IRAN-UNITED STATES CLAIMS TRIBUNAL

ایالات متحده - ایران

382—117
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Case No. 382 Date of filing: 19-12-83

** AWARD - Type of Award _____
- Date of Award _____
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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

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** DISSENTING OPINION of MR RICHARD MOSK

- Date 19-12-83
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R/12

19 December 1983

Case No. 382

Chamber Three

BEHRING INTERNATIONAL, INC.,

Claimant,

and

ISLAMIC REPUBLIC OF IRAN AIR FORCE, IRAN AIRCRAFT INDUSTRIES, and THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,

Respondents.

382-117
۳۸۲-۱۱۷

DISSENT TO DECISION

The appointment of an expert in this case has simply provided a Tribunal-created mechanism to assist one of the parties to obtain evidence in support of unsubstantiated allegations. The appointment of an expert is supposed to be for the benefit of the Tribunal. By appointing an expert at this stage of the proceedings, the Tribunal is in reality aiding one Party to engage in what amounts to a "fishing expedition". In this case, the Respondents have been represented by counsel in the United States. They have access to their property and information in the United States. There is no indication that United States parties

have similar opportunities in Iran. Indeed, in case after case, United States parties have submitted evidence that they have been unable to obtain records, property or information in Iran. This Tribunal has rarely, if ever, taken steps which resulted in a United States party obtaining material that might be of assistance in Tribunal cases.

In the instant case Claimant Behring International Inc. ("Behring") alleged that it stored goods for Respondent Iranian Air Force ("Air Force") without receiving required compensation. What obligations Behring may have with respect to the Air Force's property has not been alleged specifically, much less established, and there has been no showing that, under the circumstances, Behring would have any legal obligation to the Air Force even if any of the property has deteriorated. Moreover, Behring's allegation of non-payment of storage charges is relevant to the issue of Behring's responsibility with respect to the goods in question.

The Parties have submitted an agreement between them which settles various issues, including the disposition of the property in question, and which contains extensive terms regarding the goods. That agreement does not confer upon the Air Force the benefit it now derives from the Tribunal's decision. The Tribunal is therefore granting to one of the Parties an advantage not provided for by the bargained-for agreement.

By appointing an expert, the Tribunal is ignoring a number of prerequisites. In order to obtain an expert, the Air Force, which has already been accorded full access to the goods by Behring, should at least have been required to make a prima facie showing of the following: that there are problems with respect to the goods; that Behring caused the problems; that Behring is legally responsible for the problems; that Behring has proximately caused the Air Force to suffer damages;[1] that the claims are within the Tribunal's jurisdiction; that there is a dispute over a fact; and that the resolution of the fact can be facilitated by the use of one or more experts. Then, the Air Force should have been required to identify with specificity the exact type of expert that should be utilized and the expert's task. Finally, the Parties should have been given an opportunity to reach agreement on the expert or experts to be appointed.

The Tribunal simply avoids these obvious prerequisites. In reality, the Tribunal is using its facilities to assist the Air Force in taking possession and making an inventory of the goods -- something the Air Force could do without an "expert" -- and to find and discover facts upon which the Air Force can base a claim.

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[1] In other cases Iran has alleged that the United States Government has prevented the export of the goods. If this is so, Iran would not have received the goods, whether damaged or not.

In one significant case before the Tribunal, Iran resisted a request for the production of information unavailable to the United States on the ground that the United States' position was based on speculation. See Iran's Statement of Defence to United States Counterclaim in Case B-1. In that case, Iran argued that, before any interim relief could be granted, a prima facie case must be advanced by the party seeking the relief. The Full Tribunal has thus far refused the United States request for interim relief or for the production of information. In the instant case, the Air Force can itself obtain the information it desires because it has access to the goods. Nevertheless, the Tribunal by its decision here, arranges for a Tribunal appointed expert to assist the Air Force with an inventory and an evaluation of the equipment. The Tribunal makes no effort to reconcile this decision with the Full Tribunal decision in Case B-1 or with the Tribunal's failure to insure meaningful discovery in other cases.

The defects in the Tribunal's decision are further disclosed by the fact that the Tribunal is unable to specify exactly what kind of expert or experts are necessary and precisely what peculiar expertise is required. In other words, the terms of reference are far too indefinite.

Indeed, one may wonder how the appointed expert will be able to determine the origin and time of the emergence of

any defects -- i.e., whether the goods were defective when shipped to Behring or whether the goods deteriorated before January 19, 1981 or after that date.[2] Before retaining an expert, the Tribunal should ascertain whether the task assigned to him is possible.[3] The Tribunal has selected an "expert" of Swedish nationality who provided only the minimum amount of information about himself. There is no indication of the university degrees he holds, if any, or of the nature of his past work experience. Indeed, he states that he needs to hire someone else "to get a wider technical background." We have virtually no information on the additional person he intends to hire. The parties have had no input in the selection of the "expert".

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[2] Under Article II, paragraph 1, of the Claims Settlement Declarations, the Tribunal does not have jurisdiction over any claim that was not outstanding on January 19, 1981, the date of the Algiers Declarations. Behring has pointed out that because the goods have been stored for over four years there may well be deterioration in the value or quality of the goods. But Behring asserts that it was compelled to store the material without being paid for most of this period and that it thus bears no responsibility for any such deterioration.

[3] It has not been determined whether there are any security related problems which would require the expert to have a United States security clearance.

The Tribunal provided that the expert is entitled to obtain from the parties documents "he deems necessary", without any restriction. I assume this provision does not permit requests for documents that would be privileged or requests which would be burdensome and oppressive.[4] Compliance with the decision may entail expenses to the Claimant, but the Tribunal has made no effort to determine the nature, extent and ultimate responsibility for such expenses. Moreover, the Tribunal's $30,000 figure for an advance of costs is not based on any information or investigation.

In sum, it was premature to appoint an expert; the task for which the expert was appointed is inappropriate; the terms of the appointment and the type of expertise required are too indefinite; the method of selection of the expert is questionable; and the decision provides assistance to one of the parties unnecessarily and in violation of Tribunal Rule 15 requiring equal treatment of the parties. Accordingly, I dissent to the decision.

Dated, The Hague
19 December 1983

Richard M. Mosk

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[4] Any dispute between a party and the expert concerning the relevance or production of information is to be referred to the Tribunal. Tribunal Rule 27, paragraph 2.