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STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 129 Date of filing: 28 Oct 85

** AWARD - Type of Award _____

- Date of Award _____

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of Charles Brower

- Date 24 Oct 85

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** SEPARATE OPINION of _____

- Date _____

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** DISSENTING OPINION of _____

- Date _____

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- Date _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

IRAN UNITED STATES CLAIMS TRIBUNAL
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No. 129

CASE NO. 129
CHAMBER THREE
AWARD NO. ITL 55-129-3

DUPLICATE ORIGINAL
«نسخه برابر اصل»

SEDCO, INC., for itself and on behalf of SEDCO INTERNATIONAL, S.A., and SEDIRAN DRILLING COMPANY,

Claimants,

and

NATIONAL IRANIAN OIL COMPANY and THE ISLAMIC REPUBLIC OF IRAN,

Respondents.

CONCURRING OPINION OF
CHARLES N. BROWER

I concur in this Interlocutory Award but would have ruled definitively that the ownership interests of Claimant in SEDIRAN were sufficient to control that enterprise at the time the claim in respect of it arose.

The evidence of Claimant's legal and actual control detailed in the Interlocutory Award is quite strong if not indeed overwhelming. It becomes more so when further points, omitted from the Interlocutory Award, are considered.

First, the passage in the 22 May 1973 minutes of the Board of Directors requiring that an Iranian appointee also sign "contracts, deeds and documents committing the company" concluded by the Managing Director appointed by Claimant must be interpreted in light of the mandatory wishes of the contracting parties set forth in the Protocol of Agreement. The Protocol of Agreement does not speak of the Managing Director being limited in his ability to commit the Company. Likewise the language of the delegation does not require approval but rather only joint signature. In this sense, the specific provision is not contrary to the broad delegation of powers mandated in the basic governing agreement. It simply ensures that the Iranian participants will have timely notice of major transactions. This interpretation appears to have been that of the contracting parties, for Mr. Thorne as Managing Director in fact appears to have contractually committed SEDIRAN by his sole signature. SEDIRAN's primary business was its operation of ten land drilling rigs under contract. At the time the claims here arose such operations were taking place in part under Contract No. 3-75-270-359 entered into on or about 1 April 1977 between SEDIRAN and OSCO, which committed eight of the ten land drilling rigs until 31 March 1980; it is signed by Mr. Thorne alone.[1] The fact that Respondents have not alleged in this Case that this contract was invalid suggests

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[1]Two remaining rigs were committed until at least 28 January 1980 under Contract No. 3R/D-1, entered into on or about 28 January 1978 between SEDIRAN and NIOC; the copies of Contract No. 3R/D-1 submitted by both Parties are unsigned.

that they, too, viewed the "joint signature" provision as formalistic.

Second, SEDCO clearly controlled SEDIRAN's operations in fact. Mr. Thorne states in his affidavit that as Managing Director of SEDIRAN he "made all operating decisions of any significance and directly controlled Sediran." One would expect this when, as provided in Article 9 of the Protocol of Agreement, all operating revenues of SEDIRAN were required to be paid into a bank account in Texas, U.S.A., controlled by two "senior officials" of Claimant. SEDCO acted consistently with its assertion that it controlled SEDIRAN. It is noteworthy further that SEDIRAN and not SEDCO as a shareholder of SEDIRAN filed suit in the United States District Court for the Southern District of New York on 14 November 1979 asserting the same claims as are pursued here.

Third, the provision in Article 5 of the Protocol of Agreement to the effect that SEDIRAN's Managing Director, appointed by Claimant, cannot make a "capital expenditure" exceeding $250,000 without Board of Directors approval by definition does not apply to operating expenses but rather only to "capital" items, e.g., purchase of SEDIRAN's drilling rigs.[2] In this sense this provision would be significant primarily in SEDIRAN's initial formation period, when the joint venture was primarily dealing with one of its members, SEDCO, from which it purchased its drilling rigs, and Board review of the terms of such "self-dealing" would have been particularly pertinent. Understandably, SEDCO's Iranian partners would desire an opportunity to assure themselves that such major outlays were at fair prices, since their amortization could affect SEDIRAN profits for

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[2]Mr. Thorne's testimony at the Hearing held on 29 and 30 March 1984 confirms this interpretation of Article 5.

years to come. That is to say, the measure ensured that Claimant would not by means of exorbitant transfer pricing of the capital goods necessary to launch the business be able unilaterally to increase its real "profit" in future years at the expense of the Iranian participants. This view is supported by the fact that the Ministry of Justice Notice, which publishes information for the benefit of third persons, does not include reference to this provision.[3]

Fourth, the capital expenditure and joint signature provisions do not bear upon the Tribunal's necessary determinations under Article VII(2) in this Case. That Article requires ownership interests sufficient to control at the time the claim arose. The SEDIRAN claim arose 22 November 1979. By that time SEDIRAN had long since made its capital expenditures (i.e., the purchase of the ten drilling rigs and the establishment of the Ahwaz facility) and SEDIRAN's drilling rigs already were contractually committed. Therefore, during the period which must be examined under Article VII(2) there was no need for capital expenditures or for the signature of new contracts. The Iranian members of the Board of Directors did not have the power to reduce the power of the Managing Director or to alter the contractual obligations of the company.

Against the evidence arrayed in support of SEDCO's claim of control Respondents have not presented a single item of specific evidence demonstrating joint control of

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[3] In addition Article 36 of the Articles of Association states the "Board of Directors is authorized to delegate, partly or wholly, its powers" (emphasis added) and the delegation to the Managing Director by the Board of Directors on 22 May 1973 includes "all the powers of the Board of Directors" and makes no exception for capital expenditures exceeding $250,000.

SEDIRAN during the relevant period.[4] NIOC points to a 26 July 1978 meeting of the Board of Directors of SEDIRAN as an example of the Managing Director seeking the approval of the Board of Directors for the export and sale of a land rig. In addition to the incident being outside of the period of time relevant to the jurisdictional issue presented, the minutes of the meeting cited indicate, if anything, that the Managing Director was merely informing the Board of an agreement which had already been concluded. NIOC also submitted on 27 July 1984, in support of its contention of joint control, an affidavit of Dr. Javad Sadr, former Chairman of the Board of Directors of SEDIRAN. The affidavit in both its English and Farsi versions is neither dated nor notarized. The English text is not signed, while the Farsi text is initialed at the bottom of each page. Regardless of these deficiencies, however, the content of the affidavit is insubstantial. Dr. Sadr states that the delegation of powers to the Managing Director "does not mean divestiture of the Board's right to supervise." The truth remains nonetheless that any action by the Board of Directors would need the agreement of at least one of the two Board representatives of SEDCO and would need to be consistent with Article 5 of the Protocol of Agreement. Dr. Sadr goes on to state that "in some cases" the Managing Director "sought the Board's vote of approval." Once again, however, no specific incident is cited and it is impossible to ascertain, among other things, whether approval indeed was sought, or whether, as at the 26 July 1978 meeting, information was given as a courtesy.

When the evidence on a point admits of but one conclusion, as is true of the "control" issue here, I

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[4] Indeed, NIOC, while disputing SEDCO's right to do so, has repeatedly made statements in its pleadings evidencing extensive de facto control of SEDIRAN by SEDCO. See, e.g., NIOC Counter-Memorial filed 20 February 1984 at 26.

believe the Tribunal more nearly meets its responsibilities to the Parties (and to parties in other cases presenting similar issues) if it does not shrink from drawing that conclusion.

Charles N. Brower

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