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ES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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** AWARD - Type of Award _____

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

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** SEPARATE OPINION of Mr Brower

- Date 10 Dec 86

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- Date _____

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R/12

CASE NO. 167
CHAMBER THREE
AWARD NO. ITL 65-167-3

212

ANACONDA-IRAN, INC.,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN and THE NATIONAL IRANIAN COPPER INDUSTRIES COMPANY,

Respondents.

SEPARATE OPINION OF JUDGE BROWER

1. I concur in the Interlocutory Award and take issue only with the decision to defer its execution pending disposition of the counterclaims.

2. In July 1971 Chile nationalized the interests of the Anaconda Company ("Anaconda"),[1] propelling it into Iran.[2]

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[1] Law 17,450, Art. 10, §10, 10 Int'l Legal Mat'ls 1067 (1971).

[2] The Statement of Defense of Respondent National Iranian Copper Industries Company (page 9) reflects awareness that Anaconda came to Iran "on the rebound" from Chile:

> About this time [1971], Chile nationalized its copper mines, and Anaconda Co. and its technicians left Chile, following which, negotiations for co-operation with this company for the implementation of Sar-Cheshmeh mining project began.

The Chilean nationalization law, in addition to limiting compensation for the expropriated properties in various ways, required that such compensation be reduced by various charges, including "excess profits."[3] Anaconda's "compensation" for expropriation of its large mines was entirely wiped out by such reductions and offsets and it received nothing.[4] Apparently this unhappy experience suggested to Anaconda the importance of negotiating in Iran a waiver of any "reductions or setoffs," i.e., a requirement that either party to the Technical Assistance Agreement ("TAA") between Claimant Anaconda-Iran, Inc. ("AI") and National Iranian Copper Industries Company ("NICIC"), if it would initiate arbitration of a dispute with the other party, be granted an award of whatever would be due it (and execution thereon) irrespective of the assertion of any counterclaims. In view of the notoriety of Anaconda's Chilean dilemma at that time Respondents could hardly have been unaware of Anaconda's intention thus to discourage

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[3]Law 17,450, Arts. 1(c), 2; Transitional Art. 17(a-b), (h), 10 Int'l Legal Mat'ls 1067-70 (1971); Lillich, "The Valuation of the Copper Companies in the Chilean Nationalizations," 66 Am. Soc. of Int'l L. Procs. 213 (1972); Rohwer, "Nationalization -- International Minimum Standard -- Chilean 'Excess Profits' Deduction Held Non-Reviewable," 14 Harv. Int'l L.J. 378 (1973).

[4]Stern, "The Judicial and Administrative Procedures Involved in the Chilean Copper Expropriations," 66 Am. Soc. of Int'l L. Procs. 205, 207 (1972). Eventually, following a change in the Chilean government, Anaconda settled its claims, the book value of which alone was $417,000,000, for payment of $65,000,000 in cash and another $188,000,000 in serial notes maturing in ten years. Wall Street Journal, July 25, 1974, p.8, col.3; 13 Int'l Legal Mat'ls 1189 (1974).

defensive afterthoughts[5] or of the meaning of the resulting contractual provision.[6]

3. The pertinent provision of the TAA is Article 9, which reads in full as follows:

> 9. Termination
>
> 9.01 Except in the case of force majeure as provided in Section 2.06 of this Agreement, this Agreement may not be terminated by either party without cause and may be terminated for cause only as provided in this Section 9.
>
> 9.02 Except as provided in Section 9.03, if this Agreement is breached by either party, the parties will in good faith endeavor to remedy the breach. If a party believes that a material breach has continued unremedied for a period of 90 days following notice to the other party specifying such breach, either party may apply to

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[5]The fact that this waiver did not appear in the Memorandum of Principles subscribed 7 March 1972 as a prelude to the TAA suggests that it became a subject of discussion between the Parties thereafter. It is noteworthy that it was on 11 August 1972 that the Copper Tribunal ruled it had no power to review the order of the Chilean President directing the Comptroller General to subtract a further $364,600,000 in excess profits from any recovery of Anaconda, thus definitively establishing that Chile's "counterclaim" would utterly vitiate Anaconda's claim. 11 Int'l Legal Mat'ls 1013, 1053-54 (1972); see Rohwer, supra note 3, at 379, and Stern, supra note 4, at 207. The TAA was signed 26 September 1972.

[6]The majority's expression of doubt (paragraph 95) "that a contractual provision like the one here at issue effectively would have protected" AI in case of a nationalization is beside the point. The Libyan Nationalization Cases amply demonstrate that a properly drafted contract with a host country may provide both the arbitral forum and the rules governing resolution of a subsequent nationalization dispute. See, e.g., Texaco Overseas Petroleum Company/California Asiatic Oil Company and Libyan Arab Republic (Dupuy, arb., Award of 19 January 1977) reprinted in 17 Int'l Legal Mat'ls 1 (1978). Whether AI effectively anticipated a problem that did not arise here is irrelevant to the question of whether it did provide for the problem that in fact arose.

ICC [the International Chamber of Commerce] for a decision as to whether such material breach has occurred. Any failure by [NICIC] to pay in accordance with this Agreement any amounts due AI or Staff will be deemed to be a material breach. The decision of ICC shall be determined by arbitration by three arbitrators all in accordance with the Rules of Conciliation and Arbitration of ICC. Such arbitration shall take place in Paris, France. Pending such decision, the parties will continue to perform their respective obligations in accordance with this Agreement. If a material breach is determined by ICC to have occurred, ICC shall make an award in favor of the non-breaching party terminating this Agreement and setting forth damages to the full extent (but not in excess) of the amounts specified in Sections 9.04 or 9.05, as the case may be, without reductions or offsets of any kind or type whatsoever. The costs of arbitration shall be paid by the parties in the manner directed by the arbitrators in accordance with the Rules of Conciliation and Arbitration of ICC.

9.03 Notwithstanding, and as an alternative remedy to, the provisions of Section 9.02, if [NICIC] fails to pay in accordance with this Agreement any amount due AI or Staff and such amount is not paid within 25 days after AI has given [NICIC] notice of such failure to pay, AI may terminate this Agreement and the amounts specified in Section 9.05 shall be paid by [NICIC] to AI. In the event of such termination, AI shall have the right to request ICC to determine the exact amount payable to AI specified in Section 9.05. Upon such determination by ICC, ICC shall make an award in favor of AI setting forth damages to the full extent (but not in excess) of the amount specified in Section 9.05 without reductions or offsets of any kind or type whatsoever.

9.04 If this Agreement is terminated pursuant to Section 9.02 on account of a material breach by AI, then AI shall pay to [NICIC] within 30 days after termination, an amount in U.S. dollars equal to the aggregate fees that shall have been received by AI under this Agreement during the 18-month period preceding the date of termination.

9.05 If this Agreement is terminated pursuant to Section 9.02 on account of a material breach by [NICIC] or if AI has terminated this Agreement pursuant to Section 9.03, then [NICIC] shall pay to AI within 30 days after termination (i) all amounts then due and unpaid under this

> Agreement, (ii) all Termination Costs, and (iii) an amount in U.S. dollars equal to the aggregate of the fees paid or due to AI under this Agreement during the 18-month period preceding the date of termination.
>
> 9.06 The parties agree that judgment upon the award rendered by ICC under this Section 9, and any amounts payable under Section 9.03, 9.04 or 9.05, may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the award or amounts and an order of enforcement, as the case may be.
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> 9.07 The parties shall be entitled to no remedies of any kind or type whatsoever (except as specifically provided in Section 2.06 and this Section 9) and to no damages of any kind or type whatsoever (except for amounts payable under Sections 2.06, 9.02, 9.03, 9.04 or 9.05) under this Agreement, with respect to the performance of this Agreement, or in any way relating to the Project, the Facilities or action or inaction of any member of the Staff or any employee of [NICIC], AI or Anaconda.

(Emphasis added.)

4. The majority is in no doubt (paragraph 94) that were the present Case to have been instituted by Claimant before an ICC tribunal as originally envisioned, that tribunal would be bound to issue its award in favor of Claimant now "without reductions or offsets of any kind or type whatsoever" and not to defer its execution.[7] Indeed, it concludes that the demands of Respondent would be inadmissible as counterclaims notwithstanding that the ICC Rules of Arbitration (Article 5, paragraph 1), like the Algiers Accords (Claims Settlement Declaration, Article II,

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[7] See also Metallgesellschaft A.G. v. M/V Capitan Constante, slip op. (2d Cir. May 19, 1986) (arbitral award for freight charges confirmed, notwithstanding continued pendency of counterclaims, where freight clause in charter party provided for payment of freight "without discount upon delivery of cargo at destination").

paragraph 1) and the Tribunal Rules (Article 19, paragraph 3), ordinarily permit counterclaims. Thus NICIC would be required to initiate a separate arbitral proceeding to assert its complaints against Claimant. The majority nevertheless concludes that this negotiated bar has been overridden by the Algiers Accords and cannot be enforced here.

5. I fail to perceive any reason why we must set aside the Parties' bargain in this respect and I do not find the Interlocutory Award to be convincing in this regard. It is axiomatic by now that, as the majority points out (paragraph 97), the Algiers Accords can and do supersede contractual stipulations of parties before the Tribunal in certain respects. This occurs, however, only where provisions of the Accords or our Rules are mandatory. The Parties' contractual waiver of "reductions or setoffs" here conflicts with no mandatory provision administered by us. In short, it seems to me that the Parties' bargain could have been upheld without doing violence to that struck by the States Parties.

6. It is true that the Parties are before us not pursuant to their agreement but rather because the Algiers Accords allow Claimant to compel NICIC to answer here in preference to an ICC arbitration.[8] This results from the mandatory provisions of the Accords. Our counterclaim jurisdiction,

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[8] In the Forum Selection Cases the Tribunal ruled that it has jurisdiction to decide cases contractually subject to arbitration elsewhere, whether inside or outside Iran, particularly including ICC arbitration in Paris. Gibbs and Hill, Inc. and Iran Power Generation and Transmission Company, Award No. ITL 1-6-FT at 6-7 (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 236, 239-240 (contractual clause requiring that disputes be "settled by arbitration laws of Iran"); George W. Drucker, Jr. and Foreign Transaction Co., Award No. ITL 4-121-FT at 11-12 (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 252, 259-60 (Tribunal noted contract "lays out a procedure for . . . .

(Footnote Continued)

however, is permissive. The Algiers Accords and the Tribunal Rules permit a respondent, if it so wishes, to prosecute in a wholly different forum, e.g., an Iranian court, any claim it may have against a claimant which is related to the claim asserted against it, rather than plead it as a counterclaim here. E-Systems, Inc. and Government of the Islamic Republic of Iran, Award No. ITM 13-388-FT at 8-12 (4 February 1983), reprinted in 2 Iran-U.S. C.T.R. 51, 56-57. In my view, if a respondent's election to proceed elsewhere is unquestioned if made after it has been targeted here, its advance agreement that any claim it may assert not obstruct the effective issuance of an award against it for the full amount of its obligations should be equally respected.

7. The fact that an award here is executed from the Security Account, whereas an ICC award rendered in Paris between these Parties presumably depends for its enforcement on other arrangements, doubtless is of significance. It can be argued that in agreeing to the Security Account neither of the States Parties contemplated its use for payment of an "unnetted" claim,[9] and hence that the integrity of the Security Account indeed requires that execution of the instant Award out of that Account be deferred so long as counterclaims are still pending. This should not necessarily require the Tribunal to stay the enforcement of its Interlocutory

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(Footnote Continued)
arbitration. It is not specified, however, where the arbitration is to take place."); T.C.S.B., Inc. and Iran, Award No. ITL 5-140-FT at 2 (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 261, 262-63 (contract provided "dispute[s] will be settled . . . by arbitration . . ."); and Stone and Webster Overseas Group, Inc. and National Petrochemical Company, Award No. ITL 8-293-FT at 7-8 (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 274, 277-79 (contracts provided for ICC arbitration in Paris). An eligible claimant may invoke this jurisdiction in respect of an eligible respondent without the latter's consent.

[9] See Concurring Opinion of Charles N. Brower in Iran Chevron Oil Company and Government of the Islamic Republic of Iran, Award No. 208-73-3 (13 January 1986).

Award to Claimant by other means, however. The Claimant might be left free to attempt execution outside the Security Account, without unbalancing the bargain of the States Parties. Were there lingering concern in this regard, or alternatively, I believe all interests could be served appropriately by simply dismissing the counterclaims as inadmissible without prejudice to their assertion elsewhere (and making the Award payable now). It is true that Respondent then would be in the position of answering here while pursuing Claimant presumably at the ICC. I perceive, however, no materially greater disadvantage to NICIC in this arrangement than if it were involved in a bifurcated ICC proceeding or two unconsolidated ones.[10]

Charles N. Brower

Charles N. Brower

[10]There is no reason to assume that had there been two distinct ICC proceedings Claimant would waive its contractual rights by agreeing with Respondent NICIC to a specific sole arbitrator in both cases or designating the same party-appointed arbitrator to serve (with two others) in both cases.