79

IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

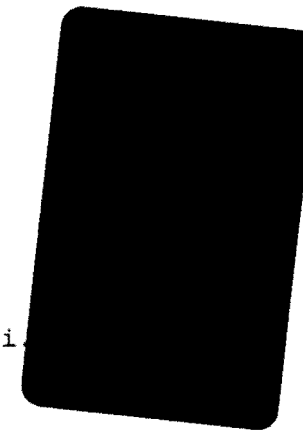
Case No. 132 Date of filing 7 April 1983

_____ AWARD. Date of Award _____

_____ pages in English. _____ pages in Farsi.

_____ DECISION. Date of Decision _____

_____ pages in English. _____ pages in Farsi.



_____ ORDER. Date of Order _____

_____ pages in English. _____ pages in Farsi.

_____ CONCURRING OPINION of _____

Date _____ _____ pages in English. _____ pages in Farsi.

_____ DISSENTING OPINION of _____

Date _____ _____ pages in English. _____ pages in Farsi.

✓ OTHER; Nature of document: Judge Lauterpacht's reasons for not signing the Award

Date _____ 20 pages in English. _____ pages in Farsi.

DUPLICATE
ORIGINAL
«نسخه برابر اصل»

[redacted]

MR. JAHANGIR SANI'S
REASONS FOR NOT SIGNING
THE DECISION MADE BY
MR. MANGARD AND MR. MOSK
IN CASE NO. 132

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه دایری دعاوی ایران ـ ایالات متحده

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No. 132 شماره
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CH.3

In the Name of God

I was not notified of the deliberative session which resulted in the issuance of an Award in the present case; nor did I happen to be present on the Tribunal premises and, consequently, at the meeting itself, when it was held. In my discussion of Case No. 30, a copy of which I annex hereto, I have already elucidated some elements of events which led to the issuance of an award in my absence and without my participation. In the present "Opinion," I shall first relate the remaining events concerning Case No. 132, following which I shall discuss the major deficiencies in the Award itself. The fact that the Award was rendered without consultation with, and in the absence of, one arbitrator, constitutes so serious a breach of recognized legal principles that I am compelled to refrain from signing such an award.

1. The Award in Case No. 132 was Rendered in My Absence and without My Participation

On Wednesday, 15 December 1982, just when I had been requested to return to Tehran to discuss my resignation tendered in relation to Case No. 30, I was confronted by the unanticipated and surprising news that Mr. Mangard and Mr. Mosk had proceeded to issue Awards in Cases No. 17 and 132, as well as in the above-mentioned case. As I have explained with respect to Case No. 30, in the preceding few days we had held some nonspecific discussions concerning the latter case; However, there had not been the slightest discussion of the other two cases. My efforts to discover the reason for their having taken such an unbelievable action led me only to the conclusion that it was related to the issue of Mr. Bellet's resignation and to the discussions which took place between six of the arbitrators following his resignation.

In the afternoon of that same Wednesday, Dr. Kashani telephoned me to state that, as a result of his efforts in concert with Mr. Hosseini, Mr. Mangard and Mr. Mosk had promised that if I were prepared to meet with them they would refrain from taking action on Cases Nos. 17 and 132, although they would be compelled to file Case No. 30. I considered that under such conditions discussions would be both inconsistent with legal principles and morally improper. Nonetheless, solely for the sake of much greater considerations, and on the advice of Mr. Kashani and Mr. Hosseini, I went to meet Mr. Mangard and Mr. Mosk off the Tribunal premises. In this meeting I expressed my deep dissatisfaction with what had transpired in the preceding several days, and stated unequivocally that my colleagues had acted in a legally unsupportable manner by reaching decisions in the three cases in question without my presence and participation. In this meeting, I sensed that my colleagues had formed a misconception regarding the reason for my resignation and had supposed that my purpose in tendering it so soon after that of Mr. Bellet was to delay the issuing of an award in Case No. 30; and that they had therefore considered themselves obliged to take measures in order to resolve the matter in Cases Nos. 17 and 132, for which hearings had been held but final deliberations had not yet taken place. In addition to elaborating upon the reasons for my resignation, I explicitly stated that it was utterly unrelated to the resignation of Mr. Bellet. In order to receive assurances in this respect, Mr. Mangard and Mr. Mosk requested that I withdraw my resignation so as to preclude further confusion. In answer to this request, I made two proposals : one, that for the time being all three cases be left in abeyance; and two, that if they intended to issue an award in Case No. 30, they do so in keeping with their most recent decision-- namely, to assign a rate of 8½% on late payment damages. At any rate, Mr. Mangard and I did finally reach a consensus that the decisions issued in Cases Nos. 17 and 132 would be withdrawn and that we would review those cases

on 15 January 1983. Mr. Mosk also evinced no opposition to this arrangement, though he did state that he would have to discuss it with his American counterparts. On the minimal condition that the Awards issued in the aforementioned cases be withdrawn and that they be reviewed on 15 January, I also promised to return to The Hague, at least in order to make a disposition of those two cases. Unfortunately, in Tehran on the following day I received word from The Hague that a decision had been made, notwithstanding the previous agreement, to file and publish Case No. 30, and that Mr. Mangard and Mr. Mosk had, firstly, signed it after assigning a 12% rate on late payment damages instead of 8½%, and, secondly, that action on the other two cases was to be deferred until I returned so that they could be discussed in the meeting scheduled for 4 January 1983 for the purpose of deliberation and exchange of views. I deeply regret that this was not a personal matter; for otherwise, in the light of the repeated breaches of promise, I would certainly have refused at once to accept the proposed arrangements . However, as under the circumstances there were much more important interests and concerns at issue, I had no alternative but to accept. In my meeting with Mr. Mangard and Mr. Mosk on 4 January 1983, I learned from them that, far from having been withdrawn, the decisions issued on the abovementioned two cases had already been filed with the Registry. Then, when I attempted to say a few words with a view to reminding my colleagues of the promises and decisions between us, Mr. Mosk abruptly left the room in vehement protest and did not return. I thereupon remonstrated with Mr. Mangard, saying that in the light of their issuance of an award in my absence and their filing it with the Registry, their invitation to me, and my presence, were completely meaningless and could have been intended only to lend a semblance of legality to a decision which had been issued without regard for the Rules of the Tribunal. Obviously, since it was utterly unseemly for me to contribute to such a result, I left Mr. Mangard's office.

I was later informed that the present case, signed and filed under No.02-132-3 on 15 December 1982, had on the order of Mr. Mangard been sent to Chamber Three from the Registry, and that after certain changes were made in the portion relating to my reasons for not signing the award, and its date of issuance changed to 5 January 1983, it had been assigned the new number of 21-132-3 in the Registry and distributed.

2. The Deficiencies in the Award Itself

2.1. Issue Related to the Requirement that a Minimum of 50% or More of the Capital Stock of American Corporations Be Held by Natural Persons of American Nationality

In addition to the requirement that a corporation or legal entity be "organized under the laws of the United States...", Article VII, Paragraph 1, of the Claims Settlement Declaration sets a second stipulation for the filing of claims with this Tribunal by such a corporation, to wit, that "collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock". In most of the claims filed with the Tribunal, the Government of Iran has argued that it is absolutely incumbent upon the Tribunal to hold to both stipulations in order to establish the standing of the claimant legal entities, and thereby its own jurisdiction. For their part, claimants have asserted that adherence to the second stipulation is impossible, citing practical difficulties. The Tribunal itself has for some time been seeking a formula for resolving the issue, but so far it has manifestly failed to arrive at a mutually agreeable solution. Yet, in the present majority decision, this issue is supposed, in all too facile a manner, to have been resolved, primarily by the following justifications : (1) the declaration

at most the above-mentioned form has a weight equal to the corresponding assertion by the claimant, and certainly it does not enjoy a degree of authority sufficient to corroborate the veracity of the Claimant's assertion. Therefore -- and in light of the fact that the determination that the stipulation that 50% or more of the capital stock of a company be owned [by natural citizens of the United States or Iran] has been met, is so important as to give the Tribunal jurisdiction over very important claims which may exceed tens or even hundreds of millions of dollars -- it is at the very least highly imprudent to content ourselves with what the Claimant has produced as evidence, particularly inasmuch as the issue of determining nationality is connected to that of jurisdiction, regarding which it is incumbent upon the Tribunal to make a restrictive interpretation.

2.2. The Issue of Control

In brief, the reasoning by Mr. Mangard and Mr. Mosk with respect to "control" as alleged by the Claimant, is that because "the power to appoint and dismiss managers and directors in charge of the day-to-day management of the companies has been with the Government of Iran or its appropriate Ministry or Agencies since the latter half of 1979," and because "this power has been exercised with regard to both companies," it has been sufficiently demonstrated and established, therefore, that "both Tchacosh and Siporex are entities controlled by Iran" (pages 8 and 9 of the English version of the Award).

In other words, these arbitrators held that the mere fact of appointment of managers by the Government or its agencies sufficed to establish control by the Government. They even went so far as to state explicitly that there was no need to discuss the various laws pursuant to which the above appointments took place, because "the Respondents do not contest the fact of the governmental appointment of managers. Instead, they rest their defence on the allegation that no expropriation or nationalization of Techacosh and Siporex has occurred" (page 8 of

the English version of the Award).

In my opinion, the issue of "control" as intended by those who drew up the Claims Settlement Declaration, is not to be resolved merely by reference to the appointment of managers by the Government of Iran. Before elaborating, however, I must turn to several points :

First : On the basis of the submissions in this case, it is clear that the Respondents did not contest the fact of the governmental appointment of managers, and instead merely denied that Tchacosh and Siporex had been nationalized or expropriated, because the Claimant had itself explicitly alleged in its Statement of Claim that Tchacosh and Siporex were nationalized by the Government of Iran in 1979 and since that time have been owned, managed and controlled by the Government of Iran (pages 2 and 3 of the English version of the Statement of Claim).

Second : The logic of the argument that although "[t]he directives by which the appointments were made cite various laws as authority, [i]t is unnecessary to discuss the specific sources for such authority because the Respondents do not contest the fact of the governmental appointment of managers" is by no means clear. As observed above, the Respondents did not address the issue of appointment of managers and the insufficiency of that fact to permit a determination that "control" existed, and instead based their defences upon a denial that the Respondent Companies had been nationalized and their ownership transferred wholly to the Government, solely for the reason that the Claimant had made the latter allegation in its Statement of Claim. However, even if we accept, arguendo, the position that the Respondents' silence in this respect signifies that managers were indeed appointed; and that by their silence the Respondents have also tacitly admitted that such appointed managers were also governmental managers, it is nonetheless still unclear why the majority thereby considers itself relieved of the obligation

to take under discussion those laws pursuant to which the purported appointment of managers was effected. Obviously, the point of conducting such a discussion would be to determine the limits of the powers of such appointed managers, so that it might be determined whether those powers are sufficient to establish control as intended in Article VII of the Claims Settlement Declaration. In other words, a determination of "control" as intended in the Declarations, is contingent, first, upon establishing that managers have in fact been appointed by the Government; and second, upon rendering a decision, after review of the powers devolving by law upon such appointed managers, that those powers are sufficient to constitute "control." By arguing that it is unnecessary to discuss the legal bases of appointment of these managers and, as a consequence, to determine the limits of the powers vested in them, simply because the Respondents have not contested the fact of the appointment of managers, my colleagues have commingled two entirely distinct and necessary preconditions and have supposed that their determination as to the first has relieved them of the obligation to reach a determination regarding the second.

Third : Even if, arguendo, we accept the majority opinion that the fact of appointment of managers suffices in itself to satisfy the precondition of "control," without the need to deliberate upon the extend of their powers, nonetheless their other argument-- to wit, that appointment of managers by the Government or its appropriate Ministry or Agencies is sufficient to establish such control-- is inconsistent with the Claims Settlement Declaration. Pursuant to Article VII of the Declaration, the Tribunal's jurisdiction is limited to adjudication of those claims brought against either of the two Governments or any of their political subdivisions, or any agency, instrumentality or entity controlled by them or by any political subdivision thereof. It should be noted that although the rubrics "agency," "entity," and "instrumentality" are cited

Iran, that it is not liable for debts and contractual obligations entered into by a large number of private Iranian companies which according to the Government of Iran have continued, from the point of view of domestic law and in practice, to be private and independent of the Government. The Government of Iran asserts that after the Revolution, a significant number of Iranian and non-Iranian companies left Iran thereby causing the complete disruption of the operations of those companies. In order to prevent the cessation of these companies' operations -- a step which incidentally also served to protect the interests of their own shareholders -- it was necessary to take a number of interim decisions. For this reason the Revolutionary Council, seeking to remedy the situation, promulgated laws permitting the ministries or governmental agencies charged with overseeing the operations of the said companies, or the ministries or governmental agencies within the purview of whose activities were included the operations of those companies, to appoint an individual or individuals on their own initiative, or at the request of the employees of those entities, who would supervise their operations on a temporary basis. Further, the aforementioned managers were referred to the Government or the concerned governmental agencies for issuance of the necessary orders appointing them, solely in order to provide their activities with a legal standing.(1) Therefore, according to the assertion by the Government of Iran, the intervention by the Government or its agencies in the operations of such companies was limited to the appointment of, or, at times, the receipt of reports on the work of, these temporary managers. The Government of Iran has also asserted, in a large number of its statements of defence, that a significant number of the companies

(1) In the present case, the individual at present in charge of the Tchacosh Company stated in the hearing that he had never previously been a government official or in any way attached to the Government; that instead he had worked for fifteen years as an engineer in private employment; and that the order appointing him to take charge of the company had been issued only on the proposal and at the insistence of the workers of the company itself, and with his agreement to it.

though they are fully cognizant of the issue's ramifications and of the fact that hundreds of claims have been filed with this Tribunal on the basis of a special interpretation of the sense of the term "control" as employed in Article VII; although they have been informed of the position of the Government of Iran in this respect as reflected in all of these cases; and without considering themselves obligated to set the issue before the Full Tribunal as a common issue The majority Opinion does not take note even of the necessity of deliberating upon such very basic matters as the degree to which governments intervene in the activities of the private sector, a degree which varies in accordance with the different kinds and structures of the economic systems in different countries, such as the fact that because of social and economic imperatives, the governments of developing nations must supervise the activities of the private sector particularly closely. Nor does the majority opinion reveal any concern for the need to answer such very crucial questions as whether, in the light of the extraordinary circumstances attending the Revolution, including the flight of the managers of some companies, the intervention by the Government ought to be considered "control," inasmuch as it took place, it is asserted, not to expropriate those companies but to ensure their continued operations. A further disregarded matter is the crucial issue, whether the appointment of managers over such entities can properly be held to constitute "control," if it be the case that these appointments were for a temporary period and the appointees were limited to managing the property of third or absent parties, and that they did not represent any intention by the Government to take permanent possession of such entities. What is even more important, the determination in the Decision that control had been established was, based on the unambiguous statement by my colleagues, made without their having considered even those laws which comprise the basis of the Government's intervention and, as a result, without their having deliberated upon the limits of the powers and degree of involvement assumed by the appointed managers as well.

Respondents argue in their defences, in brief, that Tchacosh, not Siporex, was the other party to the contract with the Claimant Company. Thereafter, through a separate contract, Tchacosh sold Siporex the machinery purchased from the Claimant Company and the transaction can be found reflected in the ledgers of Siporex Company.

I do not intend here, through perusal of the telexes exchanged, to substantiate my opinion that Tchacosh was the sole party to the contract concluded with the Claimant Company. Rather, my intention is to point to that portion of the Award where apparently the assertions by both parties are rejected and it is held that Tchacosh Company was the agent for Siporex Company; that Siporex was the principal purchaser; and that both companies were liable for damages demanded by the Claimant. The majority states that

> "The transaction was not without some confusion regarding the identity of the purchaser. The source of this confusion is to be found primarily in the fact that the managing director of Tchacosh and the managing director of Siporex were one and the same person. This person also appears to have been the major shareholder in both companies."
>
> "However, it would be reasonable to infer that, if the managing director of one company signs a bill as acceptor on behalf of the second company of which he is also the managing director, he has authority to act as agent for the latter company." (pages 10-11 of the English version of the Award)

If, arguendo, we accept the preceding information as correct, then a number of serious problems are involved in such a transaction-- at least from the point of view of Iranian law, which governs the activities of the Respondent Companies. These consist of the following :

First: Pursuant to the Commercial Code of Iran, no one is entitled to serve as the managing director for more than one company simultaneously (1);

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(1) Article 126: Transactions undertaken by such an individual with respect to a third party will, of course, be valid.

Second: Neither the managing director nor the board of directors of a company may, without completing elaborate procedures including acquisition of authorization from the board of directors and the immediate submission of a report to the inspector and to the ordinary shareholders' meeting, conclude any direct or indirect transaction with another company, or for the account of another company, any member of whose board of directors also serves on the board of directors of the first (2);

Third: Because it lay beyond the "objectives" of Tchacosh Company, the conclusion of the contract as an agent was not within the authority of the directors of the above-mentioned company (ultra vires), and was thereby null and void;

Fourth: Acts of agency are undertaken for a consideration, which does not apply in the present case. (3);

In the following portions of this opinion, I shall refer to the question of whether the Government of Iran ought to be held liable for transactions of this sort.

2-4: The Issue of Excess Freight Charges

Because the Claimant originally asserted that, as in the purchase of the machinery, both Tchacosh and Siporex Companies were liable for payment of the excess freight charges, and because the correspondence between the Parties, which is allowed by the Claimant to constitute in toto the contracts in dispute, were entered into with both Tchacosh and Siporex Companies, it is not clear on what grounds Siporex Company alone has been found liable in this matter. Apparently my colleagues reasoned that the purchase agreements involved indicate Siporex as the purchaser with the exception of one instance in which the purchase agreement was corrected (page 11 of the English version of the Award).

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(2) Article 129 of the Commercial Code

(3) Article 357 of the Commercial Code

This statement is completely incompatible with the documentary evidence submitted by the Claimant.That evidence reveals that a considerable number of the proforma invoices were sent to Tchacosh. Even if the phrase, "for Siporex Company" was used in some of them, in some others the phrase appears "for Butane Gas Company", which has been neither named by the Claimant as a Respondent nor held by the Tribunal to be liable for payment of the excess freight charges. It must be mentioned that originally the Claimant Company requested, in the course of its numerous letters to Tchacosh Company, that Tchacosh pay the former £158,086.78 for excess freight charges (Appendix 6 of the Claimant's Statement of Claim). In its letter dated 26 February 1978 (also Appendix 6), Tchacosh Company objected to the sum requested, and argued that it did not consider itself liable for payment of excess freight charges arising from the Claimant Company's own delay in sending the machinery as scheduled. In its letter in reply dated 17 March 1978 (Appendix No.10 to Claimant's Memorial dated 24 August), the Claimant Company accepted this argument and deducted a certain sum from the original invoice. In its letter to Mr. Alamir at Tchacosh Company, dated 21 April 1978, the Claimant renewed its request for expedite payment of the amount owing (Appendix No.12 of Claimant's Memorial dated 24 August). The interesting point is that the Tribunal also fixed the sum of $130,176.01 as Siporex Company's liability, based on the argument that "Tchacosh, in its letter to Rexnord of 26 February 1978 (7 Esfand 1356), did not raise any objection to the invoice covering freight charges, except with regard to one portion of the invoiced amount (page 12 of the English version of the Award). In that case, it is not easy to understand how the letter indicating Tchacosh's lack of objections-- which by my colleagues' own admission had neither a role nor liability in this matter -- has been used as a document establishing Siporex Company's liability, and for assessing the amount of such liability.

Another point which I consider necessary to mention here is that in the Hearing, the Respondents submitted documents quoting

the standard rates of shipping companies for such goods at the time in question, and on this basis they argued that the normal freight charges stood in glaring contrast to those demanded by the Claimant Company. (1)

In a later Memorial, Tchacosh Company stated that it was ready, at its own expense, to refer the matter to an expert in the field. Nonetheless, Mr. Mangard and Mr. Mosk found Siporex Company liable for payment of the excess freight charges on the grounds that the evidence presented above was inconclusive and that Tchacosh Company had not originally objected to them. I shall pass over the question why the Award refers to the rate schedules submitted by a number of disinterested shipping companies as "materials", yet elsewhere to the affidavit by an employee of the Claimant Company (and therefore an interested party) as "evidence". I shall also accept that my fellow arbitrators have the right to decide what significance to assign to the evidence and materials submitted, and to take a decision contrary to my own with respect to what they reject or accept. However, I do object to the fact that those arbitrators treated the lack of objection by the manager of a private company-- assuming that he did not in fact raise an objection-- as evidence of the Government of Iran's present liability; and that they consider the Government, which has at all events been found liable for payment of damages in the present Award, bound by this lack of objection. I do not consider it

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(1) "At the Hearing, Tchacosh and Siporex raised the argument that the freight charges demanded by Rexnord are exorbitant in comparison with the freight charges normally applied by the shipping rates at the relevant time... In support of their position, Tchacosh and Siporex submitted materials at the Hearing indicating the standard rates applied by shipping companies around the period in question." (pages 11 and 12 of the English version of the Award).

necessary to elaborate here on the special relationships between some managers of private companies and foreign companies before the Revolution, because I believe that some inkling of those relationships has been gained by the Tribunal in the course of its nearly one year's experience with various claims. However, I am obliged to take note of the fact that pursuant to the Algiers Declaration, the Government of Iran has been committed to pay solely its just debts. It will be astonishing if the Government's arguments, establishing that the payments demanded are unjust, should be disregarded merely because a private company did not previously object to them.

2-5: The Issue of Payment of the Award

Nonetheless, my more basic objections are to the order that the Award be paid out of the Security Account, because I have misgivings over the apparent finding that the Government has unlimited liability for the actions by entities involved in activities that are within the purview of the Government, entities which have proliferated and diversified in the present era-- misgivings that the decision fails to conform, not only to the articles of association of these entities, but to other legal provisions as well. There is no need to elaborate upon the point that the purpose behind the incorporation of such corporations as commerical entities having a specified capital stock independent of the Government and covered by commercial laws and regulations, was not to provide the Government or Legislature with diversion. Rather, weighty considerations were involved, among them that of bringing these entities under the provisions of private law. In other words, the liability of such entities is circumscribed by the laws under which they were incorporated, and by their own articles of association; imposing their liabilities upon the Government to the same extent, say, as is prescribed in the case of a governmental agency carrying out acts of state, is a violation of all legal rules and

standards. Even if we hold that the Respondent Companies are establishments of this kind, nonetheless, as the majority has in fact validated the independent character of the Respondent Companies by the process of issuing an Award against them, then the Award ought, as a necessary and natural consequence, to be enforced against the Party against which it was issued, not against the Government of Iran. For this reason, by announcing in the Award that the said damages are to be paid out of the Security Account of the Government of Iran, the majority has negated its own Award, in which it has ruled against the Respondent Companies as entities independent of the Government--unless it be asserted that those companies were engaged in performing acts of state.

2-6: The Issue of Interest

The highly involved issues related to interest in this arbitration require further elaboration, to which I shall address myself in the future. However, here I must take up two points. In the majority's view, the law applicable to the Agreements is that of the United Kingdom, under which "where a bill is dishonoured by non-payment, interest on the principal debt is awarded at a rate reflecting the rates which would have been incurred had the prevailing party borrowed the amount at the time it fell due." On the same grounds, the majority has made an award against the Respondents for payment of interest, relying on the schedule submitted by the Claimant specifying "its borrowing rates for the period after each portion of the debts for the unpaid drafts and excess freight charges matured". What has been forgotten is that first , both Parties had anticipated an interest rate of 7% for these drafts under certain specified conditions, a rate in glaring contrast to that awarded; and second , assuming that the conclusions revealed above are valid, it is by no means clear on what grounds the law applicable to the drafts has been applied to the issue of excess freight charges as well.

* * *

The first portion of my Opinion, referring to the fact that I was not notified of the convening of the deliberative session and so did not participate in it, corroborates my essential point, that what Mr. Mangard and Mr. Mosk of Chamber Three wrote and filed regarding Case No.132 is devoid of all legal basis. The second portion, comprising my discussion of the deficiencies in my two colleagues' Opinion, ought to be taken as my dissenting Opinion.

M. Jahangir Sani

The 'opinion' of Judge Jahangir Sani in Case No. 30

Pursuant to Article 32 of the Provisionally Adopted Tribunal Rules, which provides that if an Arbitrator "fails to sign, the award shall state the reason for the absence of the signature", I hereby cite the reasons for my refusal to sign Award No. 30 (on damages and costs), and I request that, in accordance with the express terms of said Article, the same be reflected in the test of that Award.

On 30 July 1982, Chamber 3 by a majority decision rendered a "partial award" which determined the case on the merits but postponed the decision on the issues of damages and costs. Because the issue of damages was by then already on the agenda of the Full Tribunal, I refused to take part in voting. The majority's decision to postpone adjudication of the issue of damages obviously demonstrated that the majority itself recognised the impropriety of rendering a judgement at a time when the issue of damages, which is rightly regarded as one of the most important issues before the Tribunal, had not been subjected to adequate deliberation. The position of the Full Tribunal and, presumably, the other two Chambers over this issue was thus entirely

vague and ambiguous. Until such time as the existing ambiguity had been removed, with the Full Tribunal setting specific guidelines for the Chambers to follow, logically, no decision should therefore have been rendered in this matter. For the same reason, even though Judge Mangård and Mr. Mosk had shortly before the December session of the Full Tribunal discussed the subject and apparently reached some sort of agreement, Judge Mangård expressly stated that he did not consider it appropriate to make any decision before the topic was considered and clarified by the Full Tribunal. This last point requires a few words of explanation. In order to refer the issue of damages to the Full Tribunal for consideration, Judge Mangård and I first prepared a joint Draft which was shortly followed by a Report in several pages containing the results of a preliminary investigation carried out by Mr. Hosseini and Mr. Edling. The submitted Draft and the Report containing the preliminary investigations were taken up by the Full Tribunal and formed the basis of a general discussion in its December session. This brief and general discussion not only failed to produce the desired result -- that is, a thorough examination of the subject by the Full Tribunal, setting at least broad guidelines enabling the Chambers to adopt a unified policy -- but clearly

demonstrated the diverse and highly intricate dimensions of the subject, particularly in relation to the effects of issues such as force majeure, the Freeze Order, the agreement to resort to arbitration, the starting and finishing dates, the rate of damages, and many others raised in the submitted Report.

Regard for fairness and justice, and in particular for the right of defence -- which is amongst the undisputed rights of parties to any action -- dictated that the interested Parties be first requested to submit their memorials on the subject within a reasonable period of time, so that the Chamber might at least have before it the initial views of the Parties before it rendered its award on this point. Regrettably, Judge Mangård who, in order to abide by a promise he had earlier made to Mr. Mosk, was looking for a sort of temporary expedient exclusively related to Case No. 30, declared in a Chamber meeting which took place immediatly after the conclusion of the Full Tribunal's session that he and Mr. Mosk had agreed upon a rate of 8½ percent damages, provided that I also join the majority. It is appropriate here to point out that the parties to the present case had themselves provided for the same rate of 8½ percent, in anticipation of a sort of delayed

payment under circumstances whose details I will not now discuss.

In response to Judge Mangård's proposal, I requested that the meeting be rescheduled owing to my physical and mental exhaustion, so that I could physically and mentally be sufficiently ready to discuss the proposal. Such a rescheduling, as I said then, would also enable me to seek an understanding with the rest of my colleagues on the important and sensitive issue of damages. Judge Mangård and Mr. Mosk agreed to my request, and it was decided that Case No. 30 would be taken up on Monday 13 December 1982.

I do not deem it necessary here to elaborate on the subsequent events leading to my resignation; rather, I shall leave these details to my forthcoming opinion in relation to two other awards rendered in my absence and without final deliberation in a manner which, in my opinion, was altogether illegal. Suffice it to mention that during the meeting which transpired between Judge Mangård, Mr. Mosk and Mr. Hosseini following my resignation, Judge Mangård and Mr. Mosk finally agreed to issue an award on the basis of the same rate of 8½ percent, allowing me to write my dissenting opinion. I

expressed my agreement with this arrangement, and it was decided that steps in conformity with it - i.e. filing of a majority decision setting a rate of 8½ percent and accompanied by my dissent, would be taken on the morning of Tuesday 14 December 1982.

Unfortunately, for reasons which have not yet been made entirely clear to me, the agreement was not honoured and its execution was made contingent upon my consent to the issuing of awards in two other cases, which had never been the subject of final deliberations and did not have the least relationship to the present case. Quite naturally, I expressed my rejection of such an unanticipated proposal, as I deemed it morally inappropriate, and legally and procedurally unacceptable. The very next day -- that is, on Wednesday 15 December -- I learned to my complete surprise that the Award in Case No. 30 had been signed by Judge Mangård and Mr. Mosk, not on the basis of 8½ percent damages as already agreed upon, but on the basis of the totally unacceptable rate of 12 percent.

Based on the foregoing points, the results of which are summarized below, I consider the decision by Chamber Three in regard to the awarding of damages and the rate thereof, to be unlawful, and I consequently

refuse to sign it.

First, the Parties in this Case have been given no opportunity to address the Chamber on the complex and multi-dimensional issue of damages, only some aspects of whose complexity were for the first time brought into light in the Full Tribunal's general discussion.

Second, members of Chamber Three themselves have had no opportunity to discuss the subject, having devoted all of their energies and attention to reaching an out of Chamber consensus. None of the various issues mentioned in the Full Tribunal's session has therefore been deliberated upon or discussed by the members.

Third, the rate of 8½ percent, already agreed upon both by the Parties (at a time when worldwide the prevailing rate was nearly twice the current rate) and by the other two arbitrators, has been set aside in favour of the rate of 12 percent for no valid reason, simply because I rightly refused to consent to the issuing of awards in two other cases not yet deliberated upon and totally unrelated to the present case.

Fourth, at the last chamber meeting, which was

postponed at my request, the issues of damages and costs were not, as I mentioned before, adequately deliberated upon, nor was any decision taken in those regards. If it be assumed that my non-participation in the scheduled meeting of Monday 13 December 1982 was justified -- and subsequent events indicate that my two colleagues did at any rate consider it to be justified -- then the decision by my two colleagues to meet alone, possibly continue deliberation, and issue the Award was incompatible not only with our own Provisionally Adopted Rules but with all other judicial and arbitral principles. It is precisely for this reason that in Paragraph 4 of Article 32 of said Tribunal Rules no reference will be found to the absence of an arbitrator from the deliberation or adjudication sessions, but merely to the failure of an arbitrator to sign, which attest to the assumption that the arbitrator must have attended the deliberation and adjudication meetings, but then simply refused to sign.

Mostafa Jahangir Sani