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14 JAN. 1983

The 'opinion' of Judge Jahangir Sani in Case No. 30

No. 30 شماره ۳۰

Pursuant to Article 32 of the Provisionally Adopted Tribunal Rules, which provides that if an Arbitrator "fails to sign, the award shall state the reason for the absence of the signature", I hereby cite the reasons for my refusal to sign Award No. 30 (on damages and costs), and I request that, in accordance with the express terms of said Article, the same be reflected in the test of that Award.

On 30 July 1982, Chamber 3 by a majority decision rendered a "partial award" which determined the case on the merits but postponed the decision on the issues of damages and costs. Because the issue of damages was by then already on the agenda of the Full Tribunal, I refused to take part in voting. The majority's decision to postpone adjudication of the issue of damages obviously demonstrated that the majority itself recognised the impropriety of rendering a judgement at a time when the issue of damages, which is rightly regarded as one of the most important issues before the Tribunal, had not been subjected to adequate deliberation. The position of the Full Tribunal and, presumably, the other two Chambers over this issue was thus entirely

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vague and ambiguous. Until such time as the existing ambiguity had been removed, with the Full Tribunal setting specific guidelines for the Chambers to follow, logically, no decision should therefore have been rendered in this matter. For the same reason, even though Judge Mangård and Mr. Mosk had shortly before the December session of the Full Tribunal discussed the subject and apparently reached some sort of agreement, Judge Mangård expressly stated that he did not consider it appropriate to make any decision before the topic was considered and clarified by the Full Tribunal. This last point requires a few words of explanation. In order to refer the issue of damages to the Full Tribunal for consideration, Judge Mangård and I first prepared a joint Draft which was shortly followed by a Report in several pages containing the results of a preliminary investigation carried out by Mr. Hosseini and Mr. Edling. The submitted Draft and the Report containing the preliminary investigations were taken up by the Full Tribunal and formed the basis of a general discussion in its December session. This brief and general discussion not only failed to produce the desired result -- that is, a thorough examination of the subject by the Full Tribunal, setting at least broad guidelines enabling the Chambers to adopt a unified policy -- but clearly

demonstrated the diverse and highly intricate dimensions of the subject, particularly in relation to the effects of issues such as force majeure, the Freeze Order, the agreement to resort to arbitration, the starting and finishing dates, the rate of damages, and many others raised in the submitted Report.

Regard for fairness and justice, and in particular for the right of defence -- which is amongst the undisputed rights of parties to any action -- dictated that the interested Parties be first requested to submit their memorials on the subject within a reasonable period of time, so that the Chamber might at least have before it the initial views of the Parties before it rendered its award on this point. Regrettably, Judge Mangård who, in order to abide by a promise he had earlier made to Mr. Mosk, was looking for a sort of temporary expedient exclusively related to Case No. 30, declared in a Chamber meeting which took place immediately after the conclusion of the Full Tribunal's session that he and Mr. Mosk had agreed upon a rate of 8½ percent damages, provided that I also join the majority. It is appropriate here to point out that the parties to the present case had themselves provided for the same rate of 8½ percent, in anticipation of a sort of delayed

payment under circumstances whose details I will not now discuss.

In response to Judge Mangård's proposal, I requested that the meeting be rescheduled owing to my physical and mental exhaustion, so that I could physically and mentally be sufficiently ready to discuss the proposal. Such a rescheduling, as I said then, would also enable me to seek an understanding with the rest of my colleagues on the important and sensitive issue of damages. Judge Mangård and Mr. Mosk agreed to my request, and it was decided that Case No. 30 would be taken up on Monday 13 December 1982.

I do not deem it necessary here to elaborate on the subsequent events leading to my resignation; rather, I shall leave these details to my forthcoming opinion in relation to two other awards rendered in my absence and without final deliberation in a manner which, in my opinion, was altogether illegal. Suffice it to mention that during the meeting which transpired between Judge Mangård, Mr. Mosk and Mr. Hosseini following my resignation, Judge Mangård and Mr. Mosk finally agreed to issue an award on the basis of the same rate of $8\frac{1}{2}$ percent, allowing me to write my dissenting opinion. I

expressed my agreement with this arrangement, and it was decided that steps in conformity with it - i.e. filing of a majority decision setting a rate of 8½ percent and accompanied by my dissent, would be taken on the morning of Tuesday 14 December 1982.

Unfortunately, for reasons which have not yet been made entirely clear to me, the agreement was not honoured and its execution was made contingent upon my consent to the issuing of awards in two other cases, which had never been the subject of final deliberations and did not have the least relationship to the present case. Quite naturally, I expressed my rejection of such an unanticipated proposal, as I deemed it morally inappropriate, and legally and procedurally unacceptable. The very next day -- that is, on Wednesday 15 December -- I learned to my complete surprise that the Award in Case No. 30 had been signed by Judge Mangård and Mr. Mosk, not on the basis of 8½ percent damages as already agreed upon, but on the basis of the totally unacceptable rate of 12 percent.

Based on the foregoing points, the results of which are summarized below, I consider the decision by Chamber Three in regard to the awarding of damages and the rate thereof, to be unlawful, and I consequently

refuse to sign it.

First, the Parties in this Case have been given no opportunity to address the Chamber on the complex and multi-dimensional issue of damages, only some aspects of whose complexity were for the first time brought into light in the Full Tribunal's general discussion.

Second, members of Chamber Three themselves have had no opportunity to discuss the subject, having devoted all of their energies and attention to reaching an out of Chamber consensus. None of the various issues mentioned in the Full Tribunal's session has therefore been deliberated upon or discussed by the members.

Third, the rate of 8½ percent, already agreed upon both by the Parties (at a time when worldwide the prevailing rate was nearly twice the current rate) and by the other two arbitrators, has been set aside in favour of the rate of 12 percent for no valid reason, simply because I rightly refused to consent to the issuing of awards in two other cases not yet deliberated upon and totally unrelated to the present case.

Fourth, at the last chamber meeting, which was

postponed at my request, the issues of damages and costs were not, as I mentioned before, adequately deliberated upon, nor was any decision taken in those regards. If it be assumed that my non-participation in the scheduled meeting of Monday 13 December 1982 was justified -- and subsequent events indicate that my two colleagues did at any rate consider it to be justified -- then the decision by my two colleagues to meet alone, possibly continue deliberation, and issue the Award was incompatible not only with our own Provisionally Adopted Rules but with all other judicial and arbitral principles. It is precisely for this reason that in Paragraph 4 of Article 32 of said Tribunal Rules no reference will be found to the absence of an arbitrator from the deliberation or adjudication sessions, but merely to the failure of an arbitrator to sign, which attest to the assumption that the arbitrator must have attended the deliberation and adjudication meetings, but then simply refused to sign.

Mostafa Jahangir Sani

A handwritten signature in black ink, consisting of a stylized 'M' and 'J' followed by 'Sani', enclosed within a large, hand-drawn circular flourish.