IR[illegible] CLAIMS TRIBUNAL

39-410

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 39 Date of filing: 6/2/90

** AWARD - Type of Award ______
- Date of Award ______
______ pages in English ______ pages in Farsi

** DECISION - Date of Decision ______
______ pages in English ______ pages in Farsi

** CONCURRING OPINION of ______
- Date ______
______ pages in English ______ pages in Farsi

** SEPARATE OPINION of Mr Khalilian
- Date 6 Feb 90
12 pages in English ______ pages in Farsi

** DISSENTING OPINION of ______
- Date ______
______ pages in English ______ pages in Farsi

** OTHER; Nature of document: ______

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- Date ______
______ pages in English ______ pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL
نسخه برابر اصل

In the Name of God

CASE NO. 39
CHAMBER TWO
AWARD NO. 461-39-2

PHILLIPS PETROLEUM COMPANY IRAN,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE NATIONAL IRANIAN OIL COMPANY,
Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
DATE 6 FEB 1990
تاریخ ۱۳۶۸/۱۱/۱۷

SEPARATE OPINION OF SEYED KHALIL KHALILIAN

Having noted that Mr. Aldrich has filed a Separate Statement to the above-captioned "Award on Agreed Terms",* I consider it necessary to set forth, very briefly, the facts leading to the issuance of this Award. My purpose in writing this Opinion is to discuss two matters: first, that the issuance of Award No. 461-39-2 has unambiguously confirmed the point that no enforceable award comes into being at this Tribunal until the Persian version thereof has been signed; and second, that in issuing this Award on Agreed Terms, the Tribunal has in effect confirmed that in any event, the text labelled "Award No. 425-39-2" was not a final and binding award, and did not enjoy the status of a _res judicata_.

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* I note with surprise that Mr. Aldrich has filed a Separate Statement in connection with this Award on Agreed Terms. Of course, Mr. Aldrich has long since made it a practice to issue this sort of commentary on settlements by the parties, in favor of the legal positions of American claimants. In _ITT Industries Inc._, and _Iran_, in which the parties had arrived at a settlement, all the Tribunal had to do was to issue an award on agreed terms, in accordance with legal logic. The Tribunal proceeded to issue such award (_see_ 2 Iran-U.S. C.T.R. 349), but Mr. Aldrich followed that with a Concurring Opinion as well. With what, however, did he concur? I have no idea how Mr. Aldrich could possibly have been expected to dissent, given that the parties themselves had reached agreement. Thus, as Gray states, "The propriety of making this latter Concurring Opinion where there had been an award on agreed terms is very doubtful." Gray, _Judicial Remedies in International Law_, Oxford (1987), 187, note 39. In the present Case, too, Mr. Aldrich's writing of a Separate Statement is called into question by the fact that it is absolutely unprecedented that an arbitrator on his own motion takes it upon himself to clarify or interpret an award, notwithstanding that he himself has fully agreed to the language of the award, and signed it without reservation and without making any notation that a concurring or dissenting opinion would be forthcoming.

Although according to the express terms of the Tribunal Rules (Note 2 to Article 17) , the Tribunal's awards and decisions must be rendered in both official languages of the Tribunal -- viz. Persian and English -- and although the Tribunal's practice over the past eight years has always been predicated upon the rule that a notification is not issued for the payment of any award until the Persian text thereof has been signed, some persons may possibly have supposed that the signing of the English text was sufficient to bring about an enforceable award. Now that the above-captioned Award has been issued, that view can no longer be maintained.

There now follows a brief mention of the facts leading up to the issuance of the Award in question:

1. On 29 June 1989, a text known as "Award No. 425-39-2" was issued under highly irregular circumstances. I was one of the three arbitrators who were supposed to sign that text, but I refused to do so, because I held that under the rules of procedure, that Award had been issued illegally.

2. On 30 June 1989, I issued a 12-page Statement (accompanied by 70 pages of annexes) setting forth my reasons for not signing the Award. See Mealey's Litigation Reports, 21 July 1989 (H-1 to H-39).

3. On 18 July 1989 and 6 September 1989, I prepared a Supplemental Statement and a Second Supplemental Statement, respectively, wherein I gave a thorough and reasoned discussion of the improper actions of the two arbitrators who had signed the text in question. See Mealey's Litigation Reports, 21 July 1989 (H-43 to H-51), and Id., 15 September 1989 (Section D).

4. Following upon these Statements, the Respondents -- viz. the Iranian Government and the National Iranian Oil Company -- filed a challenge against Mr. Briner.

5. On 30 August 1989, the Respondents challenged the validity of the English version of the Award and filed an Application to revoke, set aside and nullify same. The said Application was docketed with the Full Tribunal as Case A-25.

6. Somewhat later, Mr. Moons, who sat in judgment on the challenge of Mr. Briner, rendered a Decision wherein he exonerated Mr. Briner. See Mealey's Litigation Reports, 13 October 1989 (Section A).

7. Mr. Moons' Decision was so biased and unfounded that it compelled me, as a jurist, to write him an open letter. Id., 13 October 1989 (Section A, pp. 8-10). A reading of this letter alongside the text of Mr. Moons' Decision will highlight certain regrettable events at this Tribunal, events that are contrary to expectations and in violation of justice and equity.

8. Following these events, a Hearing conference was scheduled in Case A-25, to be held on 17 January 1990.

9. In the midst of these developments, Phillips, the Claimant, entered into settlement negotiations with NIOC, and the two Parties ultimately arrived at a Settlement Agreement on 3 January 1990; presenting the Settlement to the Tribunal, they then requested that an Award on Agreed Terms be issued on the basis thereof. One of the terms of this Settlement Agreement provided, of course, that text No. 425-39-2 be considered null and void.

10. On 10 January 1990, the Agent of the Government of Iran wrote a letter to the Tribunal wherein he flatly

stated that the Tribunal must, as a part of the consideration provided for in the settlement, regard the English version of the Award as null and void and without effect, a point on which both Parties to the claim had reached agreement and were in accord. In his letter, the Agent added that if the Tribunal sought to make even the slightest change in the terms of this Settlement Agreement and to detract from its integrity as a comprehensive whole, this would be regarded as constituting a rewriting of the said Settlement Agreement and as a rejection of the Joint Request of the Parties. In concluding his letter, the Agent of the Iranian Government also expressly stated the essential point that pursuant to Article 34 of the Tribunal Rules, if the signed English version is held to be a valid award, the Tribunal is not entitled to issue an Award on Agreed Terms.

11. It was on that very same day, after Chamber Two received this letter, that it signed and issued Award No. 461-39-2.

Article 34 expressly provides that:

> If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms... (emphasis added)

It is, therefore, clear that under the Tribunal Rules, if one of the Members of Chamber Two believed the English version of Award No. 425-39-2 to be final and binding, he could not possibly be entitled to sign Award No. 461-39-2.

Therefore, in light of Article 34, the signing of Award No. 461-39-2, which is an award on agreed terms,

signified that in the opinion of the arbitrators who signed it, no award had yet been issued in Case No. 39 prior to 10 January. For if an award had been issued, the Joint Request of the Parties would not have fulfilled the requirements for issuance of an award on agreed terms. Once more, refer to Article 34 of the Tribunal Rules quoted above.

In addition to the foregoing, at this Tribunal, throughout the course of the eight years during which notifications have been sent to the Escrow Agent, the President has never granted himself the latitude of issuing a notification for payment of an award, before the Persian version thereof had been filed. This means that up to that point, no final and binding award has come into being. In the instant Phillips Case, even though the two arbitrators who signed the English text sensed from the day after doing so the heated and contentious situation that would later arise, they still did not dare to have Phillips paid the amount of the award out of the Security Account; instead, they considered themselves required to defer doing so until after the Persian text had been signed. In itself, this conduct signifies that no enforceable award would have come into being until the Persian text had been signed.

Paragraph 9 of Award No. 461-39-2 states very explicitly in this respect, that:

> Whereas the English Version was filed on 29 June 1989... [i]n the present unusual circumstances where Award No. 425-39-2 has neither been filed in Persian nor notified to the Escrow Agent, the Tribunal is prepared to accept this Settlement Agreement as it fulfills the requirements for the issuance of an Award on Agreed Terms... (emphasis added)

Now, wouldn't any jurist easily perceive that what the phrase "fulfills the requirements for the issuance of

an Award on Agreed Terms" means is, that the requirements of Article 34 of the Tribunal Rules have been met?

As regards Mr. Aldrich's Separate Statement filed on 19 January 1990 and purporting not to create, but to avoid, "any misunderstanding," it is indeed a vain attempt to resurrect the highly controversial English version of Award No. 425-39-2, which was the object of a revocation process before the Full Tribunal and was subsequently declared null and void by the concerned Parties, in the Agreement filed by them. This effort on Mr. Aldrich's part apparently constitutes the last episode in a series of extraordinary measures perpetrated in the proceedings in Case No. 39.

The fact of the matter is that neither the language of the Award on Agreed Terms nor the governing legal principles can conceivably create any doubt that the said Award, which is final and binding under Article IV of the Claims Settlement Declaration, has nullified and superseded the challenged English version of Award No. 425-39-2, for the creation of which Mr. Aldrich had undoubtedly made strenuous efforts.

In the Award on Agreed Terms, the Tribunal has in most explicit manner taken note of Article 2.4 of the Parties' Settlement Agreement, wherein it is stipulated that upon issuance of the Arbitral Award on Agreed Terms and notification thereof to the Escrow Agent for payment, the following would result: (i) the English version of Award No. 425-39-2 shall be deemed by the Parties to be null and void and without any further effect, and (ii) the Government of the Islamic Republic of Iran would accordingly withdraw its Case A-25 which it had filed in applying to have the said English version declared of no effect.

Apart from the lucid wording of the Award on Agreed Terms, which ipso facto recognizes the nullity of the English version of Award No. 425-39-2 upon notification of the Award on Agreed Terms to the Escrow Agent -- which notification has already been made -- the governing provision (Article 34) of the Tribunal Rules for the issuance of the Award on Agreed Terms makes it clear that the Tribunal could not possibly have issued such an award if it had contemplated the survival of the challenged English version of Award No. 425-39-2. That Article unequivocally provides that an Award on Agreed Terms may be issued "before the award is made." See, supra. If Mr. Aldrich genuinely intended to keep the supposed validity of the English version of Award No. 425-39-2 intact, he should have refrained from signing the Award on Agreed Terms, as the issuance of an Award on Agreed Terms does presuppose that no final and binding award yet exists.

Mr. Aldrich's attempt to afford some sort of precedential value to the English version of Award No. 425-39-2 is also contradicted by the fact, as the Tribunal notes in the Award on Agreed Terms, that the said incomplete award has neither been filed in Persian nor notified to the Escrow Agent. The Tribunal has even gone so far as to refer explicitly to the "unusual circumstances" surrounding the English version. Moreover, the fact that the Tribunal has stated in the Award on Agreed Terms that it shall request the President to notify that Award, rather than Award No. 425-39-2, to the Escrow Agent is by itself further confirmation that the Tribunal considers the latter, pursuant to the Parties' agreement, as being of no effect.

Interestingly enough, Mr. Aldrich himself does not appear to be convinced that he has succeeded in accomplishing the impossible task of showing that the nullified

English version of Award No.4 25-39-2 is of some sort of effect. In his Separate Statement, he admits that the "proceedings in Case No. 39 were not completed..." Nonetheless, despite that admission and in disregard of the fact that it is the Award on Agreed Terms that has terminated all the proceedings in Case No. 39 and has expressly superseded the English version of Award No. 425-39-2, he strives not to lose hope of being able to assist those intending to salvage some sort of precedential value from that so-called award.

As I can judge from the records, if Iran had had the slightest doubt that the Settlement Agreement would not set aside the English version of Award No. 425-39-2, it would not possibly have agreed to such a settlement.* In the Settlement Agreement, Iran has taken a number of precautions for precisely this purpose, and it has drawn the Tribunal's attention to those precautions in a letter filed by the Agent of Iran on 10.1.1990. See, supra.

I am positive that Mr. Aldrich could not have been unaware of the fact that the recognition of the absolute nullity of the English version of Award No. 425-39-2 was a

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* It is obvious that if Iran had suspected that the English version of Award No. 425-39-2 would not be considered null and void, it would have had no reason to withdraw its application for the annulment of the said English version, in which proceedings a Hearing was scheduled for 17 January 1990. That application was the first of its kind on which an exchange of pleadings had been allowed and for which a Hearing had been set. Iran must definitely have been aware that because of manifest violations of the basic principles of due process in the proceedings resulting in the issuance of the English version, it had a fair chance of success. The wording of the Settlement Agreement too, as reflected in the Award on Agreed Terms, makes it plain that Iran agreed to withdraw Case A-25 in consideration of the Parties' agreement to consider the English version null and void, inasmuch as once that goal had been attained through an Award on Agreed Terms, the proceedings in Case A-25 would be moot.

sine qua non of the Parties' Settlement Agreement. Once the letter filed by the Agent of Iran dated 10.1.1990 insisting on that requirement was received, he gave up the notion of an attempted "Amendment of Award" aimed at somehow preserving the validity of the majority's conclusions and reasoning in that English version. It is for that very reason too, that Mr. Aldrich refrained from voicing any kind of disagreement with the clear wording of the Award on Agreed Terms, which unambiguously nullified and superseded the previous incomplete award.

It appears that Mr. Aldrich's unconditional agreement with the Award on Agreed Terms, and his subsequent filing of a "Separate Statement," were intended to let him work his way out of his dilemma. On the one hand, he definitely knew that in doing otherwise, he would have deprived Phillips of the settlement amount of $92 million, which would most certainly not have been welcomed. On the other hand, Mr. Aldrich must have intended to benefit other United States claimants by his strenuous efforts to introduce a so-called DCF theory of compensation in the Tribunal's jurisprudence. It was probably no mere coincidence that he waited seven days after the Award on Agreed Terms was issued on 10 January 1990, before putting out his enlightening Separate Statement once informed that the said Award had been paid. Mr. Aldrich's past practice shows that he does not normally exercise that kind of patience, before making his views public.

Mr. Aldrich's conclusion that the English version of Award No. 425-39-2 remains the definitive statement of the Tribunal's reasoning with respect to Case No. 39 is, in effect, tantamount to his putting himself in the shoes of the Full Tribunal and, on its behalf, wishfully denying Iran's application. He must not have forgotten the fact that the Full Tribunal had agreed to consider Iran's application for nullification of the English version most

seriously, as there was a grave question of the breach of the most fundamental principles of an equitable proceeding. He himself acknowledges, in his Separate Statement, that:

> In view of the pendency of that application [Case No. A-25], the Chairman of the Chamber decided to refrain from filing the Persian text of the Award and, as President of the Tribunal, decided to refrain from notifying the Escrow Agent of the Award for purposes of payment from the Security Account.

He should not, therefore, have washed his hands so conveniently of Iran's application for nullification of the English version of Award No. 425-39-2 in Case No. A-25.

Mr. Aldrich has apparently spared no effort to make the point that the nullified English version of Award No. 425-39-2 still somehow retains some of its controversial validity. In so doing, he relies on the Respondents' acknowledgement in the withdrawn Case No. A-25, to the effect that they do not seek an appeal from that Award since they understand that all decisions and awards of the Tribunal are final and binding. Of course, it is true that in Case A-25, Iran did not seek to file an appeal. This, however, was not because it held the text of Award No. 425-39-2 to be a proper and valid award. Rather, from the outset, it deemed that text to be fundamentally and intrinsically defective and without any legal effect whatsoever. Iran's Application in Case A-25 was not in the nature of an appeal of an issued award; rather, it was a request to the Full Tribunal -- and not to Chamber Two -- that it render a declaratory judgment to the effect that the text labelled Award No. 425-39-2 was void and without effect.

Mr. Aldrich's Separate Statement, therefore, ignores both the governing legal principles and the factual history of the Case. No reasonable reader of the Award on

Agreed Terms (Award No. 461-39-2) can harbor any doubt that as a final and binding award, it has unquestionably superseded the English version of Award No. 425-39-2 in its entirety, leaving the latter with no judicial value whatsoever.

Dated The Hague,

Bahmanmah 1368/6 February 1990

Seyed Khalil Khalilian