilateral action of any one party. Here, faced with a key threshold issue, the Tribunal planned and ordered a coordinated procedure. Memorials were to be submitted simultaneously, with any responses expected to be given as part of the oral arguments at the hearing. This was designed to put all parties on an equal footing, to expedite the proceedings, and to result in economies for both American and Iranian parties in presenting their cases. A schedule was established with the intention that the jurisdictional issues

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* See, e.g., UNCITRAL Rules, Art. 28; Rules of the Perm. Ct. of Arb. for Settlement of Int'l Disputes Between Two Parties of Which Only One is a State, Art. 20; Rules for ICC Ct. of Arb., Art. 15; International Rules of London Ct. of Arb., para. B(9); Rules of Procedure of the Inter-American Com. Arb. Commission, Art. 28; Com. Arb. Rules of the American Arb. Assoc., § 30; Rules of German Arb. Commission, § 21.

related to representative forum clause cases would be decided before the Tribunal's August recess. That schedule was important not only for the nine cases heard on June 21, but also for the large number of other cases in which forum clause issues arise. Moreover, the Full Tribunal and the Chambers have a heavy schedule of other matters planned for the Fall and expected to dispose of the forum clause issues before that time. The decision of the Tribunal to permit the respondents to file late memorials disrupts the careful planning which has gone into this matter and will have an adverse effect on the prompt handling of a substantial number of cases to the prejudice of the parties in those cases.

We would adhere to the April 16 Order and proceed at once to deliberations on these issues.

Howard M. Holtzmann — George H. Aldrich — Richard M. Mosk

The Hague,

June 30, 1982