IRAN-UNITED STATES CLAIMS TRIBUNAL

ایالات متحده

۵۵-۱۳۱
۵۵-۱۴۱

ORIGINAL DOCUMENTS IN SAFE

Case No. 55 Date of filing: 2 Sep 83

** 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 _____

- Date _____
_____ pages in English _____ pages in Farsi

✓ ** DISSENTING OPINION of Mr SHAFIEIE in Award No ITL 11-55-2

- Date 2 Sep 83
37 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

_____

- Date _____
_____ pages in English _____ pages in Farsi

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

55-131
55-141

CASES NOS. 39 AND 55

CHAMBER TWO

PHILLIPS PETROLEUM CO. IRAN

Claimant,

- and -

THE ISLAMIC REPUBLIC OF IRAN,
NATIONAL IRANIAN OIL COMPANY,

Respondents,

and

AMOCO IRAN OIL COMPANY,

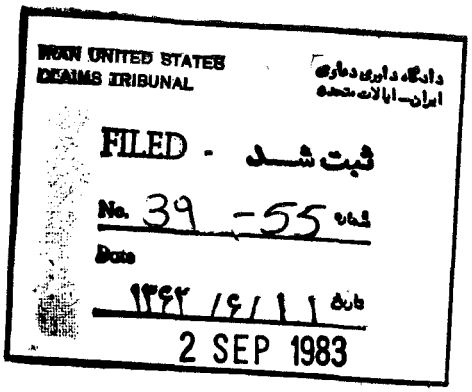
Claimant,

- and -

THE ISLAMIC REPUBLIC OF IRAN,
NATIONAL IRANIAN OIL COMPANY,
IRANIAN OFFSHORE OIL COMPANY,
IRANIAN OIL COMPANY,

Respondents,

AWARDS NOS. ITL 11-39-2 AND
ITL 12-55-2



DUPLICATE ORIGINAL

«نسخه برابر اصل»

DISSENTING OPINION OF DR. SHAFIE SHAFEIEI

I dissent from the so-called Interlocutory Awards Nos. ITL 11-39-2 and ITL 12-55-2 rendered by the majority in Chamber Two in respect to Case Nos. 39 and 55. Furthermore, on the basis of the arguments presented hereinbelow, I consider said Award to be null and void.

A. INTRODUCTION

It is unnecessary for me to address myself to the details of the background history of these cases culminating in this so-called Interlocutory Award, because those details are clearly reflected in my previous letters dated 21-7-1982 and 1-6-1983 addressed to Judge Bellet, and in the various letters sent to the Tribunal by NIOC and Iran's Agent to the Tribunal.

Therefore, I shall merely recollect and recite very briefly some of those events which are most germane to the present Dissenting Opinion, so as to demonstrate how far, by its attitude, behaviour and treatment of the Cases, Chamber Two deviated from normal and fundamental rules of procedure, exceeded its authority and denied justice in Case Nos. 39 and 55.

Before commencing this Dissenting Opinion, I must emphasize a very important point. That is, I must exhort my

colleagues that if the procedural rights of a Government and its right to be heard are respected and secured by the arbitrators, the result will undoubtedly be "the growth of the confidence of States in the system of arbitration as a means for the settlement of international disputes." (1)

A.1. Separation of Jurisdictional Issues from the Merits

Upon the request of NIOC and the Agent of the Islamic Republic of Iran, the Full Tribunal agreed to separate the jurisdictional issues from the merits in the Nullified Oil Agreements claims. Furthermore, in fact the Tribunal had not only the duty to entertain the request of the Respondent, but also the inherent power and duty to raise such a preliminary point suo moto:

> "There is inherent in this and every legal tribunal a power, and indeed a duty, to entertain, and in proper cases to raise for themselves, preliminary points going to their jurisdiction to entertain the claim." (2)

---

(1) See K.S. Carlston, The Process of International Arbitration (1946), pp.36, 244. Also Barel, Les Voies de Recours Contre les Sentences Arbitrales (1935), p.52; Recueil des Cours, p.89.

(2) Rio Grande claim: see Fred K. Nielseon, Report on American and British Claims Arbitration, Washington, D.C. (1916), p.346. See also the Administration of Prince tests, PCIJ Series A/B No.52; the Peter Pazmany University, PCIJ Series A/B No.61; and Nuclear Tests, ICJ Reports (1974).

It is a well-established rule and practice of international courts that upon receipt of a preliminary objection they suspend the proceedings on the merits forthwith.(3) This is a very logical rule and one which this Tribunal is duty-bound to observe because, in the first place, it enables the Tribunal to satisfy itself as to its competence and, second, it precludes the Tribunal from unduly imposing limitations upon the sovereignty of States when they are a party to the arbitration. Third, it relieves respondents of the burden of heavy expenditures in time and money if it is found that claims directed against them lie outside the Tribunal's jurisdiction; fourth, such a practice is in the interest of justice and in comformity with the principle of equality:

> "...the safeguarding of the rights of respondents is equally an essential part of 'the good administration of justice,' /and/ it is in the interest of the respondent that the 1946 rule of court contain Article 62 permitting the filing of preliminary objections" (BARCELONA TRACTION, ICJ Reports (1946), p.43). (4)

Moreover, one should always bear in mind that arbitral tribunals exist by virtue of the consent of the sovereign States by which they have been established, and so the issue

---

(3) See Simpson and Fox, International Arbitration, Law and Practice (1955), pp.155-6; also, V.S. Mani, International Adjudication)1980), pp.94, 123-5, 130-1.

(4) See Antony Walton, Russel on the Law of Arbitration (18th Ed.), pp.174-5; also Prdier-Fodéré, Traite de Droit International Publique (tome VI), p.376 et seq., No. 1914.

of consent naturally forms the basis for the preliminary objection.[5] When a preliminary objection is raised, the Tribunal should, therefore, seek out the consent of the Contracting Party and attempt to discover what is intended by this consent. Until such time as this is determined, all proceedings on the merits should be stayed.

A;2, Nonobservance of the Rules and of the Decision by the Full Tribunal

Notwithstanding the fact that in the Nullified Oil Agreements cases, the Full Tribunal has entertained the request for separation of the jurisdictional issue from the merits, which entertainment automatically brought about the suspension of the proceedings on the merits,[6] Chamber Two failed to act in conformity with the decision by the Full Tribunal and by an Order dated 26-3-1982 requested the Respondents to file their defences on the merits by 15 June 1982, to which Order Iran and NIOC rightfully objected. It was precisely as of this date that Chamber Two deviated from the procedural rules, in disregard of justice. Indeed, the Chairman of this Chamber went so far as to write personal letters to counsel for Amoco and Phillips, in violation of the rules of impartiality.[7] In his personal letter of 29-6-1982, the Chairman stated that

---

(5) See also Georgis Abi-Saab, Les Exceptions Preliminaires dans La Cour Internationale (Paris, 1967), p.37.

(6) BARCELONA TRACTION (preliminary objection case), ICJ Reports (1964), p.43. See also section A.1. above.

(7) See my letter to Judge Pierre Bellet, filed 21-7-1982.

> "We (!) expect that at the close of the Preliminary Hearing scheduled for September 13, 1982, in the above-referenced case, time will be afforded to the arbitrating parties to discuss with the Chamber other matters, including clarification of the issue in the case and a schedule for further proceedings." (Emphasis added)

It is interesting to note, first, that Judge Bellet signed and issued the above-referenced letter without consulting with me as a member of the Chamber, and without even evincing the slightest indication that he intended to issue such a letter. Second, of itself the letter clearly reveals that the Chamber Chairman intended from the very beginning to exceed his authority and demonstrates, furthermore, that he had already made up his mind with respect to the issue long before the Pre-hearing conference and the submission of Memorials by NIOC. Yet, what makes the Chairman's subsequent actions even more indefensible is that well before the Pre-hearing conference, I drew the attention of the Chairman to the limited mandate of Chamber Two and to the prejudgemental nature of the above letter and its consequent infringement of the principle of impartiality.(8)

B. CHAMBER TWO'S DEVIATION FROM THE LIMITED MANDATE AFFORDED BY THE FULL TRIBUNAL CONSTITUTED EXCESS OF AUTHORITY AND DEPRIVATION OF RESONDENTS' FUNDAMENTAL PROCEDURAL RIGHTS

K.S. Carlston rightly notes,

---

(8) See my above-referenced letter of 21-7-1982.

> "The primary concern of States in submitting their disputes to arbitration is that their rights shall be respected. It is their desire that the settlement of disputes between them shall proceed upon the basis of the fullest respect for their legal rights, that ample opportunity shall be afforded to present their legal position to the Tribunal, and that judgement shall not through error or conscious compromise sacrifice any of their legal privileges." (9)

Upon entertaining the request of Iran and NIOC that the jurisdictional issue be separated from the merits, the Full Tribunal set 13 September 1982 for the Pre-hearing conference; further, at its 54th session dated 2 June 1982, the Full Tribunal agreed that Chamber Two was to hold a pre-hearing on that date and subsequently report its findings to the Full Tribunal for a final decision. Chamber Two's limited mandate, that is, was that of a "juge d'instruction,"(10) as the minutes of the 54th session plainly reveal:

> "Planning for 'nullification' cases
>
> 7. Recalling that the Tribunal had, at its 41st meeting (minutes of the 41st meeting, paragraph 3) decided to ask the legal assistants inter alia to select and schedule for hearing one representative case of some 18 cases which could involve an exception to the Tribunal's jurisdiction on the ground that the disputes in question were with respect to 'nullified oil agreements,' Mr. Nilsson reported that the legal assistants had not, after careful consideration of the matter, been able to agree on a unanimous recommendation to the Tribunal.

---

(9) K.S. Carlston, The Process of International Arbitration (1946), pp.36, 244-5. Also please refer to Borel, Les Voies de Recours Contre les Sentences Arbitrales (1935), p.52; and Recueil des Cours, p.89; also Morelli, La Theorie General du Proces International (1937), p.61; Recueil des Cours, p.289.

(10) See my letter of 1-6-1983 addressed to Judge Bellet.

8. The President decided to reserve 5-6 October 1982 for a possible hearing on this issue before the Full Tribunal, instead of the September dates previously reserved, it being understood that Chamber 2 would schedule pre-hearing conferences in one or two nullification cases during the week previously reserved for the Full Tribunal hearing (week commencing 13 September 1982) and report the result to the Full Tribunal."

The majority in Chamber Two, however, exceeded this limited authority vested in them by the Full Tribunal, and they thereby deprived the Respondents of their fundamental right to be heard.(11)

It is accepted in the domain of international law that nonobservance of procedural rules constitutes excess of authority or excess of jurisdiction :

> "...arbitrators, like other judges are bound, when they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice." (12)

---

(11) As will be seen below in the present Dissenting Opinion, as a result of Chamber Two's unjust treatment of Case Nos. 39 and 55 the Respondents were deprived of this fundamental right even during the Pre-hearing conference.

(12) Haigh v. Haigh (1861), 5 L.T. 507 at p.508. Also see K.S. Carlston, The Process of International Arbitration (1946), "jurisdiction"; Blumtschli, Le Droit International Codifié, p.289, no.495; A. de Lapradelle,"L'Excés de Pouvoir de lArbitre," Revue de Droit International (1928), p.37; V.S. Mani, International Adjudication (1980), pp.48-9; Simpson and Fox, International Arbitration (1959), pp.252-3; Article 30(c) of the Draft Convention on Arbitral Procedure, UN Doc. A/cN. 4/92, Chapter VII, 105-115. Also, Walton, Russell, Law of Arbitration, p.180.

C. IRAN AND NIOC ARE DEPRIVED OF THEIR FUNDAMENTAL RIGHT TO BE HEARD

As Carlston states,

> "One of the most elemental procedural rights is the right of a party to be heard." (13)

C.1. Denial of the Right to be Heard by the Full Tribunal

At its 54th session, the Full Tribunal reserved 5-6 October 1982 for a hearing on the jurisdictional issue before the Full Tribunal, and it scheduled related pre-hearing conferences to be held by Chamber Two during the September dates previously reserved for Full Tribunal hearings on this issue. Therefore, by embarking on the issue and ruling definitively on the Tribunal's jurisdiction over the Nullified Oil Agreements cases, Chamber Two denied Iran's and Nioc's very fundamental right and logical expectation to be heard by the Full Tribunal and to have the issue duly deliberated upon by a duly constituted tribunal.

---

(13) K.S. Carlston, The Process of International Arbitration, p.40; see also p.40, Id.

C.2. Denial of the Right to Be Heard During the Pre-Hearing Conference

Iran and NIOC were deprived of their right to be heard, not only by the Full Tribunal, but also by the Chamber during the Pre-hearing conference, as a result of Chamber Two's very hasty treatment of the issue.

I should recollect that, after separating the jurisdictional issue from the merits, the Full Tribunal ordered that NIOC file its pleas on jurisdiction by 24 May 1982. NIOC filed a request for extension, but because this request was not granted, NIOC had no alternative but to prepare and file a very hastily drawn-up and incomplete statement by the stipulated date.(14)

In advance, and without being cognizant of or concerned about the great amount of work entailed, the Tribunal gave NIOC a mere one-month's time (until 1-9-1982) in which to respond to the two Memorials filed by Amoco and Phillips on 1-8-1982, notwithstanding the fact that these were received by NIOC more than two weeks after their filing date.(15) The Pre-hearing was set for 13-9-1982-- that is, only 13 days after the date fixed for filing.(16)

---

(14) See letter by NIOC filed 13-9-1982.

(15) Id.

(16) This setting of dates on such short notice constitutes a flagrant violation of procedural rules: "...the arbitrator should ensure that the date for the hearing is not so close that the case cannot be properly prepared" (Mustill and Boyd, Commercial Arbitration (1982), p.265).

Through the Agent of Iran, NIOC informed the Tribunal that they did "not consider it practicable for the issue... to be properly considered and argued at the hearing on 13th September 1982." (17) Still, Chamber Two failed to take any of these facts into consideration, and as a result NIOC had no opportunity to prepare itself or to argue its case at the Pre-hearing conference.

The procedure adopted by the Chamber stands in glaring contrast to the standard position taken by international arbitral tribunals and courts, which always scrupulously avoid treating cases before them hastily. Such bodies therefore routinely grant extensions on the basis of a variety of reasons, because they are sensitive to the fact that a hasty approach normally leads to the denial of the parties' right to be heard properly-- and therefore to injustice-- and consequently to nullity, as is the case here in the Amoco and Phillips cases.

In the "Legal Status of Eastern Greenland" case (Norway v. Denmark), the court held, notwithstanding the time-limits fixed in an agreement between the parties, that "in the sound interest of justice" the extension should be granted. (18)

With respect to extension of time-limits, the International Court of Justice emphasized in the Barcelona Traction case, that

---

(17) See Mr. Eshragh's letter of 2 September 1982.

(18) PCIJ, Series E, No.8, p.258.

"The Court did not find that it should refuse these requests and thus impose limitation on the parties in the preparation and presentation of the arguments and evidence which they considered necessary. It nevertheless remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for case to be decided without unwarranted delay." (19)

D. NIOC'S POST-HEARING MEMORIAL NOT CONSIDERED

The Agent of Iran and other Iranian representatives present at the Pre-hearing conference considered the attitude of the Chamber Chairman there highly partial and prejudgemental. All those present will recall that the Chairman repeatedly rejected the protests of Iran and NIOC that they were entitled to a proper hearing and to have an opportunity to defend their case, and that in support of his position the Chairman asserted that NIOC's previous, very brief statement was sufficient and that in his view, Iran had no other argument to raise!

After repeated contacts and presentations by the representatives of NIOC, the Chairman agreed, apparently with the intention of ameliorating the mood which he had generated at the Pre-hearing conference, to grant NIOC two month's

---

(19) ICJ Reports (1968), p.13; Reports (1970), pp.30-1. This position by the Court will prove even more relevant and significant if we note that the Court consistently granted the parties every opportunity to present their arguments, and that it took nine years before the Court embarked on the preliminary objection leading to its rejection of the claims espoused by Belgium.

time to file a Post-hearing Memorial. Thereupon, the said Memorial was filed on 3-12-1982. Nonetheless, the apparent compromise gesture in reality constituted a sham, for the Chamber never even took it into consideration in rendering its decision.(20)

Even a quick glance at the so-called Interlocutory Awards Nos. ITL 11-39-2 and ITL 12-55-2, dated 30-12-1982, will reveal that those awards give an utterly inadequate examination and consideration of NIOC's arguments and, further, that the reasoning embodied in those awards was adduced with the sole intention of arriving at the conclusions which the majority had in mind even before the Pre-hearing

---

(20) I elaborated upon this point in my letter to Judge Bellet dated 23-5-1983, of which I should like to quote the following:

> "After the pre-hearing, and as a result of many meetings with the National Iranian Oil Company's representative, you set the date of 3 December 1982 for submission of the Respondents' memorials. The Representative of N.I.O.C. exerted all possible efforts to meet the deadline. Having timely filed his memorial, he in fact called on you and offered his gratitude for being given the opportunity to prepare and submit his defence. Yet I knew, and I have evidence to prove it, that you deliberately refused to await the filing of this memorial, and that you had prepared and rendered your decision without as much as bothering to examine its contents. It is impossible to try to justify this under any code of judicial ethics, let alone that of a neutral arbitrator."

conference.[21]

In my analysis of the Interlocutory Award, I shall follow the sequence set forth by the majority.

D.1. On the First Point

The majority admits the undeniable fact that the Single Article Act of 8 January 1980 gives the special commission jurisdiction over settlement of claims arising out of the conclusion and execution of Oil Agreements which were later declared null and void. However, without examining all the arguments contained in NIOC's Memorial and in Mr. Nabavi's affidavit, the majority proceeds to state that

> "The Respondents have therefore contended that any consent that they may have given to the jurisdictional provisions of the Claims Settlement Declaration was limited by the Act's terms, an Act they allege to consider 'a specific restriction' on the authority of Iran's representatives to express the consent of Iran to the declaration within the meaning of Article 47 of the Vienna Convention on the Law of Treaties of 1969. Article 47, however requires that any such restriction must be 'notified to the other negotiating states prior to /the representative's/ expressing /his/ consent 'to the treaty.'"

---

(21) In his reply to NIOC's representative's statement that NIOC was entitled to respond to Mr. W. Christopher's affidavit, the Chairman stated that he was ready to render his decision without taking into consideration Mr. Christopher's affidavit and any reply thereto.

The majority proceeds further to say,

> "Nor is there an argument that the Single Article Act constituted a 'rule of /Iran's/ internal law of fundamental importance' within the meaning of Article 46 of the Vienna Convention, such that a 'manifest violation of the same would be grounds for invalidating Iran's consent to the Algiers Declaration in whole or in part. It is therefore relevant to note that Iran may not now invoke 'provisions of its internal law' such as the Single Article Act to avoid any obligations to perform the Algiers Declarations. See Vienna Convention, Article 27."

I strongly dissent from the majority's decision and hold, moreover, that these statements constitute clear proof of my contention that the majority never bothered to study the articles of the Vienna Convention even though it resorted to this Convention in support of its so-called Interlocutory Awards, and that rather than carefully studying NIOC's Memorials, the majority merely excerpted therefrom those passages it thought to be in conformity with its preestablished position.

First of all, and preliminary to discussion of details under this section, I must note that the question of the authority or lack of authority of the Iranian representatives to enter into an agreement with the United States has not been referred to this Chamber, and that I therefore do not find it necessary, for the time being, to discuss the issue here. What NIOC was and is attempting to explain is that the Settlement Declaration was concluded in order to enable the implementation of Principle "B" of the Algiers Declara-

tion and, at the same time, to comply with Condition Two set forth by the Iranian Majlis in its November Resolution, by referring for arbitration certain claims which had been filed with U.S. courts and which were required to be nullified by the Government of the United States.(22) As Mr. Nabavi states,

> "All that U.S. required, in this respect, was to refer such claims, upon their nullification, to a different forum for arbitration. This was the most the U.S. Government wanted. The possibility of instituting new claims not filed with the U.S. courts prior to the holding of negotiations not only was not demanded by the U.S. Governments, but did not occur to the two negotiating parties." (23)

Therefore, other potential or unknown claims, such as claims arising out of the Nullified Oil Agreements, do not and cannot fall within the jurisdiction of the Tribunal, for, as the representatives of the United States Government were well aware prior to the conclusion of the Declarations, the Majlis' November Resolution, Principle 139 and the Single Article Act limited the authority of the Iranian representatives-- a fact reflected in the provisions of Principle "B", which conform to those limitations.

NIOC's contention is that any ruling to the contrary will render the Claims Settlement Declarations invalid. In

---

(22) Page 3 of Mr. Nabavi's Affidavit attached to NIOC's Memorials filed on 3-12-1982.

(23) Id., p.6.

reaching this conclusion, NIOC resorted not solely to the Single Article Act, but rather to a series of fundamental Iranian laws, namely (1) the November Resolution by the Majlis, (2) Principle 139 of the Iranian Constitution, and (3) the Single Article Act. NIOC further rightfully contended that Principle "B" of the Declaration would be rendered devoid of all meaning if the Tribunal disregarded the fundamental laws enumerated above, the circumstances under which the Declaration was concluded, or, finally, the arguments contained in its Memorial. On the contrary, it asserted, Principle "B" should be deemed to possess an overriding importance, because it demonstrates the true intent of the Parties. (24)

D.1. a) The Majority Did Not Properly Apply the Provisions of the Vienna Convention

i) Article 27 of the Vienna Convention, entitled "Internal Law and Observance of the Treaties," provides,

> "A party may not invoke the provision of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46." (Emphasis added)

---

(24) See Mustafa Kamil Yasseen, "L'interprétation des Traites..." Recueil des Cours (1976) III, tome 151; Articles 31 (I) &32 of the Vienna Convention; Barcelona Traction, ICJ Reports (1964), p.31; Yi-Ting Chang, The Interpretation of Treaties by Judicial Tribunals (1935), p.25; A. McNair, The Law of Treaties (British Practice and Opinions) (1938), p.185. See also The Charzow Factory Case, P.C.I.J. (A/B) No.21, p.24, where it was found that

> "Account must be taken not only of the historical development of arbitration treaties... but also and more especially of the function which, in the intention of parties, is to be attributed to this provision."

Therefore, by virtue of the clear provision of the final sentence of Article 27, this Article cannot be applied in contravention of the provisions of Article 46 of the same Convention. That is, if the provisions of Article 46 have been met, Article 27 does not apply.

ii) Under the terms of Article 46, two requirements must be met in order to invalidate a treaty:

-- first, that the violation of internal law was manifest;
-- second, that the violation concerned a rule of internal law of fundamental importance.

As will be established below, the violation of the provisions of the November Resolution, Principle 139 of the Iranian Constitution, and the Single Article Act will be manifest if the contention of the Claimants and the majority is maintained. Furthermore, it will be demonstrated below that the provisions of the above laws constitute rules of Iran's internal law of fundamental importance.

Documents of international law have not yet properly defined what constitutes a manifest violation, or to whom the violation must be manifest. The International Law Commission did not consider it necessary to restrict the meaning of the expression "manifest violation," and it held that a violation of internal law was manifest if it was "objectively evident" to the other negotiating state. The Commission left

the interpretation of the phrase to the particular circumstances of each case.(25)

Another question to be dealt with here is, what constitutes a rule of internal law of fundamental importance. In this respect, it cannot be denied that the provisions and restrictions imposed by a country's constitution comprise fundamental rules of that country's internal law. Moreover, under international law the term "constitution" embraces both written constitutions and ordinary rules of law governing constitutional matters.(26)

iii) In cases (a) which do not fall under Article 46 (i.e. in cases where the given restrictions are not constitutional in nature and therefore the violation is not considered a violation of a rule of internal law of fundamental importance), and (b) "specific restrictions" have been imposed (e.g. restrictions laid down by an executive or administrative regulation or mandate), Article 47 requires, understandably, that the restriction be notified to the other party.(27)

---

(25) Reports of the Commission to the General Assembly, Yearbook of the International Law Commission (1966), vol.II, p.242.

(26) McNair, Law of Treaty (1961), p.59.

(27) As T.O. Elias notes, " Finally, it is necessary to observe that the restrictions referred to in the present article are not the constitutional limitations dealt with in the preceding Article 46, or there would be no need to insist on notification being given to the other negotiating States. Such restrictions, it would be reasonable to suppose, must be those provided for in executive instruments or administrative regulations of a kind not otherwise specially provided in constitutional documents. If it were otherwise, Article 47 would in the light of its immediate predecessor, be otiose" (The Validity of Treaties, Hague Recueil Des Cours (1971), Collected Courses, p.361). See also Report of the Commission to General Assembly, Yearbook of the International Law Commission (1966), vol.II, p.243.

However, in the instant cases, Article 47 does not apply, for several reasons. First, as will be seen below, it does not apply because the laws resorted to by NIOC are constitutional in nature and therefore their violation constitutes violation of the rules of Iran's internal law of fundamental importance. Second, the restrictions were either notified to the U.S. negotiators (as was the case with the November Resolution) or, pursuant to international law, they should be considered as notified because they were public and notorious and the United States Government must be deemed to have been actually aware of their provisions.(28) Third, the internal laws imposing restrictions upon the power of treaty-making organs constitute a part of international law.

---

(28) After citing the provisions of Article II, Section 2 of the Constitution of the United States of America, McNair states that

> "The foregoing is an illustration of a fundamental provision in a constitution, and we submit with confidence that provisions of this character must be regarded as possessing international notoriety so that other states cannot hold a state bound by a treaty when in fact there had been no compliance with a constitutional requirement of this type" (Constitutional Limitations upon the Treaty Making Power (1933), p.4. See also Id., pp.5-6; also T.O. Elias, Invalidity of Treaties, p.354; and Sinclair, The Vienna Convention on the Law of Treaties, p.90; also Report of the Commission to the General Assembly, Yearbook of the International Commission (1966), vol.II.

D.1. b) The November Resolution Limited the Iranian Negotiators' Authority and Such Limitation was Communicated to the United States Government

Prior to commencement of negotiations, all American nationals asserting claims against Iran and Iranian entities, regardless of how unfounded they may have been, had filed their claims with the U.S. courts. For its part, Iran regarded these actions as being contrary to the provisions of the relevant contracts and in violation of applicable rules and principles of law. For this reason, it was stipulated in the second condition of the Majlis Resolution that the Government of the United States be required to nullify all attachments, judgments, and proceedings before U.S. courts and to bar American nationals from instituting those claims in any court. This Resolution was notified to the Government of the United States.(29) Moreover, Principle "B" of the Declaration was drawn up, and the present Tribunal established, in order to implement the above Majlis requirement.

Therefore, it cannot now be contended that the Government of the United States was unaware of the limitations imposed upon the Iranian representatives' mandate.(30) What is more, this limitation was categorically required by Prin-

---

(29) See p.6 of Mr. Nabavi's Affidavit attached to NIOC's Memorial filed 3-12-1982.

(30) See pp.2-3 of Mr. W. Christopher's Affidavit attached to Amoco's claim.

ciple 139 of the Iranian Constitution, wherein it is provided that referral of claims to arbitration is in every case dependent upon the prior approval of the Council of Ministers, and in the claims at issue here, upon the approval of the Majlis as well.

D.1. c) Principle 139 of the Iranian Constitution

Principle 139 provides that

> "The settling of claims relating to public and state property and referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers... In cases where one party to the dispute is a foreigner, as well as in important cases... the approval of the (Majlis) must also be obtained..."

Because this fundamental provision has been incorporated in a written constitution, it possesses international notoriety, as has been shown above. Therefore, the dictates of good faith require that the United States not take advantage of circumstances when it was, or ought to have been, aware of that provision.[31] Furthermore, it

---

(31) Id. See especially the contention contained in p.6.

cannot be presumed [32] that the Iranian party engaged in negotiations in disregard of its mandate as circumscribed by the November Resolution and the corresponding provision embodied in Principle 139, or that the negotiating party implicitly agreed to refer unknown claims to this Tribunal, for the reason that "restrictions upon the independence of States cannot be presumed." [33]

In conclusion then, the Government of the United States was, or certainly ought to have been, fully cognizant of the statutory limitations imposed upon the Iranian negotiators, because the November Resolution had been notified to it and the said limitations were clearly imposed by the Iranian Constitution, whose provisions are to be considered public, notorious and manifest like those of other constitutions. Moreover, the U.S. ought to have been aware of such a limitation because many constitutions, indeed including that of the United States of America, limit the power of treaty negotiators and require parliamentary approval before they can come into effect. The history of the relations between Iran and the United States points to the same conclusion.

---

(32) Rather, the contrary must be presumed, because the mandate of the Iranian negotiators was delivered to the American negotiators, and because "the burden of proving a restriction upon sovereignty is upon the state alleging it" (the Lotus Case, PCIJ, Ser.A, No.10, p.18; Free Zones Case, PCIJ, Ser.A, No.24, p.12; Radio Corporation of America Case, UN Reports, vol.III, p.1627. See also Simpson and Fox, International Arbitration, pp.194-5.

(33) The Lotus Case (1927), op cit.

D.1. d) The Single Article Act

Although the Single Article Act was not submitted to the United States negotiating team by the Iranian negotiators through the Algerian representatives, the Government of the United States must be considered to have had notice of the Act. For these provisions were of a very fundamental and constitutional nature, and for this reason, as well as on the basis of related circumstances, they must be regarded as possessing international notoriety. Specifically:

i) The Single Article Act deals with the oil industry and the nationalization of the national wealth and natural resources of Iran, whose vital role in the socio-economic life of Iran is well-known. Indeed, it was because its role is so vitally important to the success of the Iranian Revolution that the Islamic Revolutionary Council made it a goal of the Islamic Revolution to revive the Nationalization Act of 1951 by enacting the Single Article Act, which it did at a very critical time and in the very special circumstances prevailing after the Revolution.

ii) The Single Article Act was notified to all parties to the Nullified Oil Agreements, and these parties were invited to file their claims, if any, with the Commission established pursuant to the Act.(34)

---

(34) See respectively, pages 29 and 24 of NIOC's Memorial in the Amoco and Phillips cases, filed 3-12-1982.

iii) Through its Treasury Department, the United States Government was aware, prior to the conclusions of the Declarations, of every detail and instance, and of all the circumstances and issues, relating to allegations and claims, no matter how minor, of its nationals against Iran.

Therefore, contrary to the majority's argument under Section I of the Interlocutory Awards, all three of the above (that is, the November Resolution which defined the mandate of the Iranian negotiators and was the basis of all negotiations ending in the Algiers Declaration;[35] Principle 139 of the Iranian Constitution; and the Single Article Act, which relates to contracts dealing with the natural resources and wealth of the Iranian nation and revived the Nationalization Act of 1951) constitute "rule(s) of Iran's internal law of fundamental importance."

It must also be stressed again that the Government of the United States had adequate knowledge of the provisions of the above rules of Iran's internal law, including its constitutional requirements and was well aware of the limitations imposed by the Majlis Resolution. Similarly, it knew, or ought to have known, of the fact that the resolution of disputes arising out of the Nullified Oil Agreements was placed under the jurisdiction of the special Commission established pursuant to the Single Article Act. Moreover,

---

(35) See Mr. Christopher's Affidavit, attached to Amoco's Memorial as an exhibit.

it cannot be said that the Iranian negotiators had abundantly bound Iran; quite to the contrary, they made every effort to explain that their power was limited and for this purpose submitted the text of the Majlis Resolution to the U.S. Government through the Algerian representatives. Finally, the principle of restrictive interpretation requires the exclusion of claims related to the Nullified Oil Agreements from the jurisdiction of the Tribunal.

D. 2. On the Second Point

D.2. a) Principle "B" Provides That:

> "It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of ...Algeria, 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. Through the procedures provided in the (Claims Settlement) Declaration, the United States agrees to terminate all legal proceedings in United States Courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration." (Emphasis added)

The majority has been very selective indeed in applying the Declarations. That is, it has disregarded the provisions of Principle "B" together with the related

arguments in NIOC's memorials. At the same time, it has dealt excessively upon Article 2 of the Settlement Declaration and in the process it has rendered Principle "B" devoid of all meaning.

i) Principle "B" Describes the Intention of the Parties

The true intention of the parties to the Algiers Declarations is reflected in Principle "B." Therefore, in cases of conflict, the provisions of that Principle should prevail, since the major objective of any interpretation is to establish the intent of the parties; whatever rules and maxims are adduced from textbooks and the record of other international tribunals can serve merely as prima facie guides as to the intent of the parties to a particular case.(36)

In this respect, Article 31(I) of the Vienna Convention requires that the terms of a treaty should be interpreted, not only "in their context," but also in light of that treaty's purpose and object. (37)

---

(36) NcNair, Laws of Treaties (1938), pp.175, 185. See also Charzow Factory Case, PCIJ (A/B), No. 21; Y.T. Chang, op cit, p. 78; Ilmar Tammelo, Treaty Interpretation and Practical Reason (1967), pp.12-18; Verdross, Volkerrech (5th Ed., 1964), p.173; Parry, Manual of Public International Law (1968), p.210; Lauterpocht, Annuaire de l'Institut de Droit International 43(1) (1950), pp.366-434; Schwartzenberger, A Manual of International Law (1947), p.65; Miller, Interpretation of Treaties, Iowa Law Review, vol.17 (1932), p.206.

(37) See also D. W. Grieg, International Law (1976), p.479; Southwest Africa Cases (1962), ICJ Reports (1962), pp. 335-6; J. Stone, "Fictional Elements in Treaty Interpretation-- A study in the International Judicial Process" (1953-4), at 357, n.65a, Article 19(a) of the Harvard Draft Convention.

ii) Principle "B" Reflects the Circumstances in Which the Declarations Were Concluded

Treaties are nothing more than the result of a series of facts and circumstances. Therefore, the circumstances in which a treaty was concluded and the complex factors involved in the relations between the parties as of the date of conclusion of the treaty, must be taken into careful consideration if one intends to ascertain the meaning of a given term in that treaty or properly to interpret that treaty's provisions.(38)

Mr. Nabavi's Affidavit clearly describes the circumstances in which the Algiers Declarations were concluded.(39) Of signal importance in this respect is the fact that, contrary to all rules and principles of international law, all Americans who had had any sort of relations with Iran and who were able to find some pretext for making allegations against Iran, had filed "claims" with United States courts as prompted by the U.S. Government. Naturally, Iran regarded those claims and their relevant attachments as completely illegal.

---

(38) Article 32 of the Vienna Convention; Article 19(a) of the Harvard Draft; McNair, op cit, pp.174, 264; Greig, op cit, pp.480.1; Y.T. Chang, op cit, pp.25-6, 46-9, 78, 140; De Lemos Case, Venezuelan Arbitrations of 1903 (Washington, D.C., 1904), p.310; Mustafa K. Yasseen, op cit, pp.90-1.

(39) See especially pp.1-9.

Therefore, the second condition of the November Resolution required that the United States nullify all attachments, judgments, and court proceedings before the U.S. courts and prevent U.S. nationals from instituting any future court proceedings on such claims. Principle "B" was included in the Declaration in order to implement this requirement, and this Tribunal was established to decide those certain claims that fell under the provisions of the Declaration.

iii) Principle "B" Defines the Meaning of the Word "Claim"

The intention of the parties with respect to the word "claim" as used in the Claims Settlement Declaration, can be understood only through application of Principle "B."

There is no place for a contention that a term used in a treaty has, on its face an absolutely clear and plain meaning. What a tribunal should seek is the relative meaning of such a term in its total context.(40)

---

(40) McNair, op cit, p.175. See also Arao Mines Case, Y.T. Chang, op cit, p.47; and Southwest Africa Cases (1962), ICJ Reports (1962), pp.335-6.

Embarking on an issue similar to that which we face here, the Greco-Bulgarian mixed Arbitral Tribunal decided on 4-2-1927, after considering various extrinsic evidence in Sarropoulas v. Bulgarian States, that the phrase "diplomatic or consular claims made before the war" as it appears in Article 179 of the Treaty of Neuilly, covers only those claims directly or indirectly related to the war, or to claims, settlement of which had been postponed because of the war.(41) On the basis of the above, then, a particular meaning can be given a word if it be established that that meaning was intended by the parties.(42) Moreover, words are to be understood and interpreted at the time that a treaty is negotiated and concluded.(43)

Above and beyond what has been set forth above, the relevant terms of the Principle "B" (e.g. "litigation," "legal proceedings," and "such claims") are also entirely clear and plain on their face.

Notwithstanding the logical and obvious conclusions which are to be reached through studying Principle "B" and Mr. Nabavi's Affidavit, the majority relies upon a special interpretation of certain phrases in Article 2 of the Claims Settlement Declaration to create a very broad jurisdiction for itself, and states:

---

(41) 7 T.I.M. 47. See also Colombian Bond Case (4 Moore, Arbitration, 3014).

(42) Article 31 (4) of the Vienna Convention provides: "A special meaning shall be given to a term if it is established that the parties so intend."

(43) Ilmar Tammdo, Treaty Interpretation and Practical Reason, p.10; Oppenhein, International Law (7th ed., Lauterpacht, 1948), pp.852-62.

> "The jurisdiction of this Tribunal is thus very broad."

However, the fact is that this conclusion conflicts with the rules of international law on interpretation of treaties, which require that international tribunals must interpret treaties restrictively so as to avoid unduly limiting the sovereignty and independence of States.

In an attempt to support its findings, and by the same method of broad interpretation, the majority goes on to state:

> "In this connection, it should be noted that the preamble of the General Declaration states that it was the purpose of the two Governments 'to terminate all litigation as between the Government of each party and the nationals of the other.'"

Firstly, however, it is surprising that the majority has taken notice of the preamble of the Declaration and yet passed over Principle "B." Secondly, it is entirely manifest, considering the circumstances in which the Declarations were drawn up and the arguments set forth in the preceding discussion, that the text of the preamble cannot vest the Tribunal with the extensive and definitive jurisdiction assumed by the majority. After all, it is obvious that certain claims cannot be so qualified as to fall within

the jurisdiction of the Tribunal. There can be no doubt, for example, that this Tribunal lacks jurisdiction over those claims by American or Iranian nationals arising after the conclusion of the Declarations. Thirdly, the majority failed to take into consideration the term "litigation," which appears in the preamble bearing a signification identical to that of the same term in Principle "B," and which thereby supports the contentions of NIOC and the statements by Mr. Nabavi in his Affidavit.

D.2. b) The Nullified Oil Agreements Claims Did Not Fall within the Jurisdiction of the Tribunal from the very Beginning

So far as the Declarations are concerned, claims are to be divided into two general categories: (1) claims which from the outset did not fall within the Tribunal's jurisdiction; and (2) claims which fall within the Tribunal's jurisdiction unless specifically excluded or excepted.

In this respect, it is NIOC's contention that the claims arising out of the Nullified Oil Agreements do not fall within the jurisdiction of the Tribunal, and that therefore, any argument set forth in the so-called Interlocutory Awards with the intention of defining and determining exceptions to the Tribunal's jurisdiction so narrowly as to permit the adjudication of the Nullified claims is irrelevant here. This contention by NIOC is fully supported by Mr. Nabavi's Affidavit and by the circumstances in which the Algiers Declarations were concluded; nonetheless, the majority has not taken it into account.

D.2. c) The Tribunal Cannot Be Presumed A Priori to Have Jurisdiction Over the Nullified Cases

The majority admits that

> "...in November 1980 the Majlis indicated very clearly that its intention was to put an end to any judicial claims by U.S. nationals against Iran in U.S. courts..."

Yet it immediately proceeds to contradict itself by adding gratuitously, "presumably including claims by U.S. Oil companies," and by such presumption tries to assume jurisdiction.

Whence and how this presumption has been derived is by no means clear. First of all, U.S. Oil Companies had no claim pending before the U.S. courts or any other tribunal when the November Resolution was issued. Second, it is a well-established rule of international law that tribunals should interpret their jurisdiction very restrictively and in the favour of the freedom and independence of States.(44) Quite contrary to the conclusion by the majority, any presumption regarding the Nullified claims should be the other way around. That is, it should be presumed that a tribunal lacks jurisdiction unless the State asserting such jurisdiction can prove the existence of an obligation or restriction upon sovereignty.(45)

---

(44) Simpson and Fox, op cit, p.78; A. Walton, op cit, pp. 174-5; McNair, op cit, p.210; The Free Zone Case, PCIJ Series A/B No.46, p.167.

(45) Simpson and Fox, op cit, pp.194-5. See also Colombian Bond Cases, op cit, 3614, where the umpire, Sir Frederick Bruce, interprets the term "claims" as referring only to bonds claims which the parties had reserved to themselves. See also Lotus Case (op cit, p.18), wherein the Permanent Court of International Justice said:

> "Restrictions upon the independence of States cannot be presumed."

D.2. c) The Majlis Position

In studying NIOC's submissions with respect to the Majlis position, the majority has confined itself to the merely nominal, primary and literal sense of Article 2 (1) of the Claims Settlement Declaration. Stating that "the January 1980 Act was an Act of the Revolutionary Council, not the Majlis," and that "the terms of the note to the January Act are clear and unambiguous," it concludes that

> "The words 'in response to the Majlis position' were included in the Declaration as a result of what had been said by the Majlis, not in November 1980, but in January 1981. Thus the reference to the position of the Majlis also does not affect the jurisdiction of this Tribunal in the present case."

Because the majority hereby ignored the submissions of NIOC, I should briefly comment on this position taken by the majority, which indeed reflects the attitude assumed by it throughout the present Awards:

i) The Revolutionary Council was acting in place of the Majlis and possessed legislative authority. Therefore, whether the legislative body is designated by the term "Majlis" or by other terms such as "Parliament" or "Revolutionary Council" is irrelevant.

ii) As previously set forth under section D.2. a) iii) of this Dissenting Opinion, the so-called "plain terms" doctrine is relative and is inextricably bound to the intention of parties and to the circumstances in which a treaty has been

entered into.[46]

iii) NIOC contends that the November Resolution, the Single Article Act and the January Acts are enactments, and, consequently, that they constitute the official position of the Iranian legislative authority. NIOC contends that

> "Considering the fact that even claims pending before U.S. courts have been differentiated and a series of such claims have been excluded from the jurisdiction of this Tribunal and their Iranian forums' jurisdiction are maintained, how is it possible to contend that the Government of Iran or the Majlis had agreed to the transfer of eventual claims arising from the Nullified Oil Agreements to this Tribunal, where a specific prior Iranian Law had referred all such claims to a commission for adjudication, and where such claims were never pending before U.S. courts and their cancellation and nullification by United States was not creating any difficulty for that state." (47)

D. 1. On the Third Point

The majority admits that

> "It is true that Article II, paragraph 1 of the Claims Settlement Declaration limits the jurisdiction of this Tribunal to claims 'outstanding on the date of this agreement.'"

---

(46) McNair (op cit, p.175) notes that "Expressions such these have led to a good deal of misunderstanding."

(47) NIOC Memorials in the Amoco and Phillips cases, pp. 34-6 and 28-30, respectively.

Nonetheless, the majority goes on to say,

> "The provision continues, however, to say 'whether or not filed with any court.'"

In this way, the statements and conclusions by the majority demonstrate that it has once again ignored the intention of the parties, the circumstances in which the Declaration was concluded, and the evidence represented by the preparatory works.

If we consider the statements in Mr. Nabavi's Affidavit and recall the decision of the Full Tribunal in Case A/2, we must inescapably come to the conclusion that the phrase "whether or not filed with any court" is now devoid of all meaning, (48) and that what remains to be ascertained is the meaning of the word "claims," and that this term must be interpreted through application of the definition given it in Principle "B" of the Declaration.

Therefore, considering what has been discussed in this Dissenting Opinion, the so-called Interlocutory Awards rendered in Case No.39 and 55 are null and void because :

1. The majority in Chamber Two exceeded the Chamber's limited authority and mandate.

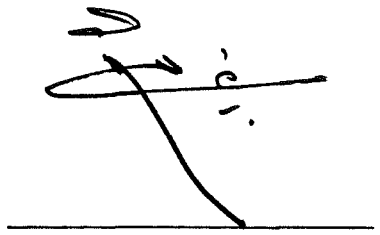
---

(48) According to a decision by the Permanent Court of Arbitration at The Hague, the words of an article may be declared meaningless, if there is specific evidence to that effect (See Y.T. Chang, op cit, pp.54-5).

2. The Awards are based on prejudgment.

3. The Respondents' right to a proper defence and hearing has thereby been denied.

4. Defences contained in the Respondents' Memorials were not considered.



Dr. Shafie Shafeiei