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** CONCURRING OPINION of $\qquad$
- Date $\qquad$
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CASE NO. 381
CHAMBER 1
AWARD NO. 375-381-1

UITERWYK CORPORATION, JAN C. UITERWYK,

MARIA UITERWYK, ROBERT UITERWYK, HENDRIX UITERWYK, JAN D. UITERWYK, Claimants, and


THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE MINISTRY OF ROADS AND TRANSPORTATION, PORTS AND SHIPPING ORGANIZATION, IRAN EXPRESS LINES, SEA-MAN-PAK,

Respondents.

SUPPLEMENTAL OPINION OF
MR. BOCKSTIEGEL AND MR. HOLTZMANN

Mr. Mostafavi, who is a Member of the Tribunal for this Case pursuant to Article 13 , paragraph 5 of the Tribunal Rules, was invited to sign the Partial Award and to indicate whether he joins in it or disagrees. In response to that invitation, Mr. Mostafavi addressed a letter dated 3 June 1988 to the President ("the letter") in which he stated that he refused to sign and requested that the president
"incorporate this response in its present form in the [Partial] Award, as constituting my reason for refusing to sign". ${ }^{1}$ Pursuant to that request, and consistent with Article 32, paragraph 4 of the Tribunal Rules, a copy of the letter is filed with the Partial Award.

Mr. Mostafavi's letter confirms the accuracy of the statement in paragraph 30 of the Partial Award that he refused to continue participating in any deliberations of this Case after the majority made certain procedural decisions with which he disagreed. In his letter, Mr. Mostafavi states that the decisions he found objectionable related to the majority's view that oral testimony by Mr. Ali Paksima and documents that he offered in evidence were inadmissible. The Tribunal's reasons for those decisions are set forth in paragraphs 22 through 29 of the Partial Award. Mr. Mostafavi also criticizes the decision of the Tribunal not to conduct further proceedings in this Case. The reasons for that decision are explained in paragraph 28 of the Partial Award.

As Mr. Mostafavi's letter also confirms, he has at no time indicated that he wished to rejoin the deliberations -which he was, of course, free to do. In those circumstances, as Mr. Mostafavi had expressly refused to continue participating in any deliberations, had been informed by the Chairman that deliberations would nevertheless continue, and then had actually withdrawn from deliberations, the working draft of the Partial Award which was part of the deliberations was not sent to him. But the text agreed to by the majority was mailed to him well in advance of its issuance. This text was received by him and he has had the opportunity

[^0]to indicate his agreement or disagreement and to file a separate opinion, which he has done, in effect, by submitting his letter dated 3 June 1988.

Mr. Mostafavi's letter purports to describe the discussions that took place following the Hearing at which the procedural decisions to which he objects were made. At those sessions various procedural issues were fully discussed and decided by majority vote of all of the arbitrators in this Case, including Mr. Mostafavi. As such, those sessions plainly constituted deliberations. The account in Mr. Mostafavi's letter concerning what occurred during those deliberations is inaccurate and incomplete, but we do not comment further in view of the confidentiality of the Tribunal's deliberations as prescribed by Article 31, Note 2, of the Tribunal Rules, as well as customary arbitral and judicial practice.

Mr. Mostafavi's letter questions the credibility of certain members of the Uiterwyk family. In that connection, we note that the Tribunal did not have to reach the matter of credibility because, as stated in paragraph 28 of the Partial Award, the Tribunal "had adequate evidence upon which to determine the issues in this Case without relying upon the affidavits or testimony of the members of the Uiterwyk family." The evidence upon which the Tribunal relies for its decision on each of the contested issues is described in the relevant sections of the Partial Award.

Finally, it is appropriate to comment briefly on Mr. Mostafavi's view that when he failed to act he should have been replaced pursuant to Article 13, paragraph 2 of the Tribunal Rules. That provision permits the challenge and replacement of an arbitrator "who fails to act or in the event of the de jure or de facto impossibility of his performing his functions." Article 13, paragraph 2 is not, however, the exclusive procedure for dealing with failure of
an arbitrator to act. As explained in paragraph 30 of the Partial Award, the established practice of the Tribunal, which is in accord with recognized international procedures, is for the majority of the arbitrators to continue their work and issue an award despite the voluntary choice of an arbitrator not to participate. In such circumstances, Article 13, paragraph 2 cannot be invoked to disrupt the orderly process of the Tribunal or to obstruct its functions. Moreover, the Tribunal is aware of no reason why it has been de jure or de facto impossible for Mr. Mostafavi to perform his functions in this Case, either during the months he was still present at the Tribunal in The Hague or after his return to Iran. As noted in paragraph 30 of the Partial Award and confirmed in his letter, he acted in two other cases after his return to Iran. During the period involved, other persons have travelled between Iran and The Hague on the business of the Tribunal. Also, as Mr. Mostafavi's letter demonstrates, the exchange of views by correspondence is entirely feasible.

Dated, The Hague
6 tuly 1988


Howard M. Holtzmann


ديوان داورى دعارى إيران - ايلات ميتّن.
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IRAN-UNITED STATES CLAIMS TRIBUNAL
SUPPLEMENTAL OPINION OF
MR. BOCKSTIEGEL AND MR. HOLTZMANN
Case No. 381
Chamber One
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شعبه يك
حكم شماره


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\begin{align*}
& \text { يوترويك كوربوريشن، } \\
& \text { جان. سى. يوترويك، } \\
& \text { ماريا يوترويك، } \\
& \text { رابرت يوترويك، هوريك } \\
& \text { هندريك يوترويك، } \\
& \text { جان دى. يوترويك، ، } \\
& \text { خواهانها ، }
\end{align*}
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دولت جمهورى اسلامى ا'يران،
وزارت راه و ترابرى
سازمان بنادر و كشتيرانى ،
ايران - أكسپرس لاينز،
سى - من - ياك؟،

خواندكّن.

متمم نظر آقاى بوكشتيكل و آقاى هولتزمن

از آقاى مصطفوى كه طبق بند ه ماده r| قواعد ديوان، داور برونده حاضر هستنده دعوت شده بود كه حكم جزيى حاضر را امضاءء و موافتت يا مخالفت خود را با آن اءعلام نمايند.
 رياست ديوان نوشتند و در آن أظهار داشتند كه از امضاى حكم خوددارى مى كنند و از رئيس ديوان خواستند كه "پاسخ حاضر را بـعنوان دلايل خوددارى اينجانب از امضاء در
Mon Th max

نامه آقاى مصطفوى ظاهرا" حاوى شرح مباحثاتى است كه بدنبال جلسه استماع صورت كرفت و در آن، تصميمات شكلى مورد اعتراض ايشان اتخاذ گرديد. در آن نشستها، موضوعات شكلى متعددى مورد بحث و بررسى كامل قرار گرفت و با راى اكثريت داوران يرونده حاضر ، از جمله خود آقاى مصطفوى، در مورد آنها تصميم كرفته شد. بدرين ترتيب، نشستهاى مزبور، به وضوح جلسات شور بوده است. شرح مندرج در نامه آقاى مصطوى راجع به رويدادهاى آن جلسات شور ه نادرست و ناقص است، لكن با توجه به محرمانه بودن شورهاى ديوان به شرح مقرر در تبصره r هاده ا ب قواعد ديوان و همجنين باتوجه به رويه مرسوم داورى و قضايى ، ما بيش از اين در آن باره اظطهارنظر نمى كنيم.

در نامه آقاى مصطفوى نسبت به صحت و اعتبار [شهادت] برخى از اعضاى خانواده يوترويك اظهار ترديد شده است. در اين رابطه يادآور مى شويم كه ديوان لزومى به رسيدگى به موضوع اعتبار [شهادت خواهانها] نديد، زيرا طبق مفاد بند r^ حكم جزيى ، ديوان "بدون استناد به سوگندنامه ها يا شهادت اعضاى خانواده يوترويك، مدارك كافى براء الى اتخاذ تصميم درباره موضوعات اين يرونده در دست" [داشته است]. مداركى كه ديوان در تصميم خود راجع به هريك از موضوعات مابهالاختلاف، بدان استناد كرده، در بخشهاى ذيربط حكم جزيى توصيف شده است.

بالاخره، جا دارد نظرمان را درخصوص اين عقيده آقاى مصطفوى به اختصار بيان كنيم كه [بمض اعلام] امتناع [از شركت در شور]؛ مى بايست طبق بند r ماده ماده داور جانشينى به جاى ايشان تعيين مى شد. بند مزبور؛ جرح و تعيين جانشين داورى با با كه به "وظايف خود عمل نكند و يا انجام وظيغه براى او قانونا" و يا عملا" غيرممكن باشد، مجاز" مى دارد. لكن بند r ماده اr $r$ ت تنها رويهای نيست كه به قصور يك داور در انجام وظيفه ارتباط بيدا مى كند. همانطور كه در باراگراف ب. حكم جزيى بيان گرديده، رويه بذيرفته شده ديوان كه موافق با رويه بذيرفته شده بين المللى است، اينست كه اكثريت داوران، على رغم تصميم آزادانه يك داور به عدم شركت در شور، به كار خود ادأمه دهند و حكم صادر

كنند. در جنين اوضاع و احوالى ، نمى توأن براى مختل ساختن نظم و ترتيب كار ديوان و يا جلوگيرى از انجام وظايف آن، به بند r ماده r ديوان اكڭاه نيست كه به جه دليل، انجام وظيفه در يرونده حاضر خواه در ماههايى كه آقاى مصطفوى هنوز در لاهه بودند و در ديوان خضور داشتند و خواه بعد از مراجعت خود به ايران، قانونا" و يا عملا" براى ايشان غيرممكن بوده است. همانطور كه در بند . جزيى ذكر شده و نامه آقاى مصطفوى نيز موعيد آنست، ايشان بس از مراجعت به ايران در رسيدگى به دو يرونده ديگر شركت كردهاند. در طول مدت مورد بحث، افراد ديگرى نيز به مناسبت كارشان در ديوان، به ايران و لاهه رفت و آمد كردهاند. كگشته از اين، باز به حكايت نامه آقاى مصطفوى، تبادل نظر از طريق مكاتبه نيز كاملا" امكان بذير بوده است.



كارل - هاينس بوكشتيكل


هوارد ام . هولتزمن


[^0]:    ${ }^{1}$ The letter was received by the president in persian only. The English translation that is filed with the Partial Award was made by the Language Services Division of the Tribunal.

