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CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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ORIGINAL DOCUMENTS IN SAFE

Case No. 18

Date of filing: 27 oct 86

** AWARD - Type of Award _____

- Date of Award _____

_____ pages in English _____ pages in Farsi

** 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 _____

- Date _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In His Exhalted Name

CASE NO. 18
CHAMBER ONE
AWARD NO. 260-18-1

PEPSICO, INC.,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
FOUNDATION FOR THE OPPRESSED,
ZAMZAM BOTTLING COMPANY AZARBAIJAN,
ZAMZAM BOTTLING COMPANY EAST TEHRAN,
ZAMZAM BOTTLING COMPANY ESFAHAN,
ZAMZAM BOTTLING COMPANY GORGAN,
ZAMZAM BOTTLING COMPANY KERMAN,
ZAMZAM BOTTLING COMPANY KERMANSHAH,
ZAMZAM BOTTLING COMPANY KHUZESTAN,
ZAMZAM BOTTLING COMPANY MASHHAD,
ZAMZAM BOTTLING COMPANY RASHT,
ZAMZAM BOTTLING COMPANY SHIRAZ,
ZAMZAM BOTTLING COMPANY TEHRAN,
Respondents.

Declaration of Judge Ameli

Before issuing my Dissenting Opinion in this Case, I find it necessary to file this Declaration at this time.

The Tribunal's failure to grant Zamzam Companies' request to appoint an expert, to accept their allegation as to the negative value of the companies, or itself to

determine the value of the companies and thus the extent of their liabilities is of grave consequences in light of the huge amount of about 19 million dollars the Tribunal has awarded against them. It is so in particular where the Tribunal has taken on itself to notify the Escrow Agent to make such payment to the Claimant out of the funds of the Government of the Islamic Republic of Iran in the Security Account established pursuant to paragraph 7 of the Declaration of the Government of Algeria. It is beyond all imaginations that the assets of the Zamzam Companies be worth $19 million to satisfy the Award rendered against them by the Tribunal. Aside from my dissent as to the merits of the Award there would not be a problem if the Majority, like all other arbitral and judicial fora, had limited itself to determining the liabilities of the parties and had refrained from entering into execution of its Award. Similarly in that situation the Tribunal would not have faced the difficulty in determining the precise value of the assets of the Zamzam Companies and consequently would not have rendered such an unfair and unreasonable Award.

In my opinion the statements following certain dispositif paragraphs, namely, that the awarded amount shall be paid out of the Security Account upon notification by the President of the Tribunal are void of all effects. If those statements are part of the dispositif they are void not only because the Government of the Islamic Republic has not been held liable in the Award, but also because they are ultra vires and ultra petitio. If they are not part of the dispositif it is axiomatic they are also void and without effect.

The denial of the Zamzam Companies' request becomes acute in particular when it is realized that their assertion has not been controverted by the Claimant in the slightest manner. Any limitations in the evidence

submitted by the Zamzam Companies in support of their assertion are immaterial so long as the assertion itself is not challenged. The Zamzam Companies' Memorial containing sufficient allegation and reference to the auditor's affidavit and other documents annexed to it was filed within the prescribed time limit on 4 May 1984. It is true that the English version of a few exhibits including that of said affidavit was filed one day before the Hearing, but the Claimant did not object to it, and the Tribunal in this Award, specifically "admits all documents by the parties, since none were such as to cause any prejudice." It is also true that the auditing firm whose affidavit was presented was related to the Foundation for the Oppressed, but again the Claimant did not object to the testimony of such auditor. Nor is it unusual for this Tribunal to accept such allegation and/or evidence in like circumstances. Although the affidavit was limited to one of the Zamzam Companies, the Award ignores the fact that the Respondents' allegation covered all of the companies and that in addition to the affidavit there were numerous photographs and contemporaneous fire department reports of considerable damage to premises, plants, and other assets of the majority of the companies in the course of the Islamic Revolution.

It is wrong to state that the Respondents did not pursue these allegations for not only were they filed eleven days prior to the Hearing, but also, as the Minutes of the Hearing signed by Chairman Lagergren at page 9 took note of the fact that the representative of the Zamzam Companies,

> Mr. Montazeri, showed the Tribunal for inspection the original photographs relating to alleged fires in the Zamzam Companies, photocopies of which were attached in Exhibits 182 through 185 to the submission of 4 May 1984. He stated that six of the Zamzam facilities has

sustained considerable damage, while some others sustained minor damage.

Consequently, in these circumstances, the Tribunal was well in a position to determine the extent of the Companies' liabilities, if not referring the matter to an expert. When the Claimant has neither challenged nor offered a value alternative to the negative value suggested by the Respondents, in my estimation the value of all Zamzam Companies assets should not be more than $200,000. The Tribunal must apply such a figure in case it intends to notify the Escrow Agent as to the awarded amount for satisfaction out of the Security Account.

There has been no indication in the Award to suggest that the Government and/or the Foundation were liable in addition to the Zamzam Companies, and the Award does not hold them liable in any respect. The only reference to the question of liability on the part of the Government and the Foundation is in page 42 of the Award. That sentence clearly leaves open the question by stating that "it is not necessary for the Tribunal to make any decisions concerning whether or not the Government of the Islamic Republic of Iran and the Foundation for the Oppressed are also liable." The stated reason for not expressly dismissing these two Respondents is incomprehensible. Apparently the Majority has got the principles wrong here. It must be recalled that the principle is non-responsibility rather than responsibility. Judicial propriety requires dismissal of all parties that are not necessary to the disposition of the Case.

There is no difference between this and the other Cases where the Tribunal, while awarding the claim against the state enterprise or controlled entity concerned, dismissed the claim against the Government of the Islamic Republic and other unrelated respondents. The

examples are legion. See for instance, Mclauglin Enterprises, Ltd. and The Government of the Islamic Republic of Iran, et al, Award No. 253-289-1, paras. 15 and 45 (b) and (d) (16 September 1986); Aeronutronic Overseas Services, Inc. and The Government of the Islamic Republic of Iran, et al, Award No. 238-158-1, paras. 75 and 84 (b) and (g) (20 June 1986); Sea-Land Services, Inc. and The Islamic Republic of Iran et al Award No. 135-33-1 (20 June 1984) pp. 36-37, reprinted in 6 Iran-U.S. C.T.R. 149, 175; Economy Forms Corporation and The Government of the Islamic Republic of Iran, et al, Award No. 55-165-1 (13 June 1983) p. 24, reprinted in 3 Iran-U.S. C.T.R. 42, 54. These Cases were decided by Chamber One including two under the chairmanship of Judge Lagergren, under whose chairmanship the Award in this Case has been issued with no justification for this change of approach.

The Award having asserted jurisdiction over the Zamzam Companies and determined that they were liable on all claims, formulated its dispositif against the Zamzam Companies and not the Government of the Islamic Republic of Iran and/or the Foundation for the Oppressed. The statement following certain dispositif paragraphs on the payment mechanism for the Award is not part of the dispositif nor was it requested as relief by the Claimant. As I have stated above, I consider it as being ultra vires of the Tribunal and ultra petitio of the Claimant. The fact that the same payment mechanism appears with no stated reason in a number of other awards involving payment to United States claimants is no justification, in particular in this Case where the assets of the Zamzam Companies should not be worth more than $200,000.

The provision of the Declaration of the Government of Algeria, paragraph 7 that "[a]ll funds in the Security Account are to be used for the sole purpose of securing

the payment of, and paying, claims against Iran in accordance with the Claims Settlement [Declaration]," does not mandate the Tribunal to indicate in its award from which sources the award must be paid. Neither of the parties must be directed or limited to the use of the funds in the Security Account. They are free to use any other sources as well as to set off the award to the settlement of any other claim or for any other purpose. Even the Technical Agreement of 17 August 1981, concluded among the Escrow Agent, Bank Markazi Iran, Federal Reserve Bank and N.V. Settlement Bank, does not help.

Clause 1(c) of the Technical Agreement states that "funds in [the Security Account] are to be used in accordance with the Declaration of the Government of the Democratic and Popular Republic of Algeria of January 19, 1981." And its Clause 1(e)(i) without requiring the Tribunal to do anything indicates certain functions for the Escrow Agent in the event it receives "from the President of the Tribunal a notification that the Tribunal has rendered" an award in favour of a United States claimant. In fact the Technical Agreement could not impose an obligation or even a right on a third party, such as the Tribunal. It is a principle of both international and municipal law that pacta tertiis nec nocent nec prosunt and obligatio tertio non contrahitur. This has also been recognized by the Vienna Convention on the Law of Treaties, Article 34 stating as follows:

> An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

It is axiomatic that even if the Technical Agreement had been concluded by the Governments of the Islamic Republic and the United States and had required or

entitled the Tribunal to notify the Escrow Agent and obligate the arbitrating parties for enforcement of the award from the Security Account, it would still require an additional acceptance of such mandate by each member of the Tribunal. As a member of the Tribunal, I certainly do not accept such a mandate in this Case even if it existed and of course a majority is no solution to this issue.

Moreover, Clause 19(b) of the Technical Agreement puts a caveat against any contrary interpretation by stating:

> Except as expressly provided in this Agreement, nothing herein shall constitute in whole or in part a waiver of any rights and privileges of the respective parties as stipulated in the Algiers Agreements.

The forum selection clause of the Technical Agreement, Clause 18(b), only entitles the parties thereto to submit any dispute thereunder to certain forums including the Tribunal, i.e. the Full Tribunal, and yet with the proviso that

> neither the Escrow Agent nor the Depositary shall be bound to any decision of the Tribunal which adversely affects its rights or privileges under this Agreement.

In such situation, in the event of a request by a proper party, it is really questionable for the Tribunal to assume jurisdiction where its decision can bind only certain parties to the Agreement but not the Escrow Agent and the Depositary, although they are also parties to the Agreement. This is so, in particular, where the Tribunal deals with the rights and privileges of either the Escrow Agent or the Depositary. In the same place where the five banks accept jurisdiction and waive immunity they

limit them "solely [to] actions brought by a party hereto and solely before the [stated] courts or the Tribunal." (Emphasis added.)

In the present Case, the Government held no shares in the companies in question. The Foundation for the Oppressed, on the other hand, did hold certain shares in the companies. But not only did the Tribunal properly refrain from piercing the corporate veil in order to hold the Foundation liable as a shareholder in the companies, it also properly recognized the separate juridical personality of the companies and held them liable in their own right. The liability of the companies thus does not extend to the assets of the Foundation, nor to those of the Government of the Islamic Republic of Iran.

In view of this, The Award should have spelt out the commonly held view that the quoted phrase from paragraph 7 of the Declaration of the Government of Algeria in no way entails that the Government of Iran has guaranteed the payment of liabilities of Iranian companies, even where a Government controlled entity is the only shareholder in certain of those companies. This is particularly so where those liabilities go beyond the assets of those companies. The establishment of the Security Account has not created a liability for the Government additional to the liability of the company against which an award is rendered. It only ensures that where a monetary award is made in favour of a United States claimant against the Government of Iran or a controlled entity, and the claimant and the United States Government wish that the award be satisfied out of those funds, then payment could be effected out of the Security Account, with no involvement of the Tribunal. In fact for a long time after entry into force of the Algerian Declarations, the United States authorities considered the possibility of not using the Security Account until all cases are

resolved by the Tribunal. This view was supported on the same basis that the United States took up the rights of individual American nationals and used them for resolution of an international crisis necessitated by the national emergency and security interests of the United States.

Consequently, I maintain that especially in this Case it would be highly improper to pay the Award made against the Zamzam Companies out of the Security Account, beyond the assets of those companies which should not be more than $200,000.

The Hague,
Dated 27 October 1986

Koorosh-Hossein Ameli