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Award No.: ITM...13-388-FT

Case No.: 388

CONCURRING OPINION OF DR. KASHANI, DR. SHAFEIEI AND DR. SANI
ON CASE No. 388.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داورى دعاوى ايران - ايالات متحده
ثبت شد - FILED	
Date	۱۳۶۱ / ۱۲ / ۲۵ 16 MAART 1983
No.	388 311

DUPLICATE
ORIGINAL
«نسخه برابر اصل»

The "Concurring Opinion" of the Iranian arbitrators Mahmoud Kashani, Sahfei Shafeiei, M. Jahangir Sani.

As set forth in the Majority Decision, on 13 September 1982, E. Systems Inc., the Claimant in the present case, arguing that this Arbitral Tribunal has exclusive jurisdiction over any counterclaim by Iran, requested that Chamber One :

- 1) issue an interim relief ordering the Islamic Republic of Iran, first, to cause the immediate dismissal or stay of certain proceedings instituted by the Ministry of Defence of the Islamic Republic of Iran against E. Systems in the Public Courts of Tehran and, secondly, to refrain from filing the Claim in the Iranian Courts or any other forum, so long as this Tribunal had pending before it the Claim by E. Systems Inc.
- 2) issue, alternatively, a declaration that the Islamic Republic of Iran is in breach of the Algiers Declaration and that, consequently, E. Systems Inc. is no longer bound by the provisions of Article VII, Paragraph 2, of the Claims Settlement Declaration.

Jurisdiction solely to hear and decide the issues raised in E. Systems' Motion was relinquished to the Plenary Tribunal by Chamber One. The Plenary Tribunal, having first declared that its jurisdiction over counterclaims by Iran is not exclusive, dismissed the Claimants' Motion for interim relief. However, in the concluding part of its Decision, the Tribunal nevertheless briefly dealt with the issue of possible inconsistency between its awards and those by other fora, and it requested that the Government of Iran move for a stay of proceedings before the Public Courts of Tehran until such time as the present proceedings before the Tribunal have been completed.

Although they concur with the conclusion that the Tribunal lacks exclusive jurisdiction over any counter-claims by Iran, and with the dismissal of the Claimant's motion, the Iranian arbitrators deem it necessary to present their views on certain other points raised in the Decision, particularly with respect to the request that the Government of Iran move to stay the proceedings before the Iranian Courts.

Before dealing with the subject one point must be made clear. Article 26 of the Provisionally Adopted Rules of the Tribunal permits the Tribunal to make an interim measure at the request of the interested party only in cases where the prompt intervention of the Tribunal is deemed necessary for the conservation of the goods forming the subject-matter in dispute; where the subject-matter is in danger of being perished during the course of arbitral proceedings; and where the non-issuance of an interim measure will result in an irreparable damage to a party. Reasons relied upon by the claimant in the present case for his request of an interim measures I however, do not come within any of the above-mentioned instances. This arbitral Tribunal cannot be requested to order another judicial body, under the pretend of an interim measure, to stop or suspend its proceedings particularly because the jurisdiction of this Tribunal is an exceptional one, while the jurisdiction of municipal courts is inherent and general over the claims before it.

The contract out of which disputes have risen between the parties to the present claim provides the following stipulation for jurisdiction by Iranian Courts:

Settlement of Differences

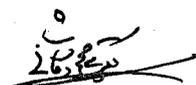
All disputes and differences between the two parties arising out of interpretation of the Contract items or the execution of the works which cannot be settled in a friendly way, shall be settled in accordance with the rules provided by the Iranian Laws, via referring to the competent Iranian Courts.

The issue of whether, in the light of the explicit provision for the jurisdiction of the Iranian Courts and of the exclusion provided in Article II, Paragraph 1 of the Claims Settlement Declaration, the Tribunal has itself jurisdiction over the present claim, can only be determined in future by the competent forum. Hence, the Tribunal's announcement that its award in the present case shall prevail over any inconsistent award which might be made by the Iranian Courts is legally untenable, if only because such a conclusion, based as it is upon the a priori assumption that the Tribunal has jurisdiction over the present claim, represents a preconceived opinion on an issue which has not yet been determined by the competent authority, and which cannot - at any rate - be determined by the Plenary Tribunal, inasmuch as it lies outside the scope of the issues relinquished by Chamber One.

What is certain is that the jurisdiction of the Iranian Courts has been explicitly provided for in the Contract. Relying on that provision, the Ministry of National Defence of the Islamic Republic of Iran has apparently decided to try to recover its alleged legal rights not by means of raising a counterclaim, but through the filing of an original claim with the competent Iranian Courts. If so, the Tribunal's request that the Government of the Islamic Republic of Iran move to stay the proceedings in the Public Courts of Tehran would not only be incompatible with its own expressed view that the Tribunal lacks exclusive jurisdiction

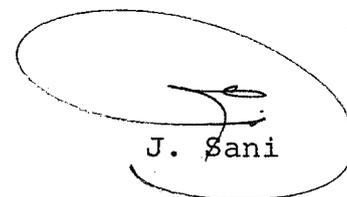
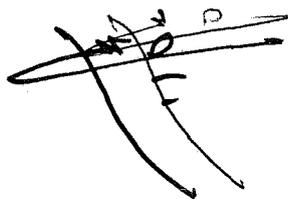
over Iran's counterclaim, but would also violate the legal rights of the Ministry of National Defence, which shall, on the basis of the Tribunal's rejection of its exclusive jurisdiction, be entitled to pursue its alleged rights, either before this Arbitral Tribunal as counterclaim, or before any other forum as original Claims.

Still more important point, however, is the fact that because of the laws governing the proceedings before the Iranian Courts, the Government, or the Ministry of National Defence, of the Islamic Republic of Iran cannot legally comply with the Tribunal's request. To be more specific, Article 290 through 298 of the Iranian Code of Civil Procedure, which govern the termination or stay of proceedings before the Iranian Courts, do not provide for such termination or stay at the parties request. Even if they wish, therefore, the Government of Iran, or its Ministry of National Defence, will find it legally impossible to implement the Tribunal's request.



M. Kashani

Sh. Shafeiei



J. Sani