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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری ایران - ایالات متحده

[redacted]

CASE NO. 35

CHAMBER THREE

AWARD NO. 145-35-3

R.J. REYNOLDS TOBACCO COMPANY,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN and IRANIAN TOBACCO COMPANY (ITC),

Respondents.

PARTIAL AWARD

Appearances:

For Claimant:
Mr. C. Stephen Heard, Attorney
Mr. Peter J. van Every
Mr. Robert F. Hermann
Mr. Peter M. Schuler
Mr. Hamid Sabi

For Respondents:
Mr. Mohammad K. Eshragh, Agent of the Islamic Republic of Iran
Mr. Nematollah Mokhtari, Legal Adviser to the Agent
Mr. Hasan Moadi, Attorney for ITC
Mr. Mostafa Shiatolaemah,
Mr. Hossein Honarbakhsh, Members of the Board of ITC
Mr. Mansaur Ahmadi, Technical Representative of ITC
Mr. Karim Partovi, Legal Adviser to ITC

Also Present:
Mr. Arthur W. Rovine
Mr. John R. Crook
Agents of the United States of America
Ms. Jamison Selby
Deputy Agent of the United States of America

I. THE PROCEEDINGS

On 16 November 1981, Claimant R.J. REYNOLDS TOBACCO COMPANY ("Reynolds" or "Claimant") filed its claim against the Iranian Tobacco Company ("ITC") and the Government of Iran.[1]

Claimant sought an amount of US $36,294,667.66 allegedly owing to it for tobacco products sold and delivered, plus interest. Claimant later asserted that it was entitled to its costs in connection with this arbitration proceeding.

On 14 April 1982, Respondent ITC filed its Statement of Defence, setting forth six counterclaims against Reynolds.

On 26 May 1982, Claimant filed a Reply to the counterclaims, requesting that the first five counterclaims be dismissed for lack of jurisdiction. In Claimant's memorial filed on 14 February 1983 this request was changed insofar as only four of the counterclaims were alleged to fall outside the Tribunal's jurisdiction.

On 6 August 1982, the Tribunal ordered that a Pre-Hearing Conference take place on 20 October 1982 and provided that it wished "to hear the Parties' final arguments as to the issue of jurisdiction over the counterclaims, in order to enable a decision to be reached". The Tribunal

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[1] There was a reference to the liability of the Iranian Ministry of Mines and Bank Markazi, but Claimant never pursued claims against these entities.

ordered the parties to file written submissions on this issue. At the Pre-Hearing Conference, ITC sought to amend one of its counterclaims and to add a new counterclaim. On 21 October 1982, ITC filed the proposed amendments to its counterclaim. On 22 November 1982, the Tribunal issued an order whereby it dismissed the new counterclaim as not being filed timely, but accepted the amendment to an existing counterclaim. The Tribunal denied Claimant's motion to dismiss the remaining counterclaims without prejudice.

The Hearing was held on 9 and 10 May 1983, at which the parties submitted oral and written evidence and made legal and factual arguments. After the Hearing, Claimant was invited to submit a post-hearing memorial concerning its alleged standing to bring the claim before the Tribunal, and did so on 7 July 1983. Respondents filed a brief in response to that memorial on 23 December 1983.

Inasmuch as the arbitrator appointed by the Islamic Republic of Iran who had participated in the above mentioned Hearing had meanwhile resigned, the Tribunal, by Order of 21 December 1983, determined by virtue of Article 14 of the Tribunal Rules that a Hearing for continued oral argument be held on 1 March 1984. After this continued Hearing the matter was taken under consideration.

In a submission filed on 11 July 1984, the Agent of the Government of Iran raised the jurisdictional issue, previously raised by Respondents (see infra), of whether under Article VII, Paragraph 2, of the Claims Settlement

Declaration only the American corporation directly owning the shares of a foreign corporation may bring a claim of that corporation before this Tribunal as its own indirect claim, or if also the parent company or other holding companies of the American corporation in question may bring, individually or collectively, the claim of the foreign corporation as their own indirect claim. As in the Agent's view this issue, in the present case specifically with regard to DISC companies, "has a common and general characteristic raised in other cases, and in view of the particular significance of the issue from the viewpoint of the correct application of the Algiers Declarations", the Agent requested that the issue be relinquished to the Full Tribunal. Because the Tribunal's findings infra regarding the jurisdiction over Claimant's claims are based on the circumstances in this particular case and the status of this particular DISC company, R.J. Reynolds Tobacco International Export, Inc., and thus do not reflect any opinion on the general issue of interpretation referred to by the Agent, the Tribunal does not find it appropriate to relinquish the case, wholly or in part, to the Full Tribunal.

No majority has yet been formed within the Tribunal on the question of whether interest on any principal amount awarded Claimant should be calculated from a date prior to the filing of the Statement of Claim. This issue, which may involve a considerable amount of money, needs further research and consideration, inter alia, on points of law. The Tribunal therefore, by virtue of Article 32, paragraph 1 of the Tribunal Rules, decides to render a Partial Award on

all other issues raised in this case, and to retain jurisdiction over a portion of Claimant's claim for interest. A related issue also to be resolved in the final award will be the allocation between the Parties of arbitration costs relating to the interest issue over which jurisdiction is retained.

Pursuant to Tribunal Rules, the member of the Tribunal appointed by the United States who had resigned from the Tribunal as of 15 January 1984, participated at the 1 March 1984 Hearing and in this Partial Award.

II. JURISDICTION OVER CLAIMANT'S CLAIM

1. Contentions of the Parties

With regard to its right to bring the claim, Claimant contends as follows with respect to the relevant times. Reynolds is a United States corporation, all of whose shares are owned by R.J. Reynolds Industries, Inc. The latter company is a United States corporation whose shares are publicly traded. At the relevant times over 99 per cent of the voting stock of R.J. Reynolds Industries, Inc. was held by stockholders of record with addresses in the United States. Claimant owns all of the shares of stock of Reynolds Cigarette Corporation, which is a Swiss company. Claimant also owns all of the shares of a United States corporation called R.J. Reynolds Tobacco International Export, Inc. This corporation is organised as a Domestic

International Sales Corporation (a "DISC"). It in turn owned all of the stock of another Swiss Corporation, R.J. Reynolds Tobacco International, S.A.

Claimant contends that R.J. Reynolds Tobacco International Export, Inc., is a non-operating company, with no business or assets other than the record ownership of R.J. Reynolds Tobacco International S.A. shares, and that it was formed solely to defer the payment of United States taxes on income earned by a foreign subsidiary. This DISC company, Claimant contends, is in effect a "paper" or "shell" corporation which has no control over the foreign subsidiary. The fact that, technically, the shares of the Swiss company are owned by the DISC company does not mean, according to Claimant, that Claimant is not entitled under the Claims Settlement Declaration to bring this claim.

ITC contends that the Tribunal lacks jurisdiction over the claim because (a) Claimant has not established that it is a United States national; (b) the claim could have been brought by R.J. Reynolds Tobacco International Export, Inc. and thus cannot be brought by Claimant; and (c) there is a relevant contract clause referring disputes to arbitration in Iran.

Claimant contends that it is a United States national and that the claim is a proper indirect claim of a national of the United States by virtue of its interpretation of Article VII, paragraph 2, of the Claims Settlement Declaration and also because R.J. Reynolds Tobacco International

Export, Inc. would not be the proper party to bring the claim. Claimant further contends that the arbitration clause referred to by ITC is not part of any of the purchase agreements upon which the claim is based and that in any event such a clause does not divest the Tribunal of jurisdiction. In the event that the Tribunal should hold that R.J. Reynolds Tobacco International Export, Inc. is the proper party with regard to part of the claim, Claimant seeks to amend the claim by introducing that company as an additional claimant.

2. The Tribunal's Findings

Claimant has submitted evidence that at the relevant times over 99 per cent of the shareholders of R.J. Reynolds Industries, Inc., a United States corporation, had United States addresses and that not more than 8 per cent of its voting shares were owned by shareholders owning 5 per cent or more of R.J. Reynolds Industries, Inc. R.J. Reynolds Industries, Inc., owns all of the stock of Claimant. Thus, it can reasonably be inferred that fifty per cent or more of the shares of Claimant are held directly or indirectly by United States citizens, thus making it a United States national under Article VII, paragraph 1, of the Claims Settlement Declaration.

Claimant submitted evidence that Reynolds Cigarette Corporation is a Swiss corporation whose shares are owned entirely by Reynolds, that R.J. Reynolds Tobacco International, S.A. is a Swiss corporation, all of whose stock is owned as of record by R.J. Reynolds Tobacco International Export, Inc., a United States corporation whose stock is owned by Reynolds.

A relatively minor portion of the claim belongs to Reynolds Cigarette Corporation, and the remaining portion belongs to R.J. Reynolds Tobacco International, S.A.

Article VII, paragraph 2, of the Claims Settlement Declaration provides that claims of nationals of the United States include

> claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interest in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement.

Since Reynolds at the relevant times owned all of the stock of Reynolds Cigarette Corporation, it can maintain indirectly that portion of the claim which belongs to Reynolds Cigarette Corporation. That the latter corporation was organized under the laws of Switzerland means that it was "not itself entitled to bring a claim" in the sense of the above provision. The Swiss nationality of Reynolds Cigarette Corporation does not mean that indirect ownership

of the claim by the Claimant would thereby be precluded. See R.N. Pomeroy et al. v. Government of the Islamic Republic of Iran, Award No. 50-40-3 (8 June 1983) 11-12.

On the other hand, it is not as clear that Reynolds can similarly put forward claims belonging to R.J. Reynolds Tobacco International, S.A., as the shares of this company are not nominally owned by Reynolds but by another United States corporation, namely R.J. Reynolds Tobacco International Export, Inc.; the DISC. The mere fact that a legal entity has the form of a Domestic International Sales Corporation does not as such deprive that entity of the legal capacity to sue and bring claims before courts and tribunals. In order for a DISC, like other American nationals, to be entitled to bring an indirect claim under Article VII, paragraph 2, of the Claims Settlement Declaration, however, additional requirements must be satisfied.

Article VII, paragraph 2, cited above, provides inter alia that a claim may be maintained if the claimant owned the claim indirectly "through ownership of capital stock or other proprietary interests in juridical persons", if such ownership interests "were sufficient at the time the claim arose to control the corporation or other entity" and if the "other entity is not itself entitled to bring a claim under the terms of this Agreement". The third requirement is satisfied inasmuch as Reynolds Tobacco International, S.A.,

a Swiss corporation and the owner of the claim, could not itself bring a claim before this Tribunal.

In the present case, the DISC is the nominal owner of the Swiss subsidiary. Generally it may be presumed that control follows nominal ownership. Despite such nominal ownership, however, the DISC in this particular case did not control or have the capacity to control the Swiss subsidiary.

This particular DISC was established merely to allow Reynolds to defer corporate taxes on export-derived income in accordance with the relevant U.S. legislation. See 26 U.S.C. § 992. A DISC does not have to observe the formalities of normal corporations and is usually in reality a "paper" corporation.[2] As to the DISC here in question, evidence shows that its board members are officers or directors of various Reynolds affiliates and that it has no office, no stationary or letterhead, and no employees; indeed, the DISC does not conduct any active trade or business, carries no inventory and is not an operating company. Thus, in reality, the DISC enjoyed no independent existence and appears from the record to have been little

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[2] See U.S. Treas. Regs. § 1.992 - 1 (a); 1971 U.S. Code Cong. & Ad. News, 92nd Cong. 1st Sess. 1998-99.

more than an extension of the tax department of Claimant and/or of Claimant's parent company.[3]

Thus the DISC never in any manner participated in the relevant sales of tobacco which took place through R.J. Reynolds Tobacco International, S.A. The evidence before the Tribunal shows that, upon receiving an order from ITC in such cases, the Swiss subsidiary directly and without the intervention of the DISC notified Claimant which (save in cases in which the goods were manufactured by another Reynolds Swiss subsidiary, Reynolds Cigarette Company) then manufactured and sold the products directly, and not through the DISC, to R.J. Reynolds Tobacco International, S.A. in order to be re-sold to ITC.

Consequently, the DISC did not exercise any control over the Swiss subsidiary, but it was rather Reynolds that was the proprietor and that, in every sense of the word, directly controlled the Swiss corporation.

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[3] In Farkar Company v. Hanson DISC 583 F.2d 68 (2nd Cir. 1978), Hanson Co. attempted to shield itself from liability to Farkar Co., an Iranian Company, by arguing that Farkar had entered into a contract for a sale of goods with Hanson DISC and not Hanson Co. Hanson DISC appears from the court record to have been as insubstantial as the DISC in the present case. The U.S. court in Farkar, concluding that Hanson Co. was the alter ego of Hanson DISC, stated that "the corporate veil was so diaphanous that it did not even require piercing." Farkar at 71.

Under these circumstances the Tribunal is entitled to disregard this particular DISC entity and conclude that Reynolds possesses, in accordance with Article VII, paragraph 2, of the Claims Settlement Declaration, the necessary "proprietary interests" in and control of the Swiss subsidiary and thus may assert, as an indirect claim, the claim of R.J. Reynolds Tobacco International, S.A.

It should be noted that even if the DISC were regarded as a necessary party, the Tribunal might have allowed an amendment to add it as a claimant under the circumstances of this case. See American International Company Inc. et al. v. Islamic Republic of Iran, Award No. 93-2-3 (19 December 1983).

Having thus restricted its holding to the jurisdictional issue before it in the instant case, the Tribunal does not have to reach the question of whether under other circumstances a DISC may be qualified to bring an indirect claim under Article VII, paragraph 2, of the Claims Settlement Declaration, nor the still broader issue of interpretation of that paragraph, referred to by the Agent of the Government of Iran in his submission filed on 11 July 1984 (see supra).

There is no dispute that ITC is an agency, instrumentality or entity controlled by the Government of Iran.

That any of the relevant agreements may contain a clause calling for arbitration between the Parties does not divest this Tribunal of jurisdiction by virtue of Article II, paragraph 1, of the Claims Settlement Declaration, for such a clause does not provide that any disputes under the contract shall be within the sole jurisdiction of competent Iranian courts. See Dresser Industries, Inc. v. The Government of the Islamic Republic of Iran, et al. Award No. ITL 9-466-FT (5 November 1982).

Accordingly, the Tribunal has jurisdiction over the claim of Claimant.

III. FACTUAL BACKGROUND TO CLAIMS AND COUNTERCLAIMS

Reynolds and its subsidiaries manufacture and distribute various brands of cigarettes, including the "WINSTON" brand, and other tobacco products. Respondent ITC, on a regular basis and for a number of years until some time in 1979, purchased such products from Reynolds and its subsidiaries.

Moreover, in 1970 ITC and R.J. Reynolds (Europe) S.A. (subsequently R.J. Reynolds Tobacco International, S.A.) entered into a "Licensing And Technical Assistances Agreement". By this Agreement ("License Agreement") R.J. Reynolds Tobacco (Europe) S.A. granted to ITC a license to

use Reynolds' techniques and trademarks and to sell or distribute Winston cigarettes in Iran, and agreed to provide assistance to ITC in connection with manufacturing, merchandising and advertising of Winston cigarettes. In return, ITC was to pay royalties on cigarettes sold. The License Agreement was for a three year period from the date when ITC began manufacturing Winston cigarettes. After that period either party could terminate the License Agreement by giving one years written notice.

IV. THE MERITS OF CLAIMANT'S CLAIM

1. Contentions of Claimant

Claimant makes the following contentions. During 1978 and 1979, Claimant, through its Swiss subsidiaries R.J. Reynolds Tobacco International S.A. and Reynolds Cigarette Corporation, sold and delivered to ITC cigarettes and other tobacco products. On 7 May 1979, R.J. Reynolds Tobacco International S.A. issued a statement of account to ITC as of 30 April 1979 for such goods. The total amount due was stated to be US $64,402,523.30. On 30 July 1979, ITC responded by acknowledging that as of 30 April 1979 it owed a total of US $59,265,990.32. The difference in the amounts was the amount of certain invoices amounting to US $4,609,755.06 which invoices ITC said it had not received and by a further deducted amount that ITC did not fully explain. Copies of the missing invoices were subsequently

sent to ITC. Between 7 May 1979 and 30 July 1979, ITC made payments of US $21,181,898.17 against the outstanding receivable of US $ 59,265,990.32 and took other deductions of US $28,533.53. ITC therefore had acknowledged that as of 30 July 1979 it owed Reynolds a total of US $38,055,558.62 (which did not include the $4,609,755.06 in connection with the missing invoices and the other unexplained deduction). There were other shipments of cigarettes to ITC by the Reynolds companies beginning in May 1979 amounting to over U.S. $22 million. Subsequent to 30 July 1979, ITC made payments to Reynolds totalling approximately US $28 million, and this amount was credited to ITC's account.

Claimant asserts that ITC owes it an amount of US $36,294,667.66 for tobacco products sold and delivered. The claim for US $35,539,486.66 out of this amount is based on a consolidated statement of account as of 31 October 1979. The claim for the remaining US $755,181 is based on a subsequent invoice for additional cigarettes dated 9 November 1979, which, according to Claimant, remains unpaid.

Claimant also seeks interest, including compound interest, from 22 November 1979 on the principal amount owing - the date when according to Claimant it became clear that ITC would not pay the debt - in accordance with a provision contained in an order acknowledgement form, which provision, according to Claimant, constitutes part of the various purchase agreements. Claimant interprets the provision as requiring compound interest. In response to ITC's defences

with regard to the claim for interest (see below), Claimant asserts that there was no waiver of the right to interest; that the contract clause providing for interest was not adhesive; that payments could have been made to Swiss bank accounts of Claimant or its subsidiary; and that it would be inequitable not to award interest since ITC had made large profits from the sale of cigarettes.

2. Respondents' Contentions

ITC ultimately acknowledged that there was an amount unpaid to Reynolds for tobacco products delivered, but only in the amount of US $34,408,206.23. ITC asserts that US $1,886,461.43 should be deducted from the amount claimed for various reasons, including prior payment, non-receipt of goods, and overcharging. ITC asserts, however, that in view of the counterclaim no amount is owing.

ITC disputes that interest should be paid at all. It argues that the provision referred to by Claimant is not binding because it was not brought to the attention of ITC, was never enforced in the past, was adhesive and because there were disputes as to amounts owing. Moreover, ITC asserts that interest should not be paid because ITC was prevented from making payments as a consequence of the Executive Order of 14 November 1979, issued by the United States President, freezing Iranian assets. ITC argued at the continued Hearing, that interest should not be allowed until the Full Tribunal has rendered its decision regarding the question of interest in Case No. A/19.

3. The Tribunal's Findings on the Claim Regarding the Principal Amount

Aside from the counterclaims, ITC's liability for tobacco products sold and delivered to it by subsidiaries of Reynolds is undisputed to the amount of US $34,408,206.23.[4] As for the US $1,886,461.43, the rest of the claim regarding the principal amount, ITC denies its responsibility. The various invoices and records of payments support Claimant's position.

It has not been alleged that ITC objected within a reasonable time period to Reynolds' statement of account of 31 October 1979 or to the subsequent invoice of 9 November 1979. In fact, there is no evidence that these specific amounts were disputed until Claimant indicated that it intended to bring this claim before the Tribunal. In view of this, the burden is now on ITC to demonstrate any facts supporting its contention that US $1,886,461.43 should be deducted from Claimant's claim. ITC, however, has not offered sufficient evidence on this point. See Time Incorporated v. The Islamic Republic of Iran et al., Award No. 139-166-2 (29 June 1984).

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[4] The $28,654,149 payment at one time referred to by ITC was shown to have been credited to ITC against invoices not included in Claimant's statement of unpaid accounts of 31 October 1979.

Accordingly, the Tribunal must conclude that ITC owes Reynolds US $36,294,667.66 for unpaid tobacco products.

There is no evidence of direct liability of the Government of the Islamic Republic of Iran, apart from ITC, and there are no circumstances existing which should result in an award against it. Accordingly, the claim against the Government of the Islamic Republic of Iran is dismissed.

4. The Tribunal's Findings on the Interest Claim

Claimant contends that it is entitled to interest based on the following terms and conditions appearing on the order acknowledgement form used in connection with the goods that are the subject of the claim:

> Buyer [ITC] agrees to pay to Seller interest at three months libor [London International Offering Rate] (as quoted by the Financial Times of London) plus 2 per cent p.a. on all sums and for the duration such sums remain unpaid in excess of the agreed payment terms. Seller's occasional or continued omission to claim interest hereunder shall not be construed as a waiver.

The order acknowledgement form provides for the application of Swiss law to the sale. Under Swiss law, a contractually agreed upon rate of interest is binding on the parties to the contract. Swiss Code of Obligations, Article 104, Paragraph 2.

Claimant asserts that this clause permits the compounding of interest. Also the large profits of ITC from the sale of the unpaid cigarettes have been referred to by Claimant as a particular justification for compound interest.

The Tribunal, however, does not find that there are any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable". III M. Whiteman Damages in International Law 1997 (1943). Even though the term "all sums" could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest.

Under generally accepted principles of contract law, a contractually stipulated rate of interest is normally binding on the parties. It is true that "[a]n international Tribunal will not enforce the provisions of a contract stipulating that a highly unreasonable or usurious rate of interest should be paid". Whiteman supra at 1981. But there is no indication that the rate of the interest is usurious under the law of the contract, i.e. Swiss law. Moreover, although the interest rate stipulated in the contract exceeds the rate applied by the Tribunal in the

absence of such contractual provisions, it does not exceed that level to an extent which would make the rate "highly unreasonable". The fact that the clause was part of an arrangement between two large and commercially equal and independent entities suggests that the prescribed rate should not be deemed to be highly unreasonable. ITC submitted no evidence of the unreasonableness of the interest rate.

ITC's argument that the interest provision is unenforceable as a contract of adhesion likewise lacks merit, for the contracts were not between a vendor and a consumer or between otherwise unequal parties, but rather were multi-million dollar contracts between two substantial and commercially sophisticated entities.

ITC further argues that it should be excused from paying interest inasmuch as it was allegedly prevented from making payment of foreign currency debts as a consequence of the Executive Order of 14 November 1979, issued by the United States President, freezing Iranian assets. The regulations promulgated pursuant to the Executive Order, however, expressly exempted from the freeze further monies entering the United States for the purpose of payment of debts. 31 U.S. Code of Federal Regulations § 535.904. Moreover, Respondents have not submitted sufficient evidence to establish that the U.S. freezing action effectively denied Iran the U.S. dollars allegedly necessary for payment. Regardless of the availability of dollars, the Iranian frozen assets, whether or not they were earning

interest at that time, were placed into interest bearing accounts. In addition, the 9 November 1979 invoice in the record before the Tribunal indicates that payment was to be made to the credit of Claimant's Swiss subsidiaries at Credit Suisse in Geneva "in U.S. dollars or equivalent in Deutsche Mark or Swiss Francs." It is reasonable to assume that Claimant would have been prepared to accept payment under a similar arrangement for the other portions of its claim, as all payments were to be made to its Swiss subsidiaries. ITC is thus in no way prejudiced by or excused from its paying interest in this case.

Finally, the argument that interest must not be allowed pending the Full Tribunal decision in Case No. A/19 should not affect the above conclusions. No date is fixed for a hearing in Case No. A/19. When the issue of interest was previously raised informally in the Full Tribunal, the prevailing opinion was that pending an eventual decision on the subject by the Full Tribunal, each Chamber should resolve issues of interest in cases before it according to its own best judgment. The three Chambers have consistently done so. To act otherwise would have meant blocking the work of the Tribunal for an unforeseeable length of time, as interest is claimed in practically every case.

Thus, Claimant is entitled to simple interest according to the terms set forth in the contract. Due to the fluctuation of the libor rate, the actual interest rate depends on the date from which the interest is calculated. According to Claimant it should be calculated "from November

22, 1979 because ITC defaulted on that date by failing to make US $14.1 million in payments against the outstanding amounts". As far as the evidence before the Tribunal shows, a demand for interest from that date, however, was not made until 16 November 1981 when the Statement of Claim was filed with the Tribunal. The evidence before the Tribunal also appears to indicate that, in the practice of the Parties during their many years of commercial relations, Reynolds had refrained from claiming interest, and had accepted payments even though ITC often was in default.

Thus, the conduct of the Parties must be considered simultaneously with the specific language of the interest provision that "[s]eller's occasional or continued omission to claim interest hereunder shall not be construed as a waiver".

As there is a majority within the Tribunal for granting Claimant interest on the principal amount at least from 16 November 1981, the Tribunal in this Partial Award grants Claimant simple interest, payable by ITC, at the rate of 13.54 per cent, i.e. 11.54 per cent equalling the average three months libor rate between the last quarter of the year 1981 and the second quarter of the year 1984, plus 2 per cent, upon the principal amount from 16 November 1981.[5]

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[5] In the case of simple interest, the application of such an average rate leads to the same results as the quarterly application of each relevant three months libor figure. The Tribunal, for practical reasons, has chosen to use the average rate.

As previously stated, the Tribunal retains jurisdiction over the issue of whether or not Claimant is entitled to interest also for the period 22 November 1979 to 16 November 1981. The Tribunal notes that a granting of Claimant's claim for interest for that period may necessitate a revision of the average libor rate here applied, due to the fluctuation of the relevant three months libor figures, and therefore a revision of the interest amount herein granted. The Tribunal retains its jurisdiction to make such revisions, if necessary, in the Final Award.

V. THE COUNTERCLAIMS OF RESPONDENT ITC

1. ITC's Contentions

ITC asserts 6 counterclaims. First, ITC states that, being a valued customer of Reynolds, it should have received lower prices than those which were charged for Winston cigarettes. ITC points to a 19 per cent discount that it received in 1979 and argues that such discount shows that, instead of being charged a lower price as might have been expected, ITC had been overcharged and that it is therefore entitled to an equivalent price reduction over some previous years. Under this counterclaim ITC seeks US $57,240,000 for discounts to which it claims that it is now entitled.

Second, ITC asserts that it was overcharged on the price of case blended strips supplied to it. For such alleged overcharge ITC seeks US $7,296,249.50.

Third, ITC asserts that Reynolds did not supply certain technical specifications and confidential formulae and techniques as it was required to do under the License Agreement. ITC seeks US $2,000,000 as damages for the alleged breach of the License Agreement.

Fourth, ITC claims that Reynolds did not exert reasonable efforts to use Iranian tobaccos in its Winston cigarette blend, as it was required to do under the License Agreement. ITC therefore seeks damages in the amount of US $3,000,000.

Fifth, ITC asserts that Reynolds "overpoured" Winston cigarettes or case blended strips into Iran and engaged in improper promotional programs, thereby destroying the Iranian tobacco industry. ITC points to a clause in the License Agreement that provides that "Reynolds will not promote the sale of WINSTON cigarettes in the License territory,..." For such alleged actions, ITC seeks US $28,000,000 in damages.

Sixth, ITC asserts that Reynolds, by shipping large amounts of cigarettes into countries close to Iran, facilitated the smuggling of illegal Winston cigarettes into Iran in violation of a clause in the License Agreement providing that "Reynolds shall to the extent possible and lawful, exert reasonable effort to prevent illegal entry of all its Brands to License Territory". ITC seeks US $10,000,000 as damages for these alleged actions.

2. Claimant's Contentions

Claimant denies liability under the first counterclaim on the grounds that ITC never objected to the prices charged; that those prices were fair; that ITC cannot now object to the prices; and that in any event ITC did not suffer any damage because it passed the cost on to the consumer. For similar reasons Claimant denies its liability under the second counterclaim.

Claimant contends that the remaining four counterclaims relating to the License Agreement do not arise out of the same contract, transaction or occurrence that constitutes the subject matter of its claim and that, therefore, under Article II, paragraph 1, of the Claims Settlement Declaration, the Tribunal lacks jurisdiction over those counterclaims. To the extent that the Tribunal may assume jurisdiction over these counterclaims, Claimant denies liability under each of them. Claimant notes that Respondent did not comply with the License Agreement in connection with the assertion of breaches, that Respondent never raised the alleged breaches until filing its Response herein, that Claimant did not in any way breach the License Agreement and that the License Agreement was terminated by ITC in December 1979, so that alleged breaches thereafter are irrelevant. Claimant further notes that the only reason given by ITC in its letter of termination was that it could not carry into effect the Agreement "due to the state of National Emergency".

3. The Tribunal's Findings With Regard to Jurisdiction over Counterclaims

Article II, paragraph 1 of the Claims Settlement Declaration establishes the conditions for determining whether a counterclaim comes within the Tribunal's jurisdiction. According to these conditions the counterclaim does not only have to be directed against Claimant, but it must also arise out of the same "contract, transaction or occurrence that constitutes the subject matter" of Claimant's claim. The subject matter of the claim in this case is contracts for sale of tobacco products. The first two counterclaims as set forth above are to the effect that ITC should, under transactions based on these contracts, have received lower prices than those actually charged. It is not disputed that these counterclaims are directed against Claimant. Thus, the two counterclaims in question fulfill the jurisdictional requirements referred to above.

The remaining four counterclaims, on the other hand, concern alleged breaches of the License Agreement. In view of the fact that the principal claim of Claimant relates to contracts for sale of tobacco products, these counterclaims do not have a similar direct connection with the subject matter of the claim. Although certain parts of Claimant's claim concern amounts due for tobacco raw products and wrapping materials delivered to ITC as envisaged in the

License Agreement, the basis of the claim, even in this respect, is separate contracts of sale rather than the License Agreement. Neither the facts nor the evidence in connection with the claim would be able to dispose of any disputes concerning the alleged breaches of the License Agreement.

Even though it is possible that in some cases one single transaction may consist of two or more contracts, in the present case linkage between the License Agreement and the separate sales contracts is not "sufficiently strong so as to make them form one single transaction" within the meaning of the Claims Settlement Declaration. See Morrison-Knudsen Pacific Limited and The Ministry of Roads and Transportation et al., Award No. 143-127-3 (13 July 1984); see also American Bell International Inc. and The Government of the Islamic Republic of Iran et al., Award No. ITL 41-48-3 (11 June 1984). Consequently, there is no relationship between the claim and the four counterclaims in question such as to justify the conclusion that the causes of action of the counterclaims arise out of the "same contract, transaction or occurrence" which has been relied on by Claimant.

The Tribunal thus concludes that, whereas it has jurisdiction over the first two counterclaims, it lacks jurisdiction over the remaining four.

4. The Tribunal's Findings With Regard to the Merits of Counterclaims

In the first counterclaim ITC alleges that it was a good customer of Reynolds and that the 19 per cent discount it was offered in 1979 is evidence of overcharging in the past. This discount was apparently offered because of the large unpaid amount owing by ITC for previous products purchases. Respondents admit that this was a one-time offer related to purchases in 1979. A discount granted under special circumstances does not necessarily indicate that the price normally charged is unduly high. In this case the evidence rather supports Claimant's allegation that ITC for certain years paid a lower price than the price charged by Claimant to its customers in other markets. Moreover, there is no principle of law which would suggest that a vendor must supply a discount to a "most valued customer". There is also no evidence that ITC had ever objected to the prices for the cigarettes. In fact, it had basically acknowledged its debt for cigarettes and made payments therefor.

Accordingly, the counterclaim for alleged overcharging for cigarettes cannot be sustained.

For similar reasons, the second counterclaim for overcharges on the price of case blended strips lacks merit. There is no evidence that the price was not freely negotiated and agreed to in 1975. The price apparently remained in effect for four years. ITC relies only on a price quote made in 1973 for the year 1973. However, a

price quote for one year cannot in itself be relevant with regard to sales made years later. There is no indication that the prices charged were not enforceable for any other reason.

Accordingly, the two counterclaims for overcharging on products cannot be sustained.

For reasons indicated above, the four other counterclaims are not dealt with on their merits.

VI. Costs of Arbitration

In the light of the above conclusions, the Tribunal determines pursuant to Articles 38 and 40 of the Tribunal Rules that in this Partial Award Claimant shall be awarded US $25,000 as its costs of arbitration.

VII. PARTIAL AWARD

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

The claim is dismissed insofar as it is directed against Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN.

The counterclaims are dismissed.

Respondent IRANIAN TOBACCO COMPANY is obligated to pay and shall pay to Claimant R.J. REYNOLDS TOBACCO COMPANY the amount of THIRTY SIX MILLION TWO HUNDRED and NINETY FOUR THOUSAND SIX HUNDRED and SIXTY SEVEN United States Dollars and Sixty Six Cents (US$36,294,667.66) plus simple interest on that amount at the rate of Thirteen point Fifty Four (13.54) per cent per annum (365 days) from 16 November 1981 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.

Respondent IRANIAN TOBACCO COMPANY is further obligated to pay and shall pay to Claimant the amount of TWENTY FIVE THOUSAND United States Dollars (US $25,000) as Claimant's costs of arbitration in connection with this Partial Award.

Such payments shall be made out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

This Partial Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

The Tribunal retains jurisdiction to resolve the specified issue of interest and related costs.

Dated, The Hague,

31 July 1984

Nils Mangård
Chairman
Chamber Three

Richard M. Mosk
Concurring Opinion

In the Name of God

The present award, under which millions of dollars of Iranian monies are to be transferred to an American Claimant who has no locus standi in the case, constitutes yet another example of misinterpretation of the Claims Settlement Declaration . Such interpretation violates the rights of the Iranian Respondents.

When cases have been deliberated in good faith and reasoned arguments prevail, they must naturally be

finalized in due course and signed by all arbitrators, however strongly these may feel about the arguments or the awards resulting from this process. But when cases have been decided on the basis of predetermined calculations and inclinations, there is no point in signing the resulting awards and thereby becoming part of an unfair and illegal process. A brief note should suffice to demonstrate the nature of the majority's decision in the present case. A more detailed examination of the case, and of the majority's violation of its mandate, will be submitted in due course.

The three most significant issues in this case were: (i) jurisdiction, (ii) counterclaims, and (iii), interest.

(i) Jurisdiction. Under the explicit terms of Article VII (2) of the Claims Settlement Declaration, a national of Iran or the United States may bring before this Tribunal a claim owned indirectly by such national through ownership of capital stock or other proprietary interests in a juridical person, provided, inter alia, that the juridical person is not itself entitled to bring a claim under the terms of the Claims Settlement Declaration.

The Claimant in the present case is R.J. Reynolds Tobacco Company which is registered in the United States. It originally asserted that it owned %100 of the stocks of the two Swiss companies which were parties to the contracts with the Respondent, Iranian Tobacco Company. Pointing out that the two Swiss companies were not themselves entitled to institute claims before this Tribunal, the Claimant first argued that it satisfied the relevant terms of the Claims Settlement Declaration as an indirect owner of the submitted claims. The institution of indirect claims by a United States registered company on the basis of its ownership of the stocks of a foreign company is by itself objectionable and clearly violative of the text and the spirit of the Claims Settlement Declaration.(1) But be that as it may, for the more important point is that during the course of proceedings in the present case it was discovered that the stocks of one of the two Swiss companies are not owned by the Claimant but by another United States registered company called R.J. Reynolds Tobacco International Export, Inc., whose stocks in turn are apparently owned by the Claimant. This meant, in short, that an indirect claim of a United States registered company who was itself apparently entitled to bring its own claim was brought by another quite independent juridical person. This was naturally objected to by the Respondents who argued that the Claimant had no locus standi to pursue the claims. The Claimant, in reply, asserted that R.J. Reynolds Tobacco International Export, Inc. is not an ordinary company but a peculiar creature known to the American law as a Domestic International Sales Corporation ("DISC") which is incapable of instituting

(1) Details of this objection may be found in, for instance, the Memorial of the Islamic Republic of Iran dated 31 January 1984, submitted in relation to Case No. 444.

claims in its name. The parties were then asked to address this particular issue, namely, whether or not a DISC is capable of suing or being sued in its own name. It became quite clear on the basis of the parties' submissions and the subsequent general discussions of the case that even assuming the American law to be relevant, a DISC company is in fact capable of pursuing its own claims; and that consequently, the present indirect claims could only have been submitted by its owner, R.J. Reynolds Tobacco International Export, Inc., and not by others. Yet, the same arbitrators who, in Case A/2, categorically stated that this Tribunal "could not have wider jurisdiction than that which was specifically decided by mutual agreement" and on a jurisdictional ground dismissed thousands of the Iranian claims, refused to follow the clear text of the Claims Settlement Declaration when it appeared to be detrimental to the interests of an American claimant. In the absence of any alternative, the majority at the last moment produced the draft of the present award in which it was argued, for the first time, that R.J. Reynolds Tobacco International Export, Inc., is a DISC different from other DISCs; and that since it does not satisfy another requirement of the Claims Settlement Declaration, namely the requirement of control, it does not have the capacity to institute claims in its own name. The fallacy of these arguments which are both factually and legally misleading and wrong shall be dealt with separately. But the point is that these were not the issues before the Tribunal; the parties, and particularly the Respondents, were not asked to and naturally did not deal with them; and the arbitrators did not deliberate on them. Indeed, it was simply a last moment device to secure the interests of the American Claimant at all cost. It was in that spirit that my last request for the transfer of this important jurisdictional issue to the Full Tribunal-- which is the undeniable right of any arbitrator-- was also rejected, while other, less important issues have been readily transferred whenever requested by the American Arbitrators.

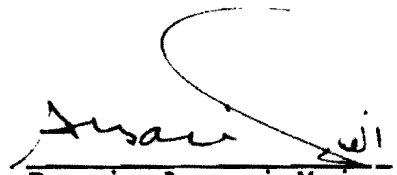
(ii) Counterclaims. The Respondents have been similarly deceived by the Chamber with regard to their counterclaims. Throughout the proceedings and in the course of deliberations the only issue-- relevant under the clear text of the Claims Settlement Declaration-- was whether or not a License Agreement between the parties formed a part of the submitted claims. If it did, the Respondents were naturally entitled to assert any counterclaim arising from that Agreement. Realizing that the Respondents' overwhelming evidence in this regard and on the merits could not be lightly dismissed, the majority again at the last moment resorted to the novel idea that a counterclaim directed against "minor parts" of the claims are outside the jurisdiction of the Tribunal and must therefore be dismissed. The majority seeks to advance another strange idea in this respect, namely, that there would be no

jurisdiction over counterclaims where the facts or evidence of the claims are not able to dispose of disputes related to the subject matter of the counterclaims. The text of the Claims Settlement Declaration is set aside in favour of imaginary theories which the parties had been given no opportunity to demonstrate their absurdity.

(iii) Interest. Finally, with regard to contractual rate of interest, the Respondents' most persuasive argument is simply ignored. It was argued by the Respondents that even assuming that the so-called "Order Acknowledgement Form" did constitute a legally valid agreement between the parties, it was the Claimant who, by instituting his claims before a United States court instead of the clearly stipulated arbitration in Geneva, violated the terms of the said Order. Having itself violated the express terms of the Order years ago, the Claimant cannot be allowed to rely on other parts of the same Order.

An award is supposed to be produced after deliberation, reflecting the arbitrators' views on issues which are defined and dealt with by the parties. The present award finds against the Respondents on the bases of arguments which are irrelevant and which were not even raised, let alone discussed, by the parties or by the arbitrators. It is therefore illegal and void.

I will file my dissenting opinion at the appropriate time.



Parviz Ansari Moin