IRAN-UNITED STATES CLAIMS TRIBUNAL

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** SEPARATE OPINION of Mr Aldrich

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CASE NO. 389
CHAMBER TWO
AWARD NO. 579-389-2

WESTINGHOUSE ELECTRIC CORPORATION,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE ISLAMIC REPUBLIC OF IRAN AIR FORCE,
THE NATIONAL IRANIAN OIL CO.,
Respondents.

SEPARATE OPINION OF
GEORGE H. ALDRICH

1. I concur in the Award in this case except that I dissent (a) from the holdings that the Tribunal has no jurisdiction over the claims submitted by Westinghouse with respect to the contracts that were brought into the case as the result of the Air Force's counterclaims on them and the Tribunal's Interlocutory Award[1] finding jurisdiction over them and (b) from the refusal by the Tribunal to award Westinghouse the full amount to which the Tribunal finds it entitled as a result of the frustration of these contracts.

Jurisdiction

2. As the Award indicates, Westinghouse made numerous claims with respect to these "counterclaim contracts" in its first filing following the Interlocutory Award that found

[1] Award No. ITL 67-389-2 (12 February 1987), reprinted in 14 Iran-U.S. C.T.R. 104.

jurisdiction over the counterclaims by the Air Force in three of these contracts.[2] Westinghouse urged that its claims on the "counterclaim contracts" be accepted as within the Tribunal's jurisdiction either as counterclaims or as amendments to its claims. The Air Force objected, and the Tribunal in the present Award holds that it has no jurisdiction over them as counterclaims because the Claims Settlement Declaration and the Tribunal Rules did not foresee the possibility of counterclaims by Claimants and that they are not proper amendments because they would introduce new claims at a date much later than 19 January 1982, which the Declaration established as the deadline for the filing of claims.[3] I will explain below, see infra paras. 13-17, that these jurisdictional holdings regarding Westinghouse's counterclaims are irrelevant because: (i) in cases where a contract has been frustrated rather than breached, Tribunal precedent requires the issuance of monetary awards based upon the parties' respective performances, without regard to who filed claims or counterclaims for breach of contract; and (ii) the present Award correctly finds that the "counterclaim contracts" in this case have been frustrated, rather than breached. Although the admissibility of Westinghouse's claims on the "counterclaim contracts" therefore should not alter the outcome, the present Award nevertheless treats the inadmissability of these claims as determinative, at least in part, of Westinghouse's rights. If the Tribunal had accepted jurisdiction over Westinghouse's claims on these contracts, it certainly would have awarded Westinghouse the full amount owed to it by the Air Force as a consequence of the frustration of the contracts. For this reason, I feel compelled to explain why the Award's jurisdictional holdings are in error. Moreover, even if the Tribunal were to award the correct amount by applying Tribunal

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[2] The Tribunal addressed only three contracts in the Interlocutory Award, because those contracts were the subject of legal proceedings in the United States, which the Tribunal ordered stayed, but the rationale of the Interlocutory Award forced the Parties to accept the Tribunal's jurisdiction over all of these contracts except the missile contracts.

[3] Article III, paragraph 4.

precedent on contract frustration, it would nevertheless be appropriate for me to explain why the jurisdictional holdings are in error.

3. The Tribunal's jurisdiction over all of the claims and counterclaims asserted in this case arises out of Article II, paragraph 1, of the Claims Settlement Declaration. That provision states:

> An international arbitral tribunal . . . is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim . . . .

Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, we must interpret this provision "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[4]

4. The ordinary meaning of the language used in Article II, paragraph 1 supports Tribunal jurisdiction over counterclaims without regard for the identity of the party by which they have been asserted. The phrase "any counterclaim" is not limited to only one party to the arbitration, but rather, extends to all counterclaims arising out of "the same contract, transaction or occurrence that constitutes the subject matter of th[e] national's claim." By defining the scope of the Tribunal's jurisdiction over counterclaims only with reference to subject matter, the provision provides no basis for discrimination between parties. By allowing the counterclaims of respondents, while excluding those of claimants, the Tribunal violates the apparent intention of Article II, paragraph 1, which confers jurisdiction over "any counterclaim" arising out of the same subject matter as the initial claims. Although the Tribunal

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[4] Article 31, paragraph 1.

cannot exceed its jurisdiction, neither can it refuse to exercise its jurisdiction within proper bounds.

5. In the circumstances presented by this case where the respondent has brought into the proceedings claims on contracts that were not subject originally to claims by the claimant, the recognition of jurisdiction over counterclaims filed by a claimant on those additional contracts also accords with the object and purpose of the Article II, paragraph 1, as described in General Principle (B) of the General Declaration. This provision states:

> It is the purpose of both Parties . . . to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.

That provision is implemented by Article II, paragraph 1, which empowers the Tribunal to decide all counterclaims arising out of the same contract, transaction or occurrence as the initial claim. Only by exercising jurisdiction to the full extent of its proper limits may the Tribunal terminate "all litigation" and "all claims," as provided in the General Declaration.

6. The recognition of jurisdiction over the counterclaims of a claimant also finds support in the relevant Tribunal procedural rule and its notes. Rule 19(3) describes the procedures by which a "respondent" might file a counterclaim or set-off. The Air Force, with reliance on paragraph 3(c) of "Introductions and Definitions" and other provisions in the Tribunal Rules, contended that the term "respondent" refers only to the party-other-than-the-claimant. Reliance on these provisions is misplaced, however, in light of Note 1 to Rule 19(3), which makes clear that the term "respondent" refers to any party against which a claim or counterclaim has been asserted. Note 1 states:

> In the event that the arbitral tribunal determines that a requirement to file a large number of Statements of Defence in any particular period would impose an unfair burden on a respondent to a claim or counter-claim, it will in some cases extend the time periods based on the above mentioned factors or by lot. (Emphasis added.)

7. While the Tribunal Rules and their corresponding notes may not, of course, expand the jurisdiction of the Tribunal beyond the limits set by Article II, paragraph 1, they do provide insight into the meaning of that provision itself. Note 1 to Rule 19(3) makes clear that claimants are respondents to counterclaims. As such, they obviously should have the rights of respondents, including the right to bring counterclaims. The phrase "any counterclaim" in Article II, paragraph 1 means what it says: The Tribunal possesses jurisdiction over any counterclaim, regardless of the party by which it has been asserted, so long as it arises out of the same subject matter as the initial claim. An interpretation of Article II, paragraph 1 which limits counterclaims to only one party to the arbitration renders Note 1 incomprehensible. Such an interpretation obviously should be avoided if possible. I submit that the Tribunal should hold that the claims filed by Westinghouse on these contracts are within its jurisdiction as counterclaims.

8. With respect to Westinghouse's alternative argument that its claims on the counterclaim contracts should be accepted as amendments to its claims, the Tribunal rejects it by analogy with other cases where claimants attempted to add new claims long after the deadline established by Article III, paragraph 4 of the Claims Settlement Declaration for filing claims had passed; but that provision was clearly intended to prevent claimants from later expanding the case to the prejudice of respondents, not to prejudice claimants in the event the case was subsequently expanded by respondents. The provision does not, of course, forbid amendments of claims pursuant to Article 20 of the Tribunal Rules.

9. An examination of Tribunal precedents shows that the Tribunal has been liberal in allowing amendments unless those amendments are made so late that their acceptance would cause prejudice to the other party. Thus, in McCollough & Co. v. Iran, Award No. 225-89-3, (22 April 1986), reprinted in 11 Iran-U.S. C.T.R. 3, 17, the Tribunal held that an amendment made in 1984 raising new claims for expenses subsequent to the termination of the contract on which the original claims were based was not inappropriate within the terms of Article 20 of the Tribunal Rules, as it "does not appear to have prejudiced the Respondent." Accord Payne v. Iran, Award No. 245-335-2 (8 August 1986), reprinted in 12 Iran-U.S. C.T.R. 3, 6 (increased amount of claim); Litton Systems, Inc. v. Iran, Award No. 249-679-1 (22 August 1986), reprinted in 12 Iran-U.S. C.T.R. 126, 131 (new claim for warehousing costs); Rankin v. Iran, Award No. 326-10913-2 (3 November 1987), reprinted in 17 Iran-U.S. C.T.R. 135, 138-39 (increase in amount of claim); Seismograph Serv. Co. v. Iran, Award No. 420-443-3 (31 March 1989), reprinted in 22 Iran-U.S. C.T.R. 3, 8 (alternative theory of claim); General Electric Co. v. Iran, Award No. 507-386-1 (15 March 1991), reprinted in 26 Iran-U.S. C.T.R. 148, 150-51 (new legal theory). In several cases, new respondents were added by amendment. See, e.g., Harnischfeger Corp. v. Iran, Award No. 175-180-3 (26 April 1985), reprinted in 8 Iran-U.S. C.T.R. 119, 121, 128; Fedders Corp. v. Iran, Decision No. DEC 51-250-3 (28 October 1986), reprinted in 13 Iran-U.S. C.T.R. 97. In International Sch. Servs., Inc. v. Iran, Award No. ITL 57-123-1 (30 January 1986), reprinted in 10 Iran-U.S. C.T.R. 6, the Tribunal permitted a claim for the enforcement of a settlement agreement to be amended by adding a claim on the underlying debt. Referring to Article 20, the Tribunal said:

> This provision affords wide latitude to a party who seeks to amend a claim, and the Tribunal's practice is in accord with this liberal approach. As Article 20 directs, the Tribunal will permit an amendment unless delay, prejudice or other concrete circumstances make it inappropriate to do so. No such circumstances appear here.

> First, the Claimant did not unduly delay before making the Amendment. To the contrary, pursuant to a previously reached agreement with NDIO, the Claimant tried as long as possible to limit the proceedings to the implementation of the MOU, and it was NDIO's refusal to join in a Request for an Award on Agreed Terms that caused any "delay" in the making of the Amendment.
>
> Likewise, the Amendment did not cause prejudice to the Respondents. Again it was NDIO's own refusal, on two separate occasions, to implement the terms of the MOU that prompted the Claimant to return to the claim arising out of the 1976 Agreement. While the relief sought was increased, the factual circumstances on which the Amendment is based had been presented in the original Statement of Claim. The Respondents can point to no "prejudice" which does not ensue from NDIO's own conduct, and thus the MOU presents no procedural bar to the proffered Amendment.[5]

10. Similarly, in Rockwell International Systems, Inc. v. Iran, Award No. 438-430-1 (5 September 1989), reprinted in 23 Iran-U.S. C.T.R. 150, 165-67, the Tribunal admitted seven amendments, including several new claims. The Tribunal said it must consider the question of prejudice to the other party and any disruptive effect or delay resulting from an amendment.

> Subject to these considerations, an amendment is generally admissible if the underlying facts of a dispute, as presented in the Statement of Claim, essentially remain the basis of the dispute, and if the amendment is so closely interrelated to the initial claim that it would be contrary to judicial economy to separate the issues and litigate them separately, or possibly, in different fora. Tribunal practice demonstrates a liberal approach in admitting amendments.[6]

In the present case, the reasons to permit Westinghouse to amend its claims are even more persuasive, as uniquely in Tribunal practice it has been the Respondent that has expanded the case by bringing the contracts in question into the case. Our

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[5] Id. at 12.

[6] Id. at 166.

acceptance of a responsive amendment by Westinghouse would not have prejudiced the Air Force, but our rejection of it seriously prejudices Westinghouse.

11. In the cases where amendments have not been permitted, prejudice to the other party was clear and was almost always the reason given. See, e.g., Cal-Main Foods, Inc. v. Iran, Award No. 133-340-3 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. 52, 60 (additional claim made, but no amendment proposed, four months before the Hearing); Reliance Group, Inc. v. Iran, Award No. 315-115-3 (10 September 1987), reprinted in 16 Iran-U.S. C.T.R. 257, 259 (claim for lost profits raised only at the Hearing); Harris Int'l Telecommunications, Inc. v. Iran, Award No. 323-409-1 (2 November 1987) reprinted in 17 Iran-U.S. C.T.R. 31, 57 (amendment made at the Hearing that raised new factual and legal arguments to which the other party had no sufficient opportunity to respond); and International Tel. & Tel. Corp. v. Iran, Decision No. DEC 87-11045-1 (7 July 1989), reprinted in 22 Iran-U.S. C.T.R. 213 (substitution of a new claimant) (But cf. Ram Int'l Indus., Inc. v. Iran, Award No. 511-147-1 (9 May 1991), reprinted in 26 Iran-U.S. C.T.R. 228, 239; TME Int'l, Inc. v. Iran, Award No. 473-357-1 (12 March 1990), reprinted in 24 Iran-U.S. C.T.R. 121, 131 (new and unrelated claim raised only in the Hearing Memorial); and Nazari v. Iran, Decision No. DEC 105-221-1 (16 June 1992) (late addition of new respondents after the Tribunal had decided claimant's dominant nationality).

12. I think it is beyond dispute that the Air Force could not have been prejudiced if the Tribunal had accepted Westinghouse's claims on the counterclaim contracts as amendments to the claim, because the Air Force itself chose to place those contracts in issue by its counterclaims and because Westinghouse submitted those claims prior to the filing of all pleadings on the merits. Consequently, the Tribunal's decision to refuse to accept those claims as amendments was contrary to precedent and, I submit, in error.

Frustration

13. The Award has found quite properly that the counterclaim contracts were frustrated and that, as a result, the amount the Air Force was entitled to receive is offset by the amount Westinghouse was entitled to receive. See paragraph 324 of the Award. In fact, it is clear that Westinghouse's performance entitled it to receive significantly more than the Air Force. These conclusions flowed from the Tribunal's analysis comparing the extent of each Party's performance and the extent of payment -- the same type of analysis that the Tribunal has made in all cases involving contract frustration. Consistent with those precedents, the difference between these amounts, at least U.S. $400,000, should be awarded to Westinghouse in the present case. The Tribunal's refusal to do so is based upon its misguided conclusion that contracts that are first placed in issue in a case by virtue of counterclaims by the respondent cannot in fairness result in an award of money to the claimant. With respect, I am compelled to protest that this conclusion is patently unfair to Westinghouse, as well as flatly inconsistent with all our precedents and with the fundamental obligation of the Tribunal to treat the Parties with equality.

14. The present case is only the second one in the history of the Tribunal where the Tribunal found jurisdiction over counterclaims on contracts that had not been the subject of claims in the Statement of Claim that commenced the proceedings,[7] but it is only one of a great many cases where the Tribunal found that one or more of the contracts on which claims were based had been frustrated.[8] In every one of those cases, the Tribunal,

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[7] The other was American Bell International, Inc. and The Government of the Islamic Republic of Iran, et al., Award No. ITL 41-48-3 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. 74.

[8] Queens Office Towers v. Iran, Award No. 37-172-1 (15 April 1983), reprinted in 2 Iran-U.S. C.T.R. 247; Gould Marketing v. Iran, Award No. ITL 24-49-2 (27 July 1993), reprinted in 3 Iran-U.S. C.T.R. 147; Gould Marketing v. Iran, Award No. 136-
(continued...)

upon finding frustration, ignored any claims or counterclaims that had been made with respect to those contracts and decided who owed what to whom by virtue of the Tribunal's analysis of the extent of performance and the extent of payments. If that analysis showed that a respondent was entitled to compensation, the Tribunal awarded that compensation without regard to the pendency of any counterclaim.[9] Indeed, in the final Gould Award, although the Ministry's counterclaim had been disposed of by a prior interlocutory award's holding that the contract had been frustrated, the Tribunal nevertheless held that as a consequence of contract frustration Gould owed the Ministry nearly U.S. $3 million. The Tribunal made clear that its final monetary award in favor of the Ministry was based upon contract frustration, not upon any counterclaim:

> Despite the Interlocutory Award rendered in the instant case, the Ministry reiterates its counterclaim for the alleged damages it has suffered as a result of Hoffman's cessation of performance of the contract. Such counterclaim may not, however, be maintained, as the Interlocutory Award disposed of any and all claims or conterclaims based on alleged breach of contract.[10]

15. In my view, these precedents demonstrate that the rights of the Parties to contracts that are found by the Tribunal to have been terminated as a result of frustration or impossibil-

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[8](...continued)
49/50-2 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 272; International Schools v. Iran, Award No. 194-111-1 (10 October 1985), reprinted in 9 Iran-U.S. C.T.R. 187; International Schools Services, Inc. v. Iran, Award No. 290-123-1 (19 January 1987), reprinted in 14 Iran-U.S. C.T.R. 65; Linen, Fortinberry v. Iran, Award No. 372-10513-2 (28 June 1988), reprinted in 19 Iran-U.S. C.T.R. 62; Shifflette v. Iran, Award No. 423-10645-1 (12 June 1989), reprinted in 22 Iran-U.S. C.T.R. 111; Combustion Engineering v. Iran, Award No. 506-308-2 at para. 207 (18 February 1991), reprinted in 26 Iran-U.S. C.T.R. 60; Levitt v. Iran, Award No. 520-210-3 (29 August 1991), reprinted in 27 Iran-U.S. C.T.R. 145; and Unidyne v. Iran, Award No. 551-368-3 (10 November 1993).

[9] See Gould Marketing, Inc. and Ministry of Defense of the Islamic Republic of Iran, supra, note 8.

[10] Id. at 19, reprinted in 6 Iran-U.S. C.T.R. at 282-3.

ity of performance do not depend upon the existence or nature of any claims or counterclaims. Usually, of course, the contract has been the subject of both claims and counterclaims based upon allegations of breach, but these claims and counterclaims always become irrelevant when the Tribunal finds the contracts to have been frustrated.

16. In light of that consistent practice, I cannot understand how the present Award can justify its conclusion that monies owing to Westinghouse as a result of frustration will not be awarded simply because Westinghouse did not choose to include claims based upon these contracts in its original Statement of Claim. It is inequitable to hold that awards of amounts owing under frustrated contracts may be in favor of either the claimant or the respondent when the contracts have been brought into the case by the claimant, but may never be in favor of the claimant when the contracts have been brought into the case by the respondent. Such a conclusion violates the basic obligation of the Tribunal to treat the Parties with equality, an obligation set forth in the following terms in paragraph 1 of Article 15 of the Tribunal Rules.

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

17. I deeply regret my inability to persuade my colleagues in the Chamber of the merit of these conclusions, particularly as they seem to me inescapable. This Award is long, complex, and in every other respect meritorious, but I regret that it may be remembered not for its virtues, but for this unfair and unjustified mistake, which reduces the award to which Westinghouse is clearly entitled by some U.S.$400,000, plus interest.

Dated, The Hague
20 March 1997

George H. Aldrich