71

DUPLICATE ORIGINAL

«نسخه برابر اصل»

MR. JAHANGIR SANI'S REASONS FOR NOT SIGNING THE DECISION MADE BY MR. MANGARD AND MR. MOSK IN CASE NO.17

IRAN UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران ـ ایالات متحده

FILED - ثبت شد

No. 17 شماره ۱۷

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[redacted]

دادگاه داوری دعاوی ایران - ایالات متحده

IN THE NAME OF GOD

I was not notified of the deliberative session which resulted in the issuance of an Award in the present case; nor did I happen to be present on the Tribunal premises and, consequently, at the meeting itself, when it was held.

In my 'opinion' related to case No. 30, a copy of which I annex hereto, I have already elucidated some elements of the events which resulted in the issuance of the present Award in my absence. In the present 'opinion', I shall first relate the remaining events concerning case No. 17, following which I shall discuss the major deficiencies in the Award issued.

The fact that said Award was rendered without consultation with, and in the absence of, one arbitrator - together with the deficiencies which I shall elaborate unpon below - constitute in my view so serious a violation of recognized legal principles as to necessitate that I not take part in the signing of the issued Award.

1. <u>The Award is Rendered Without Deliberation and in my Absence</u>

On Wednesday 13 December 1982, at the same time that I had been requested to return to Tehran to further discuss my resignation tendered in relation to case No. 30, I was confronted by the unanticipated and surprising news that Mr. Mangard and Mr. Mosk had proceeded to issue Awards in cases Nos. 17 and 132. As I have explained in my 'opinion' with respect

to case No. 30, in the few days preceding the signing of these cases we had some forms of discussion in relation to case No. 30, but did not have the least discussion about two other cases. My efforts to discover the circumstances attending this change led me only to the resignation of Mr. Bellet, and the meeting that took place between the six arbitrators following his resignation.

In the afternoon of the same Wednesday, Dr. Kashani telephoned to state that as the result of his efforts in concert with Mr. Hosseini, Mr. Mangard and Mr. Mosk had promised that if I were prepared to meet with them they would refrain from taking action on cases Nos. 17 and 132, but that they would be compelled to file case No. 30. I considered discussions under such conditions to be not only inconsistent with legal principles but also morally improper. Yet, for much greater considerations and after seeking the advice of Mr. Kashani and Mr. Hosseini, I accepted the proposal and met Mr. Mangard and Mr. Mosk outside of the court premises.

In this meeting, I expressed my utter repudiation of what had transpired in the preceding few days, and stated unequivocally that my colleagues' issuance of awards in the cases mentioned above without my presence and participation were legally unsupportable. I sensed there that my colleagues had formed a wrong impression of my resignation. Supposing that I had tendered my resignation, so closely following that of Mr. Bellet, to further delay the issuance of award in case No. 30, they had considered themselves bound to also take actions in relation to cases Nos. 17 and 132, for which Hearing sessions had been held but no delibarations

had taken place. Having first elaborated upon the reasons behind my resignation, I expressly stated that my resignation was utterly unrelated to that of Mr. Bellet. In order to receive assurances in this respect, Mr.Mangard and Mr. Mosk suggested that to avoid further confusion I withdraw my resignation. Following these discussions, I presented two proposals, one, that for the time being all three cases be left in abeyance, and two, that if Mr. Mangard and Mr. Mosk intended to issue an award in case No. 30, they do so in keeping with the decision they last made,namely, to assign a damages rate of 8½ per cent. A consesus was finally arrived at between Mr. Mangard and me to withdraw the decisions issued in cases Nos. 17 and 132, and to review those cases on 15 January, 1983. Mr. Mosk also evinced no opposition to this arrangement, though he did state that he would have to discuss it with his American colleagues. As a minimum condition, I endorsed the withdrawal of Awards issued in the two above mentioned cases and the holding of deliberations on them on 15 January, and I promised to return to The Hague in order to determine, at least, what was to be done with respect to those two cases.

Unfortunately, on the following day when I was in Tehran, I was informed from The Hague that, notwithstanding the previous promises, it had been decided by my colleagues, first to file and distribute case No. 30, in which Mr. Mangard and Mr. Mosk had decided in favour of a %12 rate of damages instead of %8½; and, secondly, to postpone the decisions on the other cases to January 4, 1983, for which a meeting had been scheduled. I deeply regret the fact that this was not a personal matter, for otherwise in the light of the repeated breaches of promises I would certainly have at once refused to agree to the proposed arrangements. However, for much more important issues of interest, I had no alternative but to agree.

In the meeting with Mr. Mangard and Mr. Mosk on 4 January, 1983, I learned from them that not only the decisions on the two cases had not been withdrawn, but that they had even been filed with the Registry. When,with a view to remind my colleagues of the promises they had made earlier, I began to refer to our last meeting, Mr. Mosk promptly left the meeting as a protest, and did not return to the end. I then inquired from Mr. Mangard as to what was the point of inviting me to such a meeting when it was clear that the Awards had already been made and filed with the Registry ? In my opinion, I added, this could have only been intended as a means to legalize decisions made in contravention of the Tribunal Rules. Since it was not proper of me to become a means of achieving that end, I,too, decided to leave the meeting.

I was informed on the following day, January 5, 1983, that in case No. 17, the Award which had been originally rendered on 15 December, 1982, had been filed under No. 20-17-3 in the Registry and distributed.

2. Deficiencies in the Award Itself

2.1. Issue Related to the Requirement of Holding a Minimum of 50% of the Capital Stock of American Corporations by Natural Persons with American Nationality

In paragraph 1 of Article VII of the "Claims Settlement Declaration", in addition to the stipulation that a corporation or other legal entity be "organized under the laws of Iran or the United States...", a second stipulation has been set for the filing with this Tribunal of claims by such corporations, to wit, that " collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or

more of its capital stock ". In most of the claims filed with the Tribunal, the Government of Iran has argued that it is absolutely incumbent upon the Tribunal to adhere to both stipulations in order to establish the nationality of the claimant legal entities, and thereby its own jurisdiction. For their part, adducing practical difficulties, claimants have asserted that adherence to the second stipulatioh is impossible. The Tribunal itself has for sometime been seeking a formula for resolving the issue, but to date it has apparently failed to arrive at a mutually agreeable solution. Yet according to the majority decision, this fundamental issue seems to deserve no more that a very light treatment : " The claimant has submitted evidence which establishes... that natural persons who are United States citizens have held an interest in the claimant equivalent to well over 50% of its cpaital ". But just what this evidence is, and what probative value it may possess, are known to no one, including the losing party, who is at least entitled to learn the grounds for the award against him.

2.2. <u>Failure to Serve the Government of Iran with the Claim; and the Absence of said Government from the Proceedings</u>

The indisputable fact is that the Government of Iran was not named as a respondent in the claim,and that the action was brought exclusively against Star Line, a private company. As a result, the Registrar of the Tribunal did not serve the Government of Iran with the " Statement of Claim " and consequently that Government did not participate in the proceedings from start to end. This situation arose, not as the result of an error or oversight by the Tribunal's Registrar, but rather on the basis of the claim itself, in which, as already mentioned, Star Line Company was named as the sole respondent.

During the Hearing, the Agent of the Government of the Islamic Republic of Iran drew the attention of the Tribunal to this very fundamental objection, and requested that the Tribunal at least order the claim to be served on the Government of Iran, if it did consider the claim to be directed against it, so that the Government might be able to defend itself. Although the Tribunal was satisfied, upon convincing evidence submitted at the Hearing, that the claim had not been served on the Government of Iran, it nonetheless ignored this request, and continued to hear the case against a corporation whose private status at the time of concluding the Lease Agreement, subjet-matter of the present claim, was acknowledged by the claimant himself. The Tribunal then proceeded to hold that the Government of Iran did control the Respondent Company and ordered that the award be satisfied out of the Security Account provided by the Government of Iran. There should be no need to elaborate here upon the danger attending such an approach in judicial proceedings. Suffice it to say that, should such proceedings be found proper, it would become posssible to first name a specific person as respondent in an action in which a third person is alleged to have committed a wrong, and then, because of the inability of the named respondent to offer an adequate defence, or because of his carelessness or even perhaps his prior collusion, easily prove in effect an uncontested action and convict the third person, ordering him to pay the award out of his funds, simply because his funds happen to be accessible.

2.3. The Issue of Control

Inasmuch as American claimants have filed as many as hundreds of claims with this Tribunal on the basis of the assertion that private Iranian companies and entities have fallen under the control of the Government of the Islamic Republic of Iran since the Revolution,

the issue of "control" has great importance and broad ramification. For if the Tribunal accepts such claimants' interpretation of the phrase, " any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof" (Paragraph 3, Article VII of the Claims Settlement Declaration), then it will probably affect the Government of Iran's position to the effect that it bears no responsibility for the debts and contractual obligations incurred by numerous private Iranian companies which, according to that Government's contention, are in reality and under the Iranian Law still private and independent of the Government. In fact, what that Government contends is that because of the flight of the managers and directors of a number of such companies from Iran after the Revolution, it had no alternative but to at least take certain temporary measures in order to prevent the cessation of their operations. These measures, taken pursuant to the law ratified by the Revolutionary Council, were even to the benefit of the shareholders of such companies, in a sense safeguarding their interests. An alternative interpretation of the above quoted phrase subsumes under its provisions only those companies or entities which have been established by the Government of Iran or the Government of the United States to carry out acta jure gestionis .

Although for many reasons I tend to favour the latter interpretation, it is not my intention here to deal with such issues; rather to draw the attention to the fact that the majority has once again sought to resolve such a vital and important matter without presenting any solid supporting reasons; supposing that their duty to act as impartial arbitrators has been accomplished. Indeed, inasmuch as my esteemed colleagues are cognisant of the ramifications of the issue and aware of

the existence of hundreds of claims before this Tribunal which are asserted on the basis of a particular interpretation of the term "Control" and in as much as they are aware of the view of the Government of Iran in this respect, I find it hard to believe that they would take a decision on the issue in a brief session without even considering whether it was necessary to refer it to the Full Tribunal as an issue of common concern. I see no need to demonstrate the shortcomings of such a decision by adducing the contrary arguments, for a few lines quoted from the Award itself will sufficiently show how the provisions of Article V of the Claims Settlement Declaration, which require the Tribunal to decide on the basis of law, are overlooked. The majority states "... the Claimant has submitted written materials, including an order by the Islamic Revolutionary Court of Korramshahr (sic) and Abadan .... and a press cutting of February 1980 indicating that the majority of the shares in Star Line were confiscated". I have certain reservations with regard to the Tribunal's reliance on a cutting from an unknown newspaper, but, more importantly, I should like to inquire whether any reader would not get the impression from the word "including" that other evidence, accepted by the Tribunal as valid, have also been submitted, tending to support the claim of expropriation. In direct contrast, where the Respondent's rebuttal to this allegation is mentioned, the Award cites only one piece of the Respondent's evidence (the certificate issued by the Corporates Registration Bureau of Iran), and the 2 other highly important pieces of evidence of the Respondent, namely the decisions by the Central Revolutionary Court and the Revolutionary General Prosecutor, quashing the expropriation order by the Revolutionary Court of Khorramshahr and Abadan, are ignored. In short, the claimant's two pieces of accepted evidence are represented as "including two pieces of evidence"; whereas two of the three pieces of the Respondent's evidence are forgotten. Moreover, the Majority contents itself with the mere mention of that sole piece of evidence, which happens to be a certificate by an official authority, without so much as mentioning the reasons for rejecting it.

Yet another point is that the Award is in parts based on " indications " with no need felt to at least clarify what those " indications " are. I need not repeat that, in accordance with Article V of the Claims Settlement Declaration, this Tribunal is bound to observe the law; and included in the imperative rules of law are those which require a decision to be justified and reasoned. That means that the arguments of both parties must be mentioned and evaluated, and that determination of issues be made in accordance with legal rules and principles. Such is also the express requirement of Paragraph 3 of Article 32 of the UNCITRAL Rules. Hence, the legal value of a judgment made on the basis of " indications" can, in my view, be justifiably questioned, particularly if even the general nature of those " indications " are not made clear.

The serious deficiencies in the Award with respect to the issue of " Control", are not confined to those already mentioned. The majority decision seems to adopt a reverse application of the principle actori incombit onus probandi; for having concluded that the Respondent company is prima facie controlled by the Government, it says that the certificate by the Corporates registration Bureau is an insufficient rebuttal evidence, requiring thereby the Respondent Company to prove that it continues to remain a private company. More important still is the fact that nowhere in the decision is there any reference to a highly material piece of evidence submitted by the Respondent, whereby a Mr. Saniee, who was appointed by the Pre-Revolution managers to run the company, testifies that he is in charge of the company's affairs. I cannot agree with the majority in that the Tribunal may first arbitrarily omit parts of evidence

submitted by a party, and then, arguing that "such evidence, (disproving the Government's control) if exists, would be in the possession of the Respondent, and could have been produced by it", proceed to find against the Respondent for his supposed failure to produce evidence. Once again I find it difficult to see how, from procedural point of view, it is found possible to find, say, "B", liable in a case in which "A" is said to have committed and act, simply because "B" has not been able to disprove the claim against "A".

2.4. The Enforcement Order Against a Party Not Privy to the Case.

Being unable to find the Government of Iran, which has not been a party to the Proceedings, liable on the merits of the case as well as on the issue of Control, the Majority has adjudged the Respondent company to be liable on the merits. On the other hand, since funds belonging to an altogether distinct third party (The Government), are accessible, it is ordered to satisfy the judgment even though the third party was not invited to the proceedings and therefore by his absence not allowed to offer a defence.

Such a notion of the Government's unbounded liability for the operation of entities which perform governmental commercial functions - proliferated and broadly diversified in the present age - is contrary not only to the laws establishing those entities, but also to all legal principles. It is not necessary to belabor the point that the purpose underlying the creation of such entities, as commercial units subject to the commercial laws and regulations, with limited capital stock, separated from and independent of the Government, was not simply to indulge in governmental and legislative diversions.

Quite to the contrary, weighty considerations were at issue, among which was the need to subsume such entities under municipal laws. In other words, the liabilities of such entities are circumscribed by the terms of the regulations pursuant to which they were created, and by their own Articles of Association. Imputing their liabilities to the Government to the same extent which might, for the sake of argument, be considered appropriate in the case of a Government agency carrying out acts of state, is hard to justify. Even if we suppose that the Respondent company falls under the rubric of such entities (though the majority inasmuch as it has named the company as the loosing party seems to have accepted its independent character), the Award ought consequently and necessarily to have been made binding upon the company itself. By saying in its Award that the judgment is to be paid out of the Security Account of the Government of Iran, the majority has violated its own finding - namely, the finding that the Respondent company as a legal entity independent of the Government, might be found liable. Unless it be asserted, of course, that the aforementioned company has engaged in acts of state.

2.5. The Law Governing the Merits of the Case

As the Award is silent in this regard, it is not clear what law has been taken as governing the merits of the case. It is there held that the legal relationship between the Claimant and Respondent is founded upon the Lease Agreement. The Respondent is therefore ordered to pay certain monthly instalments; and his failure to return the subject-matter of the lease is judged to be a breach of the Agreement which merits compensation equivalent to the market value of the machinery leased.

All this, however, without revealing what laws underpin such decisions : the law of the place where the Lease Agreement was entered into; or of where it was carried out, or where the machinery was confiscated, or the country of which the Claimant - or the Respondent - is a national, or, finally of the place of arbitration? What is definite is that the majority decision, contrary to the provisions of Article V of the Claims Settlement Declaration, which supersedes Article 32 of the UNCITRAL Rules, has made certain findings without first determining the applicable law. As a result, Respondent is ordered to pay an amount the legal basis of which is unclear, because:

a) If the intention has been to find in favour of the claimant's contention that the equipment has been expropriated, then it would have been necessary to have invited the Government of Iran to defend itself, not only on the issue of alleged control, but on the merits of the case as well. In such a case, of course, the order to pay compensation could only have been rendered against the Government of Iran and not, as in here, against Star Line.

b) On the other hand, if Lease Agreement has been found to govern the legal relationship between the parties, then it would have been necessary to first order the return of the equipment, as provided by the Agreement itself, coupled, if necessary, with compensation for any possible price depreciation. Star Line has admitted that the equipment is in its possession. It could not therefore be ordered to pay an arbitrary price, where it has not refused to return the equipment.

c) And, finally, if the Respondent's proposal to purchase the equipment has been accepted, the parties should have been first invited to arrive at a mutually satisfactory purchase price, and, failing that, a price should have been determined by experts' testimonies. As it has happened, the Tribunal has provided no opportunity for the parties to discuss and possibly agree on a price; nor has the Tribunal found it necessary to invite experts' opinions on the matter, relying merely on an affidavit submitted by the claimant's witness.

2.6 An Analysis of Principle 44 of the Constitution

To support its finding on the issue of "control", the majority decision finally relies on Principle 44 of the Constitution of the Islamic Republic of Iran, whereby "navigation" is included in the state sector of the economy. Interpreting the said principle, the majority decision concludes that " port loading and unloading facilities, with which Star Line is dealing, are an integral Part of the shipping industry." (P.6 of the Decision - emphasis added). Hence, the control of the Government over Star Line.

Beside the fact that "navigation", referred to in the Constitution, is entirely different from the "shipping industry" mentioned in the Decision, the reliance on the provisions of the Constitution of newly established regimes, prior to passing of ordinary laws implementing those provisions, is, in my opinion, legally unsupportable. This is because Constitutions merely concern themselves with the setting out of very general and all covering principles, which would not be normally enforced until such time as ordinary laws with a view to apply those principles are passed by Parliament and enforced. This, or course, has not been the case here. Even assuming, however, that one may properly rely on a Principle of Constitution not yet implemented, the fact remains that Principle 44, on which the majority decision relies, itself demonstrates, if read completely, that the interpretation of the Majority cannot be right. Paragraph 3 of the same Principle, which defines the limits of the "private sector of the economy", expressly includes in that sector "services supplementary to the State or Cooperative sectors". It can hardly be doubted that port loading and unloading is a service supplementary to navigation.

The first part of this "Opinion", which reveals the fact that I was neither aware of nor present at the

deliberative session, is intended to show that what has been signed and published by Mr. Mangard and Mr. Mosk with respect to case No. 17 cannot be considered as a legally valid Award.

The second part, which deals with the deficiencies in the decision rendered by the said colleagues, may in effect be taken as my dissenting opinion.

M. Jahangir Sani