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IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 132 Date of filing 13 April 1983

[redacted]

_____ 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 Judge Mosk

Date 12 April 1983 5 pages in English. _____ pages in Farsi.

w/ attachments

_____ DISSENTING OPINION of _____

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

_____ OTHER; Nature of document: _____

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

IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

[redacted]

DUPLICATE ORIGINAL

«نسخه برابر اصل»

REXNORD, INC.,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN, TCHACOSH COMPANY, and IRAN SIPOREX INDUSTRIAL AND MANUFACTURING WORKS, LIMITED,

Respondents.

12 April 1983

Chamber Three

Award No. 21-132-3

IRAN UNITED STATES CLAIMS TRIBUNAL — دادگاه داوری دعاوی ایران - ایالات متحده

FILED - ثبت شد

۱۳۶۲ /۱/ ۲۴

13 APR. 1983

132 ۱۳۲

Concurring Opinion of Richard M. Mosk

With respect to Judge Sani's belatedly filed document entitled "Mr. Jahangir Sani's Reasons for not signing the decision made by Mr. Mangård and Mr. Mosk in Case No. 132", I incorporate herein by reference my comments in Case No. 17 (Award No. 20-17-3 (Raygo Wagner Equipment Company)) and my Concurring Opinion in Case No. 30 (Award No. 18-30-3 (Granite State Machine Co, Inc.)), copies of which are attached hereto. Once again Judge Sani inaccurately describes procedures adopted and implemented by the experienced Chairman of this Chamber who was selected by mutual agreement of the members appointed by Iran and the United States.[1] Indeed, Judge Sani has again provided a reason not

[1] It is the Chairman who administers the Chamber.

noted that in certain respects, I would have come to conclusions different than those reached in the award. But in order to form a majority for the award, I have concurred in it. See my Concurring Opinion in Award No. 18-30-3. Although I am tempted to respond to each of the points raised by Judge Sani, there is little reason to do so over three months after the Tribunal issued the award.

Dated, The Hague
April 12, 1983

Richard M. Mosk

3 March 1983

Comments of Richard M. Mosk with Respect to "Mr. Jahangir Sani's Reasons For Not Signing The Decision Made By Mr. Mangård and Mr. Mosk in Case No. 17"

The document entitled "Mr. Jahangir Sani's Reasons For Not Signing The Decision Made By Mr. Mangård and Mr. Mosk In Case No. 17" ("document") is both inappropriate and inaccurate. See Concurring Opinion of Richard M. Mosk in Case No. 30.

First, it is a violation of Tribunal Rules and generally accepted ethical standards to attempt to divulge the deliberations of an arbitral tribunal. Article 31, Note 2, Provisionally Adopted Tribunal Rules. As one authority has written,

> Art. 54(3) of the ICJ Statute, which provides that "the deliberations of the Court shall take place in private and remain secret", represents a practice of such widespread application as to be arguably a general principle of law. 1 Encyc. of Pub. Int. Law 185 (1981).

Such confidentiality is particularly essential in arbitration proceedings such as these in which arbitrators may, as the eminent Dutch arbitration expert, Professor Pieter Sanders has written, be "forced to continue their deliberations until a majority, and probably a compromise solution, has been reached." Sanders, Commentary on UNCITRAL Arbitration Rules, II Yearbook Commercial Arbitration 172,208 (1977).

Second, an arbitrator should not participate in or aid efforts to attack Tribunal awards, because to do so may cast doubt on that arbitrator's impartiality.[1]

Third, Judge Sani, refused to participate in some of the deliberations in Case No. 17 [2] and did not sign the Award. As Professor Sanders notes: "Refusal to sign is not looked upon favourably in arbitration practice." Sanders, supra at 208. It is for the signing members to provide the reasons for the absence of Judge Sani's signature, not Judge Sani.[3]

Fourth, under international law, Judge Sani cannot frustrate the work of the Chamber or the Tribunal by wilfully absenting himself and refusing to sign an award. See, e.g., Sabotage Cases (U.S. v. Gen.), 8 R. Int'l Arb.

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[1] Within the same time period, all of the following events occurred: Iran suggested the possibility that it would challenge the award in this case in a Netherlands court; the Tribunal learned that the Iranian Government was attempting to induce the Algerian Central Bank not to perform its duties with respect to this award; and Judge Sani prepared his document claiming the award is invalid. Needless to say, I believe the award is valid.

[2] As noted below, Judge Sani participated in numerous deliberations concerning the case and received drafts of the proposed award and the final version in advance of its filing.

[3] In the legislative history of the UNCITRAL rules upon which the Provisionally Adopted Tribunal Rules are based, the following colloquy took place:

> 43. Mr. Roehrich (France) said that it was not clear who should give the reasons for an arbitrator's failure to sign an award.
> 44. Mr. Sanders (Special Consultant to the UNCITRAL secretariat) said that the two arbitrators who signed the award would give the reasons.

Summary of Discussion of the Ninth Session, UNCITRAL Committee II (A/CN.9/9/C.2/SR 11, p.7); see also Sanders, supra at 208.

Awards 225, 241-252, 458 (1939); Decision No. 32 (France v. Mex.), 5 R. Int'l Arb. Awards 510 (1929); Decision No. 22 (France v. Mex.)) 5 R. Int'l Arb. Awards 512 (1929); Columbia v. Cauca Co., 190 U.S. 524; J. Voet, 1 The Selective Voet 749 (1955); R. Phillimore, 3 Commentaries on International Law 4 (1885); A. Mérignhac, Traité Théorique et pratique de l'arbitrage international 276-77 (1895); see Iran Code of Civil Procedure, Art. 660. (M. Sabi trans. 1972) ("Where one of the arbiters after he has been informed, does not appear in the session held for proceedings or consultations, or he appears but refuses to give award, the award given by the majority of votes shall be valid even if unanimity of votes has been a condition in the agreement for arbitration").

Fifth, Judge Sani's statement of facts is inaccurate. This case was heard on September 1 and 2, 1982. During the four months subsequent to the hearing there were numerous deliberations in the case. It should be noted that the Respondent admitted having Claimant's equipment and admitted not paying for it. Respondent promised to return it or pay for it, even subsequent to the hearing, but never fulfilled its promise.

Following deliberations, Judge Mangård, late in the week of December 5, 1982, distributed to all members of the Chamber the proposed award and invited all members, including Judge Sani, to comment on the proposed award. After the distribution of the proposed opinion, Judge Sani agreed to be present at a meeting scheduled for the following week (December 13, 1982) to discuss the case.[4] The date selected for such a meeting was based on Judge Sani's request. Subsequently, however, Judge Sani refused to appear at the scheduled meeting even though he was on the premises of the Tribunal during that same week. Judge Sani

[4] With thousands of cases pending and few of them decided, one could not reasonably complain that the Tribunal has proceeded in haste.

sent word that he had communicated to his Government his resignation as a member of the Tribunal.[5] Chairman Mangård then requested Judge Sani to attend a meeting of the Chamber on December 14, 1982. Again he refused. Judge Sani sent word that he would not appear and would not participate in any further deliberations because of the above mentioned communications concerning his resignation. No document or other notification concerning any such purported resignation was ever received by the Tribunal. Judge Sani's representatives then stated that Judge Sani might reconsider his purported resignation if the substance of this and the other awards was changed. On December 15, 1982 Judge Sani's representative reported that he had spoken to Judge Sani and that Judge Sani would not sign any awards. After Judge Sani's refusal to participate in further discussions, the award was signed and filed. The same basic events transpired with respect to two other awards (Case Nos. 30 and 132).

Late in the date on December 15, 1982 Judge Sani met with Judge Mangård and me at a hotel because he refused to come to the Tribunal premises (although after the meeting Judge Sani went to the Tribunal premises). Judge Sani also demanded revisions of this and other awards, the withdrawal of the awards and even more deliberations as a condition of his not resigning. Judge Mangård and I made absolutely no promises to Judge Sani. After the aforesaid meeting, Judge Mangård and I met with Judge Bellet and the President, Judge Lagergren. Judge Bellet and Judge Lagergren both said that the awards (including the one in Case 17) had been properly filed and that there was no reason to withdraw them.

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[5] Of course one's resignation must be tendered to and accepted by the Tribunal. President Lagergren has stated, "when a Member of the Tribunal resigns, it is for the Full Tribunal to accept the resignation and to decide from which date the resignation shall take effect." Minutes of Tribunal's 67th meeting, Par. 3 (Dec. 6-8, 1982).

Nevertheless, Judge Mangård and I agreed to tell Judge Sani that the award would be held in the Registry until January 5, 1983, that there would be discussions concerning the case on January 4, 1983 and that an award in the case would be issued promptly thereafter (either the one on file or a new or revised one resulting from any further discussions). That proposed schedule was transmitted to Judge Sani. On December 17, 1982 Judge Sani's legal assistant reported that Judge Sani had agreed to this schedule. On January 4, 1983, Judge Sani, although present at the Tribunal, refused to discuss any substantive aspect of the case and stated that he wanted two more weeks before having even further deliberations in the case -- a clear violation of his promise. Judge Sani again stated that he would not sign the award. As a result, the award was released.

In short, Judge Sani used his purported or threatened resignation (which he noted would cause delay in Tribunal proceedings and jeopordize awards) to attempt to extract changes in awards and delays in proceedings. Judge Mangård and I have extended every courtesy to Judge Sani in connection with his schedule. Every reasonable effort has been made to accomodate his schedule, no matter how inconvenient to others. I have attended every scheduled meeting.

I do not feel it necessary at this time to give a point by point rebuttal to every assertion of Judge Sani. But other facts and representations by him are incorrect. The fact that this dialogue is taking place demonstrates the wisdom of rules of confidentiality of proceedings and the custom that legal opinions should be restricted to legal and factual issues on the merits of the case. Morecver, everything that Judge Sani says is irrelevant to his conclusion as to the validity of the award. The fact is that all applicable procedural rules were complied with. There was a majority in favor of the award and it was properly prepared and filed. Judge Sani is unable to point to any rule or law

which would affect the validity of the award or suggest any impropriety. What is important is that all members of the Tribunal be immune, and appear to be immune, from unfounded accusations and that they decide cases impartially, on the merits, in accordance with the evidence before them and on the basis of respect for law as required by the Claims Settlement Declaration.

Sixth, Judge Sani's statement that Iran had to be named as a party is not only wrong, but inconsistent with the position of Iran in other cases. Since Iran is defined in the Claims Settlement Declaration as including any "entity controlled by the Government of Iran" (Art. VII, paragraph 3), if such an entity is found liable, payment must be made out of the Security Account. The Government of Iran has agreed to pay the claims of "Iran", which is defined as including its controlled entities. Id.; Declaration of the Government of the Democratic and Popular Republic of Algiers, paragraph 7; Technical Agreement with N.V. Settlement Bank of the Netherlands 1(e)(i). There is no requirement that the Government of Iran be specifically named as a party. The fact is, however, that the Government of Iran participated in every aspect of the proceedings and appeared at the hearing. Indeed, pleadings received were in official covers of the Islamic Republic of Iran.

Seventh, Judge Sani's discussion in a section he entitled "Deficiencies in the Award Itself" is not in accord with the actual facts or the law. The Tribunal considered and weighed all relevant evidence submitted to it and accurately set forth the facts and the contentions. As just one example of the many errors in Judge Sani's discussion, he ignores the fact that the Claimant provided evidence of its United States nationality, which evidence included material on the American domicile of Claimant and its parent

entity, and evidence that natural persons owning more than 50% of the capital stock were American citizens. There was no evidence submitted contradicting the aforesaid evidence or otherwise suggesting that the Claimant was not a United States national as that term is defined in the Claims Settlement Declaration. Indeed, Respondent did not seriously contest the issue of the Claimant's nationality. It is not now necessary for me to rebut each point raised by Judge Sani. The point is that the majority came to conclusions not accepted by Judge Sani.[6]

As I have stated, I believe that Judge Sani's document is not part of the award and therefore is subject to the Tribunal's confidentiality standards. If, however, Judge Sani's document receives any other treatment, my comments in response to Judge Sani's document should receive the same treatment and circulation so that the record will be complete and accurate.

Richard M. Mosk

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[6] Judge Sani inaccurately refers to evidence of a confiscation order. The Tribunal did not expressly rely on the order even though it was not denied that the order was made. Respondent submitted an unauthenticated paper suggesting that the order was superseded. Even later, Claimant filed a document, not disclosed by Respondent, indicating that the confiscation order was reinstated. I will discuss the issue of control in more detail elsewhere, if necessary. It suffices to say that, had there been no control, as contended by Respondent, Respondent would have been able to produce credible evidence of its position. Its failure to do so plus Claimant's evidence amply support the Tribunal's conclusion.

Having refused to sign the award, it was not for the non-signing arbitrator to write his reasons for such refusal. Rather, the reasons are to be stated, and were stated, in the award by those who sign it. Article 32, paragraph 4, of the Provisionally Adopted Tribunal Rules; Sanders, Commentary On Uncitral Arbitration Rules, II Yearbook Commercial Arbitration-1977 172, 208.[3/]

It should be noted that confidentiality of deliberations is widely recognized as desirable and was supported by both the Governments of the Islamic Republic of Iran and the United States of America. Such confidentiality is particularly essential in arbitration proceedings such as these in which arbitrators may, as Professor Sanders wrote, be "forced to continue their deliberations until a majority, and probably a compromise solution, has been reached." Id.

In the event that the Tribunal remains unwilling or unable to enforce its own rules and other generally recognized rules of conduct, such rules may no longer be of any effect.

[3/] The non-signing arbitrator has refused to sign other Tribunal awards and decisions, including one issued by the Full Tribunal. The eminent Dutch expert, Pieter Sanders has noted: "Refusal to sign is not looked upon favourably in arbitration practice." Sanders, supra.

I concurred in the award in this case so as to end protracted deliberations which must, as noted above, "continue ... until a majority, and probably a compromise solution, has been reached." Sanders, supra; see also Separate Opinion of Members Aldrich, Holtzmann and Mosk on the Issue of the Disposition of Interest Earned on the Security Account, Case A-1 (Aug. 1982).

It is a well established principle of international law that an international tribunal has authority to award interest as part of a damage award. 8 M. Whiteman, Digest of International Law 1186 passim (1967) ; J. Ralston, The Law and Procedure of International Tribunals 129 (1925); C. Eagleton, The Responsibility of States in International Law 203-05 (1928); Lucas Claim (U.S. Foreign Claims Settlement Commission), 30 I.L.R. 220 (1957); cf. Banco Nacional de Cuba v. Chase Manhattan Bank,514 F. Supp. 5 (S.D.N.Y. 1980) (pre-judgment interest allowed for period during which payment of principal debt was prevented by U.S. Government regulations). Indeed, Iranian governmental entities have, in many claims before this Tribunal, requested interest on amounts they claim should have been paid them. Moreover, in the instant case, Respondents had the use of the money withheld from the Claimant. Also, Iran's money in blocked accounts in the United States accrued interest at prevailing rates.

A reasonable standard for determining the rate of interest "is indicated by the answer to the question, what could the claimant reasonably have expected had he had the use of the property?" O'Connell, International Law 1123 (2d. ed. 1970). In this respect, Iran itself has requested awards of interest based on commercial bank rates.

The rate arrived at in this case may not be sufficient to compensate the Claimant fully. Nevertheless, I concurred in the majority decision on the rate specified in the award in order to form the majority for the award.

An award of interest does not always fully compensate a claimant. See III M. Whiteman, Damages in International Law 1975 passim (1943). It has been said that the interest rate can be determined on the basis of such flexible standards as "just compensation" (Eagleton, supra at 205) or on what is "fair" (Wimbledon Case, [1923] P.C.I.J., ser. A., No.1, at 32). A tribunal may decide to apply a fixed rate, such as is sometimes done in municipal systems, so as to avoid difficulties in determining rates in each case. See A. Feller, The Mexican Claims Commissions 310-311 (1935). Or, based on the facts of the case, a tribunal may apply the rate prescribed by applicable municipal law. (See Award No. 7-14-3, 25 June 1982).

I also believe that the prevailing party should normally be awarded its full costs of arbitration, including reasonable fees incurred for legal representation.

Accordingly, I concur in the Final Award in favor of Claimant Granite State Machine Co., Inc.

Richard M. Mosk

Dated, The Hague
25 January 1983