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دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 76 Date of filing: 29 July 87

** AWARD - Type of Award _____
- Date of Award _____
_____ pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
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** CONCURRING OPINION of Correction of Judge Brower
- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
- Date _____
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** DISSENTING OPINION of Correction of Judge Brower
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2 pages in English _____ pages in Farsi

** OTHER; Nature of document: _____
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASES NOS. 74, 76, 81, 150
CHAMBER THREE
AWARD NO. 311-74/76/81/150-3

IRAN UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED - ثبت شد
Date 29 JUL 1987 تاریخ
۱۳۶۶ /۵/ ۷
No. 76 شعبه

Case No. 74

MOBIL OIL IRAN INC., and
MOBIL SALES AND SUPPLY CORPORATION,

Claimants,

and

GOVERNMENT OF THE ISLAMIC REPUBLIC OF
IRAN and NATIONAL IRANIAN OIL COMPANY,

Respondents.

Case No. 76

SAN JACINTO EASTERN CORPORATION, and
SAN JACINTO SERVICE CORPORATION,

Claimants,

and

GOVERNMENT OF THE ISLAMIC REPUBLIC OF
IRAN and NATIONAL IRANIAN OIL COMPANY,

Respondents.

Case No. 81

ARCO IRAN, INC., and
ATRECO, INC.,

Claimants,

and

GOVERNMENT OF THE ISLAMIC REPUBLIC OF
IRAN and NATIONAL IRANIAN OIL COMPANY,

Respondents.

Case No. 150

EXXON CORPORATION, and
ESSO TRADING COMPANY OF IRAN,

Claimants,

and

GOVERNMENT OF THE ISLAMIC REPUBLIC OF
IRAN and NATIONAL IRANIAN OIL COMPANY,

Respondents.

CORRECTION TO CONCURRING OPINION OF JUDGE BROWER

The following corrections should be made to the English version of my Concurring Opinion filed in this Case on 14 July 1987:

1. Page 8, line 2 of footnote 6: The word "makes" should be replaced by the word "reaches."

2. Page 19, line 2: Delete the period after "4G."

3. Page 22, line 3: Change "Parties" to "parties."

4. " , line 4: Insert a comma after "them."

5. " , line 8: Insert "eventually took place and" after "negotiations."

Copies of the corrected pages are attached.

Charles N. Brower

suffer the abrogation of the SPA?[5] Both questions should, as I see it, be answered in the affirmative.

9. The SPA itself recites that it is "made by and between IRAN (acting through the Imperial Government of Iran)," as well as NIOC, and, inter alia, the Claimants. It was signed "For The Government of Iran" by its Minister of Finance, J. Amouzegar, as expressly envisioned in Article 26A. Article 30B of the SPA provided that it would come into force as soon as signed and also "ratified and duly enacted as part of the law of Iran by Act of the Majlis and Senate and assent of" the Shah. The Parties agree that all this took place, resulting in the SPA taking effect 21 March 1973. Finally, by Article 26B "Iran hereby guarantees the due performance by NIOC of its obligations under the Agreement and related arrangements." There can be no doubt but that the repudiation of the SPA has engaged the legal responsibility of Iran equally with that of NIOC.[6]

10. Further, Iran effectively undertook an additional commitment not to expropriate Claimants' rights under the SPA. Article 30A of the SPA provided that "[t]he term of this Agreement shall be twenty years from the Effective Date," i.e., until 21 March 1993. This followed immediately after the final sentence of Article 29:

> The termination before expiry date or any alteration of this Agreement shall be subject to the mutual agreement of the Parties.

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[5] If the first question is answered in the affirmative, an answer to the second becomes superfluous insofar as the breach of contract claim is concerned but remains relevant to the expropriation claim, i.e., on the issue of lawfulness of the alleged expropriation. See, infra, para. 10.

[6] The Award does not expressly address this issue but implicitly reaches this same conclusion.

precisely the one originally foreseen and to which Article 4G was addressed: A "much greater actual preemption of middle distillates for domestic market" by NIOC. As to this last item, the evidence submitted by Claimants clearly demonstrates that it was only in the last quarter of 1975 that this pattern of preemption and the consequent gravity deviation became a serious problem. This also was the first period of documented losses due to refining at Abadan, and coincided also with the October 1975 imposition by Respondents of a 22¢ per barrel profit margin.

23. It seems fair to conclude that to the extent Claimants' refining losses at Abadan were due to the method of measuring gravity differential NIOC cannot be faulted because it was a method initially accepted affirmatively by Claimants and in which they then acquiesced for the remainder of a period exceeding two years. In these circumstances it is difficult to conclude that failure to apply a different method constitutes a breach of contract. This is implicitly recognized in Claimants' final emphasis on the argument that contracting parties must deal in good faith and that this principle was disregarded by NIOC in preempting ever larger portions of the light products. I find it difficult, in turn, to characterize NIOC's conduct in that regard as being so obviously a departure from good faith as to render it liable solely on that basis.

24. In the end it seems to me that Claimants' Abadan losses are more likely to be attributable, should Respondents be responsible for them at all, to the events, such as taking over control of posted prices and imposing a 22¢ per barrel profit ceiling, that Claimants have characterized as breaches of the SPA (but for which they do not appear to have made any separate claim directed to the period preceding 10 March 1979). This leaves things in somewhat of a procedural no man's land, however, for the Award has not dealt otherwise with any issues of past alleged breaches of

29. In the end the Award comes to this same conclusion (paras. 126-127):

> Both parties recognized that a reconciliation of interest was to take place between them, and that this reconciliation, as well as the other issues arising from the termination of the Agreement, was to be the object of subsequent negotiations . . . . Such negotiations eventually took place and, undoubtedly, would have resulted in compensation for the loss sustained by the Consortium alluded to in the same letter [of 23 March 1979]. Any other outcome of the negotiation, in the absence of other counterparts acceptable to the Companies, would have amounted to an unjust enrichment of Iran and NIOC and an unjust loss for the Companies.
>
> The fact that the negotiations did not succeed . . . does not relieve the Respondents from their obligation to compensate the loss sustained by the Consortium.

The only meaning this can have is to grant Claimants that which under the SPA as it stood just prior to 10 March 1979 they otherwise would have had.

D.

30. The discrete question raised by the claims for expected future profits under the SPA in respect of the sale of NGL and crude products is the by now too familiar one of whether such expectancies may be awarded as damages. Normally this is an issue only in expropriation cases, but as I would have found an expropriation here I must, for the sake of completeness, touch on it. My views, spelled out elsewhere, see Concurring Opinion of Judge Brower in AMOCO International Finance Corp. and Islamic Republic of Iran, Award No. 310-56-3, at paras. 15-30 (14 July 1987), are briefly stated: The "value of the undertaking" which has been expropriated, which value must in all cases be awarded, whether the expropriation be lawful or unlawful, includes its future prospects, i.e., its potential for earning a profit; where the expropriated property is a contract, the